

THERESA J. ROQUETTE, Employee/Appellant, v. KNUTE NELSON MEM'L HOME, SELF-INSURED/BERKLEY ADM'RS, Employer, and BLUE CROSS/BLUE SHIELD OF MINN., FAIRVIEW-UNIV. MED. CTR., and DOUGLAS CO. HOSP., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS  
MARCH 15, 2001

No. [REDACTED SSN]

HEADNOTES

EVIDENCE - RES JUDICATA. The compensation judge did not err in failing to apply res judicata to the employee's treatment expense claim where the employee's most recent claim concerned treatment rendered after the first hearing, and where the medical issues were extraordinarily complex.

MEDICAL TREATMENT & EXPENSE - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert opinion, supported the judge's decision that the claimed treatment was not causally related to the employee's work injury.

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert opinion, supported the compensation judge's decision that the employee had no permanent partial disability of her left shoulder, due to her work injury, sufficient to meet the requirements for a rating under the applicable schedules.

PRACTICE & PROCEDURE. The compensation judge erred in making findings as to MMI and continuing disability to the extent that such findings were inconsistent with an earlier decision and where the issues in question were not before him for determination.

PRACTICE & PROCEDURE. The compensation judge did not err in failing to address causation of the employee's alleged consequential gastric ulcer condition where a consequential injury claim was not clearly presented to him, in a timely manner, for decision.

Affirmed as modified.

Determined by Wilson, J., Johnson, J., and Rykken, J.  
Compensation Judge: Bernard Dinner.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the judge's denial of treatment expenses, payment for a "Massagaback" hydrotherapy table, and permanent partial disability benefits related to the employee's shoulder condition. We affirm as modified.

## BACKGROUND

The employee underwent surgery to treat thoracic outlet syndrome in 1983 and was eventually able to work without any restrictions related to that condition. In February of 1992, she began a part-time housekeeping position with Knute Nelson Memorial Home [the employer], performing such job duties as window washing, dusting, vacuuming, mopping, and flipping mattresses. At some point, the employee developed left upper extremity pain and swelling, but she continued to perform her job duties for several years.<sup>1</sup>

Eventually, in late 1995, diagnostic studies revealed occlusion of the subclavian vein, for which Dr. J. Ernesto Molina performed a second thoracic outlet procedure on February 9, 1996. Following this surgery, the employee continued to treat for a variety of symptoms, including shoulder, neck, and left arm pain and swelling. She returned to her job in early May of 1996 but was taken off work by her physicians after several weeks and was terminated by the employer in July of 1996.

On March 27, 1997, the matter came on for hearing before Compensation Judge Cheryl LeClair-Sommer for resolution of the employee's claim for various benefits related to an alleged Gillette injury<sup>2</sup> occurring on or about December 29, 1995. According to the judge's decision, issues included primary liability; the nature of the alleged injury; whether the employee was entitled to wage loss benefits for various periods through the date of hearing; whether, and if so, when, the employee had reached maximum medical improvement [MMI]; and the compensability of certain medical and rehabilitation expenses.

In her May 12, 1997, decision, the compensation judge resolved most issues in the employee's favor, finding in part that, as of December 29, 1995, the employee had sustained a work-related injury in the nature of "an aggravation of the preexisting thoracic outlet syndrome and, as a result of the aggravation of the thoracic outlet syndrome, swelling of the left shoulder." The compensation judge also concluded that the employee was entitled to wage loss benefits for the periods claimed through the date of the hearing, and she ordered the self-insured employer to "continue to pay the employee temporary total disability benefits as the disability shall warrant." The employee was found to have reached MMI with regard to her thoracic outlet syndrome condition effective December 10, 1996, and with regard to her shoulder swelling<sup>3</sup> effective March 26, 1997. Finally, the employer was ordered to pay medical expenses to providers "at the University of Minnesota, Runestone Family Practice, and Douglas County Hospital for treatment of the December 29, 1995 personal injury" and to reimburse certain intervenors for their

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<sup>1</sup> The employee also apparently developed and was treated for epicondylitis, but that condition is not at issue here.

<sup>2</sup> See Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 32 W.C.D. 105 (1960).

<sup>3</sup> In her MMI finding, the judge referenced "right shoulder swelling," but we presume this is a typographical error and that the intended reference was to the employee's left shoulder.

intervention interests related to payment of medical expenses, short-term disability benefits, and rehabilitation benefits.

Neither party appealed from the compensation judge's May 1997 decision, and the employee subsequently continued to receive care, from numerous providers,<sup>4</sup> for a wide variety of ongoing symptoms. In June of 1997, she obtained a part-time job selling pull tabs, and the employer apparently commenced payment of temporary partial disability benefits.

The matter came on for hearing again on July 25, 2000, this time before Judge Bernard Dinner, for resolution of the employee's claim for permanent partial disability benefits and payment for a Massagaback hydrotherapy table. Also at issue was the claim of intervenor Blue Cross/Blue Shield of Minnesota [Blue Cross] for reimbursement for payments made by them to various medical providers. During the hearing, the compensation judge directed counsel for the employee to ascertain whether those providers had been paid in full for their services. Evidence submitted to the compensation judge included the employee's voluminous medical records, the deposition testimony of Dr. Mark Martin, one of the employee's treating physicians, and the deposition testimony of Dr. Paul Wicklund, the employer's independent examiner. In a decision issued on October 10, 2000, the compensation judge denied all claims. 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.

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

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<sup>4</sup> Medical providers who eventually treated or evaluated the employee included Drs. Marilyn Weber, Marie-Christine Leisz, Thomas Hegstad, Leann Snow, Timothy Garvey, Mark Stuckey, Ensor Transfeldt, Mark Martin, Leslie Sebring, James Allen, and Jeffrey Rank. Disciplines represented by these physicians included osteopathy, family practice, physical medicine, orthopedic surgery, neurosurgery, and gastroenterology.

## DECISION

### 1. Medical Causation - Res Judicata - Medical Expenses

The compensation judge concluded that “medical care and treatment to employee from and after May 1, 1996 was not reasonable and/or necessary in order to cure or relieve the employee from the effects [of her] personal injury and was not causally related to the personal injury as sustained on December 29, 1995.” The judge also made separate findings concerning various conditions and/or symptoms for which the employee had been receiving treatment, determining that the following were not related to the employee’s work injury: the employee’s “chronic neck pain,” the employee’s “pain in the back of the neck, extending down toward the back and also up to the occipital area of the head with symptoms of arms still falling asleep at night”; the employee’s restriction of neck motion; the employee’s cervical scoliosis; “chronic myofascial pain”; and the employee’s claimed loss of shoulder range of motion. In so finding, the judge expressly relied in large part on the opinions and reports of Dr. Wicklund, the employer’s examiner, and Dr. Molina, the employee’s surgeon for the 1996 thoracic outlet surgery. Dr. Wicklund testified in some detail as to why the employee’s continuing symptoms and treatment were not causally related to her December 1995 work-related aggravation of her preexisting thoracic outlet syndrome. While there was evidence to the contrary, a compensation judge is as a rule entitled to choose between conflicting expert opinions. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The judge’s decision is also factually supported by several reports of Dr. Molina, who indicated that the employee’s thoracic outlet surgery had been successful and that he had no “explanation for [the employee’s] current symptoms.”<sup>5</sup> As such, the judge’s medical causation decision is supported by evidence that a reasonable mind might accept as adequate. The employee also argues, however, that Judge Dinner erroneously failed to apply principles of res judicata in making his decision, in that his findings are inconsistent with the previous findings of Judge LeClair-Sommer, who awarded all claimed benefits through March 27, 1997, the date of the first hearing. According to the employee, Judge Dinner in effect gave the employer a “second bite of the apple” with regard to primary liability for the employee’s condition.

The employee’s position arguably has some merit, at least on the surface, in that the employee apparently received medical care for the same symptoms both before and after the hearing before Judge LeClair-Sommer, yet Judge LeClair-Sommer awarded the claimed expenses, whereas Judge Dinner did not. However, the sheer complexity of this case renders it an unlikely candidate for application of res judicata with respect to the employee’s most recent medical expense claims. The employee has received an immense amount of treatment for symptoms including nausea, chest pain, headaches, dizziness, left arm pain, left hand numbness and burning, ear pain, upper back pain, elbow pain, right upper extremity pain, blurred vision, and throat sores.

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<sup>5</sup> Several other physicians indicated that the employee’s cervical pain was related at least in part to spondylosis, which had shown up on diagnostic scans. Also, as Judge Dinner noted, the employee’s MMPI results were significant for findings of hypochondriasis and conversion reaction. The employee has made no claim for any psychological condition caused or aggravated by her work injury.

Diagnoses have included not only thoracic outlet syndrome, scoliosis, spondylosis, and myofascial pain but also cervicgia of unknown etiology, impingement syndrome, myalgia, myositis, sympathetically mediated pain, ulnar neuropathy, brachial plexopathy, and brachial plexus lesions. The fact that the employer failed to contest Judge LeClair-Sommer's treatment award in 1997 should not, under these circumstances, preclude them from contesting liability for treatment rendered thereafter.<sup>6</sup>

Judge LeClair-Sommer found that the employee had sustained a work-related injury on December 29, 1995, in the nature of an aggravation of her preexisting thoracic outlet syndrome, and a consequential injury in the nature of "swelling of the left shoulder." That finding is *res judicata* as to the nature of the work injury. However, the employer was not precluded from litigating the issue of whether the employee's subsequent medical care was causally related to the employee's work-related condition, and, because substantial evidence supports Judge Dinner's decision on that issue, we affirm.

## 2. MMI/Fully Recovered

In Finding 17, Judge Dinner found as follows:

17. That by May 1, 1996, employee had reached full recovery from the two surgeries operations [sic] that Dr. Molina performed first for the "thoracic outlet syndrome" and the thoracic obstruction syndrome and employee had "reached maximum medical improvement by May 1, 1998." And . . . "as far as her thoracic outlet problem," employee was "able to return to full time work on May 1, 1996." (Opinion herein adopted by Ernest Molina, M.D., Report February 3, 1997, Dr. Ernesto Molina, employee's surgeon for the two surgeries; first for the "thoracic obstruction syndrome" and secondly for the "thoracic outlet syndrome"; part of enc. Petitioner Exhibit H.)

The employee argues that Judge Dinner's finding as to MMI impermissibly conflicts with Judge LeClair-Sommer's MMI finding and that Judge Dinner erred in finding the employee fully recovered by May 1, 1996, in that that issue was not properly before him.

The purpose of Judge Dinner's finding, quoted above, is not entirely clear. However, we agree that MMI was determined in the prior proceeding before Judge LeClair-Sommer and that Judge Dinner had no authority to issue a conflicting decision on that point. As

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<sup>6</sup> We do, however, agree with the employee on one point: to the extent that Judge Dinner's order denying treatment expenses after May 1, 1996, conflicts with Judge LeClair-Sommer's May 1997 award of specific treatment expenses, Judge LeClair-Sommer's decision governs. Judge Dinner had no authority to deny specific treatment expenses already awarded by Judge LeClair-Sommer, and to the extent that Judge Dinner purported to do so, his decision is modified. We do not think, however, that Judge Dinner intended to rule on any expenses previously awarded by Judge LeClair-Sommer.

for the employee's argument that "full recovery from the two surgeries" can be read as meaning that the employee was able to work without restrictions as of May 1, 1996, we further agree that such a finding would be improper, both for inconsistency with Judge LeClair-Sommer's award of wage loss benefits through March 27, 1997, and because the employee's need for restrictions was not at issue in the proceeding before Judge Dinner. Therefore, to the extent that Finding 17 can be read according to the employee's interpretation, we vacate that finding.

### 3. Gastric Ulcers

The employee contends that she developed gastroesophageal reflux disease [GERD], or gastric ulcers, from the medications prescribed to treat her thoracic outlet syndrome and shoulder swelling. Arguing that Drs. Martin and Molina offered unopposed causation opinions to this effect, the employee maintains that she has "met her burden of proof that treatment and medication for the GERD or gastric ulcers is related and compensable." The argument in the employee's appeal brief in this regard is identical to her argument in her post-hearing memorandum to the compensation judge.

The compensation judge made no specific finding regarding causation for the employee's GERD or gastric ulcers. However, we conclude that this issue was not properly presented to the compensation judge for determination. The employee made no claim relative to GERD or gastric ulcers in her claim petition or during the hearing, Blue Cross's claim summary contains no entries for treatment of that condition, and the compensation judge did not identify a GERD claim in his recitation of the issues, either at hearing or in his decision. A party may not expect a decision on a claim raised for the first time in a post-hearing memorandum; due process requires reasonable notice and opportunity to be heard before decisions as to benefit entitlement may be made. Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 869 (Minn. 1988). Therefore, we decline to consider the merits of this claim on appeal. The employee is free to file a claim petition or medical request for resolution of the issue if she so chooses.<sup>7</sup>

### 4. Permanent Partial Disability

The employee claimed entitlement to benefits for an 11% whole body impairment, due to restriction in her left shoulder range of motion, under Minn. R. 5223.0450, subp. 4A1(b) and B1(c). The compensation judge denied the claim, concluding both that any range of motion loss was not causally related to the employee's December 29, 1995, work injury and that the employee had not satisfied the requirements of the schedule. We affirm.

The employee's claim is supported in part by the opinion of Dr. Marilyn Weber, who rated the employee's condition under the above-referenced rules. However, the judge's rejection of the employee's claim is well supported by the opinion of Dr. Wicklund, who testified that the employee's restriction of passive range of motion--a requirement of the rules--was voluntary and unrelated to the employee's thoracic outlet condition. Also as noted by Dr. Wicklund, there are numerous entries in the employee's medical records indicating that passive

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<sup>7</sup> The employee also has a claim pending for permanent partial disability related to vascular impairment affecting the extremities.

range of left shoulder motion was normal. A finding as to permanent partial disability is one of ultimate fact, see Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 39 W.C.D. 771 (Minn. 1987), and the judge's decision is here clearly supported by substantial evidence in the record as a whole. We therefore affirm that decision.

#### 5. Massagaback Hydrotherapy Table

Citing a prescription from Dr. Mark Stuckey and the recommendation of other physicians, the employee contends that substantial evidence does not support the judge's denial of her claim for a "Massagaback" hydrotherapy table, a \$1,000 to \$1,200 piece of durable medical equipment. We are not persuaded. Dr. Wicklund testified that the device is "not a recommended or required treatment or one that you would even want to try for the kind of aggravation [that the employee] had to the thoracic outlet . . . . It simply is a dependency-producing piece of equipment that I wouldn't recommend for anyone." The compensation judge was entitled to accept Dr. Wicklund's opinion in this regard, and we affirm.

#### 6. Miscellaneous Provider Claims

As previously indicated, the compensation judge directed the employee's attorney to contact the employee's medical providers following the hearing, to ascertain whether those providers had any outstanding balances for treatment provided to the employee, beyond the payment made to them by Blue Cross. In his decision, after receiving their responses, the judge named Fairview-University Medical Center and Douglas County Hospital as party intervenors and concluded that their outstanding claims were not "causally related and/or reasonable and necessary in order to cure or relieve the employee from the effects of the personal injury."

The employee argues that the compensation judge violated the due process rights of these providers by ordering their potential claims to be asserted as part of this proceeding. We are not persuaded. The intervenors/providers at issue did not appeal from the judge's decision nor have they made any argument that their rights were violated by the judge's procedure or findings. Causation was fully litigated. Under these circumstances, we will not consider the issue further.