

Weaver v. Brush (Apr. 29, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Linda Weaver) *File #: C-7759*
) *By: Barbara H. Alsop*
) *Hearing Officer*
) *For: Mary S. Hooper*
Geka Brush) *Commissioner*
)
) *Opinion #: 28-96WC*

Hearing held at Montpelier, Vermont, on April 2, 1996.
Record closed on April 22, 1996.

APPEARANCES

Jesse M. Corum IV, Esq., for the claimant
Keith J. Kasper, Esq., for the defendant

ISSUE

Whether the claimant's back condition is related to her work injury of August 30, 1989.

THE CLAIM

- 1. Permanent partial disability compensation pursuant to 21 V.S.A. §648.*
- 2. Medical and hospital benefits pursuant to 21 V.S.A. §640.*
- 3. Attorneys' fees and costs pursuant to 21 V.S.A. §678(a).*

STIPULATIONS

- 1. Claimant suffered an injury to her right ankle arising out of and in the course of her employment on August 30, 1989.*
- 2. On the date of the injury, Claimant was an employee within the meaning of the Vermont Workers' Compensation Act.*
- 3. On the date of the injury, Geka Brush Manufacturing was an employer within the meaning of the Act.*
- 4. On the date of the injury, Liberty Mutual Insurance Company was the*

worker's compensation insurance carrier for the employer within the meaning of the Act.

5. On the date of the injury, Claimant's average weekly wage was \$187.01.

6. Claimant has currently received all workers' compensation benefits which are owed her due to her ankle injury.

7. Claimant seeks compensation for her back condition which she believes to be causally related to the work-related ankle injury. Claimant seeks an additional 23.1 weeks of permanent partial disability benefits, payment of past medical bills estimated to be \$3,594.23, and potential future medical bills, including but not limited to surgery on Claimant's back.

8. Defendant denies that the back condition is causally connected to the work-related ankle injury and, in the alternative, if there is such causal connection, then Claimant's subsequent employment constituted an aggravation of that back condition, therefore relieving Liberty Mutual of liability for Claimant's current back condition.

9. The parties agree to the admission of all medical records attached as Joint Exhibit 1; Dr. Idelkope's deposition, attached as Claimant's Exhibit 2; Dr. Thatcher's trial testimony transcript, attached as Claimant's Exhibit 3; Claimant's deposition dated March 7, 1996, as Claimant's Exhibit 4; Claimant's spouse's deposition dated March 7, 1996, as Claimant's Exhibit 5; and Dr. Ford's Curriculum Vitae as Defendant's Exhibit A.

FINDINGS OF FACT

1. The above stipulations are accepted as true, and the exhibits referenced in Stipulation 9 are admitted into evidence. Notice is taken of all forms filed in this claim. It is noted that Dr. Idelkope's deposition was taken in relationship to a civil suit arising out of this same incident. Similarly, Dr. Thatcher's proffered testimony comes from that same civil suit.

2. The claimant treated for her ankle injury initially with Dr. George A. Idelkope, her family physician. He referred her to Dr. Jonathan C. Thatcher, an orthopedic surgeon, who treated her ankle conservatively for some period of time prior to surgery.

3. The surgery on the claimant's ankle in April of 1990 was to repair a

torn and stretched ligament with use of an adjacent tendon. The surgery was successful, and, after a recovery period of several months, Dr. Thatcher released her to return to work.

4. In July of 1990, the claimant first reported to Dr. Idelkope that she was experiencing low back pain. Over the following months, he noted continued complaints of low back pain, left hip pain and sciatic notch tenderness. It was apparently his belief, as well as the claimant's, that her back problem was as a result of her altered gait because of her ankle injury.

5. The claimant returned to work for one day at the employer in the fall of 1990. Because her injured ankle swelled and became otherwise symptomatic, she placed all of her weight on her left ankle, and performed a number of tasks involving twisting to the right. Thereafter, she complained of debilitating pain in the back. The claimant denied in her testimony any prior history of back pain.

6. Dr. Idelkope gave the claimant a release from work for left sciatica on January 8, 1991, that was backdated to October 1, 1990. The claimant did not complain to Dr. Idelkope of back pain again until September 23, 1992, according to his records.

7. In that period of time, the claimant worked for an elderly couple named Sawyer on weekends, preparing meals and doing light house work for them. She worked eight hours each day of the weekend. Her husband testified that she came home tired and in pain from these weekends, and that he urged her to stop doing the work. The claimant denied that this work caused an increase in her symptoms.

8. In the summer of 1992, the claimant applied for and obtained a job at Bridgeport Metals, where her job was to put the tops on flashlights of the small, plastic variety. She would stand for eight hours a day, with a few breaks, and would attach the top to the flashlight and then turn to place the assembled product into a box. The claimant left that job after about a week and a half because of the intense pain in her back. The claimant denied that the quality of the pain she suffered changed as a result of this work, but admitted that the intensity increased at least for a period of time because of the strain of the work.

9. The claimant attempted a course of physical therapy in the fall of 1992, but found that it exacerbated her back symptoms, rather than helping them.

Thereafter, on referral of Dr. Idelkope, she went to the Dartmouth Pain Clinic where she was seen by Dr. Seddon Savage on January 11, 1993. The doctor's initial impression was of an "[u]nusual constellation of symptoms which appear to be biomechanical in origin, involve pain structures; seem to be most prominently the left sacroiliac joint and/or ligaments and the lumbosacral junctions bilaterally."

10. On Dr. Savage's recommendation, the claimant went to physical therapy through the spring of 1993, and returned to Dr. Savage on September 21, 1993.

At that time, Dr. Savage opined that the claimant would best respond to psychological pain management, but the claimant was adamantly opposed to the suggestion.

11. The claimant returned to see Dr. Thatcher in December of 1994. Dr. Thatcher did a number of tests on the claimant, including a bone scan, and determined that the claimant had a bony defect at the L-3 lumbar vertebra. He testified in a related civil trial that the defect was a lack of formation of bone in the vertebra that probably occurred in the claimant's infancy. The condition, known as spondylosis, occurs naturally in about 5% of the population, and will normally not be symptomatic until there is a stress or strain on the back. X-rays will generally reveal the defect, and in fact the claimant's defect had first been noted by Dr. Kinley in 1976, when the claimant had prior problems with her cervical spine.

12. Dr. Thatcher ordered the bone scan of the claimant's back. A positive scan would reveal a recent healing or inflammatory process in the spine, while a negative finding would indicate that the problem was at least six months old. The claimant's scan was negative. Other than degenerative changes of an apparently routine nature, Dr. Thatcher found nothing else of significance in his studies of the claimant's back.

13. Dr. Thatcher recommended a spinal fusion as a way to resolve the instability in the claimant's spine due to the spondylosis. He determined that she had a considerable loss of motion in her lumbar spine, and believed that the fusion might offer her some relief from her pain.

14. Dr. Thatcher testified that while spondylosis is usually asymptomatic, once a patient begins to experience pain, it is likely that there will be recurrent episodes of pain. The claimant first suffered pain from her spondylosis in 1979, or perhaps earlier, and continued to experience difficulties with her lower back at least through 1983, notwithstanding her denial of a prior history of back pain. Nonetheless, Dr. Thatcher opined that the consistent claims of pain through the 1990's and the change in her

condition from 1990 to 1994 allowed him to draw a correlation to a reasonable degree of medical certainty between the ankle injury and the extent of her symptoms from the spondylosis.

15. The claimant's records were reviewed at the request of the insurer by Dr. Dorothy Ford, a physiatrist. Dr. Ford testified that an altered gait would normally effect the back at the L5-S1 or L4-5 levels, not the L3-4 level, where the claimant's spondylosis is. She testified that there are a number of tests available to determine if the claimant's spondylosis is the source of the claimant's pain, including injecting the area with anesthesia, rigid bracing, flexion/extension films or a bone scan to see if there is inflammation in the area of the defect. In this case, the only test done, the bone scan, was negative for activity in the spondylosis, suggesting to Dr. Ford that it was not the source of the claimant's pain.

16. Based on the records she reviewed, Dr. Ford opined that the claimant's problem was mechanical in nature, and not due to nerve root impairment in the spine. Without more diagnostic tests, she could not determine definitively whether the spondylosis was the source of the problem. She indicated that a back problem due to an altered gait would normally resolve in a few months after correction of the gait. She also noted that a number of practitioners had noted that the claimant's gait was normal, at least as early as 1992. Additionally, she noted that the claimant is seriously deconditioned, and has not been a faithful attendant at physical therapy. In response to the claimant's assertion that the physical therapy was increasing her pain, Dr. Ford suggested that the appropriate course would have been to return to her physician for a further workup.

17. Dr. Ford contested the diagnosis by Dr. Idelkope that the claimant was suffering from sciatica in 1990. She questioned his report that the claimant had a positive straight leg raising test, given the lack of specificity in his note. Without evidence of radiating pain down the leg, the straight leg test is not indicative of sciatica, or nerve root involvement.

18. Confirming this is Dr. David J. Coffey, a neurologist, who noted on November 4, 1992, that the claimant's back pain was worsened by straight leg raising, although it did not "produce a sciatica-type symptom." Dr. Coffey did not find "any change in reflexes, power, bulk, tone, gait, coordination, station or alignment." He did find some tenderness to palpation of her lower back, a finding consistent with that made by other physicians. After further tests, Dr. Coffey determined in 1992 that the appropriate course for the claimant was medical rather than surgical treatment, a finding that comports

with Dr. Savage's opinion a year later.

19. The claimant has presented evidence of her contingent fee agreement with an attorney in the amount of one third of any recovery for permanent partial impairment. No evidence has been proffered of costs associated with this claim. Subject to the limitations of Rule 10, this agreement is reasonable.

CONCLUSIONS OF LAW

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse Co., 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. Egbert v. The Book Press, 144 Vt. 367 (1984).

2. Where the causal connection between an accident and an 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 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 & Martin Lumber Co., 112 Vt. 17 (1941).

3. The claimant has clearly established by credible evidence that she has a condition called spondylosis at the L-3 level of her spine. Similarly, she has clearly established the existence of persistent pain in her back since some time after 1990. What the claimant has failed to establish is any causal connection between the spondylosis, her complaints of pain and her work injury of August 30, 1989.

4. While Dr. Thatcher testified in the civil trial of the likelihood that the claimant's spondylosis was made more symptomatic as a result of the work injury, he did not correlate the claimant's claim of persistent sciatica-like symptoms with the spondylosis. The only objective evidence of an injury to the claimant's spine sufficient to allow a finding of a compensable injury is the spondylosis. If that spondylosis is not responsible for the pain complaints, then the claim is not compensable.

5. The testimony of Dr. Ford is cogent on the point that there is no evidence from which one can say that the spondylosis is the cause of the pain. Specifically, the failure to attempt treatment to rule it either in or

out as the cause of the claimant's distress deprives the trier of fact of the evidence necessary to make a decision in the claimant's favor. The claimant's use of testimony from another forum as the basis of her claim here cannot provide adequate evidence in the form necessary to answer the questions that must be addressed in this arena. It would require speculation or surmise to find that the claimant has established the cause of her pain.

6. The claimant having failed to meet her burden of proof is not entitled to an award of attorney's fees.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, Linda Weaver's claim for benefits for an injury to her back arising out of the incident of August 30, 1989, is denied.

DATED at Montpelier, Vermont, this 29th day of April 1996.

*Mary S. Hooper
Commissioner*