

J. C. v. Experian Information Solutions

(June 5, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

J. C.

Opinion No. 23-08WC

v.

By: Phyllis Severance Phillips, Esq.
Hearing Officer

Experian Information
Solutions

For: Patricia Moulton Powden,
Commissioner

State File No. U-04233

OPINION AND ORDER

APPEARANCES:

Michael Green, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUE PRESENTED:

Whether any or all of the injuries Claimant suffered as a result of her idiopathic fall at work on September 15, 2003 is compensable.

EXHIBITS:

Joint Medical Exhibit

Claimant's Exhibits:

Claimant's Exhibit 1: Police report
Claimant's Exhibit 2: Ambulance report
Claimant's Exhibit 3: Emergency Department report
Claimant's Exhibit 4: Andrew Hock recorded statement
Claimant's Exhibit 5: Photographs
Claimant's Exhibit 6: First Report of Injury
Claimant's Exhibit 7: *Curriculum Vitae* of Mark Bucksbaum, M.D.
Claimant's Exhibit 8: Medical textbook photographs of skull
Claimant's Exhibit 9: Dr. Benda handwritten notes
Claimant's Exhibit 10: Dr. Donaldson report, December 17, 2004
Claimant's Exhibit 11: Dr. Donaldson report, May 16, 2005
Claimant's Exhibit 12: University Disability Consortium transaction list

Defendant's Exhibits:

Defendant's Exhibit A: Kevin Barkey recorded statement

Defendant's Exhibit B: Biomechanical Analysis Report, December 14, 2007

Defendant's Exhibit C: *Curriculum Vitae* of Brian Benda, Ph.D.

CLAIM:

Workers' compensation benefits causally related to all compensable injuries

Attorney's fees and costs under 21 V.S.A. §678

FINDINGS OF FACT:

1. Claimant began working for Defendant's predecessor, Metromail, in 1984. Defendant operates a bulk mail facility containing all of the machines necessary to print, cut, fold, insert and mail a high volume of so-called "junk" mail. Initially Claimant worked as a machine operator, and then later trained as a mechanic. Over the years, she was promoted through the ranks to Senior Mechanic. Her job involved setting up and maintaining various machines throughout the plant.
2. On September 15, 2003 Claimant began her shift at 3:00 PM. Shortly before 11:00 PM, Kevin Barkey, a co-worker, observed her walking down the center aisle towards his machine. Mr. Barkey testified that as Claimant approached him, she seemed to be shaking and moving somewhat oddly. There was music playing, and Mr. Barkey thought Claimant might be dancing. Mr. Barkey testified that when Claimant was about 10 feet away from him she suddenly fell. Mr. Barkey stated that Claimant made no attempt to break her fall or otherwise protect herself. In his words, "she went down like a ton of bricks."
3. Immediately to Claimant's right as she fell was an unwinder machine. The unwinder machine is comprised of a steel mechanism with a long metal spindle for holding large rolls of paper. Large bolts at either end of the spindle hold the rolls in place and allow for the spindle's height to be adjusted up or down. The machine is supported by tube metal bars that form a rectangular base approximately 4 inches from the floor.
4. Mr. Barkey was the only one to witness Claimant's fall. He clearly recalled seeing Claimant strike the back of her head on one of the bars at the base of the machine as she fell. Mr. Barkey surmised that Claimant hit the metal bolt at the end of the spindle as well, but admitted that he did not actually see her do so.
5. Mr. Barkey ran to Claimant's side as soon as she fell. He observed that she was bleeding profusely from a large wound on the back of her head. Mr. Barkey testified that he cradled Claimant's head and moved her away from the machine.

6. Mr. Barkey's recollection as to what happened next is somewhat inconsistent. In his statement to an investigating police officer on the day after the accident occurred he reported that when he went to Claimant's assistance her jaw was locked shut and she was biting her tongue. However, in the recorded statement taken by Defendant's adjuster approximately 2 weeks later, Mr. Barkey recalled that immediately after Claimant fell she was "smacking [her head] on the floor," and that he cradled her head with his hand because "she kept on banging her head" and he "didn't want her to bang it [on] the concrete floor no more." Mr. Barkey reiterated that testimony at the formal hearing, stating that when he arrived at her side Claimant was banging her head on the floor in the midst of what he perceived to be a convulsion or seizure.
7. Emergency medical technicians arrived on the scene at 11:03 PM. Their records indicate that Claimant was alert and oriented upon arrival but then began a grand mal seizure and was unresponsive thereafter. Claimant was transported to Rutland Regional Medical Center for evaluation and treatment.
8. Claimant was comatose for nearly two weeks after the September 15, 2003 fall. During her hospitalization she was diagnosed with the following injuries:
 - Head injury with intracranial bleeding and stroke;
 - Right subdural hematoma and intraparietal hemorrhage;
 - Left occipital scalp laceration;
 - Left basilar skull fracture;
 - Left shoulder dislocation;
 - Posterior lobe liver laceration; and
 - Rib fractures.

In addition, subsequent to her hospitalization Claimant was diagnosed with a seizure disorder and traumatic brain injury.

9. The medical professionals who have treated and/or evaluated Claimant since the September 15, 2003 fall disagree as to the cause of these various injuries, particularly as to which ones resulted from impacting the unwinder machine and which ones resulted solely from impacting the floor.¹ For her part, Claimant has no recollection whatsoever of either the moments immediately preceding her fall or of the fall itself. The only physical evidence of her fall is a large irregularly shaped scar on her left occipital scalp.

¹ The distinction has important legal ramifications. As discussed *infra* and in the Commissioner's *Ruling on Claimant's Motion for Partial Summary Judgment*, Opinion No. 30-07WC (October 23, 2007), only those injuries that are determined to have been caused, in whole or in part, by impacting the unwinder machine are compensable; those that resulted solely from impacting the floor are not.

10. Dr. Deirdre Donaldson, a neurologist, conducted a medical records review at Defendant's request in December 2004. Dr. Donaldson was unable to determine the precise mechanism of injury, but surmised from Claimant's occipital scalp laceration and skull fracture that she fell backwards. Dr. Donaldson further theorized that Claimant probably hit her head more than once. After reviewing the police investigation report and particularly Mr. Barkey's statement, Dr. Donaldson concluded that Claimant initially suffered a seizure and that the head injuries she sustained in the subsequent fall probably triggered further seizure activity, which in turn resulted in further head injuries.
11. In January 2005 Claimant began treating with Dr. Mark Bucksbaum, a board-certified psychiatrist. In addition to his medical credentials, Dr. Bucksbaum also holds a degree in biomedical engineering. In this discipline he has become familiar with the methodology for analyzing the forces necessary to cause injuries to the body.
12. Having examined Claimant and reviewed all of her medical records as well as the police investigation report and witness statements, Dr. Bucksbaum reached the following conclusions as to the specific mechanism of Claimant's various injuries:
 - The left occipital scalp laceration was caused by Claimant's head impacting the metal bolt at the end of the unwinder machine's spindle;
 - The left basilar skull fracture was caused by Claimant's head impacting either the metal bolt or the metal bar that forms the unwinder machine's base, but definitely *not* by impacting the floor;
 - Similarly, the posterior lobe liver laceration was caused by impacting either the metal bolt or the metal bar at the base of the machine, but definitely *not* by impacting the floor;
 - The traumatic brain injury and seizure disorder were caused by the left basilar skull fracture, which as noted above was caused by impacting the unwinder machine, not the floor;
 - There is no way to know for sure whether the left shoulder dislocation and the rib fractures were caused by impacting some part of the unwinder machine or by impacting the floor, as either mechanism of injury is possible.
13. At Defendant's request, in August 2005 Claimant underwent an independent medical evaluation with a panel of physicians at University Disability Consortium. The panel included a neuropsychologist, an orthopedist and a neurologist, Dr. Brian Mercer. Dr. Mercer was the primary author of the panel's report and also testified at the formal hearing.

14. Dr. Mercer concluded that Claimant's left basilar skull fracture, left shoulder dislocation, traumatic brain injury and seizure disorder all were caused by impacting the floor, not the unwinder machine. Significantly, however, with the exception of his opinion as to the left shoulder injury, Dr. Mercer based all of his conclusions on the mistaken assumption that Claimant's scalp laceration was to the *right* side of her head, whereas in fact it was on the *left* side. In addition, in forming his opinions Dr. Mercer accepted as undisputed Mr. Barkey's recollection that Claimant struck her head multiple times on the floor after she fell. As noted above, however, Mr. Barkey's recollection in this regard has been somewhat inconsistent.
15. Dr. Brian Benda, a biomechanical engineer, also testified on Defendant's behalf. Dr. Benda has training in structural mechanics and holds a doctorate in medical engineering as well. He specializes in studying the human body's structural mechanics so as to determine the specific mechanism of accident-related injuries.
16. In conjunction with this claim Dr. Benda conducted a site inspection and viewed an unwinder machine. He also reviewed Claimant's medical records, the police investigation report and Mr. Barkey's various statements. Having done so, Dr. Benda reached the following conclusions as to the specific mechanism of Claimant's various injuries:
 - The occipital scalp laceration, which Dr. Benda mistakenly assumed was on the *right* side of Claimant's head, was caused by her impacting either the unwinder machine's metal bolt or the metal bar at its base;
 - The left basilar skull fracture, traumatic brain injury and seizure disorder all were caused by impacting a flat surface, either the metal bar at the base of the unwinder machine or the floor, it is impossible to tell which;
 - The left shoulder dislocation and rib fractures were caused by impacting the floor, not the unwinder machine; and
 - It is impossible to account for the posterior lobe liver laceration with any degree of certainty.

CONCLUSIONS OF LAW:

1. To establish a compensable claim under Vermont's workers' compensation law, a claimant must show both that the accident giving rise to his or her injury occurred "in the course of the employment" and that it "arose out of the employment." *Miller v. IBM*, 161 Vt. 213, 214 (1993); 21 V.S.A. §618.
2. An injury occurs in the course of employment "when it occurs within the period of time when the employee was on duty at a place where the employee was reasonably expected to be while fulfilling the duties of [the] employment contract." *Miller, supra* at 215, quoting *Marsigli Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95, 98 (1964).
3. An injury arises out of the employment "if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where [claimant] was injured." *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993), quoting 1 Larson, *Workers' Compensation Law* §6.50 (1990) (emphasis in original). This so-called "positional risk" analysis lays responsibility on an employer when an employee's injury would not have occurred "but for" the employment and the worker's position at work. *Id.*
4. Putting these two prongs of the compensability test together, the "in the course of" requirement establishes a *time and place* connection between the injury and the employment, while the "arising out of" requirement establishes a *causal* connection between the injury and the employment. See *Spinks v. Ecowater Systems*, WC 04-217 (Minn. Work.Comp.Ct.App., January 21, 2005). Both connections are necessary for a claim to be compensable.
5. There is no dispute in the current claim as to the "in the course of" requirement to establish compensability. Claimant's injuries occurred while she was at Defendant's work place, performing the job duties she was hired to do at the time she was supposed to be doing them.
6. The dispute here concerns the "arising out of" component, and it is driven by the fact that Claimant's fall itself was not caused by her work, but rather by a medical event that was purely personal to her, a so-called idiopathic fall.² Professor Larson has described the requirements for finding such injuries compensable as follows:

The basic rule, on which there is now general agreement, is that the effects of [an idiopathic] fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle.

1 Larson, *Workers' Compensation Law* §9.01[1].

² Although the medical cause of the event that led to Claimant's idiopathic fall remains unclear, there is no doubt that the precipitating event that led to it was purely personal and not work-related at all.

7. As to the more controversial question raised by the current claim, whether the effects of an idiopathic fall to a level floor should be deemed to arise out of the employment, the Commissioner previously determined that they should not. *Ruling on Claimant's Motion for Partial Summary Judgment*, Opinion No. 30-07WC (October 23, 2007). Vermont thus stands in line with the majority of jurisdictions that have considered this issue. *Larson, supra* at §9.01[4][a] and cases cited therein.
8. The question to be decided in this claim, therefore, is which of Claimant's injuries were caused by impacting with the unwinder machine and which were caused solely by impacting the floor. The former are compensable, the latter are not.
9. The medical experts disagree on this question, and therefore it is necessary to determine which of their opinions is the most credible. When faced with conflicting expert medical opinions the Department 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).
10. With specific emphasis on the third factor noted above – the clarity, thoroughness and objective support underlying the opinion – I find that Dr. Bucksbaum's opinion is the most credible here. I am particularly swayed by the fact that Dr. Bucksbaum's causation theory adequately accounted for the only piece of physical evidence – the scar on Claimant's *left* occipital scalp. While the experts can only theorize as to exactly how Claimant fell and which body parts impacted first with the machine as opposed to the floor, the scar is undeniable, and must be the starting point for any credible causation analysis. Yet much of both Dr. Mercer's and Dr. Benda's analyses flowed from their mistaken assumption that Claimant's scar was on her *right* occipital scalp. Their subsequent conclusions were tainted by the error and ultimately are unpersuasive.
11. In keeping with Dr. Bucksbaum's opinion, therefore, I conclude that Claimant's left occipital scalp laceration, left basilar skull fracture, posterior lobe liver laceration, traumatic brain injury and seizure disorder all were caused by her impacting the unwinder machine as she fell, and therefore are compensable.
12. As to the left shoulder dislocation and rib fractures, Claimant argues that they too must be deemed compensable. Claimant cites to the Commissioner's *Ruling on Claimant's Motion for Partial Summary Judgment, supra*, in support of her position that if any of Claimant's injuries are determined to have been caused by impacting the unwinder machine as opposed to the floor, then all must be deemed compensable. This is untrue, and represents both a misreading of the Commissioner's prior ruling and a misinterpretation of the statutory requirements for determining compensability.

13. Vermont's workers' compensation statute entitles an employee to recover workers' compensation benefits when he or she "receives a *personal injury* by accident arising out of and in the course of employment." 21 V.S.A. §618 (emphasis added). This compensability standard must be met as to every injury that an employee sustains in a work-related accident. There is no basis for piggybacking a non-work-related injury onto a work-related one solely because both occurred at the same time.
14. With that in mind, and again with reference to Dr. Bucksbaum's opinion as to causation, I find that Claimant has failed to sustain her burden of proving that her left shoulder dislocation and rib fracture resulted from impacting the unwinder machine as opposed to the floor. Dr. Bucksbaum theorized that either mechanism of injury was plausible. More certainty is required in order to establish that these injuries arose out of Claimant's employment. *Burton v. Holden and Martin Lumber Co.*, 112 Vt. 17 (1941). I find, therefore, that they are not compensable.
15. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$3,681.69 and attorney's fees totaling \$8,698.50. An award of costs to a prevailing claimant is mandatory under the statute. As for attorney's fees, these lie within the Commissioner's discretion. Here, although Claimant was not able to establish the compensability of her left shoulder injury and rib fracture, she did prevail as to the compensability of her other injuries. It would be impossible to separate out the costs and fees associated with proving the causation of the compensable injuries from those associated with the non-compensable ones, particularly because the same expert witnesses testified as to both. Under these circumstances, I find it appropriate to award Claimant her full costs and attorney's fees.

ORDER:

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

1. All workers' compensation benefits associated with Claimant's left occipital scalp laceration, left basilar skull fracture, posterior lobe liver laceration, traumatic brain injury and seizure disorder; and
2. Costs of \$3,681.69 and attorney's fees of \$8,698.50.

Claimant's claim for workers' compensation benefits causally related to her left shoulder dislocation and rib fracture is hereby DENIED.

DATED at Montpelier, Vermont this 5th day of June 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.