

Turco v. Crowley Cheese (May 17, 1995)

Vermont Department of Labor and Industry

<i>Dennis Turco</i>)	<i>File #A-20097</i>
)	
)	<i>By: John H. Fitzhugh</i>
<i>v.</i>)	<i>Hearing Examiner</i>
)	
)	<i>For: Mary S. Hooper</i>
)	<i>Commissioner</i>
)	
<i>Crowley Cheese</i>)	<i>Opinion #26-95WC</i>

APPEARANCES:

Dennis Turco, pro se
Glenn Morgan, Esq., for Crowley Cheese

ISSUE:

- 1. Whether the claimant is entitled to additional permanent partial disability for right and left shoulder pain arising out of and in the course of employment.*
- 2. Whether the claimant is entitled to additional medical benefits.*

THE CLAIM:

- 1. Additional permanent partial disability compensation for a 30% impairment of both upper extremities.*
- 2. Medical benefits as demonstrated by the evidence.*

PRELIMINARY CONSIDERATIONS:

- 1. This matter came on for hearing February 7, 1995. The sole witness was the claimant. Introduced at that hearing were the following documents:*

Claimant's 1: Letter of Doctor James Murphy, 11/3/94.
Claimant's 2: Clinic note of Dr. Daniel Wing, 12/21/94.
Claimant's 3: Statement, Hitchcock Clinic, 3/16/94
Defendant's A: Letter of Richard Levett dated 5/21/92

2. At the hearing, the hearing examiner took judicial notice of the following documents:

Form 5 - Notice of Injury and Claim for Compensation

Form 25 - Wage Statement

Form 10 - Certificate of Dependency

Form 21 - Agreement for Temporary Total Disability Compensation dated

July 1, 1988 with compensation beginning February 26, 1988.

Form 28 - Notice of Change in Compensation Rate dated April 5, 1989.

Form 27 - Notice of Intention to Discontinue Payments dated June 21, 1989, as claimant would return to work on June 21, 1989.

Form 28 - Notice of Change in Compensation Rate dated August 4, 1989.

Form 6 - Notice and Application for Hearing dated March 19, 1990.

Form 27 - Notice of Intention to Discontinue Payments dated April 6, 1990 for lack of cooperation and no show for IME on 4/3/90.

Form 6 - Notice and Application for Hearing dated April 20, 1990.

Form 28 - Notice of Change in Compensation Rate dated January 23, 1992.

Form 22 - Agreement for Permanent Partial Disability Compensation dated

March 6, 1992.

Form 28 - Notice of Change in Compensation Rate dated March 20, 1992.

Form 6 - Notice and Application for Hearing dated May 23, 1994.

3. Pursuant to the agreement of the parties at the hearing on February 6, 1995, evidence was left open for the report of a previously scheduled IME; depositions of Drs. Wing and Murphy (if taken); a joint medical exhibit and a

complete set of medical bills, all as described in a letter from the hearing examiner to the parties dated February 7, 1995.

4. On March 22, 1995, the defendant submitted a report by Dr. Wieneke (the

IME). Claimant objected to this report by letter dated March 28, 1995.

After

a telephone conference, the claimant was given an opportunity to elaborate on

his objections to Dr. Wieneke's report, which he did by letter dated March 31, 1995. Defendant waived deposing Dr. Wieneke to rebut the claimant's statement in his March 31st letter, and consented to the admission of claimant's March 31st letter as evidence. On April 14, 1995, the hearing officer received the joint medical exhibit from defendant and on April 21, 1995, miscellaneous other medical records from the claimant, all of which were added to the record, which was then closed. The April 21 medical records were bills for physical therapy, ice packs, massages and phonophoresis at Springfield Hospital during 1992, totalling \$1190.15 (\$41.30, \$636.65 & \$512.20).

5. The parties were given until May 1, 1995 to submit proposed Findings of Fact and Conclusions of Law. Claimant's argument was submitted on an audiotape; defendant's on paper.

FINDINGS OF FACT:

1. On February 22, 1988:

- a. the claimant, Dennis Turco, was employed by defendant, Crowley Cheese Factory in Mt. Holly, Vermont.*
- b. the defendant was an employer within the meaning of the Workers' Compensation Act.*
- c. the claimant suffered a personal injury while he was kneading cheese.*
- d. the injury arose out of and in the course of claimant's employment*
- e. the American Fidelity Insurance Company was the defendant's workers' compensation carrier.*
- f. the claimant's average weekly wage for the 12 weeks preceding the 1988 accident was \$209.74 a week.*
- g. the claimant had three dependents, Danielle, born April 4, 1980, Jennifer, born November 12, 1981, and James, born October 14, 1982.*

h. the claimant was 35 years old. His current address is RR Box 214, Mt. Holly, VT 05758.

2. On March 3, 1988, the claimant filed a Notice of Injury and Claim for Compensation (Form 5) alleging left arm tennis elbow and median nerve compression in both wrists.

3. On June 3, 1988, the Department of Labor and Industry approved an Agreement for Temporary Total Disability Compensation (Form 21) signed by the claimant and defendant for temporary total disability beginning February 26, 1988. The document describes the injury as "carpal tunnel syndrome and elbow problem."

4. On June 21, 1989, pursuant to Form 27, temporary total disability compensation was terminated on the basis that the claimant had returned to work.

5. On March 19, 1990, the claimant filed a Notice and Application for Hearing for temporary total disability covering the period from 10/15/89 to 2/5/90 and temporary partial disability covering from the weeks of 8/6/89 to 10/15/89.

6. Payments were renewed and on April 6, 1990, pursuant to a second Form 27, payments were discontinued for alleged lack of cooperation in not showing for a scheduled IME on April 20, 1990.

7. The claimant immediately filed a Notice and Application for Hearing for reinstatement of payments.

8. On February 6, 1992, the Department approved an Agreement for Permanent Partial Disability Compensation (Form 22) requiring the payment of 15.05 weeks of compensation to the claimant for 7% permanent partial impairment to the left upper extremity.

9. On May 23, 1994, the claimant filed a Notice and Application for this hearing, seeking additional permanent partial benefits, medical benefits and attorney's fees.

10. The claimant began work at Crowley Cheese in the fall of 1987. His job required him and a few other employees to knead cheese, sometimes up to 500 lbs. a day. Layoffs in early 1988 required some overtime and extra work. In the fall, 1987, he began to experience pain in his wrists. He was given wrist splints to wear at night time, and continued working. On February, 22, 1988, he ceased working due to numbness, tingling and night pain in both hands, and pain in his left elbow. His medical providers tended to focus on his left elbow, initially, and his elbow problem was eventually diagnosed as left lateral epicondylitis (tennis elbow). Various conservative treatments were tried. In 1990, Dr. James Murphy performed a left lateral epicondylar release, which resulted in significant improvement.

11. The claimant's claim for permanent disability associated with the tennis elbow was resolved by a permanent partial disability agreement for a 7% impairment of the left upper extremity (See Finding of Fact ¶ 8 above). The agreed upon impairment rating apparently was a compromise between the 4% rating given by Dr. Philip Davis on 3/27/91 and a 10% rating given by Dr. David Keller on 11/22/91. At the time the Form 22 was submitted, there was no indication in the file of possible additional permanent impairment to another body part.

12. The issue in this hearing is whether the claimant's asserted right and left shoulder pain arises out of and in the course of his employment injury of February, 1988, and if so, to what degree is there permanent impairment.

13. References to shoulder pain in the voluminous medical records are sparse until 1992. They can be itemized as follows:

a. On November 21, 1988, the claimant reported problems with his right and left shoulder to Dr. Robert Leffert. Dr. Leffert found full range of motion and no crepitus in both shoulders but some tenderness anteriorly over the rotator cuff in the right shoulder. The doctor suggested an arthrogram if complaints regarding the right shoulder continued.

b. In an interview with William Schick in August of 1988, the claimant reportedly stated that the initial work injury was "predominantly located in

the left shoulder with some pain in both the right and left wrists."

[emphasis added]

c. In March of 1991, the claimant was seen by Dr. Davis who quoted the claimant as saying that at the time of the original injury he also had some discomfort in the right shoulder and that kneading the cheese made the shoulder discomfort worse (as well as his hands and left elbow). Dr. Davis diagnosed tendinitis in claimant's right shoulder, opined that the symptoms were causally related to his work making cheese, but found no impairment in the right shoulder.

d. On November 22, 1991, the claimant complained to Dr. Keller regarding his right shoulder. Dr. Keller, who had seen the claimant eight times since his work injury, reviewed his medical records and could find no previous reference to such a problem and said he could not opine whether the shoulder was related to the work injury. He diagnosed impingement syndrome or possible rotator cuff irritation.

e. In a visit with Dr. Frederick Lord on April 15, 1992, the claimant complained of pain in both shoulders, the right worse than the left. Dr. Lord diagnosed chronic overuse syndrome, and although the claimant had not previously complained to him of shoulder pain associated with the work injury, he thought the two could be related.

f. Dr. Murphy, who had seen the claimant periodically since five months after the work injury, did not mention any complaints regarding either shoulder until after the elbow surgery in 1990. On June 5, 1992, he diagnosed subacromial bursitis in the right shoulder and said it was, by the claimant's history, related to overuse in work at the Crowley Cheese Factory. Dr. Murphy injected the shoulder with lidocaine, which improved it somewhat. In January, 1993, the claimant reported additional discomfort, that is, numbness in his right hand and discomfort in the super clavicle region of the right arm. With these developments, Dr. Murphy began to suspect thoracic outlet syndrome.

14. After stopping work at Crowley in 1988, the claimant worked from June until October, 1989 as a manager at Jiffy Mart, but stopped because his

epicondural pain in his left elbow was returning. He also, at least until mid-1991, continued to play guitar regularly in a nightclub of which he was part owner. Claimant stopped guitar playing because of pain and numbness. He used his right hand to strum the guitar.

15. On May 4, 1991, the claimant was in a motor vehicle accident in which he was rear-ended. The accident resulted in cervical strain but no apparent problems to his right or left upper extremities. In September, 1991, he suffered another motor vehicle accident which also did not involve either extremity. Medical records associated with both motor vehicle accidents do not mention that the claimant was suffering from any shoulder ailments.

16. In January of 1993, the claimant was seen by Dartmouth Hitchcock Medical Center for complaints of right shoulder pain and numbness in two right fingers. The neurologist, Dr. Lawrence Jenkyn, ruled out thoracic outlet syndrome, said the shoulder pain was orthopedic and non-neurogenic, but found "little question that all of Dennis's complaints are a direct consequence of his work related injury of February 22, 1988." On May 20, 1993, an arthrogram of the claimant's right shoulder revealed no bony abnormalities or any rotator cuff tear.

17. On February 2, 1994, Dr. Murphy performed right shoulder acromioplasty on claimant at Dartmouth Hitchcock Medical Center for anterior impingement. At the same time scar tissue was removed.

18. Following the acromioplasty, the claimant's shoulder complaint subsided but he complained of numbness in the small fingers of both hands. After another neurology test, Dr. Murphy told him he could find no objective evidence, or diagnosis, to explain his symptoms.

19. On November 3, 1994, Dr. Murphy opined that claimant's injuries to both upper extremities were related to his work for the defendant, but assessed no degree of impairment.

20. *Dr. Daniel Wing, in his report of December, 1994, diagnosed bilateral thoracic outlet syndrome based on neurologic symptoms not relieved by the 1994 surgery, and concluded that the claimant had reached a medical end result with a 4% impairment of the right upper extremity for decreased abduction, and 6% for decreased flexion; a 3% impairment for abduction and 3% decrease for flexion for the left shoulder; plus a 10% impairment of the upper extremities bilaterally resulting from the thoracic outlet syndrome, all of which he said result in a 30% impairment of the upper extremities under the AMA guides.*

21. *Dr. Wieneke, who performed a brief IME for the defendant in March, 1995, found a 5% impairment to each arm based on his exam and a review of the medical records. He could not link claimant's disability to the injury he suffered at Crowley Cheese in 1988. The disability rating of the left arm was attributed to the left elbow; the right arm impairment to the right shoulder arthrotomy.*

22. *The claimant currently complains of "cracking and snapping" in both arms followed by numbness and pain, and says his hands go to sleep when he is driving.*

23. *On January 12, 1995, Medicaid filed a lien for \$1,518.46 in medical benefits paid for the benefit of the claimant.*

24. *Claimant's Exhibit 3 itemizes medical services provided to the claimant by the Hitchcock Clinic totalling \$2586.00 for services rendered by Dr. Murphy and others relating to examination and treatment of the claimant's right shoulder. Under the Rules then in effect (June 92-May 93) those bills are reasonable and the services necessary. The \$1190.15 in bills from Springfield Hospital appear reasonable, but without more specifics regarding the treatment provided by Dr. Maurer (none of the records can be found in the Joint Medical Exhibit), they cannot be causally linked to the claimant's on-the-job injury.*

CONCLUSIONS OF LAW:

1. *In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodman v. Fairbanks*

Morse Company, 123 Vt 161 (1963). The claimant must establish by sufficient credible evidence, the character and extent of the injury and disability as well as the causal connection between the injury and the employment. There must be created in the mind of the trier of facts something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. Burton v. Holden Lumber Company, 112 Vt 393 (1941).

2. After the February, 1988, work injury, the claimant's carpal tunnel syndrome resolved and he received first temporary total, and then permanent partial, disability compensation for the consequences of his left tennis elbow. The question now is whether the acknowledged additional impairment, placed at 5% to his right shoulder by Dr. Wieneke and a total of 30% to both extremities by Dr. Wing, arose out of and in the course of his employment with the defendant, and if so, what is the appropriate degree of impairment.

3. The most credible testimony, based upon comments and remarks made by several treating physicians, as well as the testimony by claimant, is that the claimant's right shoulder pain, which required surgery in 1994, arose out of and in the course of his employment at Crowley Cheese in late 1987 and early 1988. This causative link was found by Drs.' Davis (Finding ¶ 13b), Lord (¶ 13e), Jenkyn (¶ 16), and Murphy (¶ 19). The problem was first noted by Dr. Leffert in November, 1988 (¶ 13a).

Although the claimant periodically complained of right shoulder pain, it did deteriorate to the point where it was not severe enough to warrant medical attention until 1991, three to four years after his short employment had ceased.

4. Given the history, and based on observation of the claimant and his testimony I find that Dr. Wing overestimated claimant's impairment to his right shoulder. I find the claimant had an additional permanent partial disability of 5% in the right upper extremity as a result of his work injury.

5. Although Dr. Wing found additional impairment to the claimant's left

shoulder and as a result of thoracic outlet syndrome, I find his testimony on these impairments not credible. First, claimant, through the Form 22, agreed upon the impairment rating to his left upper extremity; although that rating focused on the left elbow, it can not be said that the left shoulder complaints were not considered at the time the impairment was recognized and agreed to, and paid pursuant to the Form 22; this is a risk inherent in "piecemealing" permanent partial disability; it is incumbent on the claimant to prove facts supporting any claim and he has failed to do so. Second, as to thoracic outlet syndrome, I find Dr. Jenkyn's opinion ("ruled out" thoracic outlet syndrome) to be more credible than Dr. Wing's.

6. Based upon the conclusion that the claimant's right shoulder ailment arose out of and in the course of his employment, The medical services rendered by the Hitchcock Clinic for treatment of those ailments were reasonable and necessary. Claimant has offered insufficient evidence to determine whether the other medical bills are reasonably related to treatment of his work injuries. He may submit those bills with appropriate medical documentation to the insurance carrier, and if the carrier does not accept them as reasonable, he may request an additional hearing on that issue.

ORDER:

It is therefore ORDERED that the defendant American Fidelity Insurance Company, or in the event of its default, Crowley Cheese Company, pay to the claimant additional permanent partial disability compensation equal to 5% of the right upper extremity, and to pay medical benefits totalling \$2,586.00 to or for the benefit of the Hitchcock Clinic.

Dated in Montpelier, Vermont this ____ day of May, 1995.

Mary S. Hooper
Commissioner