

Steven Matheny v. Best Foods Baking Company

(July 19, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Steven Matheny

Opinion No. 18-11WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

Best Food Baking Company

For: Anne M. Noonan
Commissioner

State File No. R-02092

OPINION AND ORDER

Hearing held in Montpelier, Vermont on April 27, 2011

Record closed on June 10, 2011

APPEARANCES:

Kevin Brown Esq., for Claimant

Robert Mabey, Esq., for Defendant

ISSUE:

Is Claimant's right shoulder injury causally related to his March 1, 2000 work injury?

EXHIBITS

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Dr. Davignon report, March 8, 2008

Defendant's Exhibit A: Physical therapy evaluation, December 31, 2001
Defendant's Exhibit B: Dr. Davignon permanency evaluation, August 20, 2002
Defendant's Exhibit C: Functional Capacity Evaluation, February 5, 2003
Defendant's Exhibit D: Functional Capacity Evaluation, January 30, 2004
Defendant's Exhibit E: Dr. Knorpp *curriculum vitae*
Defendant's Exhibit F: Dr. Knorpp report, April 3, 2007
Defendant's Exhibit G: Dr. Ziegelman records, March 2003-December 2004
Defendant's Exhibit H: Physical therapy and Dr. Abate office notes, April-July 2005
Defendant's Exhibit I: Physical therapy evaluation, February 22, 2006
Defendant's Exhibit J: Dr. Ziegelman deposition, April 13, 2011

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

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

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 Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim. Judicial notice also is taken of the Commissioner's prior decision in this claim, *Methany v. Velan Valve and Bouyea-Fassetts*, Opinion No. 41-99WC (September 21, 1999).

Claimant's Previous Compensable Injuries

3. In early 1994 Claimant injured his lower back while employed for Velan Valve. He was diagnosed with an acute lumbar muscle strain with radiculitis. The injury was deemed compensable and Velan Valve paid workers' compensation benefits accordingly.
4. In April 1997 Claimant reinjured his back while working for Defendant's predecessor, Bouyea-Fassetts. Following a formal hearing, the Commissioner determined that the injury was an aggravation, and ordered Defendant to pay workers' compensation benefits.
5. On March 1, 2000, while still employed by Defendant, Claimant again reinjured his lower back when he slipped in some sugar water. Defendant accepted the injury as compensable.

Claimant's December 2000 Injury

6. As a result of his March 2000 injury Claimant suffered from radicular symptoms in his left leg, including weakness. On December 8, 2000 Claimant's left leg gave out while he was carrying two oscillating fans to a storage shed at his home. Claimant then fell forward, still holding the fans. He hit his nose on a table and snapped his head back. His left arm caught on a lawn mower and his right arm struck shelves.
7. Immediately after falling, Claimant went to the Fletcher Allen Health Care emergency room for treatment. The emergency room physician's notes reflect that Claimant reported moderate neck stiffness and muscle pain "in his shoulders."

8. On December 11, 2000 Claimant went to see his primary care physician, Dr. Ziegelman, for the symptoms resulting from his fall three days earlier. Dr. Ziegelman's office note reflects that Claimant complained of left shoulder pain, but does not mention any complaints at all as to the right shoulder.
9. In August 2001, Dr. Ziegelman referred Claimant to Dr. Abate, an orthopedic surgeon, for treatment of his increasingly painful left shoulder. At his first visit, Dr. Abate examined both of Claimant's shoulders. Claimant credibly testified that he told Dr. Abate from the very beginning that he had injured both his left and his right shoulder in the December 2000 fall, and that both had been causing him pain ever since.
10. Dr. Abate diagnosed Claimant with both labral and rotator cuff tears in his left shoulder, as well as subacromial impingement and arthritis in the joint. Claimant underwent surgical repair on December 6, 2001. While his left shoulder healed from this surgery Claimant had to rely solely upon his right arm to perform all activities of daily living.
11. In the course of the December 2001 left shoulder surgery Dr. Abate also performed a distal clavicle excision. The purpose of this procedure was to address the pre-existing arthritis in the joint, thus reducing the risk of continued pain and enhancing the possibility of a successful surgical outcome.
12. Defendant accepted the December 2000 fall as causally related to Claimant's compensable March 2000 work injury and paid workers' compensation benefits accordingly. These included permanency benefits for a 12% whole person impairment referable to Claimant's left shoulder injury.
13. In February 2003 Defendant's bakery closed and Claimant was laid off. Soon thereafter, he was offered a job in Defendant's shipping department. Prior to taking this job, Claimant underwent a functional capacity evaluation. The evaluation assessed Claimant with a medium duty work capacity and concluded that he could safely perform the lifting required of this assignment.
14. The functional capacity evaluation did not indicate that Claimant complained of any right shoulder pain during testing. Claimant credibly testified that he did experience right shoulder pain at the time, but did not mention it because he needed the job to support his family financially. As he warmed up, furthermore, the exercises became easier to perform.
15. Claimant took the shipping department assignment. He worked long hours and the process of loading dollies of baked goods required much overhead lifting. Claimant credibly testified that as a result of these activities he experienced pain in both shoulders and in his back and leg as well. The pain became too much for him to manage, and so he left the job after only one month.
16. After leaving the shipping department job, Claimant started his own property management company. During the summer months he performed spring cleanups, weed whacking and lawn mowing, and in the winter he did snowplowing.

17. For the first week at this new business Claimant worked alone. Most of the activities were painful, however, and he could only sustain about four hours of work daily. Riding on the mower hurt his lower back, and pulling on the starter cord for the weed whacker hurt his right shoulder. Claimant hired some employees to assist him with the day-to-day maintenance work. He continued to do some physical work alongside them, but would stop when he had “had enough.”
18. Aside from the initial emergency room record, the medical records do not indicate that Claimant either complained of or sought treatment for right shoulder pain between December 2000 and January 2005.
19. In January 2005 Claimant returned to Dr. Abate, seeking treatment for his right shoulder pain. Diagnostic imaging revealed extensive labral tearing, acromioclavicular joint arthritis, impingement and a possible rotator cuff tear. To repair the damage, Claimant underwent two surgeries, the first in March 2005 and the second in December 2005.
20. As he had with the left shoulder, at the time he surgically repaired Claimant’s right shoulder in March 2005 Dr. Abate also performed a distal clavicle excision. He did so for the same reasons, that is, to reduce the risk of recurrent symptoms and to increase the likelihood of success.
21. Claimant was prescribed a course of physical therapy following the March 2005 surgery, but because he felt financial pressure to return to work as quickly as possible he did not complete it. Subsequently, he developed complications, including tightness in the joint, pain and restricted range of motion. Dr. Abate credibly testified that such complications sometimes develop regardless of whether a patient has been fully compliant with post-surgical protocols, and that they did so in Claimant’s case.
22. To address Claimant’s ongoing right shoulder symptoms, Dr. Abate performed a second surgery in December 2005, during which he removed scar tissue and cut the shoulder capsule so as to enhance Claimant’s range of motion.
23. Claimant continued to pay himself a salary following his right shoulder surgeries and therefore did not lose any wages during the period of his temporary total disability. He left Vermont in 2006 and moved to Utah. At some point during that year he applied for and was granted social security disability benefits.

Expert Medical Opinions

(a) Dr. Ziegelman

21. Dr. Ziegelman was Claimant’s primary care physician from 1997 to 2006. Dr. Ziegelman is board certified in internal medicine and refers to himself as a “generalist.”

22. Dr. Ziegelman testified credibly in his deposition that Claimant presented medical issues of a complex nature. He had suffered several back injuries that Dr. Ziegelman followed for pain management purposes. Chronic low back pain was Claimant's main complaint between April 2000 and July 2006.
23. In anticipation of Claimant first right shoulder surgery, Dr. Ziegelman performed a pre-operative physical in March 2005. His note of that visit describes Claimant's history as "right shoulder pain since a fall worse in last couple of years." Dr. Ziegelman recalled that there could have been "some mild presence" of right shoulder pain at prior office visits, though he acknowledged that his medical records did not mention any complaints.
24. As to the causal relationship between Claimant's December 2000 fall and his right shoulder injury, Dr. Ziegelman deferred to Dr. Abate as the specialist on that issue.

(b) Dr. Abate

25. At the time he was Claimant's treating physician Dr. Abate was a board certified orthopedic surgeon, specializing in sports medicine.¹ It was not unusual for him to see 35 to 40 patients in one day.
26. Dr. Abate admitted that his medical records do not reflect any complaints of right shoulder pain during the time he was treating Claimant's left shoulder injury in 2001. Nevertheless Dr. Abate testified that Claimant had complained of right shoulder pain for as long as Claimant was his patient. I find this testimony to be credible.
27. Dr. Abate credibly testified to the following:
 - He reviewed the emergency room record taken on the day of Claimant's December 2000 fall, which noted complaints of pain in both shoulders;
 - His treatment plan was to address Claimant's left shoulder injury first, because it was more symptomatic at the time;
 - It would have been ill-advised to perform surgery on both shoulders at the same time, because Claimant would need use of one upper extremity to perform activities of daily living while the other upper extremity healed;
 - His intent was to address Claimant's right shoulder injury after he had recuperated from his left shoulder surgery, if it was still problematic.

¹ At some point after Claimant's treatment was concluded, and for reasons wholly unrelated to this claim, Dr. Abate's license to practice medicine in the State of Vermont was revoked.

28. While surgically repairing Claimant's right shoulder in March 2005, Dr. Abate noted a small cyst along the inferior labrum. This finding was significant. A cyst is a collection of fluid that develops when the limb is pulled away from the bone. A cyst follows a tear, therefore. Because it takes some time for the fluid to collect and the cyst to develop, furthermore, a cyst also helps date a tear as being remote rather than recent.
29. In Dr. Abate's opinion, the presence of the cyst in Claimant's right shoulder confirmed, to a reasonable degree of medical certainty, both that it had been traumatically caused and that the trauma likely occurred at the time of his December 2000 fall. Because Claimant's left shoulder tear had been surgically corrected shortly after it occurred, there was no time for a cyst to have developed. Because the right shoulder tear was not repaired for some time, however, the cyst was able to form. I find this reasoning to be credible.
30. According to Dr. Abate, Claimant's right shoulder injury, though traumatic in origin, was further aggravated by overuse during the months following his recuperation from left shoulder surgery. I find this reasoning to be credible.

(c) Dr. Davignon

31. Dr. Davignon first examined Claimant in 2002, in the context of performing a permanency rating for his left shoulder injury. Dr. Davignon is board certified in occupational medicine, and also has training in orthopedics.
32. Dr. Davignon re-examined Claimant in March 2008. He also reviewed Claimant's medical records and took his medical history. Having done so, Dr. Davignon noted the following:
 - The mechanism of Claimant's right shoulder injury, i.e. falling with his upper extremities outstretched, was consistent with the pathology present there;
 - There likely also was a component of overuse to Claimant's right shoulder injury, as Claimant probably would have compensated for his inability to use his left shoulder by relying more on his right upper extremity instead;
 - It was possible that various other activities in which Claimant engaged, such as shoveling snow, pulling an engine starter cord, cleaning gutters, hanging clothes, vacuuming, painting or loading overhead trays, also might have contributed to his right shoulder injury, as these also would have involved compensatory overuse of his right upper extremity as a result of his left shoulder injury.

33. Dr. Davignon concurred with Dr. Abate's analysis of the cyst in Claimant's right shoulder as indicative of a traumatically caused tear. He also concurred with Dr. Abate's conclusion that Claimant's right shoulder injury was initially caused by the December 2000 fall and then aggravated by compensatory overuse during his recovery from left shoulder surgery. Last, Dr. Davignon concurred with Dr. Abate's decision to perform a distal clavicle excision at the time he surgically repaired Claimant's right shoulder. In Dr. Davignon's opinion, this procedure was both medically necessary and causally related to the December 2000 fall.
34. Dr. Davignon determined that Claimant had reached an end medical result for his right shoulder injury as of the date of his examination, March 12, 2008. He rated Claimant with an 11% whole person permanent impairment referable to that injury. This rating included consideration of the distal clavical excision. Were that element of Claimant's injury to be omitted, Claimant's whole person permanent impairment would be reduced to 5%.

(d) Dr. Knorpp

35. On Defendant's behalf, Dr. Knorpp conducted an independent medical evaluation of Claimant in April 2007. Dr. Knorpp is board certified in physical medicine and rehabilitation. In the course of his evaluation, he conducted a physical examination, took Claimant's medical history and reviewed his medical records. Of note, however, at the time he first rendered his opinion as to causation Dr. Knorpp had not reviewed the emergency room record taken on the day of Claimant's December 2000 fall.
36. Dr. Knorpp opined to a reasonable degree of medical certainty that Claimant's right shoulder injury was not causally related to his December 2000 fall. As support for this opinion, Dr. Knorpp noted the following:
 - Claimant's medical records do not note any complaints referable to the right shoulder until early 2005, some 4 years after the December 2000 fall;
 - Claimant was able to engage in both physical and occupational therapy after his left shoulder surgery, with no complaints of right shoulder pain noted;
 - Claimant underwent two functional capacity evaluations, one in 2003 and another in 2004, during which he engaged in activities such as overhead lifting that he would not have been able to manage had his right shoulder pathology existed at the time.

37. In Dr. Knorpp's opinion, to a reasonable degree of medical certainty Claimant's right shoulder injury was degenerative in nature. The combination of the natural aging process and physical activity can cause both the labrum and the rotator cuff to first fray, and then ultimately tear. In Claimant's case, therefore, the physical work he did in the context of his property management business, for example, pulling starter cords, painting and hammering nails overhead, all increased the likelihood that degeneration would lead to tearing.
38. Dr. Knorpp disagreed that the presence of a cyst in Claimant's right shoulder was either indicative of a traumatic origin to the pathology there or significant in terms of dating any trauma to the area.
39. I find that Dr. Knorpp's conclusions are undermined by the fact that he formed them without first reading the contemporaneous emergency room records of Claimant's December 2000 injury.

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).

Causation

2. The first disputed issue in this claim is one of causation. Claimant asserts that his right shoulder injuries resulted from his December 2000 fall. Defendant argues that the injuries are degenerative in nature and that they were either caused or aggravated by Claimant's work activities during the time he was engaged in his property management business.
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 (September 17, 2003).

4. Here, I conclude that the first factor favors Dr. Abate. Having performed two surgeries on Claimant's right shoulder, he was the only medical professional who had occasion to examine Claimant's shoulder pathology from the inside. His opinion carries great weight.
5. The second factor disfavors Dr. Knorpp. To the extent that his opinion was based in large part on the fact that Claimant never complained of any right shoulder pain prior to January 2005, his failure to review the December 8, 2000 emergency room record is particularly glaring.
6. I conclude that the third factor favors Dr. Abate. The presence of the cyst in Claimant's right shoulder provides objective support for his opinion that the pathology there likely resulted from earlier trauma, not gradual degeneration.
7. I conclude that the fourth and fifth factors favor Dr. Abate as well. Although all of the experts conducted comprehensive evaluations in the context of their areas of specialization, as the treating orthopedic surgeon Dr. Abate was the only one who was able to view the pathology in Claimant's right shoulder first hand.
8. I conclude that Claimant has sustained his burden of proving that his right shoulder injury was caused by his December 2000 fall and is therefore compensable.

Temporary Total Disability Benefits

9. Claimant seeks temporary total disability benefits for two separate time periods following each of his right shoulder surgeries – first, from March 31st to May 10th, 2005 and second, from December 21st, 2005 to May 10th, 2006. However, Claimant himself testified the he never lost any wages during those time periods because he continued to pay himself a salary from his property management business. A claimant cannot receive a wage and temporary total disability benefits at the same time. See, *J.K. v. Joe Knoff Illuminating*, Opinion No. 30-05WC (July 12, 2005) at Conclusion of Law No. 6; *Kiser v. National Life Insurance Co.*, Opinion No. 38-96WC (June 28, 1996) at Conclusion of Law No. 6.
10. I conclude that Claimant has failed to establish any wage loss, and therefore is not entitled to temporary total disability benefits for the periods he claims.

Permanent Partial Disability Benefits

11. As Dr. Knorpp did not believe that Claimant's right shoulder injury was causally related to his December 2000 injury, he did not conduct a permanent impairment rating. The only evidence of Claimant's permanent impairment, therefore, comes from Dr. Davignon.

12. Defendant argues that the distal clavicle excision was necessitated not by the December 2000 fall but rather by Claimant's preexisting arthritis. Therefore, it asserts, Claimant should not be awarded any permanency referable specifically to that condition. The credible evidence establishes, however, that the arthritis was asymptomatic prior to the injury. More importantly, both Dr. Abate and Dr. Davignon concurred that the distal clavicle excision was medically necessary in order to ensure a successful outcome to Claimant's right shoulder repair surgery.
13. I conclude that the distal clavicle excision was a necessary component of the surgery that resulted from Claimant's December 2000 fall. It is properly includable in the permanency rating referable to that injury, therefore. Thus I conclude that Dr. Davignon's 11% whole person impairment rating represents an appropriate determination of Claimant's right shoulder permanency.²

Compensation for Second Right Shoulder Surgery

14. Last, Defendant argues that it should not be obligated to pay the medical costs associated with Claimant's second right shoulder surgery. It asserts that Claimant did not actively participate in his medical care and in fact refused to pursue physical therapy that was designed to improve his condition. Had he done so, Defendant argues, the second surgery would not have been necessary.
15. Vermont's workers' compensation law has been interpreted to impose upon claimants the obligation to participate actively in their medical care, and precludes them from refusing unreasonably to pursue recommended treatment designed to improve their condition. *Hall v. Maple Grove Farms, Inc.*, Opinion No. 33-95 (August 8, 1995); *Hoyt v. Vermont State Hospital*, Opinion No. 3-94WC (February 22, 1994); *Luther v. General Electric*, Opinion No. 9-93WC (July 29, 1993).
16. Here, I conclude from Dr. Abate's credible testimony that the complications that led to Claimant's second surgery cannot be attributed to his failure to complete physical therapy, and likely would have occurred regardless. There is no basis, therefore, for denying Claimant's entitlement to compensation.
17. I conclude that Defendant is obligated to pay for the medical costs associated with Claimant's December 2005 right shoulder surgery.

² Of note, the agreed upon permanency for Claimant's left shoulder injury, which Defendant accepted and paid in 2002, totaled 12% whole person and included consideration of the distal clavicle excision on that side.

Costs and Attorney Fees

18. Claimant has requested an award of costs and attorney fees in an amount to be determined. Claimant is entitled to an award of only those costs that relate directly to the claims upon which he prevailed, *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), namely (a) causation; (b) permanent partial disability; and (c) medical benefits. As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. Subject to these limitations, Claimant shall have 30 days from the date of this opinion to submit evidence of his allowable costs and attorney fees.

ORDER:

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

1. Permanent partial disability benefits in accordance with an 11% whole person permanent impairment referable to the right shoulder;
2. Interest on the above amount beginning on March 12, 2008, calculated in accordance with 21 V.S.A. §664;
3. Medical benefits covering all reasonably necessary medical services and supplies causally related to treatment of Claimant's right shoulder injury, in accordance with 21 V.S.A. §640;
4. Costs and attorney fees in amounts to be determined in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 19th day of July 2011.

Anne M. Noonan
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.