

JOHN L. WINQUIST, Employee/Appellant, v. HANSEN GRAVEL, INC., SELF-INSURED/E.C. FACKLER, INC., Employer.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 6, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY TOTAL DISABILITY; PRACTICE & PROCEDURE - ADEQUACY OF FINDINGS. Where the compensation judge simply stated that two distinct periods of disability were not caused by an admitted injury, the matter needs to be remanded to the compensation judge for completion of a clear legal analysis of the basis for denial of benefits for each period and a recitation of evidence relied on to support the decision.

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS; PRACTICE & PROCEDURE - REMAND. Where the compensation judge simply stated that the self-insured employer is not liable for chiropractic treatment because the healthcare provider did not provide notification which satisfied the insurer, where no prior approval is required under Minn. R. 5221.6205, subp. 3B(1), the compensation judge cannot simply state that the treatment parameters prevail. The matter should be remanded for a clear analysis of the applicability of the parameters, the departure rules and the "rare case" doctrine.

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS. Where the self-insured employer initially admitted liability and paid 12 weeks of chiropractic treatment, but subsequently denied treatment after 12 weeks under Minn. R. 5221.6205, subp. 3B(1)(2), it lost the right to use the treatment parameters after the date it filed a NOID denying all future liability on the basis that the effects of the admitted injury had subsided and the employee had been returned to his pre-injury condition, pursuant to Minn. R. 5221.6020, subp. 2.

Vacated and remanded.

Determined by: Wheeler, C.J., Johnson, J., and Rykken, J.

Compensation Judge: John E. Jansen.

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's denial of payment for certain chiropractic expenses and from the denial of two periods of claimed temporary total disability benefits.

BACKGROUND

The employee, John Winquist, commenced work with Hansen Gravel, the self-insured employer, on August 12, 1997, as a truck driver. On September 10, 1997, the employee sustained an admitted cervical spine injury when a bulldozer struck the rear of his truck causing his head to hit and break the rear window of the truck cab. At the time of the injury the employee was 47 years of age. The parties stipulated that his weekly wage was \$588.15.

The employee first sought treatment on September 24, 1997, when he was examined and treated by Dr. J. W. Kuehl, a chiropractor suggested to him by the employer. The employee was off work on September 24, from September 29 through October 5, 1997, and from October 14 through October 21, 1997, and was paid temporary total disability benefits. From October 22 through December 11, the employee received some temporary partial disability payments. (Resp. Ex. 1, NOID dated 5/28/98.) From September 24 through December 5, 1997, the employee saw Dr. Kuehl for 40 chiropractic treatments for his cervical injury. (Pet. Ex. A.)

The employee also received physical therapy treatment at the direction of Dr. Dennis L. Murphy during November and December 1997. (T. 51; Pet. Ex. F.) The physical therapy treatment consisted of massage, trigger point treatment, long axial traction and bicycle riding. (T. 48-53.) The employee testified that the physical therapy treatments aggravated his cervical problems and after the December 5, 1997 session he noticed the onset of low back problems.¹ (T. 53-54.) On the next day he experienced more severe low back pain and went to see Dr. Kuehl on Monday, December 8. (T. 54-55.) At Dr. Kuehl's suggestion the employee called and canceled further physical therapy. (T. 55-56; Pet. Ex. F.) The physical therapy records from Hutchinson Community Hospital indicate that the employee canceled treatment on December 8 because of "aggravated" and on December 10 "due to mm's spasms & [increased symptoms]" from "last [treatment] session causing old injury to also inflame." (Pet. Ex. F.) Dr. Kuehl released the employee from work as a result of the aggravation he attributed to the physical therapy treatments.

Dr. Kuehl's office notes from December 5, 1997, stated that "post P.T. today John experienced an exacerbation of cervical pain & a feeling of muscle pulling & tightness into the mid thoracic area." On that date Dr. Kuehl treated the employee's cervical and thoracic areas. The examination records for December 8 stated that the employee reported "a burning sensation is radiating into the thoracic area & down into the lumbar spine - burning bilaterally, in fact today acute bilateral lumbar pain is present which intensified late Sat. P.M. & into Sunday - R. leg

¹ The employee testified that he had injured his low back in 1968 and 1983. Apparently his physician in the mid 1980s, Dr. Gary Wyard, gave the employee a 10% whole body permanent partial disability rating for multi-level degenerative disc disease caused by those injuries. (Resp. Ex. 8.) The employee testified that he had periodic aches and pains associated with his low back until the date of his cervical injury, but had not sought treatment for his low back since March 1988. (T. 33-36.)

parathesia today.” On that date Dr. Kuehl provided treatment to the cervical and lumbar areas and removed the employee from work from December 9, 1997 through January 4, 1998. Treatment of these two areas continued on December 10, 12 and 15. Only the cervical spine was treated on December 17. (Pet. Ex. A.) In a letter to the self-insured employer’s claims adjuster, dated December 18, 1997, Dr. Kuehl stated,

My records document that Mr. Winquist began to experience an exacerbation of cervical pain which radiates into the mid thoracic spinal area on December 5 and December 8, 1997. On December 8, 1997 Mr. Winquist states that most of the pain which radiated into the cervical spine had radiated into the lumbar spine which progressively intensified throughout the weekend. On December 8, 1997 he exhibited substantial lumbar pain, demonstrated difficulty in walking and significant loss of lumbar motion. I examined his lumbar spine which presented vertebral subluxation at L4-5 and S1, therefore A-P and Lateral lumbar x-rays were taken prior to the spinal manipulation at L5-S1. He continues to require spinal manipulation at L5-S1. He continues to require spinal manipulation of the lumbar spine as well as the cervical spine.

Mr. Winquist states that he has a work related pre-existing lumbar PPI [sic] rating. However, he has not required treatment for several years. It is my opinion based on my daily notes on December 5, 8, 10 and examination findings that recent physical therapy exacerbated the pre-existing lumbar condition. I provided copies of my daily notes from December 5, 1997 through December 17, 1997 for your review.

(Pet. Ex. A.)

On December 19, the employee received his final treatment to his lumbar spine from Dr. Kuehl. On five occasions between December 24, 1997 and January 9, 1998, the employee received treatment for his cervical and thoracic areas. Thereafter, the only treatment was to the employee’s cervical spine.

Dr. Kuehl also referred the employee to Dr. Steven Lebow, who first saw the employee on November 25, 1997. Dr. Lebow’s initial assessment was that the employee had sustained a cervical sprain/strain with headaches. He provided him with prescriptions for Daypro and amitriptyline. The employee returned to see Dr. Lebow on January 6, 1998. At that time the employee provided a history that he had exacerbated his cervical symptoms and had acquired lumbar problems as a result of activities conducted during the physical therapy treatment for his cervical injury. Dr. Lebow found a loss of lateral flexion of the cervical and upper thoracic regions of the spine, together with mild to moderate trapezius spasm. He continued the

employee's medication and indicated that the employee should have additional chiropractic treatment with home exercises. (Pet. Ex. D.) Dr. Lebow concurred with Dr. Kuehl's earlier recommendation that a cervical MRI be performed on the employee. This diagnostic test was performed on January 25, 1998, and demonstrated a minimal central bulging disc at the C4-5 level, as well as a left-sided foraminal posterior osteophyte formation/disc deformity at the C5-6 level, resulting in joint space narrowing and narrowing of the left neuroforamen. (Pet. Exs. A and E.)

Following the employee's return to work in January 1998, he continued to treat with Dr. Kuehl. This treatment decreased in frequency into February 1998, because the employee was showing improvement. However, allegedly as a result of work activities for the employer, the employee had several exacerbations which required additional treatment. Dr. Kuehl's note of February 2, 1998 indicates that the employee experienced an exacerbation of cervical pain as a result of his activities greasing a truck on January 30, 1998. As a result of this exacerbation, Dr. Kuehl released the employee from work from February 5 through February 22, 1998, during which time he increased the frequency of the employee's treatment. As a result of his treatment, the employee recovered and was able to return to full time work with the employer. Until released from active treatment by Dr. Kuehl on May 1, 1998, the employee experienced several more exacerbations of his cervical problems as a result of his work activities. In each case the employee was treated on an episodic basis but was never removed from work by Dr. Kuehl for any period of time.

On May 14, 1998, Dr. Kuehl indicated, in a healthcare provider report, that the employee had sustained a 7% permanent partial disability of his cervical spine as a result of the injury of September 10, 1997. (Pet. Ex. A.) Thereafter, the employee saw Dr. Kuehl for treatment on August 3, October 5, October 30, November 9, December 23, December 28, 1998 and January 15, 1999. Each of these treatments were allegedly related to an exacerbation of his cervical spine condition caused by work activity for the employer.

The employee testified that he experienced progressive improvement in his condition as a result of his treatment by Dr. Kuehl. He stated that Dr. Kuehl's treatment permitted him to return to full time employment and that after December 5, 1997, he only sought treatment as a result of the aggravation caused by the physical therapy and exacerbations caused by episodic work difficulties. The compensation judge found this testimony to be credible. (Memorandum at p. 6.)

On May 7, 1998, the employee was examined by Dr. Mark Friedland, an orthopedic specialist, at the request of the self-insured employer. In his report of the same date Dr. Friedland's diagnosis was "[r]esolved cervical strain/sprain" and "[c]hronic intermittent low back pain associated with chronic multilevel lumbar degenerative disc disease." He stated that the employee had reached maximum medical improvement from his cervical injury by at least April 15, 1998 and had a zero percent permanent partial disability rating under Minn. R. 5223.0370, subp. 3A. He indicated that the employee had no restrictions on his ability to work as a result of the cervical strain. He further opined that chiropractic treatment for three months after the injury was reasonable and necessary, but that it was unnecessary thereafter, as home

exercises would have been all that were required. He stated that the employee's cervical injury did not justify his complete removal from work after December 8, 1997. He opined that the employee's low back pain in December 1997 was the result of a flare-up of chronic pre-existing degenerative disc disease and could not have been caused or contributed to by the September 10, 1997 cervical injury or physical therapy treatment for the cervical injury. He stated "there is no anatomic possibility of low back injury" from "merely lying in cervical traction." (Resp. Ex. 3.)

PROCEDURAL BACKGROUND

On December 15, 1997, the self-insured employer filed a NOID indicating that temporary partial disability benefits would be discontinued on December 11, 1997 because the "Employee was apparently taken off work for a low back injury. We have only admitted an injury to the neck and upper back." (Judgment Roll: NOID.) On January 7, 1998, a claims representative for the self-insurer's administrator wrote to Dr. Kuehl, apparently in response to the chiropractor's December 18 letter. He stated that no payment would be made for treatment of the low back injury based on a causation defense and for the cervical injury because the past treatment had been ineffective and further treatment would not be considered because there was no treatment plan provided, as required by the treatment parameters. (Resp. Ex. 10.) On January 8, 1998, an administrative conference on the NOID was held before a settlement judge at the Department of Labor and Industry. In his order of January 12, 1998, the settlement judge found that temporary partial disability benefits could be discontinued because the employee was not working.

On January 28, 1998, the employee filed a claim petition seeking payment of wage loss and medical expense benefits. Based on Dr. Friedland's report, the self-insured employer filed a Notice of Intention to Discontinue benefits (NOID) on May 28, 1998, indicating that no further temporary partial disability benefits would be paid after May 27, 1998. The NOID stated that temporary partial disability benefits had been paid at various times from October 22, 1997 through May 27, 1998. (Resp. Ex. 1.)

The dispute came on for hearing before a compensation judge at the Office of Administrative Hearings on April 9, 1999. In his Findings and Order of June 28, 1999, Compensation Judge John E. Jansen found that as a result of the September 10, 1997 work incident that the employee had sustained a 7% permanent partial disability rating as a result of the injury to his cervical spine pursuant to Minn. R. 5223.0370, subp. 3C(1).² The compensation judge denied

² Minn. R. 5223.0370, subp. 3C(1), reads as follows:

Supb. 3. Cervical pain syndrome.

* * *

C. Symptoms of pain or stiffness in the region of the cervical spine, substantiated by persistent objective clinical findings, that is, involuntary muscle tightness in the paracervical muscle or decreased passive range of motion in the cervical spine, and with any radiographic myelographic, CT scan, or MRI scan abnormality not

the employee's claim for temporary total disability from December 9, 1997 through January 4, 1998, and from February 5, 1998 through February 22, 1998, and denied his claim for reimbursement for the expenses associated with his treatment by Dr. Kuehl after December 17, 1997, through January 15, 1999. The compensation judge did, however, award payment for the January 25, 1998 MRI scan. The employee appeals from the denial of the temporary total disability benefits and medical expense claims.

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.

DECISION

Temporary Total Disability

In denying the employee's claim, the compensation judge made the following finding:

The employee has failed to establish by a fair preponderance of the evidence that during his claimed periods of temporary total disability from about December 9, 1997, through January 4, 1998, and/or from about February 5, 1998, through February 22, 1998, any loss or reduction in earning capacity or disability from work was caused or substantially contributed to by the personal injury of September 10, 1997, and accordingly he has failed to establish by a fair preponderance of the evidence his claimed entitlement to temporary total disability compensation benefits for those period

specifically addressed elsewhere in this part:

- (1) single vertebral level, seven percent.

from the self-insured employer.

(Finding 7.)

The compensation judge makes no mention of the temporary total disability claims or his reasoning for reaching his conclusion in any other findings or in his memorandum. He does not make specific findings with respect to how the period from December 9, 1997 to January 4, 1998 may be similar to or different than the period from February 5, 1998 through February 22, 1998. Our review of the evidence indicates that both periods involve significantly different facts and circumstances. At a minimum, the compensation judge should have treated each of these time periods separately and made explicit findings of fact regarding the employee's entitlement to temporary total disability for all or part of each period. The finding of no causal relationship, without supporting factual findings or explanation, lacks sufficient specificity to permit this court to determine if there is substantial evidence in the record and that the compensation judge was not clearly erroneous.

While there may be evidence in the record which would support the compensation judge's finding, it is not the role of this court to guess what the compensation judge's rationale was when he simply stated that there was no liability. As a result, the question of temporary total disability is remanded to the compensation judge. The compensation judge should do a clear legal analysis concerning each period of time and indicate the basis for his determination.

Chiropractic Expense

In making his determination with respect to the denial of chiropractic treatment after December 17, 1997, the compensation judge made the following finding:

The chiropractic treatments received by the employee following the personal injury of September 10, 1997, are subject to the limits set out in the Permanent Treatment Parameters at Minn. Rule 5221.6010, et seq., as interpreted by the Minnesota Courts in Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998) and Olson v. Allina Health System, et al. [cite omitted] (W.C.C.A. February 5, 1999). It has not been established by a fair preponderance of the evidence on behalf of either the employee or Chiropractor Kuehl that self-insured employer is liable for any of the chiropractic care and treatment provided by Dr. Kuehl to the employee from and after about December 17, 1997, relative to the employee's injury of September 10, 1997. Further, it has not been established by a fair preponderance of the evidence that either the employee or the chiropractor are entitled to payment of any earlier treatments relative to the employee's low back, claimed to be consequential to the physical therapy treatments including traction provided to the employee during November and December 1997.

(Finding 5.) In his memorandum, the compensation judge explained his denial of the chiropractic expense claim by stating:

Unfortunately, Dr. Kuehl was unable or unwilling to provide documentation sufficient to satisfy the claims administrators of the employer's liability for the disputed care and treatment, or alternatively, to intervene in these proceedings. Accordingly, the parameters prevail.

(Memorandum at p. 6.)

The finding gives us no clue as to the legal analysis used by the compensation judge. It simply states that it has not been established that the self-insured employer was not liable for expenses after December 17, 1997. The compensation judge does not tell us the basis for the lack of liability, other than to say that some form of approval by the claims administrator was required and that "the parameters prevail." This statement in the memorandum is subject to several interpretations concerning the basis for the compensation judge's denial of the chiropractor's expenses. Again, it is not the responsibility of this court to guess about what the compensation judge was thinking. It is the compensation judge's responsibility to clearly articulate the legal basis upon which his decision was made. The compensation judge should indicate which parameters apply and to discuss the requirements of these parameters in his decision.

Another issue arises concerning the compensation judge's decision regarding the chiropractic treatments in December 1997, which in some respects related to treatment to the employee's lumbar spine. The compensation judge did specifically indicate that payment for all treatment to the lumbar spine, even before December 17, 1997, was not to be awarded. He stated that he did not find the lumbar injury to be a consequence of the treatment of the admitted cervical injury. (Finding 5.) In his memorandum, the compensation judge states that, "[t]he employee had seven physical therapy visits, which he believed aggravated both his cervical and lumbar spine (although that allegation is not supported by adequate medical opinion in the record)." While there is evidence, in the form of Dr. Friedland's opinion, that there is no connection between the physical therapy traction treatments and the employee's lumbar spine condition, Dr. Kuehl, in his December 18, 1997 letter, clearly states that there is a causal relationship between the physical therapy treatment and the lumbar condition. As a result, the compensation judge can hardly say that there is not adequate medical opinion in the record, as there is an opinion supporting a finding of causation. If the compensation judge finds that the denial of treatment in December is in some way based on the fact that the treatment was primarily to the low back and the low back condition was not a consequence of treatment of the cervical injury, it would be incumbent upon the compensation judge, on remand, to resolve the conflicting medical opinions and state upon which opinion he relied in making whatever determination he makes concerning the treatment for the lumbar spine. The compensation judge should pay particular attention to the dates of treatment for the lumbar spine as it appears the last treatment was on December 19, 1997. The compensation judge should not simply treat all treatment during this period as being related to the

lumbar spine as the records clearly show that treatment was also made to the cervical and thoracic spine.

In reviewing the compensation judge's memorandum, we note he made the following statement concerning the chiropractic care and treatment: "The employee credibly testified that over all, he believed Dr. Kuehl's chiropractic care and treatment, and advice as to his exercises, etc., did benefit him by relieving his cervical and related symptoms, and kept him generally able to continue working, relieved his pain, and improved his condition over time." Given this statement and the employee's argument that even if he did not qualify for an additional twelve weeks of chiropractic treatment under Minn. R. 5221.6205, subp. 3B(1), he did qualify under the departure rules in Minn. R. 5221.6050, subp. 8, the compensation judge should specifically rule on the employee's alternative claim. In so doing, the compensation judge should not consolidate all treatment following December 17 into a single category without a finding that all the treatment was similar.³ In addition, if the compensation judge finds that the departure rules should not be invoked, he must still determine if the employee's situation involves one of those "rare cases" described by the supreme court in Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998), as the employee alternatively asserts.

Basically, we want the compensation judge to do a thorough and complete analysis of the particular treatment parameters which apply to this case and not simply indicate that the treatment parameters do not prevail. The parties are entitled to an explanation and the benefit of the compensation judge's reasoning so that the issues may be properly framed if there is a necessity for appeal.⁴

³ We note that the self-insured employer denied all liability for any benefits after May 28, 1998, when the self-insured employer filed its NOID denying any further liability to the employee because the effects of the cervical injury had ended. As a result, pursuant to Minn. R. 5221.6020, subp. 2, the permanent treatment parameters would not apply and all treatment after that date would be reviewed under the "reasonable and necessary" standard in Minn. Stat. § 176.135.

⁴ We note that the proposed findings by the parties clearly dealt with the issues on which the compensation judge has been so vague.