

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Richard Elkins

Opinion No. 29-13WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

Green Mountain Coffee Roasters

For: Anne M. Noonan
Commissioner

State File No. EE-51687

OPINION AND ORDER

Hearing held in Montpelier, Vermont on October 11, 2013

Record closed on November 13, 2013¹

APPEARANCES:

Christopher McVeigh, Esq., for Claimant

Jeffrey Dickson, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant suffer a right shoulder injury in January 2012 causally related to his work for Defendant?
2. If so, to what workers' compensation benefits is Claimant entitled?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Dr. Lawliss deposition, September 24, 2013

CLAIM:

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

¹ The parties filed Proposed Findings of Fact and Conclusions of Law on November 13, 2012. Thereafter Claimant's attorney filed a responsive pleading on November 20, 2012. Defendant moved to strike the pleading on the basis that the parties did not discuss such a filing. Claimant's attorney countered that such pleadings are routine. In fact, they are not, at least in the formal hearing arena. And when they are, all too often they merely restate what has already been said, and therefore serve little useful purpose. Nevertheless, absent a showing that the opposing party will be prejudiced thereby, I will not prohibit them as a matter of course. As Defendant has made no showing of prejudice here, its Motion to Strike is **DENIED**.

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 October 2011. Initially he set up the manufacturing machines and then underwent training to use those machines. He was assigned to operate the Schneider robot. This machine dropped K-cups into boxes, counted the cups, and then loaded the boxes on pallets. Claimant filled one pallet every 17 minutes.
4. This job entailed constant movement. If a "train wreck," or jam of K-cups, occurred on the assembly line, Claimant was responsible for determining the cause of the obstruction, clearing the jam and maintaining production. The other manufacturing machines depended on Claimant's machine functioning properly to keep the work flowing evenly.
5. The constant physical activity at work caused Claimant to lose 10 to 15 pounds within the first few weeks of production. He was five foot ten inches tall, weighed 206 pounds and was in good physical condition. He credibly testified that prior to his work at Defendant's plant he did not have any problems with his right shoulder. The only injury to his shoulder occurred 30 years earlier when he broke his clavicle playing basketball.

The Work Injury

6. Sometime at the end of January 2012 Claimant was performing his regular duties on the Schneider robot when a train wreck of K-cups occurred. He stopped the machine to clear out the debris. Before restarting the machine he noticed that some K-cups and coffee had spilled in a low, not easily accessible area.
7. Claimant credibly testified that to access the additional debris, he stood on a pipe that rested 15 inches off the floor. He positioned his body sideways to the debris and then leaned the right side of his body over, forward, and down, so that he might use his right hand to "flick" away the remaining refuse.
8. As Claimant was reaching down and flicking the debris backwards, he heard a pop in his shoulder. He likened the resulting pain to hitting his funny bone. Then his shoulder began to hurt "a lot." He stood back from the machine and rested a moment while holding his right shoulder. He was able to move the shoulder around a bit, but favored it for the rest of the day.

9. Claimant credibly testified that he may have told his line mate, Robin, what had happened, but did not report the injury to his supervisor. He did not seek any medical attention that day and if he took anything for his pain, it would have been Aleve. Over the ensuing days, his shoulder continued to hurt, but it gradually improved to the point where his pain level was not a dominant part of his daily life.

Claimant's Ongoing Symptoms

10. From February until May 2012 Claimant self-treated his shoulder injury with over-the-counter pain relievers. Every once in a while he would feel a pop in his right shoulder that would bring on the same pain symptoms he had experienced with the initial injury. His shoulder would hurt for a few days and then become asymptomatic. I find Claimant's description of his waxing and waning symptoms during this period to be credible in all respects.
11. In March 2012 Claimant had an appointment with his primary care physician, Dr. Baad, to assess an unrelated medical issue. During that office visit he did not complain of any right shoulder pain or weakness. Given the nature of Claimant's concerns at this visit, I do not find this omission remarkable.
12. Claimant credibly testified that in May 2012 he asked his pharmacist to recommend a more effective over-the-counter pain reliever for his shoulder, which was bothering him more. As his arm was increasingly sore, in June 2012 Claimant finally sought an appointment with Dr. Baad to have it evaluated.
13. Claimant's ex-wife corroborated Claimant's testimony as to the pattern of his pain complaints during this period. Initially married in 1977, the couple had three children together, and then divorced in 2009. In February 2012 they rekindled their relationship. Since then, they have seen each other at least twice a week, and refer to each other as "partners."
14. In her testimony, Claimant's ex-wife credibly described Claimant's physical condition between February and June 2012. During that time, she recalled, Claimant consistently complained about the pain in his right shoulder. When they were driving together, she observed that he could not use his right arm alone to shift gears, but rather used either both hands together or just his left hand to do so. Having observed these complaints and limitations over time, in June 2012 she finally insisted that Claimant make an appointment to see his physician about his shoulder. I find that this testimony credible and persuasive in all respects.

Claimant's Medical Treatment

15. Claimant saw Dr. Baad on June 20, 2012. Dr. Baad noted that his pain presented in the right biceps tendon and in the right shoulder joint and was chronic, having lasted for at least six months. Upon examination, Dr. Baad found Claimant's right shoulder to have normal range of motion, strength and stability. He recommended that Claimant pursue physical therapy and continue taking Aleve.

16. Five days after this office visit, while stopped on his motorcycle, Claimant felt a pop in his right arm, two inches below his shoulder joint. While at work two days later, a co-worker noticed that Claimant's right arm was completely black, from his shoulder to his elbow. The co-worker suggested that Claimant might have detached his biceps tendon. This prompted him to make an appointment to see an orthopedist. I find this description of events credible.
17. On June 27, 2012 Claimant was evaluated by Michelle Machesky, a physician's assistant to Dr. Lawliss, a board certified orthopedic surgeon. X-rays showed degenerative changes in his shoulder joint, and upon physical examination his shoulder showed some weakness. Ms. Machesky ordered an MRI to assess for biceps tendon and/or rotator cuff tears. In the meantime, Claimant was released to return to work with restrictions.
18. The significant MRI findings revealed that Claimant had ruptured the long head of his biceps tendon and torn both his supraspinatus and subscapularis tendons. Of particular note, both the subscapularis and supraspinatus muscles showed some atrophy. In addition, the MRI showed evidence of mild arthritis in Claimant's shoulder joint.
19. Due to the extent of the damage to his shoulder, Claimant elected to proceed with surgery. This treatment option offered Claimant a chance to recover most of the function in his right shoulder. Dr. Lawliss performed surgery on September 10, 2012; he repaired the two shoulder tendons and debrided the biceps tendon.
20. Six weeks after his surgery, Claimant was able to begin physical therapy. He actively engaged in physical therapy from October 3, 2012 until February 1, 2013. Over that course of time he progressed steadily and his shoulder strength began to return. He returned to full time, light duty work on December 5, 2012 as a quality control technician.

Expert Medical Opinions

(a) Dr. Lawliss

21. Dr. Lawliss specializes in shoulder and knee surgeries. He credibly testified by deposition. He did not review the joint medical record as admitted into evidence, but did review a substantial number of the pertinent medical records, most notably Claimant's July 2012 MRI.
22. Dr. Lawliss' causation opinion was based on Claimant's history of the events that led to the injury and his description of waxing and waning pain and symptoms thereafter. It is Dr. Lawliss' normal practice to accept as true the patient's history of his or her condition, because his primary goal is to "fix" the problem.

23. Upon reviewing Claimant's July 2012 MRI, Dr. Lawliss observed muscle atrophy in the supraspinatus and suprascapularis muscles. Muscle atrophy is caused by one of the following:
- Physical disuse of the muscle;
 - A detached tendon, which results in an inability to use the muscle; or
 - A nerve injury, which interrupts the normal flow of electrical impulses to the muscle.
24. In Dr. Lawliss' opinion, to a reasonable degree of medical certainty Claimant's right shoulder injury was causally related to the January 2012 work incident on the Schneider robot. He based his opinion on the following key facts:
- Prior to January 2012 Claimant's right shoulder had been entirely asymptomatic;
 - The July 2012 MRI showed evidence of muscle atrophy, a process that takes four to six months to develop; and
 - Claimant's report of waxing and waning pain after the January 2012 incident was consistent with the pattern of pain one would expect from a rotator cuff injury.

I find Dr. Lawliss' analysis persuasive.

(b) Dr. Backus

25. At Defendant's request, Dr. Backus performed an independent medical examination of Claimant in May 2013. Dr. Backus is board certified in occupational medicine. He reviewed the relevant medical records prior to his examination.
26. In Dr. Backus' opinion, to a reasonable degree of medical certainty Claimant's right shoulder condition was not causally related to the work incident in January 2012. Rather, in his opinion and based on his reading of the July 2012 MRI, Claimant suffered from pre-existing degenerative disease in his shoulder. According to Dr. Backus' analysis, over time and in the natural course, the condition deteriorated to the point where surgery became necessary, which is not unusual.

27. Dr. Backus also based his opinion on his understanding of the history Claimant reported, as follows:
- Claimant did not treat for his alleged January 2012 work injury until June 20, 2012;
 - He told Dr. Backus that two weeks after the January 2012 incident he did not remember experiencing any shoulder symptoms; and
 - He told Dr. Backus that he experienced no shoulder pain or other difficulties between early February and May 2012, and that his pain complaints began in May 2012.
28. Dr. Backus conceded that the MRI findings, including muscle atrophy, were consistent with the history and pattern of symptoms that Claimant reported to Dr. Lawliss, a history that differs in important respects from the one Dr. Backus recorded. He conceded as well that his opinion relied significantly on his understanding that Claimant had been symptom-free between February and May 2012. Last, Dr. Backus acknowledged that manufacturing workers typically persevere through injuries; thus, the fact that Claimant did not seek treatment for some six months after the injury is not unusual.
29. As noted above, Claimant's version of events, particularly his reported pattern of waxing and waning pain in the months following the January 2012 incident, was credibly corroborated by his ex-wife's testimony. Dr. Backus reported a markedly different history in support of his causation opinion, one that I do not find as credible. For that reason, I find his opinion less persuasive than Dr. Lawliss'.

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 claim is medical causation. Supported by Dr. Lawliss' expert opinion, Claimant asserts that remedying the "train wreck" of K-cups in the Schneider robot in late January 2012 caused his rotator cuff to tear. Supported by Dr. Backus' expert opinion, Defendant asserts that Claimant had pre-existing degenerative disease in his right shoulder, which over time caused the tendons in his shoulder to deteriorate and ultimately tear.

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. Considering these factors here, I conclude that Dr. Lawliss' opinion is the most persuasive. Dr. Lawliss relied on the existence of muscle atrophy as seen on the July 2012 MRI, an objective sign, to support his conclusion that Claimant's injury likely occurred in January 2012, some six months earlier. Dr. Lawliss also relied on the history Claimant reported, as to both his injury and his pattern of pain thereafter. Claimant's ex-wife persuasively corroborated Claimant's testimony in this regard. Dr. Lawliss having based his opinion on the same set of facts, I accept his causation analysis as the most credible.
5. In contrast, Dr. Backus' causation opinion relied heavily on his belief that Claimant's pain resolved soon after the January 2012 work incident and did not reappear until May 2012. In addition, Dr. Backus did not have a persuasive explanation for the atrophy found on MRI. Because his opinion was premised on a fact pattern I do not find credible, and also because he discounted objective evidence of a January 2012 injury, I conclude that his causation analysis is unpersuasive.
6. I conclude that Claimant has sustained his burden of proving that he suffered a compensable right shoulder injury in late January 2012 while he was working on the Schneider robot.
7. As Claimant has prevailed on his claim for benefits, he 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 his itemized claim.

ORDER:

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

1. Temporary total disability benefits from September 10, 2012 through December 5, 2012 in accordance with 21 V.S.A. §642, with interest calculated in accordance with 21 V.S.A. §664;
2. Medical benefits covering all reasonable medical services and supplies causally related to treatment of Claimant's right shoulder injury, in accordance with 21 V.S.A. §640; 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 December 2013.

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.