

Denise Carr v. Copley Hospital

(February 23, 2012)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Denise Carr

Opinion No. 06-12WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Copley Hospital

For: Anne M. Noonan
Commissioner

State File No. AA-52236

OPINION AND ORDER

Hearing held in Montpelier, Vermont on November 4, 2011

Record closed on December 13, 2011

APPEARANCES:

Joseph Galanes, Esq., for Claimant
Jeffrey Spencer, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant's left shoulder impingement syndrome causally related to her August 22, 2008 compensable work injury?
2. If yes, to what workers' compensation benefits is she entitled?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Temporary partial disability benefit calculation, with supporting payroll records

Defendant's Exhibit A: *Curriculum vitae*, Jonathan Sobel, M.D.

CLAIM:

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

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

Temporary partial disability benefits pursuant to 21 V.S.A. §646

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 her 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.
3. Claimant worked in Defendant's housekeeping department for seven years. Her job duties included cleaning patients' rooms, making beds, washing walls and working in the laundry.
4. On August 21, 2008 Claimant reported an injury to her right thumb, hand and wrist, which had become swollen and sore as a result of her housekeeping duties. She was diagnosed with tendinitis in her thumb and arthritis in her wrist. Defendant accepted both of these injuries as compensable and began paying workers' compensation benefits accordingly.
5. After her symptoms failed to resolve with conservative treatment, Claimant was referred to Dr. Mullins, an orthopedic surgeon. In January 2009 she underwent surgery, both to reconstruct the ligament in her thumb and to address the arthritis in her wrist.
6. Initially Claimant appeared to be recovering well from surgery. Her wrist was casted until early March 2009. Unfortunately, by the time the cast was removed she had developed complex regional pain syndrome (CRPS) in her right hand. This caused pain, swelling and hypersensitivity in her fingers, hand, wrist and forearm. As a result, for a period of months after her wrist surgery Claimant avoided using her right upper extremity, and used her left arm for most tasks instead.
7. During the period when her right arm was immobilized Claimant began to complain increasingly of right shoulder pain. By August 2009, her CRPS-related hand pain had essentially resolved, but her right shoulder pain continued. In addition, she began to complain of left shoulder pain as well.
8. Dr. Mullins attributed the pain in Claimant's right shoulder to an impingement syndrome caused by prolonged inactivity and disuse of her right arm. With disuse, the rotator cuff becomes weak, which allows the arm bone to migrate and come in contact with the shoulder blade. This narrows the space through which the tendons of the shoulder must slide and causes them to become caught, or impinged. The tendons and tissues in the area become inflamed, which leads to swelling, tearing and even more impingement.
9. Interestingly, Dr. Mullins attributed the cause of Claimant's left shoulder pain to impingement as well, though as the result of a somewhat different process. In the left shoulder, impingement resulted from her overuse of that extremity as compensation for her inability to use her right (dominant) arm. Overuse caused the tissues in the area to become inflamed, which in the context of degenerative changes in the joint led to impingement.

10. Claimant underwent right shoulder surgery in February 2010. According to Dr. Mullins' office notes, by mid-May she had resumed most of her regular activities and was released to return to work without restrictions.
11. Rather than returning to hospital housekeeping work, Claimant found a job instead at the Hardwick Kwik Stop and Deli. Initially she worked part-time, three or four days a week for four to six hours daily. Primarily she worked behind the deli counter, making grinders and doing light cleaning. Unfortunately, when she attempted to increase her hours to full-time her pain flared, particularly in her neck and left shoulder.
12. Claimant's left shoulder symptoms, which her treating providers again attributed to overuse, failed to resolve with physical therapy. In October 2010 she underwent left shoulder surgery.
13. Claimant's recovery from her left shoulder surgery has been marred by flared CRPS symptoms in her right hand, as well as pain and stiffness in her wrists bilaterally. She has continued to work at her deli counter job, but is limited to a maximum of three hours per day, three days per week.

Expert Medical Opinions

(a) Dr. Sobel

14. Dr. Sobel, a board certified orthopedic surgeon, reviewed Claimant's medical records at Defendant's request in April 2011. To a reasonable degree of medical certainty, in his opinion Claimant's left shoulder condition is not causally related in any respect to her work for Defendant.
15. Dr. Sobel concurred with Dr. Mullins' diagnosis of left shoulder impingement syndrome. In his analysis, Claimant suffered from age-related degenerative arthritic changes. Over time, bone spurs developed and impinged into the tendons and tissues in and around the rotator cuff. These changes were in no way related either to Claimant's work for Defendant or to overcompensating for her inability to use her right arm.
16. Dr. Sobel acknowledged that when tendons or tissues in the joint become inflamed, the impingement in the joint can worsen. In his opinion, even with her right arm essentially immobilized the routine activities for which Claimant used her left arm were not of a type as to cause further inflammation. This might be the case were she to use her left arm repetitively overhead, a motion that squeezes the top of the rotator cuff, but there was no evidence of that here.
17. Dr. Sobel determined that Claimant had reached an end medical result for the work-related injury to her right thumb and hand at least by the date of his April 2011 records review. Because he concluded that Claimant's left shoulder condition was not work-related, he did not express an opinion as to when she might have reached an end medical result for that condition, or whether she suffered any ratable permanent impairment referable to it.

(b) Dr. Backus

18. At her attorney's referral, in September 2011 Claimant underwent an independent medical examination with Dr. Backus, an occupational medicine specialist. Of note, Dr. Backus reported that in relating her history to him Claimant asserted that her left shoulder pain actually predated her August 2008 work injury by some months. The contemporaneous medical records do not corroborate this assertion, however.
19. Dr. Backus concurred with both Dr. Mullins and Dr. Sobel as to diagnosis – left shoulder impingement syndrome. Generally, he concurred as well with Dr. Sobel's analysis as to how the condition developed – first arthritis in the joint, which caused bone spurs to grow, which resulted in impingement and then inflammation of tendons and tissues. Where Dr. Backus's opinion diverged from Dr. Sobel's was as to the contribution first of Claimant's work activities and later of her August 2008 compensable injury on this progression.
20. Unlike Dr. Sobel, who attributed Claimant's left shoulder condition solely to age-related degenerative changes, Dr. Backus concluded, to a reasonable degree of medical certainty, that Claimant's work for Defendant was a contributing factor. He based this conclusion on the following assumptions:
 - That Claimant's left shoulder symptoms had been ongoing for some time prior to August 2008;
 - That her housekeeping duties for Defendant involved sufficient forceful repetition and awkward postures as to constitute an occupational risk factor for development of an impingement syndrome; and
 - That once the impingement developed, it then worsened as a consequence of overcompensation triggered by her August 2008 hand injury, subsequent CRPS and right shoulder immobilization.
21. As of the date of his examination, September 7, 2011, Dr. Backus determined that Claimant had reached an end medical result.¹

Discontinuance of Temporary Disability Benefits

22. Defendant initially disputed the compensability of Claimant's right shoulder surgery. Claimant appealed the denial, and on June 16, 2010 the Department issued an interim order in which it found the surgery to be compensable. Defendant did not appeal the order to formal hearing, but rather undertook to pay both medical and indemnity benefits in accordance with its terms.

¹ In the context of his independent medical examination, Dr. Backus rated Claimant with a 16 percent permanent impairment referable to her left shoulder injury. Claimant did not make a claim for permanency benefits in accordance with this rating, however, nor did Defendant present any countervailing evidence. As such, I consider the permanency issue to be beyond the scope of this decision.

23. As noted above, Finding of Fact No. 11 *supra*, rather than returning to work for Defendant, following her right shoulder surgery Claimant instead began working part-time at the Hardwick Kwik Stop and Deli. Although the record is not entirely clear, apparently Defendant paid temporary partial disability benefits for some months thereafter. It discontinued these as of the date Claimant underwent left shoulder surgery, October 22, 2010. Again, the record is not entirely clear, but it appears that Defendant did so on the grounds that any ongoing disability now was attributable not to Claimant's right shoulder injury but rather to her left shoulder condition, the compensability of which Defendant disputed.
24. Defendant did not file any Notice of Intention to Discontinue Payments (Form 27) prior to discontinuing Claimant's temporary partial disability benefits.

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 disputed issue here is whether Claimant's left shoulder impingement syndrome was causally related to her work for Defendant. Drs. Mullins and Backus assert that it was; Dr. Sobel asserts that it was not.
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. Against this backdrop, I conclude primarily on the basis of Dr. Mullins' opinion that Claimant's left shoulder injury most likely resulted from overcompensation triggered by her inability to use her right arm for some time after her August 2008 work injury. As the treating physician, Dr. Mullins was best positioned to understand how Claimant's left shoulder symptoms progressed. I accept as credible both his and Dr. Backus' analysis of how overuse caused the tendons and tissues in her left shoulder to become inflamed to the point where surgical release became necessary.

5. In reaching this conclusion, I acknowledge the deficiencies in Dr. Backus' opinion, particularly as to his conclusion that Claimant's work activities caused arthritis, bone spurs and some degree of impingement even before August 2008. As noted above, Finding of Fact No. 18 *supra*, Claimant's assertion that she had been suffering from left shoulder pain for some months prior was not substantiated by any of the contemporaneous medical records, and therefore I question the weight Dr. Backus accorded it as a basis for his opinion. Beyond that, Dr. Backus' conclusion that Claimant's work presented occupational risk factors appears to have been based on a rather superficial inquiry as to the nature and extent of her housekeeping duties.
6. For these reasons, I find that Dr. Backus' opinion as to the work-relatedness of Claimant's condition prior to her August 2008 injury is somewhat speculative. Nevertheless, I accept as credible both his and Dr. Mullins' determination that whatever degenerative condition existed in Claimant's left shoulder, it was exacerbated by the overuse that resulted from the work-related injury to her right upper extremity. Claimant's left shoulder injury thus evolved as a natural consequence of a compensable injury, and is itself compensable. *Marsigli's Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95 (1964); 1 Lex K. Larson, *Larson's Workers' Compensation* §10 (Matthew Bender, Rev. Ed.) at p. 10-1.
7. I conclude that Dr. Sobel's opinion as to the causal relationship between Claimant's inability to use her right arm and her worsening left shoulder impingement syndrome is less persuasive than either Dr. Mullins' or Dr. Backus'. Relying solely on Claimant's medical records, Dr. Sobel had no opportunity either to physically examine her or to understand how her left shoulder symptoms progressed with disuse of her right arm.
8. I conclude that Claimant has sustained her burden of proving that her left shoulder impingement syndrome was causally related to her compensable right upper extremity injury and is therefore compensable as well. Defendant therefore is responsible for whatever medical treatment was necessitated as a result, including Dr. Mullins' October 2010 surgery.
9. I further conclude that Claimant reached an end medical result for her left shoulder impingement syndrome on September 7, 2011. Defendant is therefore obligated to pay temporary total and/or temporary partial disability benefits from the date these were discontinued, October 22, 2010, through September 7, 2011.²
10. Last, I conclude that Claimant is entitled to permanent partial disability benefits. As noted above, Finding of Fact No. 21, note 1 *supra*, although Dr. Backus issued a permanency rating in the context of his independent medical examination, Claimant has not made a claim for permanency benefits in accordance therewith. Therefore, none are awarded at this time.

² Having concluded that Claimant's left shoulder condition is compensable, Defendant's discontinuance of temporary disability benefits in October 2010 was improper on substantive grounds. The fact that it failed to file the necessary Form 27 is a clear violation of both 21 V.S.A. §643a and Workers' Compensation Rule 18, as a result of which Defendant would have been responsible for ongoing payments in any event.

11. As Claimant has prevailed on her claim for benefits, she is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit her itemized claim.

ORDER:

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

1. Medical benefits covering all reasonable medical services and supplies necessitated by Claimant's compensable left shoulder impingement syndrome, in accordance with 21 V.S.A. §640;
2. Temporary total and/or temporary partial disability benefits from October 22, 2010 through September 7, 2011, in accordance with 21 V.S.A. §§642 and 646, with interest as calculated in accordance with 21 V.S.A. §664; and
3. Costs and attorney fees in amounts to be determined in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 23rd day of February 2012.

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.