

Harrington v. Grand Union (Oct. 16, 1995)

STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY

Joanne Harrington	)	File No. X-22173
	)	
v.	)	By: Jill Broderick
	)	Hearing Officer
Grand Union	)	
	)	For: Mary S. Hooper
	)	Commissioner
	)	
	)	Opinion No. 27-95WC

Heard in Montpelier, Vermont on January 9, 1995  
Record Closed: March 24, 1995

APPEARANCES

Attorney for Claimant - Thomas Aicher, Esq.  
Attorney for Defendant - William A. O'Rourke, Esq.

ISSUES

1. Are the claimant's back problems the result of a recurrence of a work injury received in 1984, or an aggravation caused by a separate intervening event? (If they are the result of a recurrence, the defendant is liable for the medical bills.)
2. If the claimant's back problems are the result of a recurrence, was the claimant temporary totally disabled between January 16, 1994 and September 11, 1994?
3. Did the claimant have any permanent partial disability due to her 1984 work injury?

THE CLAIMANT SEEKS

1. Temporary total disability compensation from January 16, 1994 to September 11, 1994;

2. Permanent partial disability compensation for permanent impairment to her spine;
3. Payment of outstanding medical bills and reimbursement for certain prescriptions;
4. Attorney's fees; and costs.

#### STIPULATIONS

The parties have entered into the following stipulations:

1. The claimant was employed by the defendant on February 5, 1984.
2. The defendant is an employer within the meaning of the Workers' Compensation Act.
3. Scott Wetzel Services, Inc. was the workers' compensation carrier for the defendant on February 5, 1984.
4. The parties have stipulated to the admission of the following exhibits:

Joint Exhibit 1: Medical records.

Claimant's Exhibit 1: Medical bills.

Claimant's Exhibit 2: Deposition transcript of Dr. Barney.

Claimant's Exhibit 3: Deposition transcript of Dr. Fabricius.

Claimant's Exhibit 4: Deposition transcript of Dr. Robbins.

Claimant's Exhibit 5: Blue Cross/Blue Shield agreement.

Claimant's Exhibit 6: Statement of Attorney's Fees and Costs.

Defendant's Exhibit 1: Letter of Dr. Polivy dated February 10, 1994.

Defendant's Exhibit 2: Deposition transcript of Dr. Wieneke.

#### 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. On February 5, 1984, the claimant injured her back while picking up dirt off of the floor with a dustpan and broom.

4. The injury arose out of and in the course of her employment by the defendant.

5. At the time of the injury the claimant was working part time for the defendant, approximately 12 to 20 hours each week. Immediately after the accident, the claimant missed four or five days of work, but she was then able to resume her part time schedule, working 4 to 6 hour shifts. The claimant received temporary total disability compensation for this injury from 2/8/84 to 2/10/84. Because of the part time nature of her work, she was able to adjust her schedule to accommodate the pain associated with her injury.

6. The claimant began treating with Dr. Barney for her back pain. He diagnosed her injury as lumbosacral dysfunction with pain and partial immobility and occasional radiculopathy into her leg.

7. The claimant received osteopathic manipulative therapy from Dr. Barney an average of twice each month between 1984 and August of 1993. The therapy usually alleviated her back and leg pain for two weeks unless she sneezed or did something else which caused the pain to recur. She also took a muscle relaxer and medication for arthritis during that period of time. Defendant's workers' compensation insurer paid for the entire course of this treatment, evidently agreeing it was related to her original injury.

8. Dr. Wieneke examined the claimant on September 15, 1989, prior to the bathtub incident. He testified that at that time the claimant did not have complaints of leg pain and was not a surgical candidate for any problem she had with her back. Dr. Wieneke stated in his evaluation of September 15, 1989: "Clearly, by everyone's reconning (sic) she is at an end result and has been so for an extended period of time. There is a five percent impairment of the lumbar spine based on the above findings, and restricted motion."

Despite the fact that defendant's expert provided an opinion that claimant had reached a medical end result and had permanent partial impairment, defendant took no action at this time. It did not pay the claimant any permanency compensation, nor did it seek any additional medical opinions as to medical end result or the existence of permanent impairment.

9. On August 21, 1993, approximately nine years after her original injury, the claimant slipped while getting out of the bathtub. Her left foot was in the tub, and her right foot was on the floor; her foot slipped and she caught herself. She did not fall to the floor or grab on to anything, but stabilized herself and stepped out of the tub.

10. Within twenty minutes of slipping the claimant began to feel heavy pressure and pain in her low back. The pain was the same as the pain she had experienced since the 1984 accident, but it was more severe.

11. The claimant saw Dr. Barney later that day, but the osteopathic manipulative therapy provided the claimant with only slight relief.

12. The claimant increased her medication and went to work two or three days later when she was next scheduled to work.

13. The claimant continued to see Dr. Barney, but he was unable to relieve her symptoms with medication and osteopathic manipulation as he had in the past. He referred the claimant for an MRI exam and an evaluation by Dr. Fabricius, an orthopedic surgeon.

14. The claimant stopped working for the defendant on October 11, 1993.

15. Several months of physical therapy and other conservative treatment failed to improve the claimant's condition, and she underwent surgery on April 20, 1994.

16. Dr. Wieneke examined the claimant again on December 14, 1993. He found that the claimant had lost motion in her lumbar spine and had evidence of left S1 radiculitis.

17. Drs. Barney, Fabricius, Robbins and Wieneke agreed that the claimant's back and leg pain in 1993 were causally related to her 1984 work accident.

18. Dr. Wieneke considered the bathtub incident to be an aggravation of her pre-existing back condition.

19. Dr. Polivy, an orthopedic surgeon, reviewed the claimant's medical records. He opined that the claimant's 1993 leg and back pain were not causally related to her 1984 work accident, but were the "natural effects of the aging process with subsequent wear and tear type osteoarthritis which resulted in a possible lumbar disc herniation occurring on August 21, 1993."

20. Dr. Fabricius first saw the claimant on October 7, 1993. His office notes state: "The present episode started on the 21st of August when she slipped getting out of the bathtub and just twisted her back."

21. Dr. Fabricius testified "In my opinion, I think that she had an underlying problem and that was, or to put it in the slang, that was the straw that broke the camel's back, so to speak, that there was just added injury that flared this up. As I said in my statement . . . I feel that this is just an aggravation of her old injury."

22. Dr. Robbins began treating the claimant on January 4, 1994, and performed the surgery in April 1994. He noted in his office notes that: "Patient says that she cannot stand more than 20 to 30 minutes at a time since August 1993 while slipping in the bathtub . . . in the past claimant has been treated by Dr. Barney and Dr. Woodworth with manipulation since 1985 on a regular basis. Patient says initially with original accident and injury it was about 100% of the low back with pressure and pain. Over time patient has had intermittent bouts of leg discomfort and back discomfort to the point where now her pain is predominantly 90-100% leg and 10% back."

23. Dr. Robbins agreed that the claimant's slip getting out of the bathtub was the "straw that broke the camel's back", causing the pain to become prominent enough that Dr. Barney's treatment no longer gave her relief.

24. Dr. Barney stated in a letter dated February 8, 1990 that the claimant had "between 15 to 20% instability" of her "lumbosacral area and lumbo [sic] spine as a permanent condition." Although defendant had earlier received a report from its own medical expert concerning medical end result and

permanent impairment (see finding no. 8) it still took no steps to pay claimant any permanent partial disability compensation.

25. Dr. Robbins stated in a letter dated January 6, 1994 that the claimant had a 7% impairment of the whole person prior to surgery which would convert to an 11% impairment of the spine. However, this evaluation took into account the August 1993 aggravation. Dr. Barney opined that the claimant's impairment in 1990 was "between 15 to 20% instability" of her lumbosacral area. Although Dr. Barney was the claimant's treating physician, I do not find his evaluation to be as credible as Dr. Wieneke's for several reasons. First, Dr. Barney's evaluation appears to be somewhat subjective, since it does not set forth any objective findings. Secondly, it does not set forth an exact percentage, but rather estimates the percentage within a range of 15 to 20 percent. Finally, Dr. Barney stated that the claimant had a certain percentage of "instability." It is not entirely clear that a rating for instability should be translated into a rating for permanent spine impairment.

#### CONCLUSIONS

Based on the foregoing findings of fact, I conclude the following:

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.
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 claimant had back and leg pain on a regular basis for nine years beginning with her 1984 accident. However, until her slip in the bathtub in 1993 she was able to manage the pain with medication and osteopathic manipulative therapy. It was not until after the 1993 incident that the claimant could not relieve the pain, became a candidate for surgery, and was unable to work.

4. In *Sotirakis v. Brandon Training School*, Op. No. 27-91 WC the commissioner held: "Once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent non-industrial cause." The record is clear that the claimant's slip in the bathtub worsened her back and leg pain. This slip, some nine years after the original injury is a separate non-industrial cause of claimant's injury. Although bathing is a routine activity of normal life, the slip in the tub was not caused by the earlier injury, there was a great lapse of time between the original injury and the slip and the claimant had reached a medical end result almost four years prior to the bathtub incident, therefore this aggravation is not compensable.

5. Dr. Wieneke found that claimant was at a medical end result in 1989. Dr. Barney impliedly agreed when he rendered an opinion about the claimant's permanent partial disability on February 8, 1990. In addition, the claimant's testimony indicates that her condition was relatively stable during the nine years she treated with Dr. Barney and continued to work. Despite these findings, defendant failed to make any effort to pay claimant permanent partial disability compensation. It had more than a reasonable period to do so, and therefore, shall pay claimant permanency plus interest at the rate of 12% per year from the date of Dr. Wieneke's evaluation.

5. I conclude, therefore, that the claimant has a five percent permanent impairment of her spine based on Dr. Wieneke's evaluation.

6. The parties stipulated that the defendant's last best offer was payment for a five percent permanent impairment to the claimant's spine. Since the

claimant has been awarded interest due to the insurer's delay in paying permanent partial disability, I conclude that claimant has prevailed and is entitled to attorney's fees and costs.

ORDER

Therefore, based on the foregoing CONCLUSIONS and FINDINGS Scott Wetzel Services or in the event of its default, the defendant, is hereby ORDERED to pay the claimant for five percent permanent impairment to her spine. In addition, Scott Wetzel services is ORDERED to pay interest on that five percent at a rate of 12% per year from the date of Dr. Wieneke's opinion to the present and claimant's costs, and attorney fees in the amount of 20% of this award but not to exceed \$3000.00.

Claimant's request for additional compensation and medical benefits for injuries arising out of the bathtub incident in 1993 are DENIED.

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

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Mary S. Hooper  
Commissioner