

L. C. v. Schwans' Consumer Brands (February 15, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

L. C. Opinion No. 07-08WC

v. Jane Dimotsis, Esq.,
Hearing Officer

Schwans' Consumer Brands

Patricia Moulton Powden
Commissioner

State File No. U-13902

OPINION AND ORDER

Hearing held in Montpelier on July 23, 2007.

APPEARANCES:

Thomas Bixby, Esq. for Claimant
John Valente, Esq. for Defendant

ISSUE PRESENTED:

Whether Claimant is entitled to additional workers' compensation benefits as a consequence of his March 17, 2004 work-related injury.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records

Claimant's Exhibits:

Claimant's Exhibit 1: Form 25 with supporting documentation

Claimant's Exhibit 2: First Report of Injury

Claimant's Exhibit 3: Dr. Thatcher deposition, July 25, 2007

Claimant's Exhibit 4: Dr. Evans deposition, August 1, 2007

Claimant's Exhibit 5: *DSM-IV*, pp. 445-452

Defendant's Exhibits:

Defendant's Exhibit A: Dr. Kenosh Independent Medical Evaluation, April 27, 2006

Defendant's Exhibit B: Dr. Kenosh letter, August 16, 2007

CLAIM:

Temporary total disability benefits under 21 V.S.A. §642
Permanent partial disability benefits under 21 V.S.A. §648
Medical benefits under 21 V.S.A. §640(a)
Attorney’s fees and costs under 21 V.S.A. §678

PRELIMINARY EVIDENTIARY RULING:

On October 22, 2007 Claimant sought to add a three-page document entitled “Somatization disorder” as an additional exhibit to those admitted at the formal hearing. The document’s source was “Wikipedia,” an Internet encyclopedia. On November 14, 2007 Defendant filed a motion to exclude this evidence on the grounds first, that it was inadmissible hearsay and second, that had not been properly disclosed.

Claimant opposed Defendant’s motion on the grounds that it had not been timely filed. Alternatively, Claimant requested that the Commissioner take judicial notice of the discussion of “somatoform disorders” contained in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)*, pp. 445-452. Defendant’s medical expert, Dr. Kenosh, testified as to his familiarity with the *DSM-IV* in the context of his finding that Claimant’s medical records reflected possible evidence of somatization.

I find that an article published in Wikipedia does not qualify under any of the relevant exceptions to the hearsay rule, V.R.E. 803. Nor is its admission justifiable under Workers’ Compensation Rule 7.1010. Claimant’s request to admit the article, therefore, is denied.

I will, however, accept Claimant’s proffer of the *DSM-IV* chapter dealing with somatoform disorders, as I find that it fits within the “learned treatise” exception to the hearsay rules, V.R.E. 803(18), and comports with the requirements of Workers’ Compensation Rule 7.1010.

FINDINGS OF FACT:

1. In March 2004 Claimant began working for Defendant as a route delivery driver, delivering frozen pizzas to retail outlets in Massachusetts and Vermont.
2. On the morning of March 17, 2004 Claimant arrived at work, clocked in and was walking across the parking lot to his delivery truck when he slipped and fell on the icy pavement. Claimant fell backwards to the ground, hitting his head “full force.” He felt disoriented and dizzy, but did not lose consciousness. He vomited once, but felt capable of working.

3. As was the routine during Claimant's training period, his supervisor accompanied him on his route that day, although the supervisor drove, not the Claimant. After an hour or so on the route, the supervisor took Claimant to the emergency department at Brattleboro Memorial Hospital, where he was diagnosed with a mild concussion and cervical sprain. Claimant was given a soft collar and advised to rest for the remainder of the day.
4. Claimant returned to the emergency department just a few hours later, now complaining of pain in his lower back, headaches and worsening neck pain. Claimant also noted that his legs were "a little numb," although on examination the numbness did not present in a dermatomal distribution. X-rays of his cervical and lumbar spine revealed no changes from prior films taken in 2003 (cervical spine) or 2001 (lumbar spine). Claimant was diagnosed with cervical and lumbar strain/sprains. Recommended treatment consisted of ice and heat to the affected areas, ibuprofen for pain and Soma for muscle spasms.
5. Claimant followed up with Dr. Idelkope, a primary care physician, on March 20, 2004. Dr. Idelkope diagnosed post-concussive syndrome with some neck strain. He prescribed Flexeril for pain and referred Claimant for a course of physical therapy. Although the initial physical therapy referral was solely for Claimant's neck symptoms, Dr. Idelkope later amended the referral to include treatment for low back pain as well.
6. For reasons that are not clear from the record, Claimant did not return to work for Defendant. Instead, in late March 2004 he took a job as a counter agent with Thrifty Car Rental.
7. Claimant's average weekly wage for the weeks during which he was employed by Defendant was \$550.00, resulting in a compensation rate of \$366.69.
8. Claimant underwent physical therapy from April 6, 2004 through June 8, 2004. The medical records during that period reflect fairly steady progress, albeit with some setbacks related to increased physical activity. For example, on May 21, 2004 the physical therapy notes reflect Claimant's report that he had worked on his girlfriend's father's car and his back was "feeling terrible today." Claimant also reported that when he took his pain medications he felt better, but that his pain increased when he didn't do so.
9. On April 20, 2004 Claimant reported to Dr. Idelkope that he was experiencing some numbness in his hands and feet when he exerted himself at physical therapy. Dr. Idelkope was unable to determine the etiology of these complaints.

10. On May 21, 2004 Dr. Idelkope referred Claimant for further evaluation with Dr. Thatcher, an orthopedic surgeon. Dr. Thatcher evaluated Claimant on June 9, 2004. He reported that the leg numbness Claimant had been experiencing had resolved, but that he was continuing to have episodes of bilateral arm numbness. Dr. Thatcher diagnosed Claimant with a whiplash injury to the cervical spine. For treatment, he recommended a brief trial of steroids followed by anti-inflammatories, and in addition another course of physical therapy. Of note, Dr. Thatcher did not mention any symptoms in Claimant's lower back, either by subjective report or on objective examination.
11. Claimant was discharged from physical therapy on June 8, 2004. The discharge summary noted that Claimant had normal range of motion in his neck and back, no tenderness to palpation, normal strength and no complaints at all of pain. Claimant was independent with his home exercise program and had met all physical therapy goals.
12. Claimant did not treat again for any neck or back symptoms until November 2004. At some point during the intervening months, Claimant stopped working for Thrifty Car Rental. In late August and early September 2004 he worked as a school bus driver, but lost that job when he was involved in a minor motor vehicle accident. In October 2004 he took a job as a selector at Northeast Food Coop. This job entailed repetitive bending and lifting, occasionally up to fifty pounds. Claimant testified that he knew within two days of starting this job that it was too taxing physically. He quit after only two weeks, when he began to experience knots and muscle spasms between his shoulder blades and in his lower back and neck. Claimant has not worked since.
13. Claimant did not treat for any back or neck pain between June 9, 2004 and November 1, 2004. On that date, he returned to Dr. Idelkope, who referred him to Dr. Donaldson, a neurologist, for further evaluation.
14. Dr. Donaldson examined Claimant on November 17, 2004. She reported that Claimant's pain had recurred after two weeks of working at Northeast Food Coop. Claimant complained of numbness in his arms and legs, decreased back and neck strength, and increased low back pain with prolonged sitting. Dr. Donaldson stated that she "[did] not find much evidence of serious injury on exam or film or by history." She concluded that Claimant probably was suffering from a muscle strain or sprain. As treatment she recommended anti-inflammatories, muscle relaxants and physical therapy.
15. Claimant underwent physical therapy from December 1, 2004 until May 11, 2005. As with the first course of physical therapy, Claimant made fairly steady gains, notwithstanding a few episodes of increased pain related to increased activity. For example, the therapy notes for April 11, 2005 reflect that Claimant reported he "did too much" while opening his camp and was experiencing increased pain in his neck and lower back. By April 15, 2005, however, Claimant reported that his neck still hurt but his lower back was "fine." By May 4, 2005 the therapist reported that Claimant had met all physical therapy goals, his symptoms had decreased and there were significant objective improvements. Claimant was discharged to a home exercise program on May 11, 2005.

16. Claimant underwent a functional capacities evaluation on July 15, 2005. The evaluator concluded that Claimant had only a sedentary work capacity, but suggested that Claimant would benefit from a work hardening program to improve his physical fitness and material handling capabilities so as ultimately to be able to work in the medium/heavy category.
17. Claimant next sought treatment for back pain on October 12, 2005. On that date, he presented to the emergency department at Brattleboro Memorial Hospital, reporting that while getting out of bed that morning he felt a pop and had immediate low back pain. Claimant was diagnosed with an acute lumbosacral strain. He was prescribed Flexeril for muscle spasms and Percocet for pain, and advised to follow up with his physician if his symptoms persisted.
18. At his attorney's request, Claimant underwent a re-evaluation with Dr. Thatcher on April 7, 2006 for the purposes of determining end medical result and permanency. Dr. Thatcher reported that Claimant continued to have symptoms about the cervical spine and upper thoracic region consistent with chronic soft tissue strain. In Dr. Thatcher's opinion these symptoms were causally related to the original March 2004 work injury. Dr. Thatcher found Claimant to be at end medical result and rated him with a 7% whole person impairment referable to his cervical spine injury. As with his first evaluation of Claimant, Dr. Thatcher did not include Claimant's lower back in his examination and did not consider it in reaching his conclusions as to causal relationship, end medical result or extent of permanent impairment.
19. Dr. Thatcher expanded on his findings in his deposition testimony. As to causal relationship, he testified that when he first evaluated Claimant in June 2004 "it was all neck." Complaints of thoracic spine symptoms did not arise until a year and a half later, and Dr. Thatcher admitted that he did not know the correlation between the two. He acknowledged that there was no way really to know whether but for the original injury Claimant's subsequent activities would or would not have resulted in the symptoms he experienced after June 2004. As to end medical result Dr. Thatcher agreed that his findings were fairly similar from his first evaluation to the one he conducted two years later. Notwithstanding that, however, he did not believe that it was appropriate under the AMA Guides to conclude that Claimant had been at end medical result at the time of the earlier exam.
20. Dr. Thatcher testified that he found no evidence of symptom magnification or somatization in either of his evaluations of Claimant.
21. Aside from Dr. Thatcher's April 7, 2006 evaluation, which did not involve any treatment, Claimant did not treat for back or neck pain from October 12, 2005 until the fall of 2006, when he underwent MRI scans of his thoracic and lumbar spine. These revealed small disc herniations at T4-5 and T8-9, both without cord compression or foraminal narrowing, and some foraminal narrowing at L4-5 and L5-S1, but with no focal disc protrusion.

22. On November 28, 2006 Claimant was hospitalized for three days after experiencing severe mid-back pain while bending over. Dr. Evans, his primary care physician, evaluated him over the course of his hospital stay and also consulted with Dr. Kinley, an orthopedic surgeon. Thoracic spine x-rays revealed no acute injury, and the ultimate diagnosis was acute back pain with probable T8 disc herniation based on Claimant's history and recent MRI findings.
23. At Dr. Kinley's suggestion, Claimant underwent another course of physical therapy from December 13, 2006 through March 19, 2007. Once again, Claimant responded well to physical therapy and made good gains in both flexibility and strength.
24. At the formal hearing Claimant testified that since the original March 17, 2004 injury his back and neck pain has waxed and waned depending on his activity level, but has always persisted to some degree. In this respect Claimant's testimony was at odds with physical therapy records reporting that he was pain free upon discharge both in June 2004 and again in May 2005. Claimant testified that he is unable to engage in activities he used to be able to tolerate, such as weight lifting, and can no longer do the type of physical labor he was accustomed to doing. Claimant wants to work, and is engaged in vocational retraining efforts aimed at finding less physically strenuous employment.
25. As for episodes of back or neck pain prior to the March 17, 2004 injury, Claimant testified that he recalled only one, many years previously while he was in high school. However, Dr. Evans testified that according to his medical records he treated Claimant for more recent episodes of mid-back pain in April 1994 and January 2002 and for episodes of neck pain in May 1996 and March 2003. Some of these episodes appear to have resulted from a specific incident or trauma, while others had no apparent mechanism of injury. As to the latter, it is difficult to discern the difference between those episodes and, for example, the episode of low back pain Claimant reported when getting out of bed in October 2005, or the mid-back pain he experienced after bending over in November 2006.
26. Dr. Evans also testified as to the causal relationship between the March 17, 2004 accident and Claimant's current back and neck symptoms. Dr. Evans acknowledged that he was not Claimant's treating physician for the purposes of that injury, but stated nonetheless that in his opinion, to a reasonable degree of medical certainty, Claimant's cervical, thoracic and lumbar spine complaints all correlated to the March 17, 2004 fall. Dr. Evans also agreed with Dr. Thatcher, however, in that once the original injury resolved it was possible for new activities to aggravate the underlying condition and result in the same symptoms returning.
27. As was the case with Dr. Thatcher, Dr. Evans testified that Claimant never exhibited any signs of symptom magnification or somatization.

28. At Defendant's request Dr. Michael Kenosh, a board-certified specialist in physical and rehabilitation medicine, performed a medical records review and issued a report on April 27, 2006, supplemented by letter on August 16, 2007. Dr. Kenosh also testified at the formal hearing. In Dr. Kenosh' opinion, Claimant suffered a minor muscular sprain/strain resulting in little trauma in the March 17, 2004 fall. He characterized Claimant's subsequent return of symptoms as "odd," stating that "it would be highly unusual for a musculoskeletal strain/sprain to entirely resolve and then recur four months later." For that reason, Dr. Kenosh did not believe Claimant's current symptoms were related to the original work injury. Rather, he theorized that Claimant might be exhibiting "illness behavior," either symptom magnification and/or somatization. Dr. Kenosh testified that Claimant's current symptoms were fairly common for people in his age group and that therefore there was no basis for relating the 2006 MRI findings of disc protrusion at T8-9 to the March 17, 2004 injury. Last, Dr. Kenosh stated that a soft tissue injury such as the one he believed Claimant suffered in the March 2004 fall would not predispose him to further injury, inflammation or herniation.
29. Dr. Kenosh testified that the medical treatment Claimant received until June 2004 was reasonably necessary as a consequence of the March 17, 2004 injury. In his opinion, however, any treatment after that point was not causally related. Dr. Kenosh did not address the question of permanent impairment, either by commenting on Dr. Thatcher's 7% rating or by rendering his own.
30. None of the medical experts testified as to the extent of Claimant's disability from working, if any, from the time of the original injury forward. Nor do the medical records reflect any finding of either temporary total or temporary partial disability.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she 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). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. At issue in the current claim is whether Claimant's current neck and back symptoms are causally related to his March 17, 2004 work injury. 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). Claimant produced some expert medical testimony supporting a causal relationship, while Defendant's medical expert testified that causation could not reasonably be established.

3. When considering conflicting expert medical opinions, the Commissioner traditionally uses a five-part test to determine which is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).
4. Based primarily on the third factor noted above, I find that Dr. Kenosh's opinion is the most credible. Drs. Thatcher and Evans' opinions suffer from a lack of objective support for two reasons. First, they fail to account for the similarity between the episodes of back and neck pain Claimant experienced at times in the years prior to the March 17, 2004 work injury and the episodes he experienced thereafter. Why should the episode of back pain that Claimant experienced while getting out of bed on October 12, 2005 be causally related to the March 2004 injury when he had had a similar episode of back pain occurring in January 2002 with no specific trauma? I can find no objective basis for concluding, as Drs. Thatcher and Evans apparently did, that despite Claimant's prior history of episodic back and neck pain, all incidences after March 17, 2004 necessarily must be related to the work injury.
5. Second, although Drs. Thatcher and Evans initially testified that Claimant's current symptoms were all causally related to his original injury, both admitted on cross-examination that in fact there was no way to know whether Claimant's subsequent activities – his job at Northeast Food Coop, for example – might have caused an aggravation or new injury. With this admission in mind, I find their conclusion that no such aggravation or new injury occurred too speculative to be credible.
6. I also am persuaded by the fact that virtually every medical provider who treated or evaluated Claimant diagnosed his March 17, 2004 injury as a minor muscle strain or sprain that should have resolved within a relatively short period of time (as apparently it did, according to the June 2004 medical reports). To attribute all of the episodes of pain that came later to that injury, even those that appear to have followed increased activity and occurred after months and months with no intervening treatment, is too speculative a conclusion for me to accept.
7. Even having accepted Dr. Kenosh's opinion, however, I still find that Claimant is entitled to permanency benefits in accordance with Dr. Thatcher's 7% whole person impairment rating. Dr. Kenosh acknowledged that Claimant suffered a cervical injury in the March 17, 2004 fall and did not address whether he might have suffered some permanent impairment as a result. Defendant did not present any other evidence to contradict Dr. Thatcher's conclusion as to permanency. I find that Dr. Thatcher's opinion as to permanency was reasonably supported.

8. Claimant has made a request under 21 V.S.A. §678(a) and Workers' Compensation Rule 10.0000 for costs totaling \$2,449.17 and attorney's fees totaling \$3,757.50. An award of costs to a prevailing claimant is mandatory under 21 V.S.A. §678. However, Claimant has failed to submit sufficient evidence from which to determine whether these costs are appropriate and therefore I cannot award them at this time. Claimant shall have two weeks from the date of this decision to submit such evidence.
9. As for attorney's fees, these are discretionary depending in part on the extent to which the claimant has prevailed. 21 V.S.A. §678; *J.R. v. Benchmark Assisted Living*, Opinion No. 46A-05WC (Nov. 23, 2005). Here, as Claimant prevailed only on his claim for permanent partial disability benefits and not on his claim for temporary disability or medical benefits, I find that his attorney's fees should be reduced by 50%, resulting in an award of \$1,878.75.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to pay:

1. Permanent partial disability benefits in accordance with Dr. Thatcher's 7% impairment rating, plus interest under 21 V.S.A. §664 computed from the date such rating was rendered;
2. Costs in an amount to be determined based on Claimant's submission within two weeks from the date of this decision; and
3. Attorney's fees in the amount of \$1,878.75.

DATED at Montpelier, Vermont this 15th day of February 2008.

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. §§670, 672.