

DONALD P. PAWLITSCHKEK, Employee/Appellant, v. DUNDEE STEEL, INC., and EMPLOYERS INS. OF WAUSAU, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 7, 1999

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS; MEDICAL TREATMENT & EXPENSE - SUBSTANTIAL EVIDENCE. The compensation judge properly considered the permanent medical treatment parameters in determining the compensability of the chiropractic expenses claimed by the employee. Substantial evidence supports the compensation judge's determination that the employee was not entitled to payment of chiropractic expenses under the 12 weeks plus 12 visits rule, the subd. 8 "incapacitating exacerbations" departure provision, the exception allowing additional passive treatment if effective in maintaining functional status for permanently totally disabled employees, or the "rare case" exception established in Jacka v. Coca-Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998).

Affirmed.

Determined by: Johnson, J., Pederson, J., and Rykken, J.
Compensation Judge: David S. Barnett

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the denial of his request for payment of chiropractic expenses incurred between April 22, 1998 and May 2, 1999. We affirm.

BACKGROUND

Donald P. Pawlitschek, the employee, injured his low back on April 11, 1975, while working for Dundee Steel, Inc., the employer, insured by Employers Insurance of Wausau.¹ The employer and insurer admitted liability for the employee's personal injuries and paid workers' compensation benefits to the employee, including payment for a 15 percent permanent partial

¹ The employee also sustained back injuries on September 27, 1964, while employed by Kimberly-Clark Corporation and on January 18, 1967, while employed by Brady Manufacturing Company. The employee was awarded a 15% permanent disability as a result of these injuries. (1/7/69 Findings & Determination.)

disability of the spine. In 1984, the parties and the Special Compensation Fund entered into a settlement agreeing the employee had been permanently and totally disabled since April 11, 1975. The employer and insurer agreed to pay weekly permanent total disability benefits, and an Award on Stipulation was filed on May 31, 1984. (Judgment Roll.)

Since his injury, the employee has received medical and chiropractic treatment from various providers. In June 1982, the employee began treating with Patrick Kunerth, D.C. (T. 43-44.) He testified that in 1990 and 1991 he treated approximately 50 times a year. By 1998, that had decreased to approximately 34 times a year. Typically, Dr. Kunerth provided manual adjustment of the employee's spine and trigger point therapy. The employee testified he sought treatment with Dr. Kunerth when his low back condition flared up. The employee stated he obtained relief from these treatments. (T. 44-48.) He testified that but for the chiropractic treatment he would be unable to perform daily activities such as washing the dishes, cooking, vacuuming and doing yard work. (T. 53-54.)

On February 11, 1994, the employee was examined by Dennis S. Olson, D.C., at the request of the employer and insurer. The doctor recorded a history from the employee that he was obtaining approximately one chiropractic treatment each week and that he treated on an as-needed basis. Dr. Olson concluded that treatment on a once-a-week basis over a long period of time was excessive and did not believe it was medically necessary or wise. The doctor further suggested that future chiropractic treatments be kept within a more accurate treatment plan and recommended no more than one treatment per month with the exception of short periods of treatment for flare-ups not to exceed two or three visits. (Resp. Ex. 2.)

On January 4, 1995, the employee was examined by Dr. Robert Wengler. The doctor found lumbar muscle spasm with limited range of motion. Reflexes in the legs were present and equal without sensory or motor loss. Straight leg raising was positive at 45 degrees but without evidence of sciatica. Dr. Wengler diagnosed chronic degenerative lumbar disc disease with a radicular component due to spinal stenosis. (Judgment Roll.)

On November 5, 1998, the employee was examined by Bradley Boisen, D.C., at the request of the employer and insurer. Dr. Boisen reviewed a report of a 1982 CT scan of the lumbar spine which showed a possible bulging or herniated disc at L4-5 and moderate disc space narrowing at L5-S1 secondary to disc degeneration. The doctor diagnosed significant degenerative disc conditions at L4-5 and L5-S1 with chronic myofascial irritation involving the posterior pelvic structure. Dr. Boisen opined the employee had a need for chiropractic care and stated it was reasonable for the employee to treat on an as-needed basis. (Pet. Ex. D.)

On July 31, 1998, the employee filed a medical request seeking payment of Dr. Kunerth's bill from and after April 22, 1998, and medical mileage. The employer and insurer filed a response on September 8, 1998, denying liability for the requested medical expenses. An administrative conference was held on December 11, 1998. On December 16, 1998, a settlement judge ordered the employer and insurer to pay a portion of the chiropractic treatment rendered in 1998. The employer and insurer filed a request for formal hearing and the matter came on for

hearing before a compensation judge at the Office of Administrative Hearings on March 12, 1999. At issue was payment of chiropractic expenses and medical mileage from April 22, 1998 through March 2, 1999 in the amount of \$1,955.73. In a Findings and Order served and filed April 12, 1999, the compensation judge found the employer and insurer were not liable for the disputed chiropractic treatment. 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 are to 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

The employee contends that his testimony regarding the efficacy of Dr. Kunerth's treatment, the records of Dr. Kunerth and the medical report of Dr. Boisen (Pet. Ex. D) establish that the treatment of Dr. Kunerth was reasonable and necessary to relieve the employee's pain from his work injury. The employee argues the compensation judge ignored this evidence and, in reliance solely on the treatment parameters, denied the employee's claim. The parameters, the employee contends, conflict with the provisions of Minn. Stat. § 176.135 which requires the employer to provide all reasonable and necessary medical care. The employee asserts the parameters are guidelines only, not evidence, and are not a basis to deny necessary medical treatment. Accordingly, the employee argues, the compensation judge's decision is legally erroneous and must be reversed. We disagree.

The permanent treatment parameters apply to all treatment provided after January 4, 1995, irrespective of the date of injury. Minn. R. 5221.6020, subp. 2; Jacka v. Coca-Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998). In Jacka, the supreme court held there is no conflict between Minn. Stat. § 176.135, subd. 1, and the treatment parameters. The court further held the treatment parameters meet the requirements of the enabling statute, Minn. Stat. § 176.83, and are validly promulgated administrative rules which have the force and effect of law. All the treatment in question was provided after January 4, 1995. The employer and insurer raised the treatment parameters as a defense to the employee's claim. Accordingly, the compensation judge properly considered the treatment parameters in determining this case.

Minn. R. 5221.6200, subp. 2.B., divides treatment for low back pain into three general phases: initial nonsurgical management (subpart 2.B.(1)); surgical evaluation, with or

without surgery (subpart 2.B.(2)); and chronic management (subpart 2.B.(3)). Initial nonsurgical management or treatment is defined as the “initial treatment provided after an injury” and specifically includes passive treatment, but does not include “surgery or chronic management modalities.” Minn. R. 5221.6040, subp. 8. Passive treatment includes all those modalities specified at Minn. R. 5221.6200, subp. 3, and includes the modalities provided by Dr. Kunerth.

The compensation judge reasonably concluded the employee falls within the category of chronic management. (Finding 12.) Chronic management modalities are set forth in Minn. R. 5221.6600, subp. 2, and do not specifically include passive treatment modalities.² The employer and insurer argue chiropractic treatment is, therefore, never medically necessary under the parameters when the employee is in the chronic management phase. We do not read the parameters to always preclude chiropractic treatment for an employee in the chronic management category.

The treatment parameter for low back pain, Minn. R. 5221.6200, subp. 1, requires a health care provider to assign a patient to one of four clinical categories: (1) regional low back pain; (2) radicular pain, with or without regional low back pain, with static or no neurologic deficit; (3) radicular pain, with or without regional back pain, with progressive neurologic deficit; or (4) cauda equina syndrome. We find no evidence in the treatment records of Dr. Kunerth that the doctor assigned the employee to one of the four categories. (See Pet. Exs. A and B.) Dr. Wengler and Dr. Boisen diagnosed lumbar degenerative disc disease. There is no medical evidence the employee has any neurologic deficit or cauda equina syndrome. It appears the employee should, therefore, be assigned to either category (1) or (2). Once the patient is assigned to a particular clinical category, a more specific treatment parameter then governs the treatment. See Minn. R. 5221.6200, subp. 2.A.(1), (2) and (3). Under both Minn. R. 5221.6200, subp. 11 (regional low back pain) and subp. 12 (radicular pain), “passive treatment” is appropriate in the initial phase of treatment.

Once initiated, Minn. R. 5221.6200, subp. 3, places limits on the duration of passive treatment, providing the use of such modalities “is not indicated beyond 12 calendar weeks after any of the passive modalities in items C to I are initiated.” Under certain conditions, an additional 12 visits over an additional 12 months may be provided. Minn. R. 5221.6200, subp. 3.B.(1). The employee argues a portion of the treatment at issue is awardable under this rule. We cannot agree. Although the compensation judge made no specific finding, it is clear from records in the file the employee received 12 calendar weeks of treatment plus an additional 12 treatments between January 4, 1995 and April 21, 1998.³ Once the employee has used the initial 12 weeks of

² Chronic management modalities listed include exercise programs, health clubs, work hardening, chronic pain management programs and psychological or psychiatric counseling. Minn. R. 5221.6600, subp. 2A - F.

³ On October 31, 1994, the employee filed a medical request seeking payment of Dr. Kunerth’s bills from April 1, 1994 through October 5, 1994, covering 23 visits. By Order on Agreement filed February 10, 1995, the employer and insurer agreed to pay all chiropractic

treatment plus the additional 12 treatments, the treatment parameters allow further passive care only under specified conditions.

Minn. R. 5221.6050, subp. 8, provides, in part, that “a departure from the treatment parameters may be appropriate” when an employee experiences an “incapacitating exacerbation.” The compensation judge found the employee failed to establish he sustained incapacitating exacerbations during the period of treatment in dispute and concluded a departure was not justified under subpart 8. (Finding 13.) This finding was not appealed by the employee. Accordingly, further chiropractic care was not appropriate under the departure provisions.

Minn. R. 5221.6200, subp. 3.B.(2) provides that,

Except as otherwise provided in part 5221.6050, subpart 8, . . . if the employee is permanently totally disabled . . . treatment may continue beyond the additional 12 visits only after prior approval by the insurer, commissioner, or compensation judge based on documentation in the medical record of the effectiveness of further passive treatment in maintaining functional status.

Chiropractic treatment may continue beyond the 12 week plus 12 visit limitation for a permanently and totally disabled employee “after prior approval by the insurer, commissioner, or compensation judge based upon documentation in the medical record of the effectiveness of further passive treatment in maintaining functional status.” Minn. R. 5221.6200, subp. 3.B.(2).⁴ The compensation judge found the records of Dr. Kunerth do not document that

expenses incurred through January 31, 1995 and agreed to pay up to 30 treatments a year for another two years and for an additional 15 over the next six months. (Judgment Roll.) The judgment roll contains extensive treatment records and reports from Dr. Kunerth. While these do not appear to be the complete records, they show the employee treated with Dr. Kunerth on March 20, 1995 and reflect the employee received well in excess of 30 treatments from Dr. Kunerth in 1996 and 1997.

⁴ This rule is clearly an exception to the 12 plus 12 rule, but for some reason is not a part of the departure provisions in Minn. R. 5221.6050, subp. 8. We note the rule requires the prior approval of the insurer, the commissioner, or a compensation judge. This requirement raises several concerns. Certainly, a prior approval requirement can delay the receipt of treatment which might otherwise be appropriate under the rule. Further, it is questionable, whether, in a typical case, an insurer would give prior approval. An employee must then resort to the legal system to obtain prior approval from the commissioner or a compensation judge. Presumably, the rule contemplates consideration of future treatment. We question how an employee can prove the effectiveness of “further passive treatment” to maintain functional status based on documentation in the medical record before the treatment is even rendered. We need not, however, reach these issues in the case before us.

the employee's treatment was effective in maintaining functional status. (Finding 20.) The employee argues this finding is unsupported by substantial evidence. He points to his testimony that Dr. Kunerth's treatments allow him to function in his daily life and perform household chores. The employee also testified he sought treatment only when he could no longer control his symptoms on his own. (T. 44.) This evidence, the employee contends, coupled with the records of Dr. Kunerth, establish the compensation judge's finding is clearly erroneous. We disagree.

While the employee's testimony on the issue is relevant, the rule clearly requires more. Minn. R. 5221.6200, subp. 3.B.(2), explicitly requires "documentation in the medical record" of the effectiveness of passive treatment in maintaining functional status. We have carefully reviewed Dr. Kunerth's records for the period of treatment in question. The records contain abbreviated descriptions of the employee's complaints, the nature of the examination performed, the doctor's assessment or diagnosis and the treatment provided. Other than the documentation of the employee's complaints, Dr. Kunerth's records contain no specific reference to the employee's functional status. (See Pet. Ex. A.) At the hearing, the employee offered no medical report from Dr. Kunerth on the issue, nor did the doctor testify at the hearing. The medical record is essentially devoid of evidence that Dr. Kunerth's treatment was effective to maintain the employee's functional status. Accordingly, the compensation judge's finding is affirmed.

In Jacka, the supreme court recognized that "the treatment parameters cannot anticipate every exceptional circumstance" and held "a compensation judge may depart from the rules in those rare instances in which departure is necessary to obtain proper treatment." Jacka, 580 N.W.2d at 35, 58 W.C.D. at 408. The employee argues this is one of those rare cases in which departure is necessary to obtain proper treatment. The employee asserts he obtained treatment only as needed when his symptoms flared up and at other times performed exercises and stretching to control his symptoms. Since the employee is permanently and totally disabled and has been treating with Dr. Kunerth for 17 years, the employee argues the compensation judge erred in denying the disputed treatment. We are not persuaded.

Medical treatment which does not qualify for a departure under Minn. R. 5221.6050, subp. 8, may qualify as a compensable "rare case" under Jacka. See, e.g., Asti v. Northwest Airlines, 588 N.W.2d 737, 59 W.C.D. 59 (Minn. 1999). In Martin v. Xerox Corp., slip op. (W.C.C.A. July 15, 1999) this court held that we would review "rare case" medical disputes under Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984) and Minn. Stat. § 176.421, subd. 1(3). We further held the application of the rare case exception is contingent upon a finding by the compensation judge that the treatment is reasonable and necessary. In this case, the compensation judge found the disputed treatment was not reasonable or necessary.

The employee testified his pain was relieved by Dr. Kunerth's treatment. Based on the frequency of treatment, however, it is apparent any pain relief was short-lived. The compensation judge found the records of Dr. Kunerth set forth no treatment plan. Although the employee appealed this finding, it is clear from our review of the doctor's records the

compensation judge's finding is accurate. The doctor's records do not document the details of his treatment. It also appears the doctor frequently provided adjustments to thoracic and cervical vertebra. Further, the compensation judge found the medical evidence did not establish the treatment at issue was effective in maintaining the employee's functional status. The employee has treated with Dr. Kunerth for 17 years. The medical records in evidence do not, however, document any significant improvement in the employee's condition or any lasting pain relief. The compensation judge found the treatment in issue was not reasonable or necessary. This is a reasonable conclusion to be drawn from the evidence. Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). Since the treatment was not reasonable or necessary, this is not a rare case which justifies a departure from the treatment parameters.