

BONNIE F. HALL, Employee/Appellant, v. FINGERHUT and TRAVELERS INS. CO.,
Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 17, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION - LEFT ELBOW. Substantial evidence, including medical records, expert medical opinion, and lay testimony supported the compensation judge's finding that the employee's work activities for the employer did not cause her left elbow condition or need for surgery.

CONSEQUENTIAL INJURY. Where the employee's left elbow condition was not caused by her work activities, and where the treatment of the employee's left elbow was neither necessitated by the treatment of her work-related right elbow condition nor performed in error in the course of such treatment, the employer and insurer were not liable to pay for the costs of further surgery to the employee's left elbow on a theory of "consequential injury" regardless whether they had previously paid for the first two left elbow surgeries in error.

Affirmed.

Determined by Wheeler, C.J., Johnson, J., and Pederson, J.
Compensation Judge: Gary P. Mesna

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's finding that she did not sustain an injury to the left elbow as a result of her work activities for the employer and from the judge's determination that the employee's left elbow condition and need for left elbow surgery is not the result of a consequential injury arising from her admitted work injury to the right elbow on November 6, 1996. We affirm.

BACKGROUND

The employee, Bonnie Hall, was hired by the employer, Fingerhut, in August 1992 as a stitching operator. For four hours out of each work day she worked loading pages into a machine which stitched them into catalogues. For the remaining four hours she worked sorting and bundling the finished catalogs. The employee is right-handed. In November 1996 the employee began to experience problems using her right arm at work, which she described as "hurting like a toothache and my fingers going numb."

On December 17, 1996, the employee was seen at the Mora Medical Center for pain in her right arm. She reported that this was related to her work duties for the employer, Fingerhut, and that she had first noticed the symptoms on November 6, 1996. Slight swelling was visible in her hands as well as in her right forearm, and there was a prominent area of swelling in the ulnar aspect of her right forearm. The employee reported pain with flexion of her wrist against resistance. She was diagnosed with a muscle strain in the forearm and wrist in the form of an overuse syndrome. A wrist brace and naprosyn were prescribed and the employee was placed on light duty restrictions for the right hand for two weeks. (Exh. 3.)

She reported the problem to her supervisor and a first report of injury was prepared on December 20, 1996. The injury was described as "pain and swelling in the right forearm, going up to armpit." (DOLI File.) The employer put the employee on light-duty work at full wages sorting scrap paper. (T. 21-22, 29-30.)

The employee returned to the Mora Medical Center on December 30, 1996 and January 15, 1997 and was on both occasions noted to have a definite prominence and swelling over the mid shaft of the right ulna. She was diagnosed with persistent tendonitis. Her work restrictions were extended. On February 3, 1997 she still had swelling in the right forearm and she was referred to an orthopedic physician. (Exh. 3.)

On February 18, 1997 the employee saw the orthopedist, Dr. Julie Samson, at the Mora Medical Center. Dr. Samson again noted an obvious fullness in the distal ulnar forearm on the right and recommended an MRI scan. The MRI scan was performed on February 20, 1997. It was read as "unremarkable" as to the mid and proximal right forearm, with no evidence of soft tissue mass or abnormal signal involving the musculature of the medial aspect of the forearm. The employee then was treated with four sessions of physical therapy at the Kanabec Hospital in Mora, Minnesota between February 25, 1997 and March 15, 1997. The physical therapy intake forms indicate that the employee located her pain at the medial right forearm, with occasional aching into the right elbow along the ulnar nerve pathway and occasional tingling in the third, fourth and fifth digits. The diagnosis was a right forearm strain. Her right forearm was noted to have an area of obvious swelling in the mid-medial forearm area. (Exhs. 3, 6, 8.)

The employee's physical therapy treatment did not relieve her right arm symptoms. On May 5, 1997, she underwent an EMG and nerve conduction study of the right upper extremity which was read as normal. (Exhs. 7, 8.)

The employee was terminated by the employer on May 28, 1997, as she was still restricted to light-duty work and the employer's union contract did not allow the employer to retain an employee in the Light Duty Department for more than six months. On June 16, 1997, the insurer notified the employee that liability for her work injury had been accepted and the employee began receiving temporary total disability benefits. (T. 24, 30; DOLI file: 6/16/97 Notice of Insurer's Primary Liability Determination.)

On August 1, 1997 the employee began treating with Dr. Chris P. Tountas at Summit Landmark Orthopedics. She reported problems with constant right arm pain from the

wrist to the underarm. Palpation of the medial aspect of the right elbow with extremes of external rotation of the right arm, as well as posterior internal rotation or reaching around to the back, all elicited complaints of pain. Dr. Tountas noted a suspect subluxation of the ulnar nerves at both elbows when the elbows went into the extremes of flexion. He found no significant pathology relative to the right shoulder or upper extremity and considered the subluxation of the ulnar nerves to be physiologic. In a letter prepared on the same date, August 1, 1997, Dr. Tountas expressed the opinion that further treatment was unnecessary and that the employee was capable of work involving no repetitive firm grasping, no lifting over 20-30 pounds, and no pulling or pushing. (Exh. 5.)

The employee testified at the hearing in this matter that when she first saw Dr. Tountas in August 1997 she had no complaints with her left elbow, although she did have swelling in both hands, left as well as right. (T. 24.)

On September 25, 1997 the employee returned to Dr. Tountas for reevaluation. Dr. Tountas noted subluxation of the ulnar lumbar nerves bilaterally, with the right ulnar nerve being hypersensitive. He opined that these findings were suggestive of an ulnar neuritis or intermittent irritation of the ulnar nerve at the elbow due to the subluxation, without any neurologic deficit. He thought it reasonable to try to control the pain with intermittent splinting, but opined that the only other option was surgical release and stabilization of the right ulnar nerve with either a transposition or a medial epicondylectomy. (Exh. 5)

On November 25, 1997 Dr. Tountas saw the employee and recorded that she continued to have pain over the medial aspect of the elbows with subluxation of the ulnar nerves as well as numbness of ring and small fingers. He suggested that she consider surgery for the treatment of both the left and the right elbow. (Exh. 5.)

Surgery in the form of a right ulnar nerve release and medial epicondylectomy was performed on January 13, 1998. On February 26, 1998 the employee was seen by Dr. Tountas who noted her right elbow was doing well but that the employee had left elbow symptoms as well as numbness of the left ring and small fingers. A left medial epicondylectomy was performed on March 15, 1998. The employee testified at the hearing below that her left arm symptoms prior to the surgery were not of a level similar to those she had experienced with the right elbow, her left elbow being "just a little achy." The insurer paid for both surgeries without objection and also paid temporary total disability compensation following each surgery. (T. 25; Exh. 5.)

At some point in 1998 the employee found work within her restrictions as a booth cashier at the Grand Casino in Hinckley, Minnesota, and remained in that employment through the date of the hearing below, December 20, 2000. (T. 28.)

On October 29, 1998 the employee returned to Dr. Tountas with increased symptoms relative to the left elbow. The employee no longer had difficulty with the right elbow. Dr. Tountas recommended additional surgery to the left upper extremity to further relieve and decompress the ulnar nerve. On January 29, 1999 the employee underwent a repeat medial epicondylectomy on the left. The insurer also paid for this surgery and paid temporary total

disability compensation for a period of time thereafter while the employee was off work. (T. 27; Exh. 5.)

On January 25, 2000, the employee saw Dr. Mark E. Holm at Summit Landmark Orthopedics. Dr. Holm noted that surgery on the right elbow had been very successful leaving normal sensation and no pain, but that the employee still complained of left elbow pain despite two attempts at medial epicondylectomy. He diagnosed chronic ulnar neuritis of the left elbow and recommended that the employee undergo a submuscular transposition of the ulnar nerve at the left elbow. (Exh. 5.)

The employee was examined on behalf of the employer and insurer on May 5, 2000 by Dr. Mark D. Fischer, M.D., an orthopedic surgeon. Dr. Fischer diagnosed a bilateral ulnar nerve dysfunction with persistent ulnar neuritis on the left. Dr. Fischer opined that the proposed left elbow surgery was reasonable and necessary, but that it was not causally related to the employee's work injury. He opined that the employee had sustained a work-related right arm injury but offered the following opinion regarding causation for the employee's left upper extremity symptoms:

. . . I find no evidence that Ms. Hall sustained an injury of the left arm on November 6, 1996. Subluxation or instability of the ulnar nerve merely is considered to be an anatomical abnormality . . . in and of itself, work-related affect occurs when a subluxing ulnar nerve is irritated by work activity. It could also be irritated by activities of daily living. In the case of Ms. Hall, there is no indication that work irritated the left ulnar nerve as it did the right and she was in fact minimally symptomatic at the time that Dr. Tountas examined her, which was already seven months after she left employment at Fingerhut. In my opinion, said injury did not occur while under the employment at Fingerhut.

. . . The ulnar nerve on the left side was minimally symptomatic when Dr. Tountas examined her. It is now significantly symptomatic as a result of the two surgeries that have been performed on it. The surgery suggested by Dr. Holm to place the nerve under the muscle should eliminate further irritation there. The need for surgery, however, is not related to any injury that occurred at Fingerhut on November 6, 1996.

(Exh. 1 at 7-8.)

A hearing on the employee's claim petition was held before a compensation judge of the Office of Administrative Hearings on December 20, 2000. Following the hearing, the compensation judge found that the employee had not sustained a work-related left arm injury while working for the employer and that the employee's left arm condition and need for surgery was not causally related to the employee's right arm injury on November 6, 1996. The employee appeals.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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 employee first argues on appeal that substantial evidence fails to support the finding that the employee did not sustain a left elbow injury as a result of her work activities at Fingerhut. To support this contention, the employee points out that the employer and insurer previously paid wage loss benefits and medical expenses arising from surgery to the left arm; that the evidence indicates that the employee, when first examined following the November 6, 1996 work injury, had swelling in both hands; that the employee had no problems with either elbow prior to the employment with Fingerhut; and that Dr. Tountas had opined that the employee sustained work injuries to both the right and left elbows. (Employee's brief at 8.)

These arguments merely restate the evidence on which the employee relied in presenting her case to the compensation judge. The issue before this court is not whether there was evidence which might support the employee's claim of causation, but instead whether the judge's finding was "clearly erroneous and *unsupported* by substantial evidence *in view of the entire record* as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992) (emphasis added). The compensation judge in this case relied principally on the expert medical opinion of Dr. Fischer and on the absence of any mention of left elbow symptoms in the medical records until August 1997. In addition, the employee herself indicated both in her hearing testimony and statements to Dr. Fischer that she had no significant symptoms in the left elbow until after the first surgery performed on it by Dr. Tountas in March 1998. There was more than adequate evidence to sustain the compensation judge's finding that the employee did not sustain a work-related left elbow injury on November 6, 1996. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985); Minn. Stat. § 176.421, subd. 1(3) (1992).

The employee's principal argument on appeal is that the compensation judge should have determined that the employee's need for further left elbow surgery is compensable as a "consequential injury." The employee has succinctly stated her argument as follows:

But for the fact that the Employee sought treatment for her work related injury to her right elbow she never would have received treatment to her left elbow and would not need surgery at this time. Dr. Tountas performed surgery with the permission of [the insurer], to the left elbow despite the fact that the Employee was experiencing little if any symptoms in the left elbow. The Employee was merely a victim of the workers' compensation system. She followed the recommendations of her treating doctors, her QRC and even the insurance company. She did not ask the doctor to treat her left elbow. The Employee's surgery is reasonable and necessary and should be compensable."

(Employee's brief at 11.)

In general, "a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." Wallace v. Judd Brown Constr. Co., 131 N.W.2d 540, 544, 23 W.C.D. 362, 367-68 (Minn. 1964). However, "where the original injury is aggravated by or the injured person sustains a new injury as the result of an occurrence that has no causal relation to the original injury, it must be said that the later injury is not a consequence of the first; hence, that no liability exists." Id. at 544, 23 W.C.D. at 368-69.

It has long been recognized that where reasonable and necessary medical treatment provided for a compensable injury causes a further injury, the new condition may be compensable. See, e.g., Radermacher v. FMC Corp., 375 N.W.2d 809, 38 W.C.D. 195 (Minn. 1985); McGough v. McCarthy Improvement Co., 287 N.W. 857, 11 W.C.D. 9 (Minn. 1939). Thus, had the treatment necessitated by the employee's right elbow injury caused the employee's left elbow condition, further treatment for the left elbow condition might be compensable.

Here, however, the employee's left elbow surgery, although performed at the advice of the physician with whom the employee treated for her work injury to the right elbow, can in no way be seen as treatment for the work-related right elbow injury. Nor was this a case where the treatment was rendered to the wrong elbow in error, causing injury, or where treatment extended to a body part contiguous to the site of injury, performed with the intention that it aid in the treatment of the area of the work injury, causes injury to that previously uninjured body part.¹

¹ See, e.g., Gross v. Independent Sch. Dist. #728, 43 W.C.D. 345 (W.C.C.A. 1990). In Gross, an employee sustained a cervical injury and her chiropractor, while performing chiropractic manipulation to her cervical back, extended his treatment over the entire back, presumably with a view towards treating the back musculature and structures as a whole system. The chiropractic treatment resulted in the development of low back symptoms. This court affirmed a finding of consequential injury as supported by substantial evidence. Important to the outcome of that case was the absence of any indication that the employee had specifically sought or assented to low back treatment at the time of the consequential injury.

We conclude that the compensation judge did not err in finding that the employee's need for further left elbow surgery as a result of her decision to undergo the prior surgeries to the non-work-related left elbow condition, was not the result of a compensable, consequential injury.

The remainder of the employee's position rests on what really amounts to an estoppel or waiver theory; specifically, there is implicit in the employee's argument the suggestion that the employer and insurer, having paid by mistake for the two previous non-work-related surgeries and related benefits, should be compelled to continue to pay for further similar treatment. We disagree. The workers' compensation statutes specifically permit a party that learns that it has voluntarily paid benefits which they later claimed were made in error to deny liability for further compensation where the defenses on which they rely have not already been raised and determined. Here, the compensation judge found that the employee's left elbow condition was not compensable or related to the work injury. Accordingly, the employer and insurer are not required to continue payment for the non-compensable condition.