

Case v. Ames Department Stores (April 20, 1995)

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

Kathleen Case) File Nos. E-8139 and D-13338
)
) By: Sheldon A. Keitel
) Hearing Officer
v.)
) For: Mary S. Hooper
) Commissioner
)
Ames Department Stores) Opinion No. 11-95WC

Heard in Montpelier, Vermont on October 5, 1994
Continued and reconvened October 26, 1994
Continued and reconvened November 10, 1994
Record closed November 24, 1994

APPEARANCES

Sam W. Mason, Esq. for the claimant
William C. Dagger, Esq. for the defendant

ISSUES

- 1. Is claimant entitled to workers' compensation benefits as the result of a personal injury by accident arising out of and in the course of employment pursuant to 21 V.S.A. §618?*
- 2. If so, was all medical care rendered thereafter reasonable and medically necessary pursuant to 21 V.S.A. §640?*

THE CLAIM

- 1. Temporary total disability compensation under 21 V.S.A. §642 from March 17, 1991 to March 16, 1992.*

2. *Medical benefits under 21 V.S.A. §640.*
3. *Permanent partial disability benefits under 21 V.S.A. §642.*
4. *Attorney's fees and costs under 21 V.S.A. §678(a).*

STIPULATIONS

1. *The claimant, Kathleen Case, was employed by the defendant, Ames Department Stores, Inc. in the Bennington, Vermont, store as a retail associate on all relevant dates as hereafter specified.*
2. *The defendant was at all times relevant to this claim an employer within the meaning of the Workers' Compensation Act.*
3. *On January 3, 1991, the claimant was injured at work when a wall fell on her as she was putting merchandise on the top shelf (State File No. D-13338).*
4. *The claimant was treated at the Emergency Room of Southwestern Vermont Medical Center that day but otherwise lost no time from work. The claimant had no further medical treatment and lost no time from work between Jan. 3 and Mar. 17, 1991.*
5. *During the weekend of March 15-16, 1991, the claimant worked a regular 8 hour shift on Friday, March 15 and returned that evening to work an overnight shift to assist with inventory. Claimant worked from approximately 9:30 Friday evening until 8 a.m. Saturday, March 16, when she began her regular shift; she worked until approximately 11 a.m., took an hour off for lunch, and returned at noon and worked until approximately 5 p.m.*
6. *Gallagher Bassett Services, Inc., third-party administrator of employer's workers' compensation claims, found neither an injury arising out of employment on March 15-16 nor a causal relationship between the alleged back injury of March 15-16 and the injury of January 3, 1991, and therefore denied the claim.*
7. *Defendant paid approximately seven weeks of temporary total disability benefits without prejudice pursuant to an Order from the Department of Labor*

& Industry dated February 4, 1992; payments were discontinued based on a report dated 3/16/92 from Marcy Jones, D.C., which placed claimant at end medical result (State File No. E-8139).

8. The claimant was 31 years of age at the time of both claimed injuries. Claimant's current mailing address is P.O. Box 11, Petersburg, N.Y. 12138.

9. Judicial notice may be taken of the following documents in the Department's claim files:

Form 1: Employer's First Report of Injury (1/3/91)

*Form 5: Notice of Injury and Claim for Compensation
(undated; received by Department of Labor &
Industry 11/15/91)*

Form 6: Notice and Application for Hearing (7/16/91)

Form 6: Notice and Application for Hearing (11/25/91)

Form 25: Wage Statement (2/2/94)

10. The following documents were offered into evidence without objection:

*Claimant's Exhibit 1: Office notes, Tim North, D.C., 10/23/89
through 3/5/92 (54 pages)*

*Claimant's Exhibit 2: Correspondence dated 3/19, 4/2, 9/24,
10/24, 10/28 and 11/1/91 (North)*

*Claimant's Exhibit 3: Report and bill, 11/11/91, Moelter
Chiropractic Clinic, P.C.*

Claimant's Exhibit 4: Report/bill, 3/16/92, Marcy Jones, D.C.

Claimant's Exhibit 5: Letters 4/2 and 10/16/92 (North-Mason)

Claimant's Exhibit 6: Report, 9/15/93, Donald L. Kinley, M.D.

Defendant's Exhibit A: Reports, 5/22/92 & 12/7/92 (Dr. Gates)

Defendant's Exhibit B: Emergency Dept. record 1/03/91 SWVMC

Defendant's Exhibit C: Time card, week ending 3/16/91

*Defendant's Exhibit D: Office notes, North Chiropractic Center
1/20/87 - 12/6/88 (42 pages)*

FINDINGS

1. *Stipulations 1 through 8 are true. Judicial notice is taken of the documents referred to in Stipulation 9. The documents referenced in Stipulation 10 were admitted into evidence.*

2. *The following document was admitted into evidence at the hearing over the objection of defendant's counsel:*

Claimant's Exhibit 7: Bills 5/22/91-3/31/92 (Tim North, D.C.)

3. *On January 3, 1991, claimant was stocking shelves when the shelves collapsed, along with the portable, vertical partition (wall) from which the shelving units were suspended; claimant was knocked to the floor and fell on her left side but was able to crawl out from under them. (Testimony of claimant.)*

4. *Claimant was taken to the emergency room. The chief concerns were noted as pain in the left forearm and thumb. X-rays of the thumb, forearm and left shoulder were all negative. Claimant was discharged in a sling and diagnosed as having suffered contusions. (Defendant's Exhibit B.)*

5. *Claimant worked her regular 8 a.m. - 5 p.m. shift on Friday, March 15 (with a one hour lunch break). Claimant returned about 9:30 that evening to conduct inventory in the Health and Beauty Aids department (HBA) with her sister, also employed by Ames; they worked through the night except for a meal break and rest breaks, which they were free to take whenever they wanted. They were the only employees in the store between closing time Friday night and Saturday morning. (Testimony of claimant and claimant's sister, Julie Case; Defendant's Exhibit C.)*

6. *All HBA products were located in two aisles; claimant and her sister were together except for brief periods when they were in the different aisles. Some merchandise had to be moved (to be counted or to be relocated) but none of the items in question weighed more than a few pounds. Their activities included bending, walking, and climbing a ladder, but at no time Friday night or Saturday morning did claimant experience pain or suffer an injury. At no time did Julie Case see claimant injure herself, act in any way that suggested she was in pain, or hear her complain of discomfort. At about 8 a.m. Saturday morning, claimant and her sister began their regular shifts. At about 11 a.m. they broke for lunch, drove to their apartment*

(approximately 40 minutes round trip), returned to the store about noon, and worked the rest of the afternoon until completing their shifts at 5:00 p.m. (Testimony of claimant and Julie Case.)

7. Claimant testified that she first began to experience discomfort over the lunch hour or shortly after returning to work on the afternoon of March 16. Pain in her back, hip, and left leg continued to increase throughout the afternoon to the point that she was limping and at times was in such pain that she was unable to walk. (Testimony of claimant.)

8. Julie Case did not notice anything unusual in her sister's demeanor over the lunch hour, and claimant did not complain of pain or discomfort. Julie did not see claimant limping on March 16, and at no time was Julie told by claimant that she was in pain although they had numerous contacts with each other at work over the course of the afternoon. (Testimony of Julie Case.)

9. Claimant testified that she notified an Assistant Manager, Gary Norman, of her injury prior to leaving the store that afternoon at 5 p.m. She telephoned David Thurber of Petersburg, New York, before leaving the store on Saturday, March 16, to arrange for him to pick her up at her apartment when she got home. Claimant's sister (Julie) had asked claimant to drive Julie's car to their apartment because Julie was going out with someone else right after work. Mr. Thurber picked up claimant at her apartment and they drove together to his home where she has resided ever since. (Testimony of claimant.)

10. Mr. Thurber was so concerned about claimant that he called Dr. North on his own initiative. Dr. North advised claimant to apply moist heat, rest, and he would get in touch with her on Sunday morning to see how she was doing. Claimant was treated by Dr. North on Sunday, March 17, throughout the following week, and on a regular basis (at least once per week) through March 1992. (Testimony of David Thurber; Claimant's Exhibits 1 & 7.)

11. Julie Case testified that it was not her practice to loan her car to anyone and that she rarely, if ever, loaned her car to her sister. Further, it was not her practice to go out immediately after work without going home first to change clothes; to the best of her memory, she drove home with claimant the night of March 16, 1991. (Testimony of Julie Case.)

12. Claimant had lived with her sister for about six weeks as of 3/16/91;

Julie was not surprised that her sister never returned to share living accommodations after going to Thurber's home after work on March 16 because claimant had lived with him previously during their 15 or 16 year relationship and planned to move back in with him anyway. Julie did not learn from her sister until Monday, March 18, that claimant had sustained the alleged injury, had sought medical attention, and had not returned to work as a result. (Testimony of Julie Case.)

13. Gary Norman, Assistant Manager and claimant's supervisor on March 16, 1991, testified that he did not receive a report from claimant or anyone else on Saturday, March 16 that claimant had sustained an injury or was in pain, nor did he observe claimant limping at any time that day. It was his responsibility to prepare accident reports if work-related injuries were reported to him, and he routinely did so when reported. Mr. Norman did not learn until sometime the following week from the store manager that claimant was out of work indefinitely because of an alleged work-related disability. Norman was at the time of the alleged injury and at the time of the formal hearing a close friend of Julie Case; he has not been employed by Ames since November 1991 when he was seriously injured in an auto accident. His memory since the accident has been adversely affected but memory and recall of events prior to the accident are intact. (Testimony of Gary Norman.)

14. Treatment notes of Tim North, D.C. (Claimant's Exh. 1, Def. Exh. D) are largely illegible, but they indicate as the chief complaints on 3/17/91 bilateral lower back pain and thoracic and cervical tenderness, which "began after (during) taking inventory." These generalized complaints, in addition to the other diffuse symptoms noted throughout the course of her subsequent treatment (headaches, loss of sleep, numbness or pain in arms and legs) were the same as those for which claimant was treated between January 1987 and December 1988. (Def. Exhibit D.)

15. Claimant obtained two permanency ratings at the request of her attorney. (Claimant's Exhs. 4 & 6; testimony of claimant.)

16. Dr. Gates reported that claimant clearly told him at the time of his IME

that, following the 1/3/91 injury, "she had no back pain whatsoever and that her left upper extremity recovered to the point that she was fine and had no ongoing problems with that She indicates there is clearly no history of injury in March, and the story is somewhat vague, with no indication of any specific time that the pain started or its being related to any one particular activity." (Defendant's Exhibit A; testimony of Dr. Gates.)

17. Dr. Gates concluded: "There is clearly no good evidence to link lower back pain with the injury in January of 1991" Dr. Gates obtained inconsistent measurements at the time of his examination, "which would suggest no signs of permanent impairment in this area." Dr. Gates assessed a 6.5% permanent impairment to claimant's cervical spine based on limitation of motion "that could possibly be related to that injury," but not conclusively related by him to that injury. (Def. Exhibit A.)

CONCLUSIONS OF LAW

1. To recover under the Workers' Compensation Act, it is essential that a worker receive a personal injury by accident arising out of and in the course of employment. Norman v. American Woolen Co., 117 Vt. 28 (1951). A workers' compensation claimant has the burden of establishing by sufficient competent evidence the nature and extent of an injury and of showing the causal connection between the accident causing the injury and her employment. Lapan v. Berno's, Inc., 137 Vt. 393 (1979).

2. The circumstances surrounding the alleged injuries as reported by claimant to medical examiners were "vague" (Findings 14 and 16) and inconsistent with the various accounts given by her on the Form 5 date stamped Nov. 15, 1991 and both Forms 6 dated July 16 and November 25, 1991. Claimant's alleged disability and the claimed link with her employment are not only dubious on paper, but the credibility of the claimant and all but one of the other witnesses who testified was called into question by the bizarre events which occurred during the hearing. David Thurber at first refused to take an unqualified oath prior to giving testimony; he gave at last only a qualified `yes' because he surmised it would expedite his escape from what was clearly an uncomfortable situation for him. Claimant and her sister traded titters across the room in the course of claimant's direct examination; their giggles turned to uncontrollable sobbing by the time Julie testified. Claimant's sister recanted nearly everything she said on direct

examination when cross-examined by claimant's attorney; it is more likely than not, however, that her testimony on direct was truthful because consistent with that of Gary Norman (the only dispassionate, objective and credible witness at the hearing) and that she hedged on cross-examination out of familial affection.

3. Norman's testimony convincingly contradicted the claimant's regarding the onset of symptoms and the alleged temporal link between disability and employment. Claimant has not met her burden with regard to either the alleged disability or causal link with her employment; neither has she demonstrated that the minimal permanencies documented arose out of incidents on either alleged date of injury as opposed to long-standing and pre-existing conditions.

ORDER

Based on the foregoing findings and conclusions, all claims are DENIED.

DATED at Montpelier, Vermont this _____ day of April, 1995.

*Mary S. Hooper
Commissioner*