

CYNTHIA M. SUTTON, Employee/Appellant, vs. OGILVIE MILLS a/k/a JOHN LABATT, LTD., and AIG INS. CO./GAB ROBINS, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS  
APRIL 19, 2001

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - DISCONTINUANCE; OVERPAYMENT; CAUSATION; PERMANENT PARTIAL DISABILITY. Where the sole issue before the compensation judge was the employer and insurer's NOID seeking to discontinue wage loss benefits as of March 27, 2000, the compensation judge's findings that (1) the employee was released to work without restrictions on July 12, 1994, (2) the employee's 1992 left lateral epicondylitis was a temporary injury that had resolved within a year, and (3) his award of permanent partial disability benefits impermissibly expanded the issues without the consent or agreement of the employee, contrary to Minn. Stat. § 176.238, subd. 6(d), and the findings are, accordingly, vacated.

Affirmed in part and vacated in part.

Determined by: Johnson, J., Wilson, J., and Pederson, J.  
Compensation Judge: Rolf G. Hagen

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals the compensation judge's finding that the employee was released to return to work without restrictions on July 12, 1994, and the finding that the employee's epicondylitis of her left arm was a temporary aggravation that resolved no more than one year after the May 8, 1992 injury. The employee further appeals the compensation judge's finding that the employee sustained a two percent permanent partial disability as a result of her May 8, 1992 injury.

BACKGROUND

Cynthia M. Sutton, the employee, began working for Ogilvie Mills, the employer, as a secretary in 1986 or 1987 on a part-time basis. In 1991, the employee was promoted to a full-time position as an administrative assistant. The employee stated her job as an administrative assistant involved more keyboard work on a computer than her part-time position. She testified that at some point in 1991 she began to develop pain in both hands and wrists up to her elbows. (T. 22-25.)

On January 2, 1992, the employee was seen by Dr. Sonntag at the Park Nicollet Clinic complaining of sinusitis and "long-standing carpal tunnel syndrome symptoms particularly of her left hand." Carpal tunnel testing showed some numbness in the employee's fourth and fifth

fingers. Dr. Sonntag ordered an EMG of the left arm which was normal. The employee returned to the clinic and saw Dr. Jennifer Olson on February 26, 1992, complaining of tenderness over the lateral epicondyles of both arms. Dr. Olson recommended ice, massage and stretching exercises and prescribed Meclomen. On March 18, 1992, Dr. Olson injected the employee's right lateral epicondyle area with Lidocaine. The employee saw Dr. Janos in the Rehabilitative Medicine Clinic on April 15, 1992. The employee complained of bilateral wrist pain, left greater than right, into both forearms and elbows. The doctor noted diffuse tendinitis-like symptoms throughout both forearms and wrists and diagnosed bilateral epicondylitis. Dr. Janos issued bilateral tennis elbow straps and commenced a course of physical therapy. Dr. Olson again injected the employee's right elbow with Lidocaine on May 4, 1992, and instructed the employee to keep her arm in a sling. The doctor took the employee off work and referred her to Dr. Chris Olson in the orthopedic department. (Pet. Ex. E.)

The employee was seen by Dr. Olson on May 8, 1992, complaining of right arm pain for many years which increased after commencing full-time work as a computer operator. Dr. Olson diagnosed pain syndrome of the right arm and continued the employee's off-work status. (Pet. Ex. E.) A First Report of Injury was prepared on May 12, 1992, which referenced notice from the employee on May 8, 1992, and described the injury as pain in the left and right fingers, wrists, lower arms and elbows. (Judgment Roll.) The insurer commenced payment of temporary total disability benefits effective May 8, 1992. (NOID.)

The employee was examined by Dr. Scott Glickstein, a rheumatologist, on May 14, 1992. She complained of left wrist pains which partly resolved and pain in her right elbow. On examination, the doctor found no evidence of active arthritis and diagnosed bilateral arm pain which he suspected was myofascial in nature. The employee saw Dr. Matthew Putnam, a hand specialist on June 18, 1992. The doctor diagnosed right lateral epicondylitis. A bone scan of the right elbow on June 19, 1992 was normal as were x-rays of both elbows and wrists. Dr. Putnam re-examined the employee on June 25, 1992, and diagnosed long-standing chronic right greater than left epicondylitis of the forearms as well as associated posterior interosseous nerve tenderness. Dr. Putnam noted the employee was unlikely to be able to return to repetitive or heavier lifting activities or participate in typing or repetitive filing activities. On August 20, 1992, Dr. Putnam saw the employee for follow-up and concluded the employee was not a surgical candidate at that time. (Pet. Ex. E.)

The employee saw Dr. Patrick Kraft at Northwest Orthopedic Surgeons on October 8, 1992. She related an injury to her right arm on May 8, 1992. The doctor diagnosed chronic lateral epicondylitis and referred the employee to Dr. B.F. Morrey at the Mayo Clinic. (Pet. Ex. G.) The employee was examined by Dr. Morrey on November 20, 1992. The employee reported a history of pain over the right lateral epicondyle with any type of activity, pain in her left wrist and infrequent pain in the left medial epicondyle. Dr. Morrey diagnosed chronic refractory right lateral epicondylitis and possible symptoms of posterior interosseous nerve entrapment on the right. On August 2, 1993, Dr. Morrey performed a right lateral epicondyle release. On January 17, 1994, Dr. Morrey released the employee to return to work, with restrictions. He re-examined the employee on July 12, 1994. The employee noted she avoided motor activity on a repetitive basis but was able to work as long as she was not required to use her right arm on a repetitive basis. Dr. Morrey stated the employee could return to work without restrictions. He

noted, however, the employee may have some limitations but he could not place an objective limit on her activity. (Pet. Ex. F.) By report dated September 2, 1994, the doctor rated a four percent permanent partial disability for the epicondylar release.

Following the May 8, 1992 injury, the employee apparently returned to work with the employer from mid-May through August 1992. Thereafter, the employee was off work and was paid temporary total disability benefits through March 29, 1994. (See NOID, 3/27/00.) The employee returned to work on March 30, 1994 with a different employer (Scholl's), and continued to work at various employments through 2000. (T. 43-62; Pet. Ex. D.) The insurer paid temporary partial disability benefits to the employee during this period of time. In September 2000, the employee quit working for her current employer, Van-O-Lite, because she felt she could no longer do the job due to pain in her hands and arms. (T. 66-67.)

The employee was examined by Dr. David P. Falconer on February 4, 2000, at the request of the insurer. The employee complained of diffuse and generalized pain in her right arm especially with repetitive finger activities. On examination, the doctor noted findings of advanced osteoarthritis of the right thumb and tenderness over the lateral aspect of both elbows. Dr. Falconer diagnosed residual symptoms of diffuse lateral elbow ache on the left, osteoarthritis of the right thumb and a possible new onset of carpal tunnel symptoms over the last three to four weeks. The doctor felt the employee needed some degree of functional restrictions due to the osteoarthritis, however, he opined that condition was not work-related. Dr. Falconer stated the specific complaints and findings of lateral epicondylitis were relatively minimal and the employee had no significant limitations due to this condition. (Resp. Ex. 1.)

By NOID dated March 27, 2000, the employer and insurer sought to discontinue the employee's workers' compensation benefits. The basis for the request was the employee "has no limitations due to the workers' compensation injury on 5-8-92. Dr. Bernard Morrey recommended no functional limitations or restrictions when she was discharged in July 1994. Her objective findings are unrelated to the 5-8-92 injury." (See Judgment Roll.)

The employee returned to see Dr. Kraft on April 13, 2000, complaining of continuing pain in the lateral aspect of her right elbow. The employee also complained of pain in both arms and hands which she stated affected her ability to grip and grasp things. The doctor diagnosed residual lateral epicondylitis, recently exacerbated, and prescribed ice and anti-inflammatory medication. Dr. Kraft advised the employee to restrict her activities. The employee returned on June 8, 2000, complaining of swelling after using her hand for ten minutes which affected her ability to write and use the computer. Dr. Kraft felt the employee had a significant problem and recommended a functional capacity evaluation which was obtained at Northworks in August 2000. (Pet. Ex. G.) The evaluation prepared by Northworks restricted the employee's work activities with both hands. (Pet. Ex. H.) By report dated October 18, 2000, Dr. Kraft diagnosed chronic lateral epicondylitis and accepted the restrictions set by the Northworks evaluation. (Pet. Ex. J.) In addition, Dr. Kraft limited the employee to a 30-hour work week on October 24, 2000. (Pet. Ex. I.)

In a report dated October 2, 2000, Dr. Falconer stated he reviewed his February 4, 2000 report, the employee's deposition, the Northworks R-33 form and the R-33 form signed by

Dr. Kraft. In that report, the doctor opined any restrictions or functional limitations on the employee were primarily due to her elbow and hand joint arthritis as well as her carpal tunnel condition and not epicondylitis. He further opined the employee's work activities at Van-O-Lite were a substantial contributing factor to the development of a carpal tunnel condition. (Resp. Ex. 2.)

The matter was ultimately heard by a compensation judge at the Office of Administrative Hearings on October 25, 2000. The parties stipulated the employee sustained personal injuries to both arms on May 8, 1992, arising out of her employment with the employer. (Stip. No. 1.) The employer and insurer admitted liability for right lateral epicondylitis but denied liability for left lateral epicondylitis. (Stip. No. 2.) In a Findings and Order filed November 17, 2000, the judge found the employee's left lateral epicondylitis was a temporary aggravation which resolved no more than one year after the May 8, 1992 injury. (Finding 2.) The judge found the employee was released to return to work without restrictions effective July 12, 1994 (Finding 4) and permitted the insurer to discontinue benefits effective March 27, 2000, because the employee had no restrictions on her ability to work. (Finding 5.) The judge further found the May 8, 1992 right arm injury was a substantial contributing cause of the employee's temporary partial disability from April 13 through September 16, 2000. (Finding 11.) Based on these findings, the compensation judge denied temporary partial disability benefits from March 27 through April 13, 2000, but ordered payment of benefits from April 13 through September 16, 2000. The compensation judge also awarded the employee a two percent permanent partial disability for the right elbow surgery under Minn. R. 5223.0120, subp. 3.G., payable as impairment compensation. The employee appeals the judge's finding of a temporary aggravation, the finding regarding the employee's restrictions prior to the date of hearing and the finding regarding permanent partial disability benefits.

## STANDARD OF REVIEW

"[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).

## DECISION

### 1. Temporary Partial Disability Benefits

The compensation judge found the employee was released to return to work without restrictions by Dr. Morrey. Accordingly, the compensation judge granted the employer and insurer's request to discontinue benefits effective March 27, 2000, the date of the NOID. The judge further found, however, the employee did have restrictions on the use of her right arm effective April 13, 2000, when the employee saw Dr. Kraft. Accordingly, the compensation judge ordered the employee's temporary partial disability benefits reinstated effective April 13, 2000. The employee appeals the compensation judge's denial of benefits contending the judge's findings are inconsistent and difficult to reconcile and his denial of benefits is clearly erroneous. There is merit in the employee's position.

The compensation judge accepted the July 12, 1994 opinion of Dr. Morrey as credible and reasonable and found the employee had no restrictions relative to her right arm injury as of July 12, 1994.<sup>1</sup> The judge went on to find, however, the employee had “subjective complaints of pain referable to the right and left upper extremities (right more than left) and based upon same did self-limit her work and personal activities.” (Finding 6.) The judge found the employee’s testimony credible. In an unappealed finding, the compensation judge found the “employee’s subjective complaints of pain relating to her right upper extremity from July 12, 1994 to October 25, 2000 (date of hearing) are supported by the objective clinical findings of Dr. Kraft in his examination report/notes of April 13, 2000 and June 8, 2000. (Ex. G)” (Finding 9.) We cannot reconcile Findings 6 and 9 with the judge’s conclusion that the employee had no restrictions on the use of her right arm after July 12, 1994.

The employee returned to see Dr. Kraft on April 13, 2000, complaining of continued pain in her right elbow. Dr. Kraft diagnosed residual lateral epicondylitis and advised the employee to restrict her activities. On June 8, 2000, Dr. Kraft concluded the employee had a significant problem with her right arm and recommended a functional capacity evaluation. Thereafter, Dr. Kraft assigned restrictions on the employee’s use of her right arm and hours of work. The compensation judge found Dr. Kraft’s opinions credible and reasonable as they related to the nature and extent of the employee’s right arm injury, her permanent partial disability and restrictions and the doctor’s opinion that the employee continued to suffer from chronic lateral epicondylitis. (Finding 7 and 8.) Finally, the compensation judge found the employee’s May 8, 1992 work injury was a substantial contributing cause of her temporary partial disability from April 13, 2000 to September 16, 2000, her last day of work. (Finding 11.) These findings are inherently inconsistent. Given the judge’s findings as to the employee’s credibility, nature of the injury and complaints, the record as a whole does not support the judge’s conclusion that the employee was not subject to restrictions from March 27 through April 13, 2000. We, therefore, further reverse the compensation judge’s denial of temporary partial disability benefits for that period.

The employee further appeals the compensation judge’s finding that as of July 12, 1994, the employee was released to return to work without restrictions. The employee’s need for restrictions after July 1994 was not necessary to the judge’s decision on discontinuance and because we are not convinced that issue was fully litigated we vacate Findings 4 and 5. The employer and insurer’s petition to discontinue temporary partial disability benefits is denied.

## 2. Temporary Aggravation

The compensation judge found, and the parties stipulated, the employee sustained a personal injury to both arms on May 8, 1992. The compensation judge went on to find, however, the left lateral epicondylitis was a temporary injury which resolved within a year. (Finding 2.) The employee again asserts this finding constitutes an impermissible expansion of the issues by

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<sup>1</sup> The doctor stated: “I believe this patient can return to work without restrictions. She may have some limitations that she finds in the course of resuming activity but I cannot place an objective limit on her activity based on the assessment.” (Pet. Ex. F.)

the compensation judge. The employer and insurer respond that the compensation judge specifically advised the parties he would make a decision regarding primary liability for both the left and right arm injuries.<sup>2</sup> They argue the employee's failure to object to the judge's stated intention to expand the issues constitutes a consent to such expansion under Minn. Stat. § 176.238, subd. 6(d). We disagree.

The sole issue before the compensation judge was the insurer's request to discontinue temporary partial disability benefits from and after March 27, 2000. The issue of primary liability for the admitted left arm injury was not raised in the NOID. Although the compensation judge did state he was going to resolve that issue, the employee did not specifically agree to such an expansion of the issues. Finding 2 is therefore vacated.

### 3. Permanent Partial Disability

The compensation judge found the employee sustained a 2 percent whole body disability under Minn. R. 5223.0120, subp. 3.G.,<sup>3</sup> payable as impairment compensation. The employee argues this issue was not before the compensation judge and asks this court to vacate the finding.

It is clear from the record, neither the parties nor the compensation judge raised the issue of the employee's entitlement to permanent partial disability benefits. Arguably, the compensation judge's award of a two percent permanent partial disability could be viewed as a minimum payment under Minn. Stat. § 176.021, subd. 3. The compensation judge, however, determined that no statutory attorney fees were due and owing on the permanent partial disability award. Since the permanency issue was not raised at the hearing, the employee's attorney was denied the opportunity to present an attorney fee claim to the compensation judge. Further, we note the compensation judge made no provision for payment of interest as required by Minn. Stat. § 176.221, subd. 7.<sup>4</sup> Under these circumstances, we conclude the compensation judge's award of permanent partial disability benefits should be vacated.

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<sup>2</sup> The compensation judge stated: "I feel compelled to have to make a decision regarding primary liability for the right and left conditions because there has been an admitted right epicondylitis, lateral epicondylitis condition. And there's evidence back and forth. I'm sure I'll take a look at this as to whether or not the left was also injured at the same time . . . Bills were paid, benefits were paid. Now, all of a sudden there's a primary denial. Even though that is not raised per se in the NOID it does perhaps go beyond the scope of the NOID but before I can render an opinion as to that I feel that I have to make a finding as to the nature and extent of the 1992 work injury, whether its limited to the right, the left, both, what the situation is, because the restrictions go to both the right and the left." (T. 101.)

<sup>3</sup> Minn. R. 5223.0120, subp. 3.G. provides for a 2 percent permanent partial disability for a surgical release of the medial or lateral epicondyle.

<sup>4</sup> Minn. Stat. § 176.221, subd. 7 provides, in relevant part:

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Any payment of compensation . . . not made when due shall bear interest from the due date to the date the payment is made at the rate set by section 549.09, subd. 1.

For the purposes of this subdivision, permanent partial disability payment is due 14 days after receipt of the first medical report which contains a disability rating, if such payment is otherwise due under this chapter.