

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Al Waters, Jr.

Opinion No. 22-12WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

Commonwealth Dairy, LLC

For: Anne M. Noonan
Commissioner

State File No. DD-00357

OPINION AND ORDER

Hearing held in Montpelier, Vermont on June 12, 2012

Record closed on July 13, 2012

APPEARANCES:

Sharon Gentry, Esq. and Thomas Costello, Esq., for Claimant
Jennifer Moore, Esq., for Defendant

ISSUES:

1. Did Claimant's venous stasis ulcer and/or cellulitis infection arise out of and in the course of his employment with Defendant?
2. Was Claimant's venous stasis ulcer and/or cellulitis infection aggravated by his employment for Defendant?
3. If so, to what workers' compensation benefits is Claimant entitled?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum vitae*, Gregory Gadowski, M.D.

Defendant's Exhibit A: Claimant's time records
Defendant's Exhibit B: Claimant's short term disability application
Defendant's Exhibit C: Claimant's job description
Defendant's Exhibit D: Claimant's Employment Physical Exam Report
Defendant's Exhibit E: Claimant's employment application
Defendant's Exhibit F: Claimant's resume
Defendant's Exhibit G: *Curriculum vitae*, Stuart Glassman, M.D.

CLAIM:

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

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

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 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.
3. Claimant began work for Defendant in January 2011. Defendant was then a start up dairy manufacturing plant that planned to produce yogurt. Claimant was hired as a packager. Before Defendant could go into a production phase, the machinery had to be set up and the employees had to be trained.

Claimant's Job Duties from January through March 2011

4. For the first four weeks of Claimant's employment for Defendant, he received classroom-type training on how to set up and use the machines in the plant. During this period, he sat at a table or desk for most of the day. Employees were allowed two 15-minute breaks during the day, as well as one hour for lunch.
5. Even after the first four weeks of its operation, Defendant still had yet to receive its first delivery of milk. Because it had promised its work crew 40 hours of work per week, the employees were kept busy with snow shoveling, landscaping, learning how to run a forklift and cleaning the floors.
6. In late March 2011, Defendant was ready to start test production runs. Thereafter, employees' lunch breaks were reduced from one hour to only 30 minutes.
7. By April 2011 Defendant's production runs were to the point where it was anticipating that the plant would soon be fully operational. The employees began to assume their own job duties on a regular basis.
8. Claimant's specific job duties as a packager consisted of filling boxes on a conveyor belt with small containers of yogurt. For that portion of his job he stood at the conveyor belt. However, he was also expected to work at the end of the belt and load the boxes of yogurt onto a pallet. When the pallet was full, Claimant then carried it to the cooler for storage. As Claimant credibly described it, "I bounced around between machines."

9. Based on Claimant's own credible testimony, I find that there were no extended periods of static standing during the pre-production phase of his employment for Defendant. I further find that once the plant became fully operational the production line workers, including Claimant, moved around frequently and interchanged positions.

Claimant's 2010 and 2011 Venous Stasis Ulcers

10. Claimant suffers from venous stasis deficiency disease. This disease occurs when the valves in one's veins become incompetent or defective. As a result, the normal flow of blood back to the heart is impaired. Gravity causes a reversal of blood flow, which leads to pooling of blood in the lower legs.
11. In April 2010, Claimant was treating with Dr. Park, a primary care provider at the Deerfield Valley Health Center, for an unrelated medical condition. At this routine appointment he reported that he had a wound on his right lower leg that had been there for almost a year. The wound was diagnosed as a venous stasis ulcer. By their very nature, such ulcers are slow to heal.
12. A common form of treatment for venous stasis ulcers is an Unna boot. This is a treated dressing that applies compression to the area wrapped. In Claimant's case, the boot was applied from his right foot up his leg to just below his knee. Dr. Park instructed Claimant to keep the Unna boot dry and clean.
13. Claimant returned in May 2010 to have the boot changed, and again in June 2010. At the latter visit, Dr. Park reported that the ulcer was improving and was less deep. When Claimant returned in July 2010, he reported to Dr. Park that he had taken the Unna Boot off a week earlier. Dr. Park noted that the ulcer looked worse.
14. In September 2010 Claimant reported that the ulcer continued to be a problem and that he wanted to restart the Unna Boot. Thereafter, the ulcer improved, to the point where it was almost completely closed by the time of his October 19, 2010 appointment. From October 2010 to the end of March 2011, Claimant had medical appointments for other reasons, but the ulcer was not mentioned.
15. At an April 12, 2011 appointment, however, Claimant was noted to have developed a venous stasis ulcer on his right lower leg that was surrounded by dead tissue. The dead tissue was removed and an Unna boot was applied. It was clear to both Claimant and his providers that this was a new ulcer, located approximately three inches away from the site of his 2010 ulcer.
16. When Claimant returned on April 21, 2011 to have his Unna boot changed, the boot was noted to be intact, but wet. The ulcer was measured to be 1.5 centimeters by one centimeter by .25 centimeters deep. Claimant described it as very painful. The doctor removed the dead tissue and applied a new Unna boot.

17. On April 28, 2011 Claimant self-referred to Dr. Gadowski, a board certified surgeon, for further treatment of his condition. At this appointment, he reported that the new ulcer on his right lower leg had developed over the course of the past several weeks, that is, at some point after he had commenced working for Defendant.
18. Claimant returned to see Dr. Gadowski on May 5, 2011. The ulcer was a bit larger. As the previous ulcer had healed with compression, Dr. Gadowski thought this one would as well. However, he cautioned Claimant that he needed to leave the Unna boot on in order for the treatment to be successful.
19. From May 5 through June 6, 2011 Claimant had weekly appointments with Dr. Gadowski. These appointments were primarily to change Claimant's Unna boot. Dr. Gadowski also monitored the size of the ulcer and the degree of Claimant's pain.
20. In early June 2011 Claimant had his Unna boot changed every three or four days. This was first prompted by the fact that Claimant did not protect the Unna boot and it got wet. Dr. Gadowski was also concerned that the ulcer was becoming larger.
21. Dr. Gadowski credibly testified that the reason the ulcer increased in size was because of cellulitis. Cellulitis is an infection of the skin and the deeper tissues beneath it that occurs when bacteria enters a wound. In the context of venous stasis ulcers, removing one's Unna boot may contribute to the development of cellulitis. Smoking can also be a contributing factor.
22. Dr. Gadowski credibly opined, and I find, that the bacteria at Defendant's dairy plant did not cause or worsen Claimant's cellulitis.
23. As June progressed into July, Claimant continued to have his boot changed every three or four days. During this period, he continued to complain of significant pain as well. At his July 26, 2011 appointment, Claimant reported that he had removed the Unna boot a week earlier. The ulcer appeared larger.
24. Claimant next saw Dr. Gadowski on July 29, 2011. At this visit, he complained of more pain in the ulcer. Dr. Gadowski observed fluid oozing out of it and superficial dead tissue around the wound. He determined that Claimant needed intravenous drugs to fight the cellulitis infection. Therefore, he had Claimant admitted to the hospital immediately for further treatment of what had become a very serious infection. In the hospital admission chart, Dr. Gadowski described three reasons for Claimant's in-patient treatment: deterioration of the wound, noncompliance with compression and smoking.
25. Claimant responded well to the in-patient intravenous drug treatments. He was discharged from the hospital on August 1, 2011 and was followed very closely thereafter by the wound clinic.

26. Claimant was totally disabled from working as a consequence of his April 2011 ulcer and subsequent cellulitis infection from the time he was admitted to the hospital, July 29, 2011, until November 3, 2011. Claimant could not be released to return to work sooner because he needed to keep his leg elevated as much as possible in order for the ulcer to heal properly.
27. Claimant never returned to work at Defendant's dairy plant. He did return to work at a local brewery in March 2012.

Nature of Claimant's Job Duties from Mid-April 2011 forward

28. Claimant testified that once yogurt production started at Defendant's plant in mid- to late April, employees were often denied their 15-minute breaks, overtime became mandatory and he was required to work every other Saturday. I find that the more credible evidence belies this testimony, however. For example, Defendant's time cards show that Claimant only worked one Saturday from at least March 2011 until the time he left Defendant's employ at the end of July. In addition, Claimant's supervisor, Berthold Grüber, testified that employees were never denied their scheduled breaks, even if production had to be shut down temporarily in order to do so, and also that overtime work was always strictly voluntary. I find Mr. Grüber's testimony more convincing than Claimant's on this issue.
29. Claimant testified credibly that during both his lunch and his shorter breaks, he would either elevate his right leg, have a cigarette, or both. Mr. Grüber, himself a smoker, often witnessed Claimant smoking during his breaks and corroborated this testimony.
30. Regarding how the venous stasis ulcer developed, Claimant was both emphatic and convincing when he testified that he did not know what caused either the ulcer for which he was treated in 2010 or the one that developed in April 2011. Both ulcers simply appeared. Claimant was certain that he did not suffer any trauma at Defendant's plant that would have caused the 2011 ulcer to develop.

Expert Medical Opinions as to Causation

(a) Dr. Gadowski

31. As noted above, Dr. Gadowski began treating Claimant in April 2011 and as of the formal hearing continued to be Claimant's treating physician.
32. In Dr. Gadowski's opinion, the venous stasis ulcer that developed in mid-April 2011 was caused by Claimant's employment for Defendant. In reaching this conclusion, Dr. Gadowski assumed that Claimant's work required him to be standing constantly for seven to eight hours every day. If this assumption were accurate, this would be a substantial contributing factor in causing the ulcer to develop, because standing increases the pressure in the veins in the lower legs, which in turn causes more blood to pool there.

33. In fact, however, Dr. Gadowski conceded that he did not know the specific requirements of Claimant's job. He was unaware that Claimant had two fifteen-minute breaks and one thirty-minute lunch period daily, during which he often sat with his right leg elevated. Dr. Gadowski acknowledged that with this information, his causation opinion likely would change.
34. Dr. Gadowski also did not understand the extent to which Claimant's job required him to move about among various machines rather than just maintaining a static standing position. He agreed that having the ability to move around while on the job likely would have promoted healing.
35. Last, Dr. Gadowski confirmed that Claimant had been non-compliant with both his and Dr. Park's treatment recommendations on numerous occasions, by removing his Unna boot and also by continuing to smoke. A patient who is non-compliant with treatment is more likely to develop an infection.
36. I find that Dr. Gadowski's causation opinion is significantly weakened, both by the fact that it appears to have been based on faulty assumptions as to the functional components of Claimant's job and also considering Claimant's own non-compliance with treatment as a likely causative factor.

(b) Dr. Glassman

37. Dr. Glassman is board certified in physical medicine and rehabilitation and is the Director of Occupational Medicine at Concord Hospital. At Defendant's request, Dr. Glassman performed an independent medical examination of Claimant in March 2012. Prior to his testimony in this matter, Dr. Glassman reviewed Claimant's medical records, his deposition, his job description, copies of his time records from the dairy plant and Dr. Gadowski's deposition.
38. Dr. Glassman opined that Claimant's venous stasis ulcer neither arose out of and in the course of his employment nor was worsened by it. He based this opinion on the following:
 - Claimant's job duties, both as he described them and as portrayed in Defendant's written job description, did not involve static standing for any length of time;
 - There was no evidence that Claimant suffered any trauma to his leg at Defendant's plant to cause the wound;
 - There was no indication that any condition at the plant or specific job duty made the wound worse; and
 - Claimant was noncompliant with his treatment, by taking the Unna boot off and by continuing to smoke.

39. Dr. Glassman concurred with Dr. Gadowski's opinion that moving around typically enhances the healing process, whereas static standing impedes it. In Dr. Glassman's opinion, therefore, Claimant's job duties actually had the effect of promoting healing of his ulcer rather than worsening or prolonging it. I find this analysis persuasive.

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 in this case is whether Claimant's venous stasis ulcer was either caused or aggravated by his employment for Defendant. Claimant asserts that the constant standing required by his job as a packager first caused and then aggravated the ulcer that developed in April 2011. Defendant contends that Claimant's job duties did not involve either static standing or any other causative factors that reasonably could be associated with his condition.
3. The parties presented conflicting medical evidence on these issues. 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. Based primarily on the second and third factors, I conclude that Dr. Glassman's causation opinion is the most persuasive. Not only did he examine Claimant's medical records, but he also reviewed Claimant's deposition, his time cards and his written job description. From these sources, he derived independent, objective proof (a) that Claimant's job duties were not at all static, but rather involved moving about frequently and "bounc[ing] around between machines"; and (b) that Claimant did not work extended overtime hours during the period in question. Dr. Gadowski lacked this specific knowledge about Claimant's job duties, and instead based his opinion on what I have found to be erroneous assumptions. His opinion is significantly undermined as a result.

5. I conclude that Claimant has not presented sufficient evidence to prove that his April 2011 venous stasis ulcer initially arose out of and in the course of his employment. There is no evidence to suggest that he suffered any trauma at work to cause the ulcer. Nor is there any evidence to suggest that any other work condition caused the ulcer. To the contrary, the fact that much of Claimant's time at work was spent moving about likely enhanced rather than inhibited healing.
6. I further conclude that Claimant's job duties were not responsible for any aggravation of either his venous insufficiency disease or of his April 2011 venous stasis ulcer. Vermont's workers' compensation rules define an aggravation as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." Workers' Compensation Rule 2.1110. Here, although Claimant's ulcer may have worsened during the period during which he worked for Defendant, there is insufficient credible evidence to establish either his job duties or his work environment as the cause of such exacerbation.
7. Rather, I conclude that it is more likely that non-work-related factors caused Claimant's ulcer to worsen. Against medical advice, he removed the Unna boot for at least a week on two different occasions, after which his ulcer noticeably deteriorated each time. He also continued to smoke, which likely further impeded the healing process. Beyond that, by their very nature venous stasis ulcers are slow to heal, as was evident when Claimant was treating for the ulcer from which he suffered in 2010. That ulcer took more than a year to resolve, despite ongoing treatment. The ulcer at issue in this case followed essentially the same course. That the healing period was prolonged was likely a function of the condition's natural course and resistance to treatment, not of any work-related circumstance.
8. I conclude that Claimant has not sustained his burden of proving that his April 2011 venous stasis ulcer was either caused or aggravated by his work for Defendant. As his injury is not compensable, his claim for workers' compensation benefits must fail.
9. As Claimant has failed to prevail on his claim for benefits, 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 April 2011 venous stasis ulcer is hereby **DENIED**.

DATED at Montpelier, Vermont this 28th day of August 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.