

*Plante v. Slalom Skiwear, Inc. (May 24, 1995)*

STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY

*Therese Plante* ) *File No. Z-14004*  
 )  
*v.* ) *By: Jill Broderick, Esq.*  
 ) *Hearing Officer*  
*Slalom Skiwear, Inc.* )  
 ) *For: Mary S. Hooper*  
 ) *Commissioner*  
 )  
 ) *Opinion No. 19-95WC*

*Heard in Montpelier, Vermont on January 3, 1995*  
*Record Closed: March 1, 1995*

*APPEARANCES*

*Attorney for Claimant - Duncan Frey Kilmartin, Esq.*  
*Attorney for Defendant - Keith Kasper, Esq.*

*ISSUES*

- 1. Are the claimant's current spine and/or upper extremity problems causally related to her accident of January 13, 1987?*
- 2. If the claimant has surgery during a period of time in which she is unemployed, is she entitled to temporary total disability?*

*THE CLAIMANT SEEKS*

- 1. Payment of medical bills related to treatment for her neck and left upper extremity disorder.*
- 2. Attorney's fees.*

3. *Costs.*

*STIPULATIONS*

*The parties have entered into the following stipulations:*

1. *The claimant was an employee of the defendant, Slalom Skiwear, Inc., on January 13, 1987.*

2. *The defendant is an employer within the meaning of the Workers' Compensation Act.*

3. *Liberty Mutual is the workers' compensation insurance carrier for the defendant.*

4. *The claimant's January 12, 1987, injury arose out of and in the course of her employment.*

5. *The claimant underwent surgery on her lower back on November 6, 1988.*

6. *The claimant has received all the temporary total compensation to which she is entitled as of July 14, 1994.*

7. *The parties have stipulated to the admission of the following exhibits:*

*Defendant's Exhibit #1      Medical records.*

*Defendant's Exhibit #2      Deposition transcript of Dr. Ford.*

*Claimant's Exhibit #1      Deposition transcript of Dr. Jennings.*

*Claimant's Exhibit #2      Medical records.*

*FINDINGS*

*Based on the evidence and testimony presented at the hearing, I find:*

1. *The exhibits listed above are admitted into evidence.*

2. *The stipulations set forth above are true.*

3. *The claimant began work for the defendant on March 29, 1976 and worked there as a seamstress until her accident on January 12, 1987.*
4. *On January 12, 1987 the claimant started to sit on a metal clothes container approximately 30 inches high. It slid out from under her and she landed on her buttocks on the floor. She worked the remainder of that day and the next day.*
5. *At the end of her shift on January 13, 1987, the claimant went directly to the emergency room at North Country Hospital complaining of pain in her lumbar and sacral spine.*
6. *She did not work again until February, 1990, when she returned to her job with the defendant.*
7. *The claimant's first language is French; she speaks very little English. During the course of medical treatment over the next eight years she attended many of the office visits with her doctors without an interpreter. She would communicate with sign language and by pointing to parts of her body.*
8. *On January 30, 1987, she sought treatment at the University Health Center for low back pain.*
9. *On April 8, 1987, the claimant underwent a total abdominal hysterectomy.*
10. *The claimant had two more appointments at UHC on March 20, 1987 and July 7, 1987. She complained of leg and back pain and was diagnosed as having a left L5- S1 herniated nucleus pulposus.*
11. *The claimant first saw Dr. Jennings on August 12, 1987, again complaining of low back pain. His office notes indicate that her "history is a little confusing, because of language difficulty.."*
12. *She saw Dr. Jennings again on September 2, 1987, at which time he notes that she is complaining also of pain in her neck.*

13. The claimant began treatment with Dr. Jennings and with physical therapy for back and neck pain radiating into her left arm.

14. The claimant's x-rays on October 27, 1987 showed mild degenerative changes associated with disc space narrowing at C5-C6.

14. The claimant underwent a laminectomy on her L5-S1 disc level on November 10, 1988.

15. On November 30, 1988, Dr. Jennings noted that the claimant continued to have problems with her left arm with numbness down to the hand at times and a sore neck. He testified that the claimant's "complaints (about her left arm) were steady and certainly pointed towards some nerve root irritation....But at that time certainly didn't look anywhere near as bad as the back..." He noted also that some of the exercises the claimant was told to do after her lumbar surgery aggravated her neck.

15. In December, 1989, the claimant attended an intensive three week program at the New England Spine Institute and made significant improvements in her back condition.

16. The claimant returned to her job with the defendant on February, 1990, gradually working into a full time position and continued until the factory closed in February, 1991.

17. She continued seeing Dr. Jennings for problems with her neck and left arm.

18. On July 13, 1991 the claimant was involved in a motor vehicle accident.

19. The claimant was treated at the North Country Hospital emergency room for "back and neck pain." The physician rendered a diagnosis of whiplash and prescribed a soft collar for the claimant's neck for a few days.

20. Dr. Jennings testified that the auto accident "aggravated" the claimant's neck; however, it caused no permanent disability and in his opinion the claimant's 1987 work injury was the cause of her neck problem.

20. Dr. Jennings ordered an MRI for the claimant in May, 1992, which showed a disc herniation at C6-C7. He testified that the claimant's left upper extremity problems are the result of this disc herniation, which pre-existed the auto accident.

21. Dr. Jennings opined that the disc herniation was caused by the claimant's fall on January 12, 1987.

22. Dr. Krag and Dr. Jennings have recommended neck surgery to alleviate the symptoms in the claimant's arm and neck.

23. Dr. Ford examined the claimant on April 13, 1993. Dr. Ford testified that the claimant did not have an interpreter with her for the examination.

24. Dr. Ford stated in a letter dated May 19, 1992 that "the January 1987 fall was not responsible for the cervical disc herniation."

24. Dr. Ford based this opinion primarily on the fact that there are no documented complaints of arm pain until September, 1987.

25. Dr. Ford testified that it would be "pretty unusual" for a whiplash injury in a car accident to cause a herniated disc. She testified that she had no opinion whether the claimant's neck and arm pain were related to her 1987 accident. Dr. Ford believes the cervical disk herniation was a "purely spontaneous event."

## CONCLUSIONS

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395 (1984). The claimant must establish by sufficient, competent evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

2. Where the claimant's injury is obscure and a layman could have no well-grounded opinion as to its causation, expert testimony is the sole means of laying a foundation for an award. *Lapan v. Berno's, Inc.* 137 Vt. 393 (1979). There must be created in the mind of the trier of fact something more than a mere possibility, suspicion, or surmise that the incident complained of was the cause of the injury, and the inference from the facts proved must be at least the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

3. The defendant maintains that the claimant's left upper extremity disorder is unrelated to her 1987 work accident. The defendant's expert, Dr. Ford, based her opinion on the fact that the claimant did not report arm pain until September, 1987, eight months after the accident. However, between the accident in January, 1987 and the first documented report of arm pain, the claimant had a hysterectomy, which interrupted the treatment for her back and neck. In addition, as Dr. Jennings noted, the claimant's back pain was much more significant soon after her accident than the arm pain and numbness. It is possible, therefore, that her back pain so overshadowed the arm pain and numbness that she simply did not report it until September, 1987. Finally, the claimant is unable to communicate in English and often attended medical appointments without an interpreter. The claimant testified at the hearing that she has had arm pain since her accident, and I find this testimony to be credible. I also find Dr. Jennings opinion that the 1987 accident caused her arm problems to be credible. I conclude, therefore, that the claimant's left upper extremity injury is work related.

4. The claimant seeks temporary total compensation for the period of time after her anticipated surgery during which she will be unable to work. However, the claimant has been unemployed due to reasons other than her work-related injury. Temporary total benefits are awarded as wage replacement for the injured employee during the period of disability. See *Orvis v. Hutchins*, 123 Vt. 18 (1962) and 2 LARSON WORKMEN'S COMPENSATION LAW at §57.00. Temporary total benefits are based on the injured employee's wages during the twelve weeks "preceding the injury." 21 V.S.A. §650(a). The Department interprets the date of injury as the date on which the injury becomes

*disabling. In the instant case this will be the date on which the claimant has surgery. Therefore, her temporary total compensation will be based on her wages, if any, during the twelve weeks prior to her surgery.*

*5. Claimant has prevailed. Reasonable costs and an award of attorney fees in accord with Workers' Compensation Rule 10, will be awarded if claimant's attorney provides proper documentation within fifteen days.*

#### *ORDER*

*Therefore, based on the foregoing FINDINGS and CONCLUSIONS, Liberty Mutual, or in the event of its default, the defendant, is ORDERED to:*

- 1. Pay the claimant's medical bills related to treatment for her neck and left upper extremity disorder.*
- 2. Determine whether the claimant has any permanent partial disability as a result of her work injury, determine the nature and extent of any such disability, and pay any permanent partial disability compensation owed the claimant.*

*It is further ordered that claimant's attorney has 15 days from the date of this order to submit a statement of attorney hours in accord with Workers' Compensation Rule 10, and an itemization of costs for which it seeks reimbursement. Failure to submit such information shall result in a denial of an award of fees and costs.*

*Dated at Montpelier, Vermont this \_\_\_\_\_ day of May, 1995.*

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*Mary S. Hooper  
Commissioner*