

JOHN F. KRAMER, Employee, v. BUFFALO BITUMINOUS, SELF-INSURED/BUILDERS & CONTRACTORS WC FUND, Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 6, 2001

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Prophylactic measures in anticipation of consequences related to remote risks of reasonable and necessary surgery are normally not reasonable and necessary "treatment" under the statute. The employee's use of sperm bank services in anticipation of remotely possible infertility consequences of his work-related spinal fusion surgery was not medical "treatment" under the workers' compensation statute, and therefore the compensation judge's award of reimbursement for payment for such services was reversible error.

Reversed.

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

OPINION

WILLIAM R. PEDERSON, Judge

The self-insured employer appeals from the compensation judge's award of expenses incurred for sperm banking as a precautionary measure against sterility, a risk associated with anterior/posterior low back fusion surgery. We reverse.

BACKGROUND

On July 15, 1999, John Kramer sustained an admitted work-related injury to his low back in the course of his employment with Buffalo Bituminous [the employer], which was self-insured against workers' compensation liability. Mr. Kramer [the employee] was diagnosed with L5-S1 spondylolisthesis and left L5 radiculopathy and was referred to orthopedic surgeon Dr. Garry Banks. Eventually, on January 20, 2000, Dr. Banks performed an anterior/posterior fusion at L5-S1.

Before undergoing the surgery, the employee and his wife discussed with Dr. Banks the risks associated with an anterior and posterior fusion procedure. One of the risks discussed was sterility. For the Kramers, who did not have children at the time, this risk was of some concern. Dr. Banks indicated that the risk of infertility was small, but sperm banking could be coordinated if the employee wished. The employee elected to proceed with sperm banking through Cryogenic Laboratories, Inc., at a total cost of \$430.00.

On May 19, 2000, the employee filed a Medical Request, seeking reimbursement for the expenses incurred at Cryogenic Laboratories and for mileage associated with the visits. The employer denied liability for the sperm banking, contending that the expense was not reasonable and necessary to cure or relieve the effects of the injury. The employer contended also that infertility was not a significant risk of the required surgery and that the cost of banking against it was simply a personal expense. Following an administrative conference, the employee's claim was denied, and on August 4, 2000, the employee filed a request for formal hearing.

The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on October 17, 2000. The judge framed the issue as whether the cost of sperm bank donation prior to an anterior/posterior fusion was reasonable and necessary to cure or relieve the effects of the work injury. In a Findings and Order issued November 13, 2000, the judge found the expenses to have been reasonable and necessary and ordered reimbursement to the employee. 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.

DECISION

In a note dated October 13, 2000, Dr. Banks wrote that "sperm donation was recommended [to the employee] prior to lumbar fusion because of [the] risk of infertility with the procedure. Based on this it was necessary as a result of [the] work injury." At Finding 4, the compensation judge concluded as follows:

Based upon a preponderance of the evidence, the cost of sperm bank donation prior to anterior-posterior fusion of L5-S1 is reasonable and necessary to cure or relieve the effects of the July 15, 1999 work injury. Since sterility could have resulted from the L5-S1 fusion, it is reasonable for the employee to take the steps necessary, prior to surgery, to assure his ability to father a biological child. Waiting

until after surgery to deal with an irreversible consequence of the surgery would be unreasonable.

On appeal, the employer contends that the compensation judge erred as a matter of law in awarding payment for sperm banking, in that sterility was not an existing element of the employee's low back work injury or its treatment. The employer argues that it was "legally insufficient" for the judge to conclude that the expenses at issue were reasonable and necessary simply because sterility could have resulted from surgery. The employer relies upon Holmlund v. Standard Constr. Co., 307 Minn. 383, 240 N.W.2d 521, 28 W.C.D. 317 (1976), wherein the supreme court explained that, "[t]o sustain a finding of causal relation[,] it is not enough that there is medical testimony that the injury might have caused the subsequent condition or could have caused that condition[,] but there must be medical testimony that the injury did cause that condition." Holmlund, at 389, 240 N.W.2d at 525, 28 W.C.D. at 324 (emphasis in original). We agree that the services here at issue are not compensable.

Minnesota Statutes § 176.135, subdivision 1, reads in part as follows:

Subdivision 1. Medical, psychological, chiropractic, podiatric, surgical, hospital. (a) The employer shall furnish any medical, psychological, chiropractic, podiatric, surgical and hospital treatment, . . . as may reasonably be required at the time of the injury and any time thereafter to cure and relieve from the effects of the injury. . . .

(Emphasis added). While it is difficult to quarrel with the reasonableness of the precautionary measures taken by the employee or with the rationale provided by the compensation judge, we conclude that the expenses incurred in this case are too remote and speculative to be compensable as "treatment" expenses under the workers' compensation statute. Contrary to the judge's implication at Finding 4, nothing, of course, precludes an employee in such circumstances from personally investing in such a precaution, but such a speculative investment is not the obligation of an employer and its insurer. An employer and insurer are obligated to pay for medical treatment that is reasonable and necessary to cure and relieve the effects of a work-related injury. In the present case, Cryogenic Laboratories did not provide any treatment to the employee. Nor were its services for the purposes of diagnosis and cure or significant relief of the employee's condition. There are always risks associated with surgical procedures. If an employee is injured as a result of medical treatment provided to cure or relieve a work-related injury, the additional injury is compensable as well. However, prophylactic measures in anticipation of consequences related to remote risks, such as the measures taken in this case, are not covered by the statute.

Because we find that the services provided by Cryogenic Laboratories were not medical "treatment" under the statute and were not reasonable and necessary to cure and relieve the effects of the employee's work-related injury, we reverse the compensation judge's decision and deny reimbursement to the employee.