Stefan Kurant v. Sugarbush Soaring Association, Inc. (May 4, 2010)

STATE OF VERMONT
DEPARTMENT OF LABOR

Stefan Kurant

v.

Sugarbush Soaring Association, Inc.

Opinion No. 17-10WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. M-08732

OPINION AND ORDER

Hearing held in Montpelier, Vermont on February 11, 2010
Record closed on March 1, 2010

APPEARANCES:

Patricia Turley, Esq., for Claimant
Keith Kasper, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant's bilateral shoulder condition causally related to his October 5, 1998 work injury?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum vitae*, Sikhar Banerjee, M.D.
Claimant's Exhibit 2: Dr. Banerjee deposition, December 2, 2009

Defendant's Exhibit A: *Curriculum vitae*, Verne Backus, M.D., M.P.H., C.I.M.E.
Defendant's Exhibit B: Dr. Backus deposition, January 6, 2010

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640
Costs and attorney fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

Claimant's 1998 Compensable Injury

3. On October 5, 1998 Claimant was seriously injured when the glider plane he was piloting crashed. Claimant suffered multiple injuries, including a burst fracture in his thoracolumbar spine, a traumatic brain injury, bilateral ankle fractures and trauma to his knees.

4. Defendant initially disputed the compensability of Claimant's injury on the grounds that he was not an employee. After a formal hearing on the merits, Claimant's claim was determined to be compensable. *Kurant v. Sugarbush Soaring Association*, Opinion No. 10-01WC (April 18, 2001). Subsequently the Department approved the parties' proposed Form 14 Settlement Agreement, which resolved Claimant's entitlement to indemnity benefits causally related to his injury.

5. Claimant has recovered remarkably well from his injuries. He leads an independent and productive life and works from his home as a self-employed information technology specialist.

6. While Claimant suffered extensive injuries to his lower extremities in the 1998 accident, aside from a fractured left hand his upper extremities were largely unaffected.

Claimant's Bilateral Shoulder Symptoms

7. Claimant testified that he first began experiencing pain in his shoulders in June 2007. He sought treatment with Dr. Rodeo, the orthopedic surgeon who had treated him in conjunction with his 1998 injuries. Dr. Rodeo first examined Claimant on July 30, 2007. His office note reflects that Claimant reported that he had been experiencing left shoulder pain for the past two months, but that he could not recall any one distinct precipitating injury. According to Dr. Rodeo's note, Claimant further reported that the pain occurred when he arose from a seated position by pushing down with his arms, and also when he engaged in overhead activities. Dr. Rodeo suspected a left shoulder impingement and/or rotator cuff tear. As treatment he administered a subacromial steroid injection.

8. Claimant testified that following Dr. Rodeo's appointment he began to think back on his activities to see if he might recall a precipitating incident for his shoulder pain. Ultimately he recalled a Sunday in early June when he lost his balance at home and saved himself from falling by bracing his arms against the wall. Claimant reported this incident to Dr. Rodeo, and to all subsequent medical providers as well, as the event that triggered his left shoulder pain.

9. Claimant testified that he has had balance issues ever since his 1998 accident. He rarely falls to the ground because he is able to catch himself with his arms and break his fall. Claimant estimated that these near-fall incidents have occurred approximately two times every month for the past eleven years.

10. Claimant underwent formal equilibrium testing in February 2009, which confirmed findings of both unsteadiness and decreased reaction time for recovery. Although Claimant's medical records prior to 2007 make no mention whatsoever of any ongoing balance issues, such problems are not uncommon among traumatic brain injury patients. Claimant's orthopedic injuries also may be a contributing factor.

11. Since initially complaining of pain and restricted motion in his left shoulder in July 2007, Claimant has treated for similar symptoms in his right shoulder as well. Claimant believes this is due to overcompensation for the pain in his left shoulder.

12. Claimant has metal hardware in his body from his prior surgeries, and therefore cannot undergo an MRI scan to aid in diagnosing his shoulder condition. His current treating orthopedic surgeon has recommended a shoulder arthroscopy, for both diagnostic and therapeutic purposes.

Expert Medical Opinions

13. At his attorney's referral, Claimant underwent an independent medical evaluation with Dr. Banerjee, a physiatrist, in October 2008. Dr. Banerjee described a scenario of "repeated" and "frequent" falls causally related to Claimant's balance deficits. He likened the resulting stress to Claimant's shoulders to that experienced by workers whose jobs require constant repetitive movements. The repetitive stress causes microtrauma, which gradually accumulates and becomes symptomatic.

14. In Dr. Banerjee's opinion, Claimant's shoulder symptoms are causally related to his frequent falls and near-falls, which in turn are causally related to the balance deficits that have resulted from the injuries he suffered in 1998. In this way, according to Dr. Banerjee, Claimant's shoulder symptoms are causally related to his 1998 work-related accident.

15. Dr. Banerjee admitted that he did not discern from Claimant exactly how often he experiences episodes requiring him to use his shoulders in order to catch himself from falling. In that respect, Dr. Banerjee made no attempt to quantify the extent of the microtrauma to which Claimant likely has been exposed under his theory of causation.

16. At Defendant's request, in July 2009 Claimant underwent an independent medical evaluation with Dr. Backus. Dr. Backus is board certified in occupational and environmental medicine, and also has completed a master's degree in public health. His training includes specific expertise in biostatistics, epidemiology and occupational injury causation.

17. Citing to a "mega-analysis" of the medical literature on causation of shoulder tendinitis, impingement and rotator cuff tears,[1] Dr. Backus determined that the proposition that Claimant's bilateral shoulder injuries were related to repeatedly catching himself from falling was "an interesting theory," but one that could not be sustained to a reasonable degree of medical certainty. More specifically, Dr. Backus testified that the frequency of these incidents – twice a month, according to Claimant – was insufficient either to qualify as "repetitive" or to cause a significant accumulation of microtrauma so as to result in injury.

18. According to the treatise cited by Dr. Backus, there is "some evidence" that highly repetitive work, either alone or in combination with other factors such as force and awkward posture, is an occupational risk factor for shoulder tendinitis, impingement and/or rotator cuff tears. At the same time, there is "strong evidence" of non-occupational risk factors for these injuries. For example, such "biopsychosocial" factors as high job stress, depression and/or previous shoulder or neck discomfort are associated with an increased incidence of tendinitis, impingement and/or rotator cuff tears. Obesity is also a risk factor. Last, there is "strong evidence" of age as a risk factor; according to one study cited in the treatise, among the factors with the highest predictive value for identifying a person likely to develop shoulder tendinitis in the near future is "age older than 40 years."[2]

19. Dr. Backus acknowledged that it certainly is possible for Claimant's suspected shoulder condition to have been caused by trauma. He cautioned against assuming that to be the case, however, as a non-occupational cause might be equally plausible. To do as Claimant did, therefore – assume a traumatic cause for his symptoms and then look back for a likely incident – often leads to an erroneous conclusion.

20. Dr. Backus was not asked to determine, to a reasonable degree of medical certainty, what the most likely cause of Claimant's shoulder condition was. He admitted that not all of the various risk factors identified in the medical literature "mega-analysis" cited above were present in Claimant's case. In Dr. Backus' experience, it is not always possible to identify the exact cause of an injury to the required degree of medical certainty. In his opinion, that is the case here.

[1] Melhorn, J. Mark, and Ackerman, William E., *AMA Guides to the Evaluation of Disease and Injury Causation*, chapter 9 at pp. 184-190.

[2] Claimant was approximately 45 years old when he first began experiencing pain and restricted motion in his shoulders.

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. 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).

3. Carefully weighing these factors in the current claim, I conclude that Dr. Banerjee's opinion is deficient, and that Dr. Backus' is the most persuasive. I accept Dr. Banerjee's conclusion that Claimant's repeated falls and near-falls most likely have resulted from balance deficits causally related to his 1998 work injury. However, I cannot find sufficient evidence to sustain Dr. Banerjee's ultimate conclusion – that as a result of those falls Claimant sustained repetitive microtrauma sufficient to cause his bilateral shoulder symptoms.

4. Dr. Banerjee conducted only a cursory inquiry into the nature, severity and frequency of Claimant's falls. He provided no supporting documentation for his assertion that a frequency averaging only two such incidents per month, even when sustained over a period of eleven years, would equate to the conditions faced by workers engaged in constant repetitive activities in the course of their jobs. The medical literature "mega-analysis" cited by Dr. Backus seems to indicate otherwise.

5. I acknowledge that a causation opinion such as Dr. Backus', which is based primarily on an analysis of the medical literature as to risk factors, is not always persuasive. Typically this type of analysis involves statistical associations across sample populations, not specific facts in individual cases. Even so, by either adding to or detracting from the significance of specific facts, statistical associations assist in the process of determining which causation theories are sustainable and which are not. *Compare Brace v. Jeffrey Wallace, DDS*, Opinion No. 28-09WC (July 22, 2009) *with Daignault v. State of Vermont, Economic Services Division*, Opinion No. 35-09WC (September 3, 2009).

6. Here, Dr. Banerjee's reliance on Claimant's history of "frequent" and "repeated" falls as support for his theory that repetitive microtrauma caused Claimant's shoulder injury is undermined both factually and statistically. The stress to his shoulders was in no sense "highly repetitive," nor did it involve any additional factors such as force or awkward posture.[3] There is no basis, therefore, for identifying the near-falls as any more likely a cause of Claimant's shoulder pain than, for example, his age.

7. I note, finally, that while it is somewhat unsatisfying for Dr. Backus to rule out Claimant's falls and near-falls as the most likely cause of his shoulder condition without at the same time conclusively ruling in an alternative cause, the burden was not on him to do so. Claimant bears the burden of proof as to causation, and unless he does so to the required degree of medical certainty his claim must fail. *Burton v. Holden Lumber Co.*, 112 Vt. 17, 20 (1941). I conclude that he has not met his burden here.

8. As Claimant has not prevailed, he is not entitled to an award of costs or attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits causally related to his bilateral shoulder symptoms is hereby **DENIED**.

DATED at Montpelier, Vermont this 4th day of May 2010.

_____
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.

[3] In his proposed findings Claimant cites to one of the studies reviewed in the "mega-analysis" as support for his contention that the "awkward postures" to which he was subjected as a result of his falls and near-falls also contributed to create a significantly higher risk of shoulder injury. In fact, the two studies referred to both involved *sustained and prolonged* awkward postures of a type presumably not at issue here. *AMA Guides to the Evaluation of Disease and Injury Causation*, *supra* at p. 188.