

S. D. v. Fletcher Allen Health Care

(February 28, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

S. D.

Opinion No. 08-07WC

v.

By: George K. Belcher
Hearing Officer

Fletcher Allen Health Care

For: Patricia Moulton Powden
Commissioner

State File No. Y-00307

Hearing held in Burlington on January 4, 2007, and in Montpelier on January 12, 2007
Record closed on January 19, 2007

APPEARANCES:

William B. Skiff, Esq. for the Claimant
Wesley M. Lawrence, Esq. for the Defendant

ISSUE:

Did the Claimant suffer a work-related injury on June 25, 2006?

EXHIBITS:

Joint I: Medical Records
Joint II: State Forms
Joint III: First Report of Injury

Claimant's II: Index and Medical Record
Claimant's III: Incident Report
Claimant's IV: Employee Report of Event

Defendant's V: Orientation Checklist
Defendant's VI: Claimant Letter to Department dated July 20, 2006
Defendant's VII: Sketch of hospital bay/orthopod

FINDINGS OF FACT:

1. The Claimant is an employee within the meaning of the Vermont Workers' Compensation Act (Act).
2. The Defendant is an employer within the meaning of the Vermont Workers' Compensation Act.
3. The Claimant has one dependant within the meaning of the Workers' Compensation Act
4. The Claimant is 57 years old. He has a history of working in the security field. He has worked as a security officer at the Denver General Hospital and as an "interventionist" at Howard Mental Health. He is also a licensed private investigator and he is licensed to carry a firearm.
5. The Claimant was hired by the Defendant in November of 2005 to work as a "Security Officer One" at the Defendant's hospital. He was hired for general security duties.
6. While on duty on Sunday, June 25, 2006, shortly after noon, the Claimant was asked to respond to a security situation by a nurse near the emergency room.
7. The Claimant responded to a room near the emergency room which held four beds. At one of the beds, a patient was being held by one of the doctors. The patient was standing, bent over forward onto the bed by the doctor holding him down from behind. The doctor passed the patient off to an Emergency Medical Technician, Heather Gibbs. Ms. Gibbs held the patient down by holding his hands behind his back.
8. The patient was being held down because he had refused to follow directions to return to his room by the doctor and he had tried to punch the doctor.
9. As the Claimant entered the room, EMT Gibbs asked him to apply handcuffs to the patient. He did not have handcuffs and was not authorized to use them.
10. While the patient was being held down on the bed, he was red-faced and swearing. Ms. Gibbs held his hands behind his back as she spoke to the patient, trying to calm him down.

11. Another security officer, James Bona, responded to a call for security and he entered the area where the Claimant and Ms. Gibbs were with the patient. Mr. Bona found that the patient was not struggling at this time. Ms. Gibbs asked Mr. Bona if he had handcuffs. He had none. Mr. Bona was then asked to get four point restraints. He left the room and returned with straps. The patient was then put in four point restraints on the bed with his arms and legs tied to corners of the bed by the straps. Ms. Gibbs then dismissed the security officers.
12. At Fletcher Allen Health Care the security force and Emergency Room staff are trained in a system of Management of Aggressive Behavior (called "MOAB"). The MOAB system uses a "ladder of force" where levels of intervention such as verbal de-escalation, nonviolent contact, and incapacitation, are used in a progression. Four point restraints are the highest form of restraint, and handcuffs are just one level below the highest level of incapacitation.
13. Following the incident, the Claimant continued to work his shift. He completed an incident report of the intervention with the patient. (Claimant's Exhibit 3). His right arm and shoulder hurt. During the afternoon of June 25, 2006, he told his co-worker, Michael Wells, that he had been hurt during an incident with a patient. During that evening, his shoulder was quite painful and the pain interfered with his sleep. He complained to his wife, Cynthia Delorme, that he had been injured at work and that he was in pain. On Monday morning he complained to his wife that he was still in pain. He worked on Monday. His shoulder was quite painful but he thought it would resolve.
14. On Tuesday, June 27, 2006, the Claimant was still in pain and he tried to get an appointment with his primary care doctor. When he could not get the appointment, he went to the Fletcher Allen Emergency Room and was evaluated. During this evaluation, he reported to the emergency room personnel that he was injured while at work restraining a patient. Joint Medical Exhibit, Page 500. He was referred to an orthopedic surgeon, Dr. John Lawliss. (Joint Medical Exhibit, Page 550.) He reported to medical providers on June 27, 2006, June 30, 2006, July 5, 2006, and July 12, 2006 that his right shoulder problem was the result of the incident with the emergency room patient. He claimed that he had injured his right arm and shoulder during a struggle with the patient.
15. The Claimant was treated by Rebecca Winokur, M.D. on July 5, 2006 for a suspected ruptured biceps rotator cuff tear. An MRI which was performed on July 18, 2006 showed a complete proximal biceps tear and abnormal supracapinatus and subscapularis tendons. Both of these problems ("rotator cuff pathology and biceps rupture") were related to the work injury in Dr. Winokur's report of July 25, 2006. Joint Medical Exhibit, Page 700.
16. The Claimant has improved without surgery and he has returned to work as of the date of the hearing.

17. There was no medical evidence offered to contradict Dr. Winokur's opinion that the injuries were related to the incident at work. The Defendant, instead, brought forward a number of inconsistencies and contradictions to show that the Claimant was not truthful. They are as follows.
18. The incident report filed by the Claimant on June 25, 2006 (Claimant's Exhibit 3) did not mention the injury to the Claimant, nor does it specifically describe a violent struggle. Nowhere in the Claimant's report does it say that the Claimant used force on the patient, other than to apply the four point restraints after the patient had been de-escalated.
19. The Claimant did not complete a report of injury to his employer until July 5, 2006, despite being instructed and trained to immediately report any personal injury suffered at work. (Defendant Exhibit 4).
20. Heather Gibbs, the EMT who was present during the incident, testified that she never saw the Claimant touch the patient and that the entire restraint of the patient was performed by herself and Dr. Stone, and, possibly, a medical student. She testified that Dr. Stone turned the patient over to her and that the Claimant had no role in the physical restraint of the patient. She also testified that the patient was fairly calm and compliant after he was persuaded by her to relax. The patient volunteered to lie on his back on the bed, in order to be restrained in four point restraints. The Claimant had no role whatsoever in this.
21. The Claimant's testimony is in direct conflict with that of Ms. Gibbs. The Claimant testified quite clearly that he had taken physical control of the patient from Dr. Stone, saying, "I've got him!" The Claimant also told this to Dr. Lawliss, the treating orthopaedic surgeon, on August 29, 2006. (Page AOS 850, Joint Medical Exhibit). His testimony and his report to Dr. Lawliss were unequivocally contradicted by Ms. Gibbs. Likewise, Physician's Assistant Brochu, who was also in the examining room when the patient was being restrained was quite clear in his testimony that he did not see Mr. Delorme struggling with the patient. Mr. Brochu testified that Mr. Delorme was not involved at all in the "pass off" of the patient to Ms. Gibbs.
22. When the second security officer, Mr. Bono, arrived, the patient was calm and not struggling. He testified that the Claimant did in fact have his hand resting on the patient.

23. Michael Wells, a co-worker of the Claimant, testified that on the morning of July 25, 2006, (before the incident with the patient) the Claimant told him that he had hurt his shoulder while unloading a portable generator with his son while the Claimant was off duty several days before the hospital incident. The Claimant told Mr. Wells that his arm “hurt like hell.” Mr. Wells testified that the Claimant indicated that it was his right arm which was hurt. The Claimant himself admitted on cross examination that on June 21 or June 22, 2006, he was unloading a 250-pound portable generator from his pickup truck when his son lost his grip. The generator shifted, putting the full force of the generator on the Claimant. The Claimant testified that this incident caused some pain in his left arm for several hours, and then went away. The Claimant was again unequivocally contradicted by Mr. Wells, since Mr. Wells testified that the Claimant was still having pain on June 25, 2006 (two or three days after the generator incident) and that he was complaining of significant right arm pain, not left arm pain.
24. The Claimant wrote a letter to the Department on July 20, 2006 in support of his claim. In the letter he stated that he restrained a “280 pound individual.” Defendant’s Exhibit 6. The medical report of Dr. Grambling also states that the Claimant described the patient as “about 6 feet 2 inches and 280-pound” Heather Gibbs testified that the patient only weighed 180 pounds and was between 5 feet, 3 inches, and 5 feet, 5 inches. Dr. Grambling’s notes also indicate that the Claimant reported that he got the patient “flipped over onto his belly,” and yet none of the witnesses including the Claimant testified that the patient was flipped onto his stomach. Joint Medical Exhibit page 700.
25. According to the initial emergency room intake of the Claimant as a patient, the records report that he had a prior history of right shoulder injury, “torn cartilage” with cortisone injections. The Claimant denied saying this.
26. While some of the contradictions in the Claimant’s reports and claim are minor and would not impugn his overall credibility, the contradictions about the generator incident and the lack of a struggle with the patient are fatally damaging to the Claimant’s overall credibility in this matter. If he had hurt his arm and shoulder by lifting the generator several days before going to the emergency room, why would he have not told the treatment providers about that history? None of the treatment providers were told about the generator incident according to the records. Instead, they were told an embellished history of a major physical struggle with a large patient, which was not corroborated by any of the personnel who were present in the emergency room.
27. The Claimant was out of work completely for about one month. He made a slow but steady recovery and is now back to work full time.

CONCLUSIONS OF LAW:

1. In Worker's Compensation cases the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). 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 proven must be the more probable hypothesis. *Burton v. Holden and Martin Lumber Co.* 112 Vt. 17 (1941).
3. In this case the Claimant clearly had a medical injury and, from the medical reports, there seems to be no question that the injury of a ruptured biceps tendon and the other torn tendons could have been caused by a forceful struggle with a patient. The issue is primarily one of the credibility of the Claimant in light of the inconsistencies and contradictions in his version of the events.
4. The Defendant claims that the late report of injury (injury sustained on June 25, 2006 and not formally reported until July 3, 2006) is evidence that the injury was not incurred at work. In cases of late report of injury, the Department has evaluated the credibility of witnesses using a four-point analysis which is helpful in this case. The four questions which are to be evaluated are: First, are there medical records contemporaneous with the claimed injury and/or a credible history of continuing complaints? Second, does the Claimant lack knowledge of the workers' compensation reporting process? Third, is the work performed consistent with the Claimant's complaints? Fourth, is there persuasive medical evidence supporting causation? *Seguin v. Ethan Allen*, Opinion No. 28S-02 WC (2002).
5. In this case there are adequate medical records which document that the Claimant reasonably sought medical treatment as soon as it appeared that his arm and shoulder injuries were continuing to hurt and were not resolving. The medical records clearly and consistently show that the Claimant was claiming the incident as the source of his injury. Second, the Claimant was aware of the personnel policy of the Defendant and the process for reporting work related injury. His failure to report was inconsistent with his instructions to immediately report injuries. Third, the work involved in this claim of injury becomes basically a test of credibility between Ms. Gibbs and Mr. Delorme.

6. It is not reasonable to believe that the Claimant suffered a ruptured biceps during a struggle with a patient as described by Ms. Gibbs because she testified that there was no struggle between the Claimant and the patient. The Claimant's version of his involvement in the struggle with the patient is also significantly contradicted by Physician's assistant Brochu (who testified that the Claimant was not in the room when he and Dr. Stone left the room). Likewise, it is not supported by his own incident report made on the same day as the incident.
7. The Claimant's testimony that the generator incident was minor and that his left arm might have hurt for only several hours, is directly contradicted by Mr. Wells. He testified that the Claimant's right arm "hurt like hell" from the generator incident, even on the morning of June 25, 2006, before the altercation with the patient. It appears that the Claimant was having significant pain from the generator incident not just "several hours" after the incident but several days after the incident.
8. Where the reports of a claimant are suspect and incredible, the medical opinions which are based upon them may lack the soundness to support an award. See *Bowen v. E. F. Wall*, Opinion No. 17-04 WC (April 20, 2004) (where claimant's report of incident were so variant that physicians' opinions concerning causation were discounted). Virtually all the medical reports which address causation in this case between the incident in the emergency room and the biceps and rotator cuff injuries are based upon the Claimant's subjective reports to the physicians. Nowhere do these records reflect that the Claimant reported to the examiners the previous generator-lifting incident.
9. Because of the Claimant's lack of credibility, the inconsistencies in his claim, and the strong possibility that his injury was incurred while he was off duty (which possibility was not refuted or considered in the medical evidence), it would be speculation to determine that his injuries occurred at work. The Claimant has not met his burden of proof.

ORDER:

Therefore, based upon the foregoing findings of fact and conclusions of law, the Commissioner determines that the Claimant's claim for workers' compensation benefits, including attorney's fees and costs is DENIED.

Dated at Montpelier, Vermont this 28th day of February 2007.

Patricia Moulton Powden
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. Sec. 670, 672.