Jewett v. Banner Publishing Co. (May 16, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Jeffrey Jewett	*)*	*File #: F-21944*
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	*For: Mary S. Hooper*
Banner Publishing Co.	*)*	*Commissioner*
	)	
	)	*Opinion #: 32-96WC*

Hearing held at Montpelier, Vermont, on April 15, 1996.
Record closed on April 25, 1996.

APPEARANCES

Sam W. Mason, Esq., for the claimant
Andrew C. Boxer, Esq., for the defendant

ISSUE

Whether the claimant has reached an end medical result from his work injury
of May 12, 1993.

THE CLAIM

1. Temporary total disability compensation pursuant to 21 V.S.A. §642 to the present.

2. Permanent partial disability compensation pursuant to 21 V.S.A. §648.

3. Medical and hospital benefits pursuant to 21 V.S.A. §640.

4. Attorneys' fees and costs pursuant to 21 V.S.A. §678(a).

STIPULATIONS

1. On May 12, 1993, the claimant was an employee within the meaning of the
Workers' Compensation Act.

2. On May 12, 1993, Banner Publishing Company was an employer within the

meaning of the Workers' Compensation Act.

3. On May 12, 1993, the claimant suffered a compensable injury while employed by the defendant within the meaning of the Workers' Compensation Act.

EXHIBITS

Joint Exhibit 1 Medical records
Joint Exhibit 1a Additional medical records
Defendant's Exhibit A Claimant's application for employment at Chemfab

FINDINGS OF FACT

1. The above stipulations are accepted as true and the above exhibits are admitted into evidence. Notice is taken of all forms filed with the Department in this matter.

2. The claimant was a rural route home delivery driver for the defendant. He would deliver between 450 and 550 newspapers six nights and one day a week. He would place the newspapers into a sleeve attached to mail box posts or other uprights. He would grab a newspaper with his right hand and fold it once, folding it again as he transferred it to his left hand, and then reach out with his left hand to place it in the plastic tube.

3. The claimant reported, as of May 12, 1993, that he was no longer able to work because of pain in his left hand and arm. He initially treated with Dr. Jeffrey Kratzer, who performed minimal tests but determined based on electrophysiologic evidence that the claimant was suffering from left carpal tunnel syndrome. Dr. Kratzer was unable to perform needle electromyography, a more conclusive test, because of the claimant's unwillingness to undergo the procedure. He referred the claimant to an orthopedic surgeon.

4. The claimant was seen on June 29, 1993, by Dr. Edward D. Harrington, an orthopedic surgeon, who diagnosed the claimant's condition as left forearm tendinitis with probable left carpal tunnel syndrome. The claimant refused a proffered injection, indicating that he was feeling somewhat better, and was advised to obtain a better fitting splint. He was also released to light duty work as of June 30, 1993, with restrictions of no heavy lifting or repetitive motions with the left hand.

5. The claimant met with Dr. Harrington again on July 7 and August 11, 1993. On the latter date, Dr. Harrington found that, while the claimant suffered tenderness along the flexor musculature of the left hand, all other tests were negative, and the claimant had full range of motion in his elbow and shoulder. The claimant's hand grasp was strong. The claimant reported an increase of symptoms after performing heavier work at home the prior week.
The claimant had had one attempt to return to work, but he was again delivering newspapers and increased his symptoms. Dr. Harrington restricted
the claimant from using his left hand in work, and referred him to Dr. Edwards for further neurological studies. At neither visit did Dr. Harrington retract his opinion that the claimant had a light duty work capacity.

6. On August 27, 1993, the claimant was seen by Dr. Keith R. Edwards, a neurologist, who performed an EMG on Mr. Jewett. He found evidence of a chronic brachial plexus injury which was "clearly separate from his left forearm complaints with which he gets sharp shooting pains in various fingers, today primarily the middle finger." Dr. Edwards found normal nerve conduction throughout the forearm and elbow, and opined that the claimant's
injury was a chronic tendinitis from overuse. He further added that "I suspect clinically that his shoulder girdle atrophy is due to brachial plexus injury rather that facoscapulohumeral or limb girdle muscular dystrophy, and I did not evaluate that further as that is not pertinent to the patient's chief complaint."

7. On follow up with Dr. Harrington, the claimant on September 22, 1993, was still complaining of forearm discomfort. The finding, based on Dr. Edwards' negative tests, was "left forearm tendinitis without evidence of carpal tunnel syndrome, moderate symptoms still persist." Dr. Harrington recommended a two month follow up. Upon the claimant's return to Dr. Harrington on November 24, he had many more subjective complaints. However,
there was no objective evidence of arm pathology, and Dr. Harrington noted "[l]eft forearm and arm pain which becomes more bizarre and unusual with each
evaluation." He also indicated a lack of a complete neurologic evaluation of the patient, which is puzzling in light of Dr. Edwards' tests in August. He noted that there was no atrophy in the claimant's left arm.

8. Further neurological testing with Dr. Edwards in January of 1994 revealed "multi-level chronic denervation consistent with a diffuse brachial plexopathy primarily of the upper trunk." Dr. Edwards also noted the

claimant's condition was compounded by a psychosomatic component. Because of the claimant's fear of needles, the treatment protocols available were not appropriate, and Dr. Edwards opined that the claimant's rehabilitation potential was low.

9. The claimant underwent a functional capacity evaluation (FCE) in February of 1994. The examiners ascertained that the claimant's performance in the evaluation was inconsistent, and might be indicative of less than full effort. Nonetheless, the claimant was found to have at least a sedentary to light physical demand work capacity. The claimant testified that he was in pain at the time of the FCE, and he did not want to strain it any further.

10. The claimant returned to Dr. Harrington after the FCE, and Dr. Harrington determined that the claimant had reached his maximal medical endpoint on February 23, 1994. However, he also noted that the claimant would return to Dr. Edwards for further treatment regarding the brachial plexopathy with causalgia.

11. A return visit to Dr. Edwards in March of 1994 resulted in a change of medications and encouragement to increase his range of motion exercises. Dr. Edwards noted that the claimant had passive full extension of his left shoulder, although with some discomfort. Because of Dr. Edwards' concern that the claimant was at risk of becoming a "chronic pain long term disability patient," he was scheduled for monthly appointments for two more visits. In the April visit, the claimant complained of a new stiffness in his left leg, but otherwise there was no new finding. In May, Dr. Edwards opined that the claimant had made a slight improvement. It is interesting to note that the entry under the heading "Problem" for April says "Left arm causalgia" while the one for May says "RSD." Aside from that note, there is no mention of reflex sympathetic dystrophy in Dr. Edwards' note for May 10, 1994.

12. When the claimant returned to Dr. Edwards in September of 1994, his condition was worse, as he had developed a "partial frozen shoulder syndrome." There is no record of any additional medical treatment until the claimant returned to Dr. Edwards on May 26, 1995. At that time, the diagnosis of a partial frozen shoulder was confirmed. Dr. Edwards noted little change, but indicated that "[p]atient still has not reached a medical end point. He needs retraining and vocational rehabilitation. Follow up in six weeks for EMG's left upper extremity. Depending upon patient's clinical response and EMG findings, he may be at a medical end point at that time but depending upon that evaluation, he may need further therapeutic

intervention." It does not appear that the EMG studies were ever performed.

13. In October, because of the possibility of rotator cuff tearing and AC joint instability, the claimant was referred back to Dr. Harrington, who sent him to physical therapy. The result of the physical therapy was the loosening of the frozen shoulder, which then revealed a painful click when the claimant's shoulder was abducted. Based on this, Dr. Harrington has recommended an MRI to determine whether the clicking was due to the brachial plexus injury or to pathology of the rotator cuff.

14. In November of 1995, the claimant was seen by Dr. Kuhrt Wieneke, an orthopedic surgeon, at the request of the insurer. Dr. Wieneke noted that the claimant showed no muscle atrophy that would be consistent with his complaint that he could not use his arm. He specifically noted that the musculature in his left arm was equivalent to that in his right, or dominant, arm. However, he made findings consistent with the diagnosis of RSD, as well as evidence of some tenderness in the left shoulder girdle in the area of the brachial plexus.

15. Dr. Wieneke testified at the hearing that Dr. Harrington's finding that the claimant's symptoms were bizarre in September of 1993, when taken in context with the FCE and Dr. Wieneke's own examination, suggested that the claimant was engaged in symptom magnification. Specifically, the claimant's presented behavior of an absolutely limp left arm would suggest an expected finding of muscle atrophy. Instead, the muscle mass suggested a normal use pattern of the arm. While this would not discredit the finding of RSD, which was clinically supported, it might result in an overstatement of the amount of permanency attributable to the RSD.

16. Dr. Wieneke indicated that brachial plexopathy is usually seen where there is a violent stretch action. The claimant's description of his overuse syndrome and his work procedure was not consistent with the violence generally required to cause the condition, an opinion Dr. Wieneke held to a reasonable degree of medical certainty.

17. Based upon his examination of the claimant, Dr. Wieneke found that he suffered a 4% permanent impairment to his left upper extremity as a result of the brachial plexopathy, which was not work related, and an 8% permanent impairment for the RSD, which, giving the claimant the benefit of the doubt,

was work related. Dr. Wieneke asserted that the claimant was certainly at an end medical result by the time he examined him, and was in all likelihood at an end medical result on February 23, 1994, the date established by Dr. Harrington. Dr. Wieneke did not see any evidence suggesting the necessity for an MRI, and indicated that it would be unreasonable to perform one.

18. The claimant and his mother both testified extensively at the hearing regarding the claimant's inability to use his left arm. Given that the defendant concedes the compensability of the RSD, such testimony is merely corroborative, and unhelpful on the issue of the brachial plexopathy.

19. The first time that Dr. Edwards attributed the claimant's brachial plexopathy to his work injury was in a letter to the claimant's attorney on December 22, 1995. However, this contradicts his impression at his initial appointment with the claimant, when he found a chronic brachial plexus injury not related to the claimant's assertion of his work injury. In fact, he failed to address the brachial plexus injury as it was "not pertinent to the patient's chief complaint," which the doctor had diagnosed as chronic tendinitis from overuse.

20. Dr. Edwards continues to opine that the claimant is not at an end medical result because he needs further orthopedic care. Dr. Block indicates that, after an MRI to rule out rotator cuff problems, the claimant will be at an end medical result if there is no surgically repairable lesion. Both doctors indicate that the claimant needs to be retrained for different work.

21. The claimant has received vocational rehabilitation benefits in the form of a vocational rehabilitation entitlement assessment by Rehabilitation Consultants, Inc. Based on the evaluation, it was determined that the claimant was entitled to further vocational rehabilitation benefits, based on his lack of transferable skills to a position within his current restrictions. The claimant on his own in March of 1995 applied for a position with a company called Chemfab. He testified that he was ready, willing and able to work full time at that time. That position would have required use of both hands, and it is unlikely that the claimant would have been able to perform it for any length of time.

22. On April 13, 1995, the claimant's benefits were terminated pursuant to a Form 27, Notice of Intention to Discontinue Payments, based on the end medical result finding of Dr. Harrington and the claimant's then lack of cooperation with vocational rehabilitation efforts. That termination of benefits was appropriate, since all treatment since that date was for the brachial plexopathy. The insurer has advanced $1,500.00 in permanency

benefits since April 13, 1995.

23. The claimant has presented evidence of his fee agreement with his attorney for a contingency fee of 20% of the amount received for permanent partial benefits, permanent total benefits, contested temporary total benefits or contested temporary partial benefits. This agreement is reasonable, subject to the limitation in Rule 10(a)(2). He has also claimed reimbursement for costs in the amount of $100.00, but has supplied no evidence in support of that claim. Evidence of costs is required by the terms of Rule 10(d) and failure to comply with this requirement may result in denial of an award.

CONCLUSIONS

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. In this case, while it is clear that the claimant suffered from tendinitis as a result of his position with the defendant, it is by no means clear that the brachial plexopathy also arose from that employment. The claimant's original complaints were all addressed as either carpal tunnel syndrome or tendinitis, and the problems involving his brachial plexus, while noted, were not addressed because they were not deemed to be relevant. Compounding this neglect is Dr. Wieneke's description of the mechanism of a brachial plexus injury. The lack of medical evidence to contradict either Dr. Wieneke's opinion or the medical records prevents the claimant from meeting his burden of proof.

4. If the brachial plexopathy is not compensable, then the claimant was in all likelihood at an end medical result at some time prior to the filing of

the Form 27 in 1995, as the tendinitis appears to have resolved at some time in 1994 at the latest. Therefore he is not entitled to any further temporary disability benefits. Similarly, to the extent that any medical treatment after the filing of the Form 27 related to the brachial plexus injury, it is not compensable.

5. Dr. Wieneke has indicated that, giving the claimant the benefit of the doubt, the RSD is work related and has resulted in an 8% permanent impairment to the claimant's left upper extremity. As there is no evidence to the contrary, the claimant is entitled to all benefits related to the RSD. However, as there is no evidence that any treatment has been specifically addressed to the RSD, I am unable to find that any treatment after the filing of the Form 27 is compensable.

6. Vocational rehabilitation is required for a claimant "[w]hen as a result of an injury covered by this chapter, an employee is unable to perform work for which he has previous training or experience...." 21 V.S.A. §641(b). The services to which such an employee would be entitled are "...retraining and job placement, as may be reasonably necessary to restore him to suitable employment." Ibid. Because of his RSD, the claimant is not able to perform work for which he has previous training or experience. Therefore he is entitled to vocational rehabilitation benefits to be determined in accordance with the Workers' Compensation and Occupational Disease Rules.

7. A claimant who prevails is entitled to his costs as a matter of law and his attorney's fees as a matter of discretion. In this case, the claimant has failed to produce evidence, as required by Rule 10(d), of his costs beyond a bald statement of a dollar figure. The claimant is therefore not entitled to an award of costs.

8. The claimant is entitled to an award of 8% partial permanency for his injury. He is entitled, therefore, to the sum of $4,109.26, $1,500.00 of which has already been advanced. The claimant can be said to have prevailed to the extent that he will receive an award of $2,609.26. His attorney's fee, based on the contingency fee agreement filed with the Department, is therefore $521.85.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, it is hereby ordered that:

1. Travelers Insurance Company, or in the event of its default Banner Publishing Company, provide the claimant with medical benefits for his reflex sympathetic dystrophy in accordance with this opinion;

2. Travelers Insurance Company, or in the event of its default Banner Publishing Company, pay to the claimant permanency benefits in the sum of $2,609.26;

3. Travelers Insurance Company, or in the event of its default Banner Publishing Company, provide to the claimant vocational rehabilitation benefits in accordance with the Workers' Compensation and Occupational Disease Rules;

4. Travelers Insurance Company, or in the event of its default Banner Publishing Company, pay the claimant's attorney's fees in the amount of $521.85; and

5. All other claims made by the claimant arising out of his injury of May 12, 1993 are denied.

DATED at Montpelier, Vermont, this ____ day of May 1996.

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Mary S. Hooper
Commissioner