

Henry v. Bestfoods Baking Co.

(April 6, 2005)

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

John Henry	)	Opinion No. 22-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Bestfoods Baking Co.	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. P-14069

Pretrial conference held on December 13, 2004

Hearing held on March 10, 2005

Record Closed on March 23, 2005

**APPEARANCES:**

Craig Weatherly, Esq., for the Claimant

Jennifer K. Moore, Esq., for the Defendant

**ISSUES:**

1. Are claimant's knee problems and right shoulder problems related to his December 24, 1999 work-related motor vehicle accident?
2. If so, is the carrier responsible for claimant's gym membership and trainer for his weight lifting activities?

**EXHIBITS:**

Joint I: Medical Records

Claimant's 1: Photograph

**FINDINGS OF FACT:**

1. Claimant was seriously injured in the course of his employment for Bestfoods Baking Co. (Bestfoods) on December 24, 1999 when he as driving a tractor-trailer on the interstate. His vehicle was hit and flipped over. Claimant's seatbelt was torn; he was tossed around in the cab and lost consciousness. He had to be extricated from the vehicle.
2. Claimant was transported an Emergency Room where extensive left sided face and ear injuries were treated as well as left arm and shin injuries. X-rays were taken of his left shoulder. Lower leg films were negative for fractures.

3. While at the hospital, a photograph was taken of claimant's legs. It shows scratches on the lower legs, but no obvious swelling in the knees. He was discharged the next day.
4. On January 3, 2000 claimant saw his primary care physician, Dr. John Reynolds, with complaints of achiness and weakness in his left foot.
5. On February 4, 2000 Dr. Reynolds noted that claimant continued "to have pain in his legs, but the swelling is better."
6. Prior to that accident, claimant had lifted heavy weights for years.
7. In March of 2000 claimant was referred to physical therapy (PT) with a diagnosis of left shoulder, wrist and neck strain. He continued physical therapy through August of 2000. The PT records during that time do not reference knee or right shoulder complaints.
8. Claimant received tri-weekly massages in March and April of 2000. There is no mention in the massage therapy records of knee or right shoulder complaints.
9. Claimant was sedentary because of the multiple injuries for about five months after the accident.
10. In May of 2000 claimant presented to Dr. John Lawliss with a complaint of left shoulder pain. At that time, claimant had returned to weight lifting and was lifting 150 pounds on a low bench press, less than his pre-injury weights. Dr. Lawliss advised against the weight lifting, except for strengthening for his rotator cuff.
11. The compensability of claimant's left shoulder problem is uncontested.
12. When Dr. Lawliss saw claimant again on May 27, 2000, he diagnosed left shoulder impingement syndrome and referred claimant to physical therapy. Notes for that visit reflect the physician's advice that claimant not lift heavy weights and that he clear independent exercises through physical therapy.
13. In July 2000, claimant began chiropractic treatment, but did not mention knee or right shoulder pain.
14. When claimant saw Dr. Philip Davignon in October 2000, no mention was made of knee or right shoulder complaints, although claimant described multiple traumas, including those to his head, ear, left shoulder and left wrist.
15. Claimant continued to treat for numerous accident related sequelae, some unrelated to the instant dispute. But the active nature of the treatment is evident from a November 2000 note from Dr. Sargent's office that measured progress with claimant's ability to drive around town without vomiting. At that time he still had numbness in his hand. On December 7, 2000, he was told to use pulley weights, not bar bells.

16. Dr. Claude Nichols saw claimant for the first time on January 31, 2001. The doctor noted, "He cannot lift weights. He cannot do flies, military press, lateral raises or work on his deltoids. He can do lap pull downs. Bench pressing causes deltoid pain. He cannot do a close grip bench press."
17. On February 13, 2001 claimant complained of bilateral knee problems to his physical therapist who recommended that he modulate his self-prescribed weight program.
18. X-rays taken in March 2001 revealed degenerative changes in claimant's knees.
19. Claimant began physical therapy for his knees in April 2001. At that time he was working out at the gym three days a week. He was advised to use only his body weight as resistance at the gym.
20. On April 27, 2001, claimant underwent corrective surgery for the clearly compensable left shoulder injury.
21. On June 22, 2001 claimant told Dr. Reynolds that he had lifted over 600 pounds on the leg press at the gym, although it caused him pain. By August 14, 2001, he was lifting 1200 pounds with the leg press. His knee pain was increasing, prompting a physical therapist to link the pain to the weight lifting. He was advised to cut back on the weight lifting.
22. On September 11, 2001, claimant told the therapist that his knee symptoms had improved since backing off to 600-700 pounds for the lower extremities.
23. Claimant complained of knee pain to Dr. Nichols on September 26, 2001 and had a second MRI, this time for the left knee revealed patellar tendonosis.
24. Claimant continued to treat and to work out at the gym. By February 2002, he was working out five days a week, bench-pressing 325 pounds without pain.
25. On April 15, 2002 complained to Dr. Nichols of right shoulder pain, which was later diagnosed as distal clavicular osteolysis, for which surgical removal of the distal clavicle is recommended. It is not unusual for symptoms of osteolysis to appear sometime after a trauma.
26. By July 2002 claimant was complaining of pain in both knees when he saw Dr. Nichols, who recommended surgery. Dr. Nichols performed the first procedure on September 20, 2002 to correct a partial tear of the patellar tendon.
27. The first medical record linking claimant's knee problems to the 1999 motor vehicle accident is an October 8, 2002 note from Fletcher Allen reflecting claimant's report that both his knees were forcibly pushed into the dashboard at the time of the accident.

28. On May 9, 2003 Dr. Nichols operated on claimant's right knee for what the operative report describes as patellar tendonosis and what Dr. Nichols testified was a procedure similar to that performed on claimant's left knee the previous September.
29. Claimant's right shoulder became problematic, prompting Dr. Nichols to recommend an MRI and distal clavicle excision.
30. On November 21, 2003, Dr. Nichols excised a traumatic neuroma from claimant's right knee. Because claimant continues to have right knee symptoms, further surgery is recommended.

#### Medical Expert Opinions

31. Claimant's treating physicians, Dr. Reynolds and Dr. Nichols, both testified in support of the claimant at the hearing. Both concluded that the accident, not weight lifting, led to the claimant's right shoulder and bilateral knee problems because claimant had been thrown around in the cab and suffered multiple injuries. Since acute problems had to be addressed first and claimant was inactive for months after the accident, the less acute knee and right shoulder problems did not become clear for years after the accident, according to these experts.
32. Dr. Nichols, the surgeon who operated on claimant's knees and shoulders, accepted claimant's description that his knees were driven into the dashboard of the truck during the accident. He explained that emergency departments necessarily focus on life threatening acute injuries, and may not document evidence of less serious injuries. In his opinion, blunt trauma during the accident caused the bilateral knee problems, in all likelihood combined with an eccentric load of claimant's bracing his legs before impact. Yet, he acknowledged that swelling would have been obvious at the time of the initial hospitalization and that squatting, done with weight lifting, also puts an eccentric load on the knees.
33. Because claimant did not have problems with his right shoulder and knees before the accident even while power lifting, Dr. Nichols did not think the weightlifting after the accident accounts for the knee and right shoulder problems that developed later.
34. In Dr. Nichols's opinion, had claimant's right shoulder osteolysis been caused by weight lifting, given the extreme weights he had been using, the degree of degeneration would have been much greater than what was actually seen during surgery.
35. Dr. Victor Gennaro, orthopedic surgeon, evaluated claimant for the defendant in this matter. He reviewed all medical records studied the photograph admitted as "Claimant's Exhibit 1" and examined the claimant. He concluded that claimant's 1999 accident did not cause his right shoulder or knee problems.

36. In Dr. Gennaro's opinion, claimant's knee and right shoulder problems are those common to weightlifters. In fact, the lay term for claimant's shoulder problem is "weightlifter's shoulder." Further, he noted that knee and shoulder symptoms became clear years after the motor vehicle accident, and proximate in time to claimant's resumption of weightlifting. The photograph and emergency department records are consistent—claimant did not have knee swelling after the motor vehicle accident, although he had scratches on his legs. Finally, Dr. Gennaro concluded that continued weightlifting is not reasonable because it is likely to worsen claimant's condition.

#### Attorney Fees and Costs

37. Claimant submitted a request for hourly attorney fees based on 76.30 hours worked, supported by a statement, and necessary costs of \$1,009.79.00.

#### **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*, 123 Vt. 161 (1962). 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. *Egbert v. Book Press*, 144 Vt. 367 (1984).
2. 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. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
4. In considering conflicting expert opinions, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (Aug. 4, 1997); *Gardner v. Grand Union* Op. No. 24-97WC (Aug. 22, 1997).
5. Dr. Reynolds and Dr. Nichols offered opinions in favor of the claimant; Dr. Gennaro for the defendant. Because Dr. Reynolds defers to Dr. Nichols on questions of orthopedics, the opinions of Dr. Nichols and Dr. Gennaro are those relevant to the *Miller* analysis.

6. Dr. Nichols has the advantage as the treating physician, although that advantage is tempered by the facts that he did not see the claimant for more than a year after the injury and by the less than objective reporting of the claimant that formed the basis for much of his opinion. Both Dr. Nichols and Dr. Gennaro share the necessary expertise in orthopedics. Dr. Gennaro's is the more objective opinion of the two, based on all the medical records, a photograph taken at the time of the initial hospitalization and explanation of the mechanics of the injury. Claimant did not complain of or treat for knee symptoms for more than a year after the accident, despite having treated with multiple providers. Although I can accept Dr. Nichols's opinion that a delay in the onset of symptoms can be expected in one who is inactive and who focused on more acute injuries immediately after the accident, I do not believe that such a theory applies to more than a year delay in the onset of symptoms that coincided with the resumption of weight lifting. In fact, the experts agree that had claimant suffered the blunt trauma he now alleges, some physical findings would have been evident immediately, including bruising or swelling. The photograph does not support that history.
7. Based on the complete record presented, claimant has failed to prove that the MVA accounts for his knee and right shoulder problems under standard in *Burton 112* Vt. 17. Therefore, it is not necessary to address the question whether the treatment he seeks for those conditions is compensable under 21 V.S.A. § 640(a).

**ORDER:**

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 6<sup>th</sup> day of April 2005.

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Laura Kilmer Collins  
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.