PANDA R. OLSON, Employee, v. ALLINA HEALTH SYS., SELF-INSURED, Employer/Appellant, and VAX-D INST. OF MINN., and OCCUPATIONAL REHAB. CTR., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 5, 1999

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS; RULES CONSTRUED - MINN. R. 5221.0050, SUBPS. 8.D. AND 9. The compensation judge erred in concluding that the employee's chiropractic care qualified for a departure under the permanent treatment parameters, where the employee's chiropractor failed to provide the notification of proposed treatment required by the rules.

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY; MEDICAL TREATMENT & EXPENSE - FEE SCHEDULE. Substantial evidence supported the compensation judge's award of expenses for vertebral axial compression, under case law standards, and, because the procedure is not listed in the medical fee schedule, the judge properly allowed the provider to charge 85% of the usual and customary fee for the treatment.

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. The compensation judge erred in awarding one portion of expenses for treatment rendered by Occupational Rehabilitation Consultants where that treatment was passive and did not meet the requirements of the permanent treatment parameters, including the departure rules, but the remainder of treatment expenses awarded was affirmable on substantial evidence grounds. The compensation judge's award of treatment expenses for a pain evaluation by a psychologist was not inconsistent with the applicable treatment parameters.

Affirmed in part and reversed in part.

Determined by Wilson, J., Johnson, J., and Pederson, J.
Compensation Judge: John E. Jansen.

OPINION

DEBRA A. WILSON, Judge

The self-insured employer appeals from the compensation judge's decision as to the compensability of the employee's chiropractic care, treatment at the Vax-D Institute of Minnesota, treatment at the Occupational Rehabilitation Center, and evaluation by psychologist Ronald Berk. The employer also contends that the compensation judge erred in his decision as to the appropriate billing rate, under the medical fee schedules, for Vax-D treatment. We affirm in

part and reverse in part.

BACKGROUND

On July 2, 1996, the employee sustained an injury to her low back while moving a patient in the course and scope of her employment as a labor and delivery nurse with Allina Health System, Inc. [the employer]. The following day, she sought treatment for low back and right leg pain from Dr. Leanne Warner, D.C., who took her off work and began providing chiropractic care four or five times a week. An MRI scan performed on July 17, 1996, was read to reveal degenerative disc disease at L4-5, "with a central and right-sided disc herniation . . . producing mild central spinal stenosis and extend[ing] laterally into the intervertebral nerve root canal to produce mild impingement on the post-ganglionic portion of the right L4 nerve as it exits the canal." The employee was then seen by Dr. Ronald Tarrel, D.O., of the Noran Neurological Clinic, who concluded that she was suffering from "a true L4 radiculopathy," prescribed medication, and advised her to continue treatment with Dr. Warner.

Despite chiropractic care, medication, and epidural steroid injections, the employee continued to complain of low back and right leg pain, and Drs. Warner and Tarrel therefore referred her for treatment at the Vax-D Institute. Vax-D, which stands for vertebral axial decompression, is an FDA-regulated machine, the purpose of which is to create negative pressure within a herniated disc. The machine is computerized to regulate the extent of decompression and must be monitored by a technician trained on the device. According to Dr. J. P. Bertsch, who with his brother owns the institute, Vax-D is different from traction, which does not create negative pressure within the disc but instead only stretches the muscles. Dr. Bertsch also testified that he paid $125,000 for the Vax-D machine and that there is only one such machine in Minnesota.

The employee began undergoing a series of about twenty Vax-D treatments on September 9, 1996. Each treatment apparently concluded with electrical muscle stimulation and ice. During the same period, and sometimes on the same day, the employee received chiropractic treatment from Dr. Warner. At about the same time, in early September 1996, the self-insured employer notified Dr. Warner that it would not pay for additional chiropractic treatment beyond September 24, 1996, pursuant to the twelve-week limit on passive care contained in the applicable treatment parameters. Dr. Warner nevertheless continued to provide ongoing treatment, three to four times a week.

While the employee testified that the Vax-D treatment substantially improved her right leg symptoms, treatment records are somewhat equivocal in this regard. In any event, in mid-October of 1996, Dr. Warner released the employee to return to work, with various restrictions, on a part-time, gradually increasing schedule.

In December of 1996, a representative of the employer suggested that, since her symptoms were continuing, the employee should seek a second opinion. The employee then found Occupational Rehabilitation Center [ORC] in the telephone book and arranged for a referral there.

The employee was seen initially by Dr. Seth Rosenbaum of ORC on December 30, 1996, but she did not begin actual treatment there until early March of 1997. In the interim, the employee continued to receive chiropractic care, at least once or twice a week, from Dr. Warner. Treatment at ORC, from March through July 1997, consisted of exercise instruction; use of a Med-X machine, an isokinetic exercise device; and myofascial release therapy. Also in March of 1997, the employee returned to the Vax-D Institute for several more treatments, and she continued to see Dr. Warner. Dr. Warner testified that she released the employee to treat on an as-needed rather than regularly-scheduled basis in May of 1997.

On July 10, 1997, the employee underwent another MRI scan, which, according to the radiologist, was "essentially unchanged compared to the previous study." In a report dated July 16, 1997, Dr. Tarrel wrote to Dr. Warner that there was really "no choice but to consider repeating some of the therapies that have been marginally beneficial in the past." Oral steroids were reinstituted, and the employee continued to treat with Dr. Warner.

On August 19, 1997, the employee was seen by Dr. Greg Dyste for a surgical consultation. Noting complaints suggesting that the employee had developed foot drop, Dr. Dyste scheduled an EMG and also a myelogram/CT. The EMG was normal, and the post-myelographic CT scan was interpreted by Dr. Dyste to show "some minimal irregularity of the L4-5 disc space" but "no clear cut disc herniation [or] nerve root impingement at that site." Dr. Dyste later noted, on examination on September 2, 1997, that the employee had some weakness of the L5 innervated musculature, but, given the normal EMG, he did not believe that the employee was then a candidate for surgery.

In late September of 1997, Dr. Rosenbaum referred the employee for pain counseling to Ronald Berk, a psychologist, who saw the employee on two or three occasions in October of 1997. Mr. Berk's October 31, 1997, report indicates that the purpose of his evaluation was "for use in the preparation of a comprehensive treatment plan." He performed psychological testing and ultimately recommended biofeedback training, psychotherapy, and another EMG. The employee testified that the purpose of her visits with Mr. Berk was to "set up an eval for pain management." He provided no actual treatment. Also on referral from Dr. Rosenbaum, the employee received TENS unit instruction at the Sister Kenny Institute. She testified that the TENS unit was helpful for about six months.

In December of 1997, the parties entered into a stipulation for settlement, in which the employee's claims for permanent partial disability were settled to the extent of a 13% whole body impairment. An award on stipulation was issued on December 22, 1997.

On May 14, 1998, the matter came on for hearing to resolve the parties' dispute over the compensability of treatment rendered by Dr. Warner after September 24, 1996 ($6,336.21); Vax-D treatment ($5,049.00); treatment at ORC ($4,109.84); and the services provided by Mr. Berk ($234.30). With respect to the bill from ORC, the employer indicated that it had paid, or would pay, $1,865.52, based on the opinion of its independent examiner, Dr. Mark

Friedland, who indicated that about eight weeks of Med-X treatment would have been reasonable for strengthening and functional improvement. In addition to reasonableness and necessity issues, the parties disagreed as to the appropriate billing code to be used for Vax-D treatment, which is not specifically covered by the medical fee schedules. The employee, Dr. Warner, and Dr. Bertsch testified live at hearing; other evidence included the employee's extensive treatment records, articles on Vax-D, and the deposition testimony of Dr. Friedland. After submission of post-hearing proposed findings, order, and memorandum, the compensation judge resolved virtually all issues in the employee's favor. The employer 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 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

All of the treatment at issue in this matter was rendered after the effective date of the permanent treatment parameters, Minn. R. 5221.6010, et. seq. As such, the employer's obligation to pay for the disputed treatment is limited by the parameters unless this is one of "those rare cases in which departure is necessary to obtain proper treatment." Jacka v. Coca-Cola Bottling Co., 580 N.W.2d 27, 36, 58 W.C.D. 395, 408 (Minn. 1998). On appeal, we will consider challenges to the reasonableness and necessity of treatment under the treatment parameters only if the issue is raised in the appellant's brief, and then only to the extent of specific rules cited and addressed in that brief. See also Jordan v. Howard Lumber Co., slip op. (W.C.C.A. Aug. 28, 1998) (the compensation judge on remand need only consider treatment parameters specifically raised and addressed by the parties); Brantl v. Kendrick Elec., Inc., slip op. (W.C.C.A. Mar. 18, 1998) (the court would not consider the treatment parameters where those rules were not raised

below or on appeal); Wise-Thackery v. Universal Colour Lab., slip op. (W.C.C.A. Dec. 31, 1998) (the court would not consider the employer's arguments as to application of the permanent treatment parameters where those parameters were not adequately raised at the hearing below).

Other factors potentially relevant to the compensability of the disputed treatment include the following: the employee's opinion as to relief obtained; the provision of services on a scheduled rather than as-needed basis; the duration of relief from symptoms; whether symptoms return; the use of alternative medical care; whether the employee is psychologically dependent on treatment; evidence as to a reasonable treatment plan; documentation of the details of treatment; whether the frequency of treatment is warranted; the cost of treatment in light of the relief obtained; the employee's overall activities and the extent of the employee's ability to work; and the potential for aggravation of an underlying condition. 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-Siefert v. Goodhue County, slip op. (W.C.C.A. Mar. 5, 1990). Not all factors apply in all cases. Similarly, the weight to be attached to any given factor will vary from case to case. The reasonableness and necessity of treatment under case law standards is a question of fact, and a compensation judge's decision will not be overturned unless it is clearly erroneous and unsupported by the record as a whole. See id.

Chiropractic Care

Beginning the day after the employee's July 2, 1996, injury and continuing nearly through the date of hearing twenty months later, Dr. Warner provided the employee chiropractic care for back and leg symptoms. Treatment was, at least initially, frequent; by the end of 1997, the employee had seen Dr. Warner more than one hundred and fifty times. Dr. Warner released the employee to treat as-needed in May of 1997, nearly ten months after the injury. Nevertheless, in July and August of 1997, the employee returned to Dr. Warner two to four times a week, explaining at hearing that she had suffered an aggravation of her condition due to work activities. The employer apparently paid for the initial twelve weeks of treatment. However, in September of 1996, the employer notified Dr. Warner that it would not pay for treatment after September 24, 1996, pursuant to the twelve-week limit on passive care under the treatment parameters. Dr. Warner admitted to receipt of this notification, that the notification had contained instructions as to how to request a departure from the parameters, and that she made no such request but instead simply continued to provide treatment.

In a decision adopted largely from the employee's proposed findings and order, the compensation judge concluded that Dr. Warner's treatment after September 24, 1996, was both reasonable and necessary under case law standards and consistent with the requirements for a departure from the parameters as set forth in Minn. R. 5221.6050, subd. 8D.[1] Accordingly, the

[1] As indicated above, it is evident that most of the judge's findings were adopted from the employee's proposed findings and order. Included in his decision (and the proposed findings) is reference to Hirsch v. Bartley-Lindsay Co., 537 N.W.2d 480, 53 W.C.D. 144 (Minn. 1995), a case in which the supreme court had held that the temporary treatment parameters were merely

judge ordered the employer to pay Dr. Warner's outstanding $6,336.21 bill in its entirety. On appeal, the employer argues that substantial evidence does not support the compensation judge's award under case law standards and that the disputed treatment is in any event not compensable under the applicable permanent treatment parameters. We agree that the award is clearly erroneous, and reverse.

Pursuant to Minn. R. 5221.6200, subp. 3A, passive care, including chiropractic care, is generally not indicated beyond twelve calendar weeks after passive care is initiated. While the specific passive treatment parameters provide for an additional twelve treatments under certain circumstances, see id., subp. 3B, the requirements for those additional treatments have not been met here.[2] Moreover, the rules provide that, unless grounds for departure under Minn. R. 5221.6050, subp. 8, exist, passive treatment beyond the time limits specified by rule may not be provided without prior approval by the insurer, the commissioner, or a compensation judge, based on certain specified criteria. Minn. R. 5221.6200, subp. 3B(2). As no prior approval was given as contemplated by rule, the issue becomes whether the criteria for departure have been satisfied.

Minn. R. 5221.6050, subp. 8, lists circumstances in which "[a] departure from a parameter that limits the duration or type of treatment . . . may be appropriate." The compensation judge concluded that the employee had established grounds for departure under subpart 8D, based on evidence of progressive improvement in the employee's subjective complaints, objective clinical findings, and functional status. In her response to the employer's appeal, the employee contends that several other grounds for departure specified in subpart 8 have also been established.

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guidelines that did not limit the discretionary power of the compensation judge. On June 11, 1998, after the submission of the parties' proposed findings in the present case, the supreme court issued Jacka, a case requiring more stringent application of the permanent treatment parameters. Jacka, 580 N.W.2d 27, 58 W.C.D. 395. Accordingly, the compensation judge apparently added the following finding to the findings that had been proposed by the employee:

> 22. The Court specifically finds that based on the evidence as a whole, the VAX-D treatments, the ORC Med-X treatments, and the chiropractic treatments provided by Dr. Warner, taken together and in combination with each other were reasonable and necessary, did provide cure and relief, and the patient experienced improvement in all of the three areas described in Minn. Rule 5221.6050, Subp. 8, to wit: subjective complaints of pain, objective clinical findings, and functional status, under the holding in Jacka vs. Coca Cola-Bottling Co., et.al. and Kelley v. Viking Auto Salvage, et.al. [580] N.W.2d [27], [58] W.C.D. [395], (Minn. Sup. Ct., 6/11/98), and previous case law.

[2] Among other things, the employee continued to treat on a regularly-scheduled basis, at least for eight months of the period at issue, see Minn. R. 5221.6200, subp. 3B(1)(b), and we see no indication that Dr. Warner "document[ed] in the medical record a plan to encourage the employee's independence and decreased reliance on health care providers," id., subp. 3B(1)(c).

After review of the record, we find both the compensation judge's conclusions and the employee's arguments questionable at best. More importantly, however, one of the prerequisites for any departure under subpart 8 has not been satisfied.

Minn. R. 5221.6050, subp. 8, specifies that "[a] health care provider must provide prior notification of the departure as required by subpart 9" (emphasis added). Minn. R. 5221.6050, subp. 9, provides that "[p]rior notification is the responsibility of the health care provider who wants to provide the treatment" listed in that subpart, including "treatment that departs from a parameter limiting the duration or type of treatment . . . ." Id., subpart 9A(4). Subpart 9B lists the information that must be provided with the notification to the insurer, and subpart 9C describes procedures to be followed by the insurer and by the provider in the event a departure is sought. One of the insurer's alternatives following a provider's notification of proposed treatment is to request additional information, in which case the provider "may not" give additional treatment until the additional information is conveyed. Id., subp. 9C(7).

Dr. Warner neither provided the required notification nor offered any reasonable basis for failing to do so; she admitted that the employer's letter described the means to request a departure, but she simply made no attempt to comply with the rules. Nor can we conclude that the notification requirement is a mere technicality that may be ignored if the treatment otherwise meets the requirements for a departure - - the departure rule itself expressly mandates notification, and the rules on notification are lengthy and detailed.

In Jacka, the supreme court concluded that the permanent treatment parameters "have struck the right balance between flexibility and substance and should have the respect, force and effect accorded other properly promulgated administrative rules." Jacka, 580 N.W.2d at 36, 58 W.C.D. at 410. The court also explained that the "rules are substantial enough to establish standards and procedures based on good medical practice that can be used to regulate provider abuses and reduce litigation over compensable treatment." Id. The apparent intent of the notification rules at issue in the present case is to avoid unnecessary disputes by requiring a certain level of communication, between a health care service provider and an insurer, concerning proposed care that is beyond that care ordinarily deemed reasonable and necessary under the treatment standards established by the parameters. Notification sets in motion a process intended to allow the insurer to reasonably evaluate proposed treatment and to request additional information, if necessary, without causing undue delay in the provision of services to an injured worker. The insurer, too, has various responsibilities under the notification rules; for example, an insurer that fails to respond to provider notification in a timely manner may not later refuse to pay for the treatment covered by the notification. Minn. R. 5221.6050, subp. 9C(1). Other safeguards exist to ensure that payment for proposed treatment is not denied arbitrarily by nonmedical personnel. Id., subp. 9C (an insurer's review of its denial of authorization for proposed treatment must be made by a currently licensed health care provider). We would also observe that the notification requirement of the rules places only a minimal burden on a provider who wishes to provide additional treatment. What is required here is only notification and the provision of pertinent information; under most circumstances, the provider need not obtain the insurer's prior approval.

An employer or insurer is not liable for an "excessive" health care service, and a service is excessive if it "is inconsistent with an applicable parameter or other rule in parts 5221.6050 to 5221.6600." Minn. R. 5221.6050, subp. 7 (emphasis added); see also Minn. R. 5221.0500, subp. 1D (an insurer is not liable for a charge if "the service does not comply with the treatment standards and requirements adopted under Minnesota Statutes, section 176.83, subdivision 5, concerning the reasonableness and necessity, quality, coordination, level, frequency, and cost of services . . ."). And, contrary to the employee's argument, nothing in the record establishes that the employee had such a "spectacular response to treatment" as to justify deviation from the express requirements of the rules. The supreme court's discussion in Jacka provides clear indication that the permanent treatment parameters are to be taken seriously, and, while there may be cases in which compliance with the parameters is not determinative of compensability, this is not one of them. We therefore reverse the judge's award of expenses for the chiropractic treatment provided by Dr. Warner after September 24, 1996.

Vax-D Institute

The employer argues that, under case law criteria, substantial evidence does not support the judge's award of expenses associated with the employee's treatment at the Vax-D Institute.[3] Certainly there is evidence that supports the employer's reluctance to pay this expense. The claimed cost was high ($5,049.00), the studies supporting the efficacy of the treatment are open to challenge, at least according to Dr. Friedland, and the extent of relief obtained is the subject of highly conflicting evidence. Moreover, the employee received this rather expensive treatment in addition to other, also costly conservative care. However, while we might not have awarded the expense had we been in the factfinder's place, we cannot conclude that the judge's decision so lacks support in the record as to warrant reversal.

The employee testified that her leg pain improved substantially from the Vax-D treatment, and this testimony is minimally supported by certain entries in contemporaneous treatment records. Similarly, while it is difficult to separate the effects of one kind of treatment from the others rendered in this case, the fact is that the employee's condition improved enough over time to allow the employee to return to her usual job and to gradually resume her usual schedule. Moreover, while she continued to experience occasional exacerbations of her condition, the employee testified that she recovered more quickly from those aggravations as time went on, at least arguably because of the care received from the various sources.[4] As to the efficacy of Vax-D treatment in general, the compensation judge was free to rely on the published

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[3] The employer has raised no treatment parameters issue with respect to the employee's Vax-D treatment.

[4] Dr. Friedland testified that a large percentage of patients with herniations recover well, within six months, even without any treatment. The compensation judge was not, however, required to accept his testimony on this issue.

articles submitted into evidence, as well as the testimony of Dr. Bertsch, Dr. Friedland's criticisms notwithstanding. Finally, while the cost of treatment was in fact quite high, we are in no position, on appeal, to conclude that the high cost alone is sufficient to overturn the judge's award. Therefore, while the evidence on this issue is less than overwhelming, we affirm the judge's decision that the Vax-D treatment is compensable under case law criteria.

The other issue regarding the Vax-D award is the appropriate rate for billing. It is undisputed that Vax-D is not listed in the applicable medical fee schedule, Minn. R. 5221.0100, et. seq. Relying on a communication by Medical Technologies Group, apparently a national review group, Dr. Bertsch utilized a physical medicine CPT[5] code, rather than a chiropractic CPT code. Dr. Bertsch testified at hearing that he has the only Vax-D machine in Minnesota but that the prevailing charge for Vax-D treatment in the Midwest, including Wisconsin, is $150.00 to $200.00 a treatment. Dr. Bertsch also testified that Vax-D is not traction, that, unlike the case with traction, a patient utilizing Vax-D must be monitored throughout the treatment, that providers of Vax-D must receive at least ten to twelve hours of training on the device, and that the machine itself cost $125,000. In his decision, the compensation judge concluded that the physical medicine code utilized by Dr. Bertsch was appropriate and that, pursuant to the rules, Vax-D treatment was billable at 85% of Dr. Bertsch's usual $150.00 charge, or $127.50 per treatment.

On appeal, the employer argues that, pursuant to Minn. R. 5221.0700, subp. 3C(1), Dr. Bertsch, a chiropractor, may not "use a procedure code for a service outside of [his] scope of practice." Therefore, according to the employer, since Dr. Bertsch cannot use a physical medicine procedure code for billing, and since the chiropractic procedure code closest to Vax-D is the code for traction, Dr. Bertsch is entitled to only $54.31 a treatment.[6] We are not persuaded that resort to an analogous code is necessary to determine the proper charge.

Minn. R. 5221.0500, subp. 2B, provides in part as follows:

> if the service is not included in parts 5221.4000 to 5221.4070, the payer's liability payments shall be limited to 85 percent of the provider's usual and customary charge, or 85 percent of the prevailing charge for similar treatment, articles, or supplies furnished to an injured person when paid for by the injured person, whichever is lower.

The employer has pointed to nothing in the rules that would require Dr. Bertsch to apply a code, within his area of specialty, to a service or procedure not listed in the fee schedules. To imply

[5] A CPT code is a code included in the Current Procedural Terminology Coding System manual. Minn. R. 5221.0100, subp. 4B.

[6] Which includes the permissible additional charge for electrical stimulation and ice packs, which the employee received after each Vax-D treatment.

such a requirement, without specific authority, would negate the language allowing providers to charge a percentage of their usual and customary charge for unlisted procedures. Therefore, because substantial evidence supports the compensation judge's decision that Vax-D is not traction,[7] and because substantial evidence also reasonably supports the conclusion that $150.00 is the usual and customary charge for Vax-D treatment, it was not unreasonable for the judge to conclude that Dr. Bertsch was entitled to charge 85% of $150.00, per Vax-D treatment, under Minn. R. 5221.0500, subp. 2B. This is the case regardless of whether Dr. Bertsch was technically entitled to utilize a physical medicine procedure code. See also Minn. R. 5221.4000, subp. 3B (the medical fee schedule applies if "the service conforms to a billing code listed in this chapter or in the CPT or HCPCS manual in effect on the date the service was rendered").

ORC

The employee's treatment at ORC consisted of exercise education, use of a Med-X machine, and myofascial release. The compensation judge awarded the entire expense as claimed, finding, again, that it was reasonable and necessary under case law and consistent with the requirements for a departure under the permanent treatment parameters.

Taking the treatment parameters issue first, the record is clear that Med-X therapy is active treatment, as specified by the rules, whereas myofascial release is passive.[8] The employee in fact makes no argument otherwise. Because myofascial release was provided beyond twelve weeks after passive care was originally initiated (by Dr. Warner), that particular treatment modality is compensable only if the requirements of Minn. R. 5221.6200, subp. 3B, or Minn. R. 5221.6050, subp. 8, were satisfied. There is no evidence in the record whatsoever to indicate that the myofascial release portion of the employee's treatment was either reasonable and necessary in general or consistent with the treatment parameters or specific departure rules. Furthermore, there is again no evidence that ORC complied with the notification requirements of Minn. R. 5221.6050, subps. 8 and 9. Therefore, we reverse the judge's award for payment of myofascial release therapy, which was billed separately from the other services provided by ORC. Because, however, the employer has made no argument, as to the permanent treatment parameters, that would be applicable to Med-X therapy, an active treatment modality, we will not consider the parameters further with regard to the ORC bill.

The only remaining issue regarding ORC charges in whether Med-X therapy was reasonable and necessary under case law. The evidence on this point is similar to that relevant to the Vax-D treatment. ORC records reflect equivocal results from Med-X treatment; at times testing disclosed an increase in the employee's strength, at times no progress. However, the result obtained is merely one factor to consider in evaluating reasonableness and necessity - - the fact

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[7] Even Dr. Friedland admitted as much.

[8] Even Dr. Friedland, the employer's expert, expressly testified that Med-X is active treatment.

that a treatment might not, in the end, improve the employee's condition is not necessarily determinative of compensability.[9] In this case, even Dr. Friedland indicated that the Med-X program was reasonable for six to eight weeks. And, while he testified that the employee's participation in the Med-X program thereafter was not reasonable and necessary, he also testified that additional Med-X treatment might well be consistent with his own current recommendation for stretching and strengthening exercises. Therefore, while the evidence is again not particularly strong, we affirm the judge's award of the expenses related to treatment at ORC, with the exception of the myofascial release charges.

Psychologist Berk

The employee was seen on two or three occasions by Mr. Berk in October of 1997, on referral from Dr. Rosenbaum. On appeal, the employer argues that the employee is not entitled to payment for this treatment because Mr. Berk did not satisfy the requirements governing the chronic management parameter for psychological counseling, Minn. R. 5221.6600, subp. 2F(2). More specifically, the employer argues that Mr. Berk did not delineate specific goals and a timetable for achieving those goals. We think, however, that Mr. Berk's evaluations reasonably fall under Minn. R. 5221.6200, subp. 1G, and 5221.6600, subp. 1A, governing "[p]ersonality or psychosocial evaluations . . . for patients who continue to have problems despite appropriate care." Mr. Berk provided evaluation, not treatment per se. As the employer made no other substantive argument on this issue, we will not consider the question further. The award for Dr. Berk's charges is affirmed.

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[9] Physicians, for example, frequently try different medications before hitting on one that works for a particular patient. Even surgery can fail, despite the best efforts of practitioners. If compensability were solely dependent on results, doctors might well be reluctant to try any but the most proven and conservative measures, to the detriment of their patients.