

TAMMIE G. OLDENBURG, Employee/Appellant, v. PHILLIPS & TEMRO CORP. and AMERICAN COMPENSATION INS./RTW, INC., Employer-Insurer, and MEDICA CHOICE by HRI, TEXA-TONKA MGMT., BRADLEY P. KUNTZ, D.C., and BLUE CROSS/BLUE SHIELD OF MINN., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 29, 1999

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS; APPEAL - SCOPE OF REVIEW. Pursuant to Minn. R. 5221.6020, subd. 2, the permanent treatment parameters are inapplicable where the employer and insurer have denied liability for the work injury. While the employee failed to raise this specific issue at the hearing before the compensation judge, the applicability of the parameters is a threshold question of law, and, because the dispositive facts were well established in the record, the Workers' Compensation Court of Appeals reviewed the issue on appeal. Because the compensation judge considered the disputed treatment expenses solely under the treatment parameters, which were as a matter of law inapplicable, the matter was remanded for reconsideration under longstanding case law principles.

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS. An employer and insurer alleging that an injury is merely temporary may not rely on the limits set by the treatment parameters with respect to treatment rendered after the alleged resolution of the injury.

Reversed and remanded.

Determined by Wilson, J., Johnson, J., and Pederson, J.
Compensation Judge: Kathleen Nicol Behounek.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's finding that certain treatment was not reasonable and necessary under the permanent treatment parameters, Minn. R. 5221.6010, et. seq. We reverse and remand.

BACKGROUND

The employee worked as an assembler in the production department of Phillips & Temro Corporation [the employer], operating various machines used in the assembly of tank heaters for automobiles, tractors, and trucks. The work apparently tended to be repetitive and at

times involved prolonged awkward positioning. For example, the employee testified that, to run an “atomizer drilling machine,” equipment used for certain very fine drilling, she sat on a high chair, with her feet elevated on a crate, and had to bend her head down very low to observe the drilling process, while at the same time raising her arm to a particular level to operate the machine.

In early April of 1997, the employee sought treatment for neck, mid back, and low back symptoms after having worked ten-hour shifts on the atomizer drilling machine for three weeks in a row. The employee testified that, while she had experienced similar symptoms intermittently in the past, she was no longer able to relieve the pain at home through the use of ice, Advil, and heating pads. After consulting a physician recommended by the employer, the employee sought additional care, on her own initiative, from Dr. Bradley Kuntz at Prior Lake Chiropractic Clinic. Dr. Kuntz provided the employee with chiropractic care and referred her for physical therapy and for a second opinion by an orthopedist. The employee was also instructed in home exercise. She missed little or no time from her job due to her symptoms and was released by a physician to work without restrictions within a month or two after beginning treatment. Dr. Kuntz related the employee’s neck and back symptoms to her work activities with the employer, indicating that the employee continued to experience flare-ups in her condition as a result of her job.

On May 23, 1997, a Notice of Insurer’s Primary Liability Determination was filed,¹ indicating that “[t]he employer and insurer [were] interpos[ing] a primary denial of liability” because “[t]here is no specific incident and the employee has previous back problems,” and because “[t]he medical information we have received to date indicates that there is no known cause of her condition and complaints.” About a month later, on June 27, 1997, the employee filed a medical request, seeking payment of Dr. Kuntz’s bills and other treatment expenses. In their response, the employer and insurer reiterated their denial of primary liability and indicated that the employee would have to file a claim petition to proceed with her request for payment of the claimed treatment expenses.

In July of 1997, the employee retained counsel, and a claim petition was eventually filed on January 5, 1998, alleging that the employee had sustained a Gillette injury² to her neck and back on April 2, 1997, and claiming entitlement to various treatment expenses and associated mileage. In their answer filed January 12, 1998, the employer and insurer again specifically denied primary liability and indicated that an independent medical examination had been scheduled with Dr. Larry Stern for January 15, 1998.

Dr. Stern examined the employee as scheduled and issued a report on that same date. In that report, Dr. Stern concluded that the employee had a “[h]istory of cervical and thoracic strain,” that the employee had “sustained a temporary aggravation of her preexisting neck

¹ A First Report of Injury was filed on the same date.

² See Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 32 W.C.D. 105 (1960).

and mid back complaints,” which “would have lasted no longer than 90 days,” and that treatment beyond 90 days following the employee’s initial complaints had been excessive and unnecessary. The employee apparently continued to receive chiropractic care and physical therapy until about mid September of 1998.

The employee’s claim petition came on for hearing on January 29, 1999. At the commencement of the hearing, the employer and insurer’s attorney indicated that the insurer had paid certain of the claimed treatment expenses at some point prior to hearing; just what was paid, and when, is unclear from the transcript. When asked about the employer and insurer’s defenses, counsel for the employer and insurer asserted that the employee’s injury was merely temporary, ending at “90 days or thereabouts,” that the disputed treatment was not reasonable or necessary, that the disputed treatment was “well beyond treatment parameters,” specifically Minn. R. 5221.6200 and Minn. R. 5221.6205, and that the chiropractic treatment and physical therapy were duplicative. In response, counsel for the employee indicated that, while the injury was “admitted,” the dispute was over whether the injury was permanent or merely a temporary aggravation of a preexisting condition. He then argued that the treatment rendered after 90 days was reasonable and necessary, was not duplicative, and was “not inconsistent with the parameters,” which were, in his view, merely a guideline for the compensation judge.

In a decision issued on March 30, 1999, the compensation judge determined that the employee’s April 2, 1997, cervical injury was permanent but that “[t]he evidence fails to establish that the work injury of April 2, 1997 resulted in a permanent aggravation to [the employee’s] lumbar spine.” With regard to the disputed treatment expenses, the judge concluded that the chiropractic care and physical therapy were not duplicative, because they involved different treatment modalities, but that the chiropractic care and physical therapy rendered after twelve weeks from the initiation of treatment “exceeded the guidelines of the Workers’ Compensation Treatment Parameters and was not reasonable and necessary treatment.” In her memorandum, the judge explained in more detail why that treatment exceeded the pertinent treatment parameters. The employee appeals.

STANDARD OF REVIEW

“[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

The only treatment apparently at issue on appeal is the chiropractic care and physical therapy rendered beyond twelve weeks after initiation of that treatment. The compensation judge concluded that that treatment was not compensable under the applicable

treatment parameters, including the rule relating to departure from the parameters.³ On appeal, the employee argues that the compensation judge erred in applying the parameters, because the employer and insurer had denied primary liability for the injury, and that substantial evidence does not in any event support the judge's conclusion that the treatment at issue is inconsistent with the parameters.⁴

Minn. R. 5221.6020, subp. 2, concerning application of the permanent treatment parameters, provides that the parameters "do not apply to treatment of an injury after an insurer has denied liability for the injury," except that the rules "do apply to treatment initiated after liability for an injury has been established." See also Snickers v. Fingerhut Corp., slip op. (W.C.C.A. May 28, 1999); Dawson v. University of Minn., slip op. (W.C.C.A. May 6, 1999). In the present case, the employer and insurer denied primary liability in their May 1997 Notice of Insurer's Liability Determination, again in their June 1997 response to the employee's medical request, and yet again in their January 1998 answer to the employee's claim petition. There is in fact no evidence in the file as to when, if ever, the employer and insurer actually admitted liability for any work injury prior to the January 1999 hearing.⁵ Even assuming, for argument's sake, that the employer and insurer had admitted liability for a 90-day temporary injury upon receipt of Dr. Stern's January 15, 1998, report, by that time they were for all practical purposes reasserting a denial of liability, because the "admitted" injury had, under their theory, resolved months before.

We acknowledge that the parameters were devised in part to hold down costs associated with treatment of work-related injuries. It is also evident to us, however, that the parameters were intended to foster communication between the parties and providers on treatment issues, to avoid unnecessary disputes over proposed treatment, and to minimize undue delay in the provision of reasonable and necessary care. See, e.g., Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998); Olson v. Allina Health Systems, slip op. (W.C.C.A. Feb. 5, 1999). Presumably, the parameters are inapplicable, by rule, when an employer and insurer deny liability for a work injury because, under those circumstances, the employer and insurer have no real interest in information about the course of the employee's care and no

³ In her memorandum, the compensation judge analyzed the treatment under Minn. R. 5221.6205, subp. 3; Minn. R. 5221.6200, subp. 3; Minn. R. 5221.6205, subp. 4D(1)(b); and Minn. R. 5221.6050, subp. 8. Contrary to the employer and insurer's contention, the judge's analysis clearly focused on the requirements of the parameters, not case law factors.

⁴ The employee also appealed from the judge's finding that she did not sustain a permanent low back injury, but that issue was not addressed in her brief and so is deemed waived. Minn. R. 9800.0900, subp. 1.

⁵ At oral argument, counsel for the employer and insurer indicated that the employer and insurer had admitted liability for a temporary injury at some point after receipt of Dr. Stern's report, but counsel was unable to determine exactly when. Again, there is nothing in the file to substantiate counsel's assertion.

legitimate expectation of influencing or limiting the employee's treatment options. See also 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). The same may be said where the employer and insurer are denying that an "admitted" injury has any continuing effects. Therefore, an employer and insurer alleging that an injury is merely temporary may not reasonably rely on the parameters to deny payment for treatment rendered after the alleged resolution of the injury. Accordingly, pursuant to Minn. R. 5221.6020, subd. 2, the parameters are simply inapplicable to any treatment rendered in this matter prior to hearing.

The employer and insurer's primary response to the employee's contention as to the inapplicability of the parameters is to assert that "the Employee's failure to raise this issue before the compensation judge means that it may not be addressed on appeal." This court has held on several occasions that, generally, an issue may not be raised for the first time on appeal. See, e.g., Baker v. Tonka Ford, slip op. (W.C.C.A. Mar. 8, 1993); Malinoski v. North American Cable Systems, slip op. (W.C.C.A. Dec. 14, 1989). However, our review in the present case involves a question of law, not fact, and the dispositive underlying facts are well established by the record. See also Tentis v. Kenneth Schumacher, slip op. (W.C.C.A. Oct. 2, 1989) ("[w]hile issues not raised at the trial level will generally not be considered for the first time on appeal, where the issue involves only a question of law applied to a set of undisputed facts and the resolution of the issue is dispositive of the controversy, the issue may be reviewed"). The limits on treatment set by the parameters are a defense, and when an employer and insurer raise that defense, the trier of fact must ascertain whether the prerequisites for application of the rules have been satisfied. This is, as the employee asserts, a threshold issue. Here, review of the file would have disclosed that primary liability for the injury had been denied for at least nine months after the injury and the commencement of treatment.

It is evident from her decision as a whole that the compensation judge analyzed the compensability of the disputed treatment expenses exclusively under the permanent treatment parameters, which were, as a matter of law, inapplicable to the employee's claims. While the judge can hardly be faulted for taking this approach, given the arguments of the parties, we are compelled to reverse the denial of treatment expenses and remand for reconsideration under longstanding case law principles. See, e.g., Horst v. Perkins Restaurant, 45 W.C.D. 9 (W.C.C.A. 1991); Fuller v. Naegele/Shivers Trading, slip op. (W.C.C.A. Apr. 14, 1993); Field-Seifert v. Goodhue County, slip op. (W.C.C.A. Mar. 5, 1990). On remand the compensation judge should also determine when any work-related temporary aggravation to the employee's low back would have resolved, if such determination is necessary in conjunction with her reevaluation of the employee's treatment expense claims.⁶ The judge should base her decision on the current record.

⁶ With regard to the employee's low back injury claim, the judge found that the employee had failed to prove that she had sustained a permanent injury, but the judge made no definite finding as to when the effects of any work-related temporary injury had ended.