Burns v. The Town Restaurant (May 24, 1995)

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

JOANN TOURANGEAU BURNS	*)*	*State File No. E-7055*
	)	
	)	*By: Frank E. Talbott, Esq.*
v.	*)*	*Contract Hearing Officer*
	)	
	)	*For: Mary S. Hooper*
	)	*Commissioner*
	)	
THE TOWN RESTAURANT	*)*	*Opinion No. 30-95WC*

Hearing held at Montpelier, Vermont on January 20, 1995.
The record closed on May 11, 1995.

APPEARANCES

Rodney F. Vieux for the Claimant
Harold E. Eaton for the Defendant Courtside Cafe
John W. Valente for the Defendant The Town Restaurant

Also present: Jeff Barrows

ISSUES

1. Whether the claimant suffered a work related injury while employed at The Town Restaurant when she fell down the stairs at a Christmas Party held at her employer's home.

2. The period of temporary total disability.

3. Whether the claimant suffered any permanent disability has a result of her injury.

4. Whether the claimant timely notified the defendant of her injury and claim.

5. Did a subsequent auto accident in 1991 act as an intervening cause.

6. Which carrier, if any, is responsible for the claimant's workers' compensation.

THE CLAIM

1. Temporary total disability compensation for 116.1 weeks spanning from October 1990 through October 10, 1992.

2. Permanent partial disability compensation in the amount of 30% of the spine; and permanent partial disability compensation in the amount of 17.5% of the right upper extremity.

3. Medical and hospital benefits.

4. Attorney's fees.

STIPULATIONS

1. The claimant had one dependent, Kim Tourangeau Burns under the age of 21 during the period of October 1, 1990 to October 10, 1992.

2. The claimant was placed at a medical end result on October 10, 1992.

FINDINGS

1. The foregoing stipulations are true.

2. During the course of the hearing, the following exhibits were received in evidence:

Claimant's Exhibit 1: *Picture dated 12/18/85; marked "R. Flank."*

Joint Exhibit 1: *Binder containing medical records and reports.*

Joint Exhibit 2: *Medical records from Dr. Roy supplementing binder.*

Joint Exhibit 3: *Release from work slip from Dr. Roy dated*

7/25/90.

Joint Exhibit 4: *MCHV Discharge Summary dated 9/23/91.*

Joint Exhibit 5: *11/12/91 Office Note by Dr. Gross.*

Joint Exhibit 6: *Office notes of 11/5/91 and 10/11/91 by Dr. Gross.*

Joint Exhibit 7: *Radiology Report dated 11/7/91.*

Joint Exhibit 8: *Hospital discharge summary from MCHV dated 3/18/92.*

Joint Exhibit 9: *Office Notes dated 3/24/92 and 3/31/92 by Dr. Gross.*

Joint Exhibit 10: *Office Note dated 1/14/92 by Dr. Gross.*

Joint Exhibit 11: *Letter from Dr. Gross to Dr. Roy dated June 30, 1992.*

Joint Exhibit 12: *Letter from Dr. Gross to Attorney Rodney Vieux dated February 11, 1993.*

Joint Exhibit 13: *Copley Hospital Medical record dated 11/2/87.*

Joint Exhibit 14: *Copley Physical Therapy Discharge Summary dated 11/23/87.*

Joint Exhibit 15: *Copley Physical Therapy Follow up treatment and progress record dated 11/2/87.*

Joint Exhibit 16: *Copley Hospital medical record by Betsy Harper, P.T. dated 3/9/87.*

Joint Exhibit 17 *Copley Hospital Physical Therapy Follow up Treatment and Progress record dated 3/9/87 - 3/12/87.*

Joint Exhibit 18 *Copley Hospital medical record dated 1/2/9/88.*

Joint Exhibit 19 *Initial Visit report by Dr. Ciongoli dated January 29, 1988.*

Joint Exhibit 20 *Copley Hospital emergency room outpatient*

record dated 10/6/91.

Joint Exhibit 21 *Medical bills.*

Defendant's Exhibit 1: *Complaint in Burns v. Sarah Hull, Lamoille County Superior Court Civil Action.*

Defendant's Exhibit 2: *Answers to interrogatories in Burns v. Sarah Hull, Lamoille County Superior Court Civil Action.*

Defendant's Exhibit 3: *Handwritten notes by the claimant.*

3. On December 13, 1985, the claimant was working for Don and Shirley, Inc., which operated under the tradename of The Town Restaurant. The claimant worked at The Town Restaurant as a cook, doing various kitchen duties.

4. On December 13, 1985, the claimant went to an employees' Christmas party at the home of Jeff and Sandy Barrows, who were the owners of The Town Restaurant. While at the party, the claimant fell down some stairs leading from the first floor to the basement of the house. The party was being held in the basement, and the claimant had gone upstairs to use the restroom. She fell on her way back from the bathroom. The stairs were split by a landing in the middle. The claimant slipped on the top step and landed on her buttocks; she then bounced down the stairs coming to a stop at the landing. She does not remember hitting her head.

5. The claimant was not intoxicated at the time of her fall down the stairs.

6. In December, 1985, there were 7 or 8 employees of the Restaurant. There were 28 people at the party. The guests at the party were the employees of the Town Restaurant, their spouses and friends, and a few customers of the restaurant. Not all of the employees of The Town Restaurant attended the party. The purpose of the party was to show appreciation to the employees of the restaurant, to boost morale and "generally to share a good time."

7. The party was not for the purpose of gathering the employees together to discuss business purposes. No speeches were given. The claimant testified that the conversations at the party were not about anything specific; people were just mingling around and talking to each other. The claimant testified that the atmosphere was just friendly talk and joking around. The party was not for the purpose of addressing situations at work. At her depositions, the claimant testified that they might have talked about work situations but she could not recall. At the hearing the claimant testified that fumigation of the restaurant and installing a second door to the kitchen to avoid employees colliding with each other were discussed. It is evident that while there may have been some discussion regarding the restaurant, in the nature of "shop talk," the party's purpose did not specifically include the discussion of problems or concerns around the restaurant.

8. The claimant was embarrassed by the fall. She left the party approximately 15 minutes after the fall. Jeff Barrows was aware that the claimant fell at the party.

9. When the claimant arrived at her home, she and her daughter examined her body and found bruises on her right arm and a large bruise on her right buttock. The claimant began to experience a great deal of pain and discomfort in the area of her buttock and she also experienced pain in her neck and right upper extremity.

10. The claimant had no back, arm or neck pain before this fall down the stairs.

11. While the claimant's chief complaint was initially associated with her right buttock area, this pain diminished over time, and her right upper extremity and neck pain increased.

12. The claimant's pain gradually increased, getting worse and worse until it was like a constant tooth ache.

13. After the fall in 1985, the claimant returned to work and did not tell her employer that she was in serious pain. The claimant did not tell her employer that she was receiving treatment for injuries arising out the fall down the stairs. Her employer did not know that the claimant was making a workers' compensation claim until he received a phone call from the claimant in 1991.

14. In March, 1987, the claimant's physician, Dr. Roy, instructed her to stay out of work for two weeks because of her pain. Prior to this time, the claimant did not miss any substantial periods of time from work, and her employer was not aware that she was taking time off from work due to any injury.

15. Although her condition did not improve or stabilize while she was off work, the claimant felt she needed to return to work in order to support her family.

16. The claimant sought work at another restaurant because she was fearful that The Town Restaurant was going to be sold. Indeed, The Town Restaurant was sold by Sandy and Jeff Barrows in 1987.

17. The Claimant obtained a job at Courtside Cafe, and began working there in April, 1987. She continued to work at Courtside Cafe until October, 1990.

18. The work at the Courtside Cafe was of the same nature as at The Town Restaurant, but it was a little more strenuous. For example, the pans of soup she carried were heavier and she lugged more garbage.

19. The claimant's pain has never gotten better. Her symptoms increased whether she was working or not. She underwent various treatment modalities, including physical therapy, anti-inflammatory medications, rest, home exercise and surgery. None of these treatment methods have alleviated her pain and symptoms.

20. The claimant stopped working in October, 1990.

21. Even though the claimant was not working, her pain continued to worsen. She underwent an anterior discectomy, osteophytectomy and interbody fusion at C5-6 and C6-7 on September 18, 1991 -- nearly a year after she stopped working at the Courtside Cafe.

22. In October, 1991, the claimant was involved in a motor vehicle accident. The vehicle she was in was hit from behind. This happened about a week or week

and a half after her first surgery on September 18, 1991. She was still in pain from surgery so she could not tell if the car accident caused any symptoms different than she was already suffering.

23. A follow-up MRI in early 1992 detected a residual spur over C-6. A follow- up surgery for posterior decompression secondary to spondylosis was performed on March 13, 1992.

24. The claimant's physicians have said that the claimant's complaints could have been caused by her fall down the stairs in 1985, but they cannot determine this. The medical records do not indicate when or how any disc herniation was sustained, but only that the pain complaints over a seven year period were certainly something that could fit with a history of a fall down the stairs and her subsequent motor vehicle accident. Dr. Jennings, whose specialty is orthopedic surgery and sports medicine, has said that there is no way he can relate any of the claimant's symptoms to her injury in 1985.

25. The claimant filed a notice of injury and claim for compensation in October, 1991, against The Town Restaurant. The Courtside Cafe was not put on notice of this claim until June, 1993.

26. In 1992, the claimant began receiving Social Security Disability benefits, retroactive to her last date of employment at Courtside Cafe. The claimant has not worked since she quit Courtside Cafe. The claimant feels that today her arm feels worse than it ever was.

CONCLUSIONS

1. In a workers' compensation matter, the claimant has the burden of establishing all facts essential to her claim. McKane v. Capital Hill Quarry Co., 100 Vt. 45 (1929); Goodwin v. Fairbanks, Morse, and Co., 123 Vt. 161 (1962). The claimant must establish by sufficient competent evidence the extent and nature of her injury as well as the causal connection between the injury and the employment.

2. An injury arises out of and in the course of employment when it occurs in the course of it and is the proximate result of the employment. Rae v. Green Mountain Boys Camp, 122 Vt. 437 (1961).

3. Social activities are within the course of employment when:

a. They occur on the premises as a regular incident of the employment; or

b. The employer, expressly or impliedly, requires participation, or makes the event part of the services of an employee, thus bringing it within the orbit of employment; or

c. The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of social activities.

Larson, Law of Workmens' Compensation, §22.

4. The Christmas Party in 1985 was to show appreciation to the employees and improve morale. While there was testimony by the claimant that there was some discussion about the restaurant, it was clear that this discussion was unplanned, and was not part of any agenda. There was no evidence that any discussions about the restaurant were conducted with an intention of making any business decisions. Rather, the discussions were in the nature of "shop talk." In short, there was no evidence that the employer received any substantial direct benefit from the party beyond improvement of morale.

5. Therefore, the claimant's fall down the stairs in 1985 was not an accident arising out of and in the course of employment.

6. Where the causal connection between an accident and injury is obscure, and a lay-person would have no well grounded opinion as to causation, expert medical testimony is necessary. 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).

7. Even if the fall down the stairs in 1985 were considered to be an accident arising out of and in the course of employment, the claimant did not sustain her burden of proof that the disc herniation was a natural and direct progression of her fall down the stairs in 1985. There was no medical evidence to a reasonable degree of medical certainty that the claimant's disability from working in October, 1990, was caused by injuries she suffered in the fall at the Christmas party in 1985. Nor was there any such evidence that the claimant's disability resulted from any progressive "micro-traumas" while working at the Courtside Cafe.

8. Under 21 V.S.A. §656 a proceeding for compensation shall not be maintained unless a claim for compensation has been made within six months after the date of the injury. Under 21 V.S.A. §660, want of notice or of making a claim shall not be a bar to proceedings under the provisions of the workers' compensation statute if the employer had knowledge of the accident or the employer has not been prejudiced by the delay or the want of notice. In this case, both The Town Restaurant and Courtside Cafe have been prejudiced by the delay in the claimant giving notice of her claim. Both were denied any opportunity for medical management and rehabilitation. However, as to The Town Restaurant, the owner, Jeff Barrows was aware of the claimant's accident when she fell on December 13, 1985. Therefore, as to The Town Restaurant, the delay in making a claim is not a bar to the claimant's claims since in any event they were filed within six years of the accident date.

9. The remaining issues are moot, given the foregoing findings.

ORDER

Therefore, based on the findings and conclusions, the claimant's claims are DENIED.

Dated at Montpelier, Vermont, this _____ day of May, 1995.

_____

Mary S. Hooper
Commissioner