

Craig Schopman v. C & S Wholesale Grocers, Inc.

(January 7, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Craig Schopman

Opinion No. 01-09WC

v.

By: Phyllis G. Phillips, Esq.
Hearing Officer

C & S Wholesale Grocers, Inc.

For: Patricia Moulton Powden
Commissioner

State File Nos. W-58473 and Z-50580

OPINION AND ORDER

Hearing held in Montpelier on October 9, 2008

Record closed on October 27, 2008

APPEARANCES:

Richard Perra, Esq., for Claimant

Corinna Schafner-Fegard, Esq., for Defendant

ISSUES PRESENTED:

1. Are the osteoarthritis and associated loose bodies in Claimant's right elbow conditions that were either caused or aggravated by his work for Defendant?
2. If so, to what workers' compensation benefits is Claimant entitled?

EXHIBITS:

Joint Exhibit I: Medical records

Defendant's Exhibit A: "Order Selector" job description

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642

Medical benefits pursuant to 21 V.S.A. §640

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

FINDINGS OF FACT:

1. At all times relevant to these proceedings Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all forms contained in the Department's files relating to this claim.
3. Claimant has worked as a selector in Defendant's grocery warehouse since 1994. His job entails filling customer orders by moving up and down the warehouse aisles on a motorized pallet jack and picking cases of goods off the shelves. The job is fast-paced and requires strenuous physical labor. As selectors are paid based on how many cases they select per shift, there is a premium placed on getting the job done as quickly as possible.
4. Prior to March 1995 Claimant was able to pick anywhere from 2,200 to 3,000 cases per ten-hour shift. Depending on where the cases were located in their storage slots, Claimant might have to reach in with his left arm to grab a case, hoist himself up onto one pallet to access another pallet, or use both his arms to pull a case forward. Claimant was left-handed, but because of the way the cases were stored all of these activities required him frequently to load, extend and/or rotate his right arm as well.
5. On the evening of March 1, 2005 Claimant felt pain in his right elbow after shoveling two walkways at his home. Claimant was unable to straighten his arm the next day, and the pain was severe enough to affect his ability to work. Two days later, on March 3, 2005 Claimant presented to his primary care physician, Dr. Linder, who determined that he was unable to work due to right elbow trauma as of March 4, 2005.
6. After x-rays and other diagnostic studies revealed the presence of degenerative arthritis associated with loose bodies in Claimant's right elbow, Dr. Linder referred him to Dr. Chard for surgical consideration. Later, Dr. Chard referred Claimant to Dr. Vranos, who performed arthroscopic surgery to remove the loose bodies on April 25, 2005.
7. Degenerative arthritis is an on-going process involving the breakdown of the cartilage between two joints. As the disease progresses loose pieces of bone or cartilage can flake off and become lodged between the joint surfaces, causing mechanical pain or catching.
8. Dr. Linder's, Dr. Chard's and Dr. Vranos' medical records all described Claimant's use of his right arm in the course of his selector job as relevant to the right elbow symptoms he exhibited. In particular, all noted that Claimant frequently had to rest the weight of his upper body on his right elbow in order to access cases with his left arm. In addition, all of the doctors reported that Claimant had been experiencing right elbow pain at least intermittently for the past several years.

9. In contrast, none of the medical records referred directly to Claimant's snow shoveling activities on March 1, 2005 in any way. Dr. Linder's March 3, 2005 office note reflects only that Claimant "has had pain [in his right elbow] in distant past which is noticeably worse in past 36 hours," a possible temporal reference to snow shoveling on the evening of March 1st. In addition, Dr. Chard's March 16, 2005 note states that Claimant had a "recurrence of [right elbow] symptoms" on March 2, 2005 but that unlike previous episodes this time the pain did not "go away."
10. Claimant recovered well from the April 2005 surgery and returned to work after only a brief period of temporary disability. Dr. Vranos cautioned him, however, that it was possible that he would experience "recurrent loose bodies" again in the future. Later, in September 2005 Dr. Vranos determined that Claimant had reached an end medical result and rated him with a 1% whole person permanent impairment referable to his right elbow injury.
11. Defendant did not accept Claimant's injury as work-related, presumably because his symptoms first became disabling after the March 1, 2005 snow shoveling incident rather than at work. Instead, it paid workers' compensation benefits voluntarily, without prejudice to its right to contest compensability in the future.
12. After his April 2005 surgery, Claimant altered the way in which he performed his selector job so as to minimize the strain on his right elbow. In particular, he no longer leaned into slots with his upper body resting on his right elbow, but rather found other ways to access cases with his left arm. Claimant testified that he did so because his doctors had advised him that that was what had caused his right elbow problems. At least in part because of this change in the way he selected cases, Claimant's productivity decreased, from an average of about 2,400 cases per shift before March 2005 to an average of 1,800 cases per shift thereafter.
13. In January 2007 Claimant returned to Dr. Vranos, again complaining of pain in his right elbow and occasional catching with extension as well. Diagnostic studies confirmed multiple loose bodies, which Dr. Vranos surgically removed on April 4, 2008.
14. This time, Defendant denied compensability. With an independent medical evaluation conducted by Dr. William Boucher as support, it argued that neither the right elbow symptoms Claimant had experienced in 2005 nor those he currently was experiencing were causally related to his work activities.
15. Dr. Boucher is a specialist in occupational medicine. Although he has never observed Claimant at work, he is familiar with the warehouse selector job generally, having observed the job tasks involved being performed by employees of other grocery warehousing employers.

16. According to Dr. Boucher, the degenerative arthritis in Claimant's right elbow could only have been caused by some direct trauma in his distant past, probably involving a severe but subtle twisting injury. In his opinion, neither frequent bending and extending at the elbow nor simple lifting would cause the kind of localized arthritis that Claimant exhibited. Thus, Dr. Boucher concluded, Claimant's work for Defendant did not cause the degenerative arthritis with which he presented in March 2005.
17. In Dr. Boucher's opinion, furthermore, once the degenerative arthritis process begins, cartilage continues to deteriorate and loose bodies flake off regardless of either activity or body mechanics. Dr. Boucher maintained, therefore, that there was no causal relationship between Claimant's work for Defendant and either of the surgeries he underwent to remove loose bodies in 2005 and 2007.
18. Dr. Vranos disagreed. In his opinion, Claimant's degenerative arthritis most likely was caused by his work for Defendant. Dr. Vranos testified that when he first examined Claimant's elbow in March 2005, Claimant already had been working as a selector for ten years. His job activities in that position, particularly the frequent loading, extending and rotating he did with his right elbow, likely produced what Dr. Vranos characterized as a "fairly commonly described" pattern of overuse. This pattern of work-related overuse caused the underlying disease to develop and later the loose bodies to flake off. According to Dr. Vranos, therefore, both the 2005 and 2007 surgeries were causally related to Claimant's work.
19. Dr. Vranos also testified that although degenerative arthritis progresses regardless of activity, the more strenuous the work that a person with that condition performs, the greater the risk that loose bodies will continue to flake off. In Claimant's case, therefore, Dr. Vranos contended that by returning to work after the April 2005 surgery in the same job that he had had previously, Claimant increased the risk that he would encounter the same problem again.
20. Claimant testified that he could not recall any direct trauma to his right elbow in his distant past such as that supposed by Dr. Boucher.

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. The key issue in this claim is one of medical causation. Claimant's treating physician, Dr. Vranos, ascribes both Claimant's degenerative arthritis and the loose bodies it produced in 2005 and 2007 to his work as a selector for Defendant. In contrast, Defendant's expert, Dr. Boucher, attributed Claimant's degenerative arthritis to some unspecified direct trauma in his remote past, and the loose bodies to the progression of that disease unrelated to any particular activity.
3. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion 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. I note at the outset that given Dr. Boucher's opinion, Defendant's argument that Claimant's 2005 injury was not compensable because it occurred after snow shoveling at home is somewhat of a red herring. On its face, Dr. Boucher's testimony that the progression of degenerative arthritis in Claimant's elbow was unrelated to any particular activity applies equally to the snow shoveling he did at home as it does to the job tasks he did at work. Lacking even its own medical expert's support, therefore, Defendant's attempt to pin the cause of Claimant's 2005 injury on his snow shoveling necessarily must fail.
5. As to the cause of the degenerative arthritis in Claimant's elbow, I find Dr. Vranos' opinion to be the most credible. It relies on a "fairly commonly described" pattern of overuse to account for the development of the disease. In doing so, it assimilates the long-standing history of at least intermittent elbow pain that Claimant described to his doctors with the strenuous work he had been doing for several years prior to 2005.
6. In contrast, Dr. Boucher's opinion relies on some supposed injury to Claimant's elbow at some point in his distant past, an event for which there is no evidence and of which Claimant has no memory. I cannot credit such a speculative explanation, particularly when a far more concrete one is readily at hand.
7. I also find Dr. Vranos' opinion to be more credible than Dr. Boucher's as to the cause of the loose bodies that became symptomatic in both 2005 and 2007. Although both experts opined that degenerative arthritis progresses regardless of activity, Dr. Vranos testified that continuing to work at the same strenuous job that had caused the initial problem probably increased the risk that Claimant would develop more problems in the future. I find that in fact, that is what occurred.
8. I conclude, therefore, that both the initial development of degenerative arthritis in Claimant's right elbow and the occurrence of loose bodies in 2005 and 2007 most likely were causally related to his work for Defendant. Both injuries are compensable.

9. As Defendant voluntarily paid workers' compensation benefits after Claimant's 2005 injury, it appears Claimant is due nothing more for that occurrence. As for the 2007 injury, the record does not establish for how long Claimant was temporarily disabled or whether he has incurred additional permanency. Presumably the parties can resolve these issues without resort to further formal proceedings.
10. Claimant having prevailed in his claim, he is entitled to an award of costs under 21 V.S.A. §678(a). As for attorney's fees, these lie within the Commissioner's discretion, and I find that they are appropriate here. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this decision to submit his claim for both costs and attorney's fees.

ORDER:

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

1. Temporary disability benefits causally related to Claimant's compensable right elbow injuries, in amounts to be proven;
2. Medical benefits covering all reasonably necessary services and supplies causally related to treatment of Claimant's compensable right elbow injuries;
3. Permanency benefits causally related to Claimant's compensable right elbow injuries, in amounts to be proven;
4. Interest on the above amounts in accordance with 21 V.S.A. §664; and
5. Costs and attorney's fees as appropriate, in accordance with 21 V.S.A. §678 and Workers' Compensation Rule 10.

DATED at Montpelier, Vermont this 7th day of January 2009.

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.