CAROL L. RIENDEAU, Employee/Appellant, v. WAL-MART and AIG/CLAIMS MGMT., INC., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 30, 2001

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS. Where the treatment parameters were prominent in the multi-proceeding litigation of the case, and where technically flawed notices of denial based on the treatment parameters included an attachment of those parameters and invitations to call with any questions, the employee had sufficient notice of the employer and insurer's denial of continuing chiropractic care based on the treatment parameters so as to render the compensation judge's application of those parameters not clearly erroneous.

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS; RULES CONSTRUED - Minnesota Rules 5221.6205, Subpart 3B(2). Where the findings and order of the compensation judge made no mention of the employee's argument under Minnesota Rules 5221.6205, subpart 3B(2), despite the fact that that argument was raised by counsel for the employee in closing argument, the matter was remanded to the compensation judge for findings as to whether the chiropractic care at issue was "effective in maintaining employability" within the meaning of Minnesota Rules 5221.6205, subpart 3B(2).

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS; RULES CONSTRUED - Minnesota Rules 5221.6050, Subpart 8E. Where it was evident from his previous decision in the case that the judge was well versed in the employee's work-injury-related condition and her medical and chiropractic history in treatment of it, it was neither unreasonable nor improper for the compensation judge to find that the exacerbations at issue were not sufficiently "incapacitating" to justify departure from the treatment parameters.

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS; RULES CONSTRUED - Minnesota Rules 5221.6050, Subpart 9A. Where the treatment at issue on appeal had already been affirmed as not reasonably necessitated by an "incapacitating exacerbation" so as to justify a departure from those parameters, the court would not address the issue of whether or not the judge's collateral finding of insufficient notice of such a departure by the employee was supported by substantial evidence.

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS. Where the compensation judge offered no explanation for rejecting application of the Jacka/Asti "rare case exception" to the treatment parameters, the WCCA remanded the issue for findings indicating the basis for that decision, noting that such findings would have relevance, however, only in the event that the judge has first found the disputed treatment to be not only reasonable and necessary treatment of the employee's work injury under case law criteria but also outside the medical treatment parameters provided in the Minnesota Rules.

MEDICAL TREATMENT & EXPENSE - TREATMENT PARAMETERS; MEDICAL TREATMENT & EXPENSE - REASONABLE & NECESSARY. Where issues relevant to the argument had been remanded to the compensation judge, the employee's contention that, "[i]n applying the treatment parameters, judges still may not ignore or disregard uncontroverted medical opinion that treatment is reasonably required to cure or relieve the effects of an employee's work-related condition" was effectively premature. The court noted, however, that, notwithstanding expert medical opinion, it would be entirely appropriate for a compensation judge to deny medical expense benefits where the treatment at issue is inconsistent with the treatment parameters, fails to qualify for a departure from the parameters, and fails to meet the requirements for a "rare case" exception under Asti.

Affirmed in part and remanded.

Determined by: Pederson, J., Johnson, J. and Rykken, J.
Compensation Judge: Gary Hall

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's denial of certain chiropractic expenses on various grounds pursuant to application of the treatment parameters. We affirm in part but remand for additional determination.

BACKGROUND

On July 19, 1993, Carol Riendeau sustained a work-related injury to her back in the course of her employment as a paint and hardware department manager with Wal-Mart [the employer]. Ms. Riendeau [the employee] was thirty-five years old on that date. Following her injury, the employee began treatment with chiropractor Dr. Scott McBride. On a Physician's Report dated July 23, 1993, Dr. McBride diagnosed acute thoracic sprain/strain with mild secondary cervical sprain/strain, recommending one to three months of chiropractic spine adjustment and ultrasound therapy, with home application of ice. The employee underwent over ninety treatments with Dr. McBride from July 22, 1993, through January 8, 1997.

On January 9, 1997, the employee sustained a work-related exacerbation of her 1993 work injury while scrubbing shelves and performing stocking activities for the employer. On a Physician's Report dated January 17, 1997, Dr. McBride diagnosed the injury as an "[a]cute cervico-thoracic sprain/strain & myofascial pain syndrome w/Lt C radiculitis." Dr. McBride anticipated that the injury would require one to two months to heal, with treatments three times a week for the first two to four weeks. On July 30, 1997, Dr. McBride responded to a series of queries from the insurer's claims manager, indicating in part that the employee had reached maximum medical improvement [MMI] but would continued to require chiropractic adjustments one or two times a month indefinitely, although she had returned to work without any permanent partial disability and without any physical restrictions.

On February 2, 1998, the employee underwent an independent medical evaluation [IME] with rehabilitation specialist Dr. Matthew Eckman. Dr. Eckman diagnosed "a strain of the left shoulder girdle region, most likely involving the rotator cuff," indicating that the employee "may have a component of impingement syndrome." He stated also, "I do not think she has a significant cervical or thoracic strain" and "certainly no evidence of a herniated disc or radiculopathy." The doctor recommended a trial of outpatient physical therapy focusing on shoulder strengthening exercises, indicating that he did not think that there was sufficient neck involvement to warrant continuing chiropractic treatment, in light of the fact that "benefits are transient and rather secondary." Eventually, on April 27, 1998, the employee sought treatment with medical physician Dr. Jennifer Cornell. On September 21, 1998, following the employee's completion of twenty-four physical therapy sessions, Dr. Cornell referred the employee back to Dr. McBride for further chiropractic care.

On April 9, 1999, the employee filed a medical request, seeking payment for certain treatment including well over a hundred chiropractic treatments with Dr. McBride spanning a period from January 10, 1997, through March 24, 1999. On July 12, 1999, the employee underwent another IME with Dr. Eckman, who diagnosed "myofascial pain in her left shoulder girdle region with episodic tendonitis subsequent to sporadic overuse." In his report to the employer and insurer's attorney on August 12, 1999, Dr. Eckman offered his opinion that the employee was "dependent and could be considered addicted to chiropractic as her method of choice for treatment of her aches and pains." He explained that "[h]er treatment has not cured her and I doubt she will ever be cured of her subjective complaints, although I do agree that it likely has given her some transient symptomatic relief, but this is not acceptable as a long term management method." The doctor concluded in part as follows:

> After this stage after having literally hundreds of chiropractic treatments over the years without resolution, I think it is unreasonable to continue on and on with that as a coverable treatment. At most I would recommend authorization for half a dozen physical therapy sessions a year with well defined goals and under the direction of her primary physician at the Grand Rapids Clinic for treatment of exacerbations and reinforcement of her home program.

The employee's medical request was considered at an administrative conference before Compensation Judge James Cannon on August 18, 1999. By a decision and order pursuant to Minn. Stat. § 176.106, filed September 30, 1999, Judge Cannon denied the employee's request "as and for unreasonable and unnecessary medical treatment . . . , pursuant to the permanent treatment parameters and Minn. Stat. § 176.135." On October 7, 1999, the employee filed a request for formal hearing under Minnesota Statutes § 176.106.

A few days later, on October 11, 1999, the employee underwent the last of over one hundred forty treatments with Dr. McBride since the occurrence of her second injury on January 9, 1997. On December 10, 1999, Dr. McBride wrote to the employee's attorney, responding to a request for updated information. In that response, Dr. McBride reported in part that the employee

had in his opinion reached MMI with regard to her work injuries and had been at that point "for quite some time." He indicated also, however, that the employee had never completely recovered from her injuries and would "continue to require some degree of intermittent conservative care for relief of pain, for maintenance of function and to slow/prevent any further deterioration of the condition." The doctor indicated that the employee's functional limitations were likely to be permanent and that all care to date had been "absolutely appropriate" and "effective in reducing [the employee's] symptomatology and in improving/maintaining her functional status."

Formal hearing in the matter was held on December 21, 1999. At issue before the compensation judge was Dr. McBride's treatment provided between December 14, 1997, and December 1, 1999. In an unappealed decision filed January 14, 2000, Compensation Judge Gary Hall denied payment for all care at issue except that undergone during the twelve weeks beginning September 9, 1998. The judge expressly found the latter twelve weeks of care to have resulted from an "incapacitating aggravation" and so to qualify for a departure from the treatment parameters pursuant to Minnesota Rules 5221.6050, subp. 8E. In a memorandum accompanying his findings and order, the judge indicated that the employee's exacerbation occurring on September 9, 1998, was "severe enough to reasonably require a return to the 'initial nonsurgical' phase of treatment for an acute condition." Judge Hall also concluded expressly, however, as had Judge Cannon before him, that the denied care was outside the treatment parameter established in Minnesota Rules 5221.6205, subp. 3A, and did not qualify for a "departure" pursuant to Minnesota Rules 5221.6205, subp. 3B, and/or Minnesota Rules 5221.6050, subp. 8A. Judge Hall also concluded that Dr. McBride had failed to give adequate prior notification of his intent to depart from the parameters pursuant to Minnesota Rules 5221.6050, subp. 8E, and that disputed chiropractic care provided by Dr. McBride did not qualify for departure from the parameters as a "rare case" pursuant to Jacka v. Coca Cola Bottling Co., 580 N.W.2d 27, 58 W.C.D. 395 (Minn. 1998).

On January 28, 2000, two weeks after the filing of Judge Hall's decision, the employer and insurer's attorney wrote to the employee's attorney and to Dr. McBride, stating as follows:

> The employer and insurer pursuant to Minnesota Rule 5221.6600, Sub[p]. 2, hereby give notice that the employer and insurer intend to apply the chronic management parameters to all future treatment for the employee, Carol Riendeau. A copy of the chronic management parameters, Minnesota Rules 5221.6600 *et[] seq.* are attached. All future authorizations and payments for medical services will be based upon those parameters.
>
> If you have any questions, please do not hesitate to contact me at your convenience.

On February 7, 2000, Dr. McBride wrote to the insurer's claims analyst, Lesa Foreman, indicating that he had treated the employee on February 4, 2000, "for an acute exacerbation of chronic neck, upper back and headache pain as a result of a previous work related injury." Dr. McBride indicated that the "condition was aggravated by her work duties at [the employer] (changing modulars) over

a three day period (2-2-00 through 2-4-00)." That letter was evidently faxed to Ms. Foreman the following day, with a note on the cover sheet indicting that the letter was "notification of treatment for [the employee] per W.C. parameters." Ms. Foreman responded in an undated letter to Dr. McBride, indicating that, "[p]ursuant to Minnesota Statutes 5221.6600, Subp. 1C and 5221 Subp[.] 8E this treatment does not comply with these parts and payment will be denied at this time,"[1] adding, "If you have any questions or concerns, please do not hesitate to give me a call."

On May 19, 2000, the employee filed a claim petition, alleging entitlement to compensation for permanent partial disability to 12.5% of the whole body, consequent to her July 1993 and January 1997 work injuries, reserving the right to claim "any medical benefits which become due and owing." The employee ultimately claimed entitlement to payment of $1,384.57 in chiropractic expenses for approximately twenty-one treatments by Dr. McBride between December 15, 1999, and January 29, 2001, for flare-ups in her back condition.

The matter came on for hearing on February 22, 2001. Issues at hearing included the following: (1) the existence and extent of any work-injury-related permanent partial disability; (2) whether or not the medical treatment parameters applied to the approximately twenty-one chiropractic treatments at issue and, if so, the reasonableness, necessity, and compensability of that treatment in light of those parameters; (3) the employee's entitlement to certain medical mileage expenses; and (4) the employee's attorney's entitlement to attorney fees. By Findings and Order filed April 13, 2001, the compensation judge concluded in part that the employee has continuing complaints of chronic pain, stiffness, and loss of range of motion in both her cervical and her thoracic spine and that, as a result of her July 1993 and January 1997 work injuries, she is subject to a 3.5% permanent partial disability of the whole body related to her cervical spine[2] and to a 2.5% permanent partial disability of the whole body related to her thoracic spine.[3] The judge ordered payment of benefits and of statutory attorney fees accordingly, and these findings and orders regarding permanency benefits and attorney fees are uncontested on appeal.

The compensation judge also found, however, in what he called in his memorandum "a close case," that the treatment parameters did apply and that all disputed chiropractic treatment in the case exceeded the cap for passive care under those parameters. Finding that the employee's testimony conflicted with medical records on the issue, the judge concluded that the employee had failed to demonstrate that any of exacerbations that she claimed led to the disputed treatment constituted an "incapacitating exacerbation" such as is required to justify a departure under the parameters. The judge concluded also that, except for Dr. McBride's treatment from February 2 to February 4, 2000, no disputed chiropractic treatment or related medical mileage was the subject of proper prior notification such as is required under the treatment

[1] Ms. Foreman's reference to Minnesota "Statutes" instead of to the Minnesota "Rules" is clearly an inadvertence.

[2] Pursuant to Minnesota Rules 5223.0370, subpart 3.B. In his memorandum, the compensation judge indicated that he did not find sufficient credible evidence of radiographic findings to support Dr. McBride's 10% rating of the employee's cervical spine.

[3] Pursuant to Minnesota Rules 5223.0380, subpart 3.B.

parameters. Having concluded that the employee had failed to demonstrate either that the disputed treatment fell into any of the departure categories set forth in the treatment parameters or that that treatment constituted a "rare exception" under the Jacka case and its progeny, the judge denied the employee's claim for payment of medical expenses and mileage in its entirety. The employee 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

The compensation judge concluded that the medical treatment parameters were applicable to the employee's treatment expenses claim and that none of the chiropractic treatments at issue was compensable pursuant to those parameters. The employee contends (1) that the judge erred in applying the treatment parameters at all; (2) that, having applied the parameters, the judge erred in finding that the treatment at issue was inconsistent with the parameters; (3) that the judge erred in finding that the treatment at issue did not qualify for a departure as an "incapacitating exacerbation"; (4) that the judge erred in denying coverage on grounds that Dr. McBride failed to provide prior notification of the treatment; (5) that the judge erred in concluding that the treatment at issue did not constitute a "rare case exception" under Jacka and its progeny; and (6) that the judge's denial of the treatment at issue is unsupported by substantial evidence in view of the whole record.

1. Application of the Treatment Parameters

Citing Dawson v. University of Minnesota, slip op. (W.C.C.A. May 6, 1999), and Minnesota Rules 5221.6050, subpart 7B, the employee contends that the treatment parameters are waived as a defense for an employer and insurer absent an affirmative showing by them that they have "complied with the provisions of the treatment parameters requiring notice of denial." Minnesota Rules 5221.6050, subpart 7B, provides as follows:

> If the insurer denies payment for treatment that departs from a parameter under parts 5221.6050 to 5221.6600, the insurer must provide the employee and health care provider with written notice of the reason for the denial and that the treatment rules permit departure from the parameters in specified circumstances. If the insurer denies authorization for proposed treatment after prior notification has been given under subpart 9, the insurer must provide the employee and health care provider in writing with notice of the reason why the information given by the health care provider does not support the proposed treatment and notice of the right to review of the denial under subpart 9, item C. The insurer may not deny payment for a program of chronic management that the insurer has previously authorized for an employee, either in writing or by routine payment for services, without providing the employee and the employee's health care provider with at least 30 days' notice of intent to apply any of the chronic management parameters in part 5221.6600 to future treatment. The notice must include the specific parameters that will be applied in future determinations of compensability by the insurer.

The employee cites this rule as "clearly and unequivocally requir[ing] an insurer to provide notice whenever payment for treatment is denied on the basis that the treatment departs from the treatment parameters." She contends that neither the January 28, 2000, letter of the employer and insurer's attorney nor the undated letter of claims analyst Foreman to Dr. McBride shortly thereafter satisfied these notice requirements. She argues further that the compensation judge "failed to discuss this issue in his Findings and Order despite the fact that the argument was raised by counsel for the employee in closing argument." We are not persuaded.

First of all, we conclude from the language of these rules that an insurer's notice obligations under subpart 7B are triggered by either a request for payment or prior notification of proposed treatment by a healthcare provider. The only evidence of a request for payment during the period currently in dispute is Dr. McBride's letter of February 7, 2000. The evidence of the insurer's response is Ms. Foreman's undated denial, which makes reference to specific treatment rules and invites a call if there are questions or concerns. It would appear that neither the healthcare provider nor the insurer technically complied with the specific requirements of the notification provisions set forth in Minnesota Rules 5221.6050, subparts. 7B and 9, which address the notice responsibilities of the insurer and the healthcare provider, respectively. Nevertheless, in this case, neither party has argued it was in the dark as to the nature of the care being provided to the employee or the potential applicability of the parameters to the care.

In cases where this court has found insufficient compliance with the technical requirements of the parameters, evidence of effort to comply has been essentially nonexistent. See, E.g., Olson v. Allina Health Sys., 59 W.C.D. 37, 46 (W.C.C.A. 1999) ("[the provider] neither provided the required notification nor offered any reasonable basis for failing to do so; she . . . simply made no attempt to comply with the rules"); see also May v. City of Richfield, slip op. (W.C.C.A. June 4, 2001) ("[u]nder any circumstances, . . . a good faith effort to comply with the

parameters is essential to their effectiveness"). The treatment parameters remain guidelines, and, although their notice provisions may not be ignored, see Olson at 46, a good faith effort to comply with their technicalities may be sufficient.

This court's denial of the employer and insurer's entitlement to the parameters defense in Dawson was based not on any conclusion that the employer and insurer had not complied with notice obligations under the parameters. Instead, it was based--and even then only in part--on a conclusion that the employer and insurer had never timely raised to the compensation judge the issue of the healthcare provider's notice of obligation under the parameters. With regard to notice, it was in effect our conclusion in that case that the compensation judge had properly refrained from raising the issue *sua sponte*, on behalf of the employer and insurer--that "it is generally inappropriate for a compensation judge to decide a contested issue on grounds not raised or litigated by the parties." Dawson at page 7, citing Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 869 (Minn. 1988). Under the facts of the present case, we conclude that the purpose of the parameters' notice-of-denial requirement has been sufficiently satisfied to preclude reversal on this basis, in light of all of the evidence, especially in the context of the previous litigation concerning the compensability of Dr. McBride's care under the parameters. Moreover, we conclude also that it was neither improper nor unreasonable for the compensation judge, having presided also in that earlier proceeding where notice by both parties was expressly addressed, to have refrained from expressly addressing the notice-of-denial issue here. Accordingly, we affirm the judge's determination that the parameters apply to this case.

2. Passive Treatment Pursuant to Minnesota Rules 5221.6205, subpart 3B(2)

At Finding 4, the compensation judge concluded that all of the treatment at issue before him exceeded the cap for passive care under the Minnesota medical treatment parameters and was therefore implicitly a departure from those parameters. The employee contends that the judge erred in that conclusion, in that Minnesota Rules 5221.6205, subpart 3B(2), provides "that passive treatment modalities may continue beyond the presumptive 12 weeks of regularly scheduled care plus 12 as needed visits to maintain functional status achieved during the initial period of regularly scheduled care, if the additional passive treatment modalities are 'effective in maintaining employability'" (quoting the employee's brief). Noting that "[t]his provision of the treatment parameters does not contain specific frequency or durational limitations," the employee appears to argue that, under this rule, any treatment that is "effective in maintaining employability" does not exceed the treatment parameters and, as such, does not require either prior notification or analysis as a permissible departure. The employee argues that, instead of analyzing the compensability of the employee's treatment in terms of its basic compliance with Minnesota Rules 5221.6205, subpart 3B(2), of the parameters--i.e., in terms of the treatment's effectiveness in maintaining the employee's employability--the compensation judge erroneously "focuses entirely upon whether or not any of the employee's periodic exacerbations were severe enough to rise to the level required for a departure [from the parameters] under the 'incapacitating exacerbation' departure section," Minnesota Rules 5221.6050, subpart 8E. The employee requests a remand to the compensation judge for findings pursuant to this rule.

We agree the Findings and Order of the compensation judge make no mention of the employee's argument under Minnesota Rules 5221.6205, subpart 3B(2), despite the fact that

the argument was raised by counsel for the employee in closing argument. Therefore, we remand this issue to the compensation judge for a determination of whether the disputed treatment rendered in this case is consistent with Minnesota Rules 5221.6205, subpart 3B(2). The judge shall make all necessary findings contemplated by the rule. See Minn. Stat. § 176.371.

3. "Incapacitating Exacerbation," under Minnesota Rules 5221.6050

At Finding 8, the compensation judge concluded that the employee had failed to demonstrate that any of the claimed exacerbations leading to her disputed treatment constituted an "incapacitating exacerbation" such as would justify a departure from the treatment parameters under Minnesota Rules 5221.6050, subpart 8E. Asserting that the compensation judge did not explain anywhere in his decision the standard that he applied in drawing this conclusion, the employee contends that the judge's denial of benefits on grounds that the "incapacitating exacerbation" departure was not satisfied must be reversed and remanded. We do not agree.

In Kappelhoff v. Tom Thumb Food Markets, 59 W.C.D. 479 (W.C.C.A. 1999), this court, lacking any statutory or other applicable standard, construed the word "incapacitating," as it occurs in a different section of the treatment parameters, to be "permissive of less than total disability" from working. Kappelhoff v. Tom Thumb Food Markets, 59 W.C.D. 479, 488 (W.C.C.A. 1999). On that conclusion, we affirmed as "not unreasonable" a compensation judge's award of medical benefits, thereby implicitly identifying the issue as a factual one for compensation judges.[4] Id. The employee claims that she sustained "incapacitating exacerbations" on twenty-one separate occasions between December 15, 1999, and January 29, 2001. We note that the employee did not lose time from work as a result of these exacerbations. The employee's single visits to the chiropractor did not require a new episode of care beyond each visit, and she was always released to continue treatment on an as-needed basis. In unappealed Finding 6, the judge found that "[t]he employee testified at hearing that her February 4, 2000 visit with Dr. McBride was the result of a "mild" exacerbation." At Finding 7, the compensation judge concluded that "[t]he employee's testimony that she did not seek treatment until her pain was at a 9/10 or 10/10 level conflicts with Dr. McBride's records which appear to show 4 to 6 out of 10 level pain at her visits." In her brief, the employee has argued that Dr. McBride's "notes reflect that Employee was suffering +4, +5 or +6 muscle spasm when she presented for treatment" and that "that is entirely different from Employee's subjective quantification of her pain." We find only four references to spasm in all of Dr. McBride's notes on the twenty-one treatments here at issue. Most of the doctor's ratings were of "hypertonicity"--tightness--and "tenderness," and all but one or two of the records also expressly reference "pain" in the same context, by far the majority of those references being to only "[m]inor," "[m]ild," or "[m]oderate" discomfort. On only three dates, February 25 and May 11, and July 5, 2000, was that pain identified as "[b]ad" or "intolerable"; those were also dates on which Dr. McBride was expressly rating "spasm." Given

[4] Factors perhaps to be considered by a judge in determining whether an exacerbation qualifies as an incapacitating exacerbation under the rules here at issue may include not only the exacerbation's impact on the employee's ability to work or perform the duties of a job but also its impact on the activities of daily living, the severity of the employee's pain, the documented history of the exacerbation, findings on examination and treatment, and any other factors that the judge may consider relevant.

this evidence, we conclude that it was not unreasonable for the compensation judge to find less than credible the employee's suggestion that what she experienced as a level 9 or 10 pain would result the same day in only a level 4/10 to 6/10 tenderness rating by the doctor.

Notwithstanding the brevity of the findings and memorandum in his decision in this current proceeding, it is evident from the judge's previous decision in the case that the compensation judge in this matter was well versed in the employee's work-injury-related condition and her medical and chiropractic history in treatment of it. Particularly given his familiarity with the case, the longevity of his connection with it, and his unique position to assess the credibility of the employee's testimony,[5] we conclude that it was neither unreasonable nor improper for the compensation judge to find that the exacerbations here at issue were not sufficiently "incapacitating" to justify departure from the treatment parameters. 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).

4. Prior Notification under Minnesota Rules 5221.6050, subpart 9A

At Finding 9, the compensation judge concluded that payment for all but three days of the treatment at issue "is also precluded for [the employee's] failure to give prior notification as required by the medical treatment parameters."[6] The employee contends that the compensation judge erred also in this finding. Because the treatment at issue here on appeal has already been affirmed as not reasonably necessitated by an "incapacitating exacerbation" so as to justify a departure from those parameters, we need not, and will not, address the issue of whether or not the judge's collateral finding of insufficient notice of such a departure is supported by substantial evidence.

5. "Rare Case" Exception under Jacka or Asti

In Jacka, the supreme court held that "[t]he rule regulating departure from the permanent [treatment] parameters, Minn. Rule 5221.6050, subp. 8, . . . does not state that it provides the *exclusive* means of departing from the rules." Jacka, 580 N.W.2d at 33, 58 W.C.D. at 404. The court went on to state, "in recognition of the fact that the treatment parameters cannot anticipate every exceptional circumstance, we acknowledge that a compensation judge may depart from the rules in those rare cases in which departure is necessary to obtain proper treatment." Id. 580 N.W.2d at 35-36, 58 W.C.D. at 408. The following year, the court followed its Jacka holding in reinstating a compensation judge's award of a health club membership, concluding that this was "one of those rare cases where a departure from the treatment parameter rules is necessary." Asti v.

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[5] See Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (assessment of a witness's credibility is the unique function of the trier of fact), citing Spillman v. Morey Fish Co., 270 N.W.2d 781, 31 W.C.D. 187 (Minn. 1978).

[6] The judge had found at Finding 5 that "[t]he only evidence of prior notification is Dr. McBride's February 7, 2000 letter notifying the insurer of the employee's acute exacerbation and treatment for a three-day period from February 2, 2000 to February 4, 2000."

Northwest Airlines, 588 N.W.2d 737, 740, 59 W.C.D. 59, 64 (Minn. 1999). At Finding 11, the compensation judge in the present case merely concluded, without explanation, that "[t]he disputed treatment does not constitute a 'rare exception' under either the Jacka case or the Asti case." The employee contends that the compensation judge erred in this conclusion. She argues that, "[i]f Dr. McBride's treatment of Employee does not technically satisfy the basic parameters . . . , then it certainly constitutes one of the 'rare' cases where looking beyond the treatment parameter rules is necessary to award reasonable treatment." We remand the issue for further findings.

At trial, counsel for the employee specifically argued for the applicability of the "rare case exception" to the fact of this case. In rejecting this argument, the compensation judge offered no explanation of his reasoning on this point, either in his findings of fact or in his memorandum. In Martin v. Xerox Corp. 59 W.C.D. 509 (W.C.C.A. 1999), we indicated that we would review Jacka "rare case" medical treatment disputes under Hengemuhle standards and provisions of Minnesota Statutes § 176.421, subdivision 1(3). In order for this court to exercise its review function on an issue, the compensation judge must issue factual findings on that issue. Therefore, we remand this matter to the compensation judge for findings indicating the basis for his decision on the "rare case exception." We note that such findings have relevance, however, only in the event that the judge has first found the disputed treatment to be both otherwise reasonable and necessary under case law criteria and, upon remand as indicated above, inconsistent with Minnesota Rules 5221.6205, subpart 3B(2).

6. Substantial Evidence

The employee contends, finally, that the judge's denial of payment for the treatment at issue is unsupported by substantial evidence in view of the record as a whole. She argues that, "[i]n applying the treatment parameters, judges still may not ignore or disregard uncontroverted medical opinion that treatment is reasonably required to cure or relieve the effects of an employee's work-related condition." Issues relevant to this argument have been remanded to the compensation judge, rendering the argument effectively premature. We would note here, however, that, notwithstanding expert medical opinion, it is entirely appropriate for a compensation judge to deny medical expense benefits where the treatment at issue is inconsistent with the treatment parameters, fails to qualify for a departure from the parameters, and fails to meet the requirements for a "rare case" exception under Asti.

Concluding that the compensation judge properly found the medical treatment parameters to be applicable to the current matter and the treatment here at issue to be a departure from those parameters that was unjustified as an "incapacitating exacerbation," we affirm the compensation judge's decision here in part and remand the matter to the compensation judge for further findings on the applicability of Minnesota Rules 5221.6205, subpart 3B(2), and the applicability of the "rare case" exception provided for in the Jacka and Asti cases.