

Sherry Siebanaler v. Chittenden County Transportation Authority (June 2, 2015)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Sherry Siebanaler

Opinion No. 11-15WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

Chittenden County Transportation
Authority

For: Anne M. Noonan
Commissioner

State File No. DD-60248

OPINION AND ORDER

Hearing held in Montpelier, Vermont on November 21, 2014
Record closed on January 29, 2015

APPEARANCES:

William Skiff, Esq., for Claimant
Jennifer Moore, Esq., for Defendant

ISSUE PRESENTED:

Are Claimant's cervical condition and disc replacement surgery causally related to her February 16, 2012 compensable work injury?

EXHIBITS:

Claimant's Exhibit 1:	Deposition of Dr. Talley, November 4, 2014
Claimant's Exhibit 2:	Deposition of Dr. Barnum, November 6, 2014
Claimant's Exhibit 3:	<i>Curriculum vitae</i> , Dr. Barnum
Claimant's Exhibit 4:	<i>Curriculum vitae</i> , Dr. Talley
Claimant's Exhibit 5:	Various Department forms
Defendant's Exhibit A:	<i>Curriculum vitae</i> , Dr. Backus

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 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 has worked for Defendant for over 15 years as a bus driver. She enjoys her work tremendously, as she encounters people from all walks of life and earns good wages with excellent benefits. Claimant works the late shift, so that she can spend the day at her farm, where she raises Morgan horses and small herd meat goats.
4. On a typical day, Claimant starts her shift first by performing the bus inspection. Next she goes through her checklist to assure that all of the bus' systems are in working order, and then repeats the process to be certain. Then she checks her assignment and sets out on her route.

Claimant's Prior Medical History

5. Claimant was a patient of Dr. Heyn, a chiropractor, since at least 2011. She attended appointments there for what she called "maintenance" work. Due to the mechanics of driving Defendant's buses, the muscles over her shoulder blades sometimes got tight and sore. The chiropractic treatments "freed" up those muscles. Claimant typically would attend a short series of chiropractic appointments until her symptoms resolved.
6. In November 2011 Claimant sought treatment with Dr. Heyn. She complained of thoracic pain, which she rated as a 9 on the 10-point analog scale. She exhibited decreased left cervical rotation and could only lift her left arm to 90 degrees before getting a tingling sensation in her fingers.
7. Claimant returned to Dr. Heyn on January 27, 2012 complaining of primarily right-sided neck and upper back pain. She reported that the pain had started approximately ten days earlier while she was driving the bus. Dr. Heyn noted that her pain was localized in the cervical and upper thoracic regions and did not radiate. She also exhibited a slight muscle weakness on her left side.
8. On January 28, 2012 Claimant saw her primary care physician, Dr. Hobbes, complaining of upper back pain with no specific injury. She reported that the pain improved somewhat with her chiropractic treatments, which Dr. Hobbes indicated she should continue.

Claimant's Work Injury

9. On February 16, 2012 Claimant worked her normal shift. The route she drove that day was the North Avenue run. She pulled up to a shelter, took the bus out of gear and started to engage the emergency brake. The brake was located to the left and behind her on a shelf, and on this particular bus it was very difficult to pull up. To engage it, she had to turn her body to the left and then reach across with her right hand so that she could use both arms to manipulate it. As she turned her body, she rotated her head in the same direction, that is, to the left.
10. Claimant credibly testified that as she pulled up on the brake she heard and felt a pop in her left ear. She described feeling as if "someone had taken a baseball bat and hit her" across her upper arm. Her immediate sensation was as if her arm had gone to sleep. It dropped, felt totally dead and she could not move it.
11. Claimant used her right hand to lift her left arm onto the bus's steering wheel. Her entire left arm was numb, with tingling in her fingertips. Claimant notified her supervisor of her injury but indicated that she thought she could continue her shift, which she did. As the night wore on, she gradually regained feeling in her arm, but still could not raise it above her shoulder. At the end of her shift she completed an injury form. Defendant accepted the injury as compensable and began paying workers' compensation benefits accordingly.

Claimant's Subsequent Medical Treatment

12. One week after her injury, on February 23, 2012 Claimant sought treatment with Dr. Hobbes. At that time, she reported that she did not have any numbness or tingling in her left arm. Dr. Hobbes diagnosed left shoulder trauma and left triceps tendonitis. He took her out of work, prescribed ibuprofen and referred her to physical therapy.
13. Claimant participated in physical therapy over the next two months, but with very little improvement. Her physician ordered an MRI of her left shoulder in May 2012 and referred her to an orthopedist. The MRI indicated an extensive posterior labral tear. However, on physical exam in both May and June 2012 the physician's assistant reported a negative Spurling's test. If positive, this maneuver produces radicular symptoms in the arm, thus indicating a pinched nerve in the neck.
14. After reviewing her treatment options with Dr. Lawlis, an orthopedist specializing in shoulders, on August 16, 2012 Claimant underwent surgery to repair the tear. Thereafter, Dr. Lawlis advised her to remain out of work for five or six more weeks and to participate in physical therapy.
15. Claimant's shoulder improved with physical therapy, although at times she noticed mild tingling down her left arm and into her middle and fourth fingers. She credibly rated her recovery as 90 percent improved from her pre-surgical condition. The shoulder surgery did not resolve the weakness over her left shoulder blade, however.

16. In April 2013 Claimant reported to Dr. Lawlis that she continued to suffer significant pain over her left shoulder blade and was frustrated that she had not improved more. Dr. Lawliss ordered electrodiagnostic testing to rule out cervical radiation or long thoracic nerve palsy as the cause of Claimant's posterior shoulder pain.
17. One morning in May 2013 Claimant awoke to excruciating pain such as she had never experienced before. She could not raise either arm up and could not get out of bed. She waited until May 16, 2013 to see her primary care physician, now Dr. Stein, about these symptoms. Claimant reported that her pain worsened with movement, that she had numbness and tingling down her arms and that her symptoms kept her awake at night. Dr. Stein's assessment was that her shoulder was improved post-surgery but that she now had signs of inflammation and nerve compression on the left side.

Expert Medical Opinions

(a) Dr. Talley

18. Shortly after her visit with Dr. Stein, on May 20, 2013 Claimant underwent electrodiagnostic testing with Dr. Talley, a physiatrist affiliated with Fletcher Allen Health Care. Dr. Talley testified by deposition. Based on the test results, which she characterized as abnormal, Dr. Talley diagnosed Claimant with a left C6 or C7 radiculopathy. She found no evidence of long thoracic nerve palsy or peripheral neuropathy.
19. In Dr. Talley's opinion, Claimant's nerve injury likely occurred at some point six to 24 months prior to her EMG testing, most likely greater than one year prior. As she credibly explained, a nerve injury can be dated by the manner in which it gives off electrical impulses. If an injury is fresh, that is, two to three weeks old, the nerves are "irritable" and demonstrate increased "spikey" activity. As the injury heals, the firing pattern changes to a polyphasic one, which is not at all "spikey." Based on the firing pattern documented in Claimant's EMG, which was polyphasic, Dr. Talley concluded that her injury likely occurred sometime between May 2011 and December 2012. I find Dr. Talley's analysis on this point credible.
20. Dr. Talley could not determine the cause of Claimant's nerve damage, however. She suggested further cervical imaging to better diagnose her condition. To that end, Claimant underwent an MRI on June 14, 2013. The MRI revealed a small to moderate C6-7 right posterior disc herniation that was slightly compressing her spinal cord and the nerve root.

(a) Dr. Barnum

21. Dr. Barnum is a board certified orthopedic surgeon. He testified by deposition. Prior to his testimony, he reviewed both his own treatment records and Dr. Talley's EMG test results. He did not review Claimant's pre-injury medical records.

22. Dr. Barnum first evaluated Claimant for her cervical condition in July 2013. After reviewing her MRI and taking the history as she reported it, Dr. Barnum diagnosed radiculopathy of the left upper extremity due to a C6-7 herniated disc. As treatment, Dr. Barnum suggested that Claimant undergo epidural steroid injections. If those did not relieve her symptoms, in his opinion she would be an excellent candidate for disc replacement surgery.
23. Claimant underwent the epidural steroid injections as Dr. Barnum had suggested, but failed to garner any relief from them. Thereafter, on December 6, 2013 she underwent disc replacement surgery. She tolerated the surgery well and the next day she reported that she no longer experienced left arm pain, tingling, numbness or weakness.
24. In Dr. Barnum's opinion, Claimant's cervical condition and resulting disc replacement surgery were causally related to her February 2012 work injury. He based his opinion on the following:
- Claimant did not experience any neurological symptoms prior to her work injury, that is, she did not have weakness, numbness, tingling or pain in her left arm; and
 - Claimant's mechanism of injury, which Dr. Barnum understood to have involved a rotational component, in which she turned her body to the left to pull up on the emergency brake at the same time that she turned her neck to the right to look in the opposite direction, was a classic description of how discs herniate. According to Dr. Barnum, this biophysical rotational component was the likely cause of Claimant's disc herniation.
25. I do not find Dr. Barnum's opinion compelling. First, his belief that Claimant did not experience any neurological symptoms prior to her work injury is contradicted by Dr. Heyn's chiropractic records, which document complaints of tingling in her left fingers when raising her left arm higher than 90 degrees (November 2011), and muscle weakness in her left arm (January 27, 2012). More important, Dr. Barnum's understanding of the mechanism of injury was flawed. Claimant was not looking to her right, as he described. To the contrary, when she turned her head it was in the same direction as her body, that is, to the left. That Dr. Barnum assumed otherwise critically undermines his causation analysis.
- (b) Dr. Backus
26. At Defendant's request, Dr. Backus, a board certified occupational medicine specialist, performed an independent medical examination of Claimant. He also reviewed Claimant's relevant medical records.

27. Dr. Backus diagnosed Claimant with left cervicobrachial syndrome, a left shoulder strain, cervical spondylosis with degenerative disc disease and C7 radiculopathy. In Dr. Backus' opinion, Claimant's cervical condition was not causally related to her February 16, 2012 work injury. He based his opinion on the following:
- As the medical records document, Claimant was experiencing neurological symptoms in her left arm prior to the work injury;
 - In her early post-injury treatment, Claimant did not report radicular symptoms in her left shoulder or arm; and
 - Claimant complained of tingling in all her fingers, which is not specific to the C7 nerve root.
28. According to Dr. Backus' analysis, Claimant likely was already suffering from a C6-7 disc herniation, with resulting radicular symptoms into her left neck, shoulder and arm, prior to her February 2012 work injury. The work injury likely irritated her cervical nerves, but did not further injure them, and did not itself cause her disc to herniate.
29. I find Dr. Backus' analysis credible. The medical records clearly indicate that Claimant was experiencing neurological symptoms in her left arm prior to her work injury on February 16, 2012, as documented by Dr. Heyn in November 2011 and again in January 2012. Both of these dates are within the timeframe Dr. Talley estimated for Claimant's nerve injury to have occurred, furthermore.

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. At issue in this case is whether Claimant's neck condition and subsequent disc replacement surgery are causally related to her February 2012 work injury. Claimant argues that her neck condition was causally related and in fact occurred at the same time as her accepted left upper extremity injury. Defendant argues that the cervical injury is not causally related to the left upper extremity injury.

3. On this issue the parties presented conflicting medical opinions. In such cases, 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. Relying on the second and third factors, I conclude that Dr. Backus' opinion is more persuasive than Dr. Barnum's. Dr. Backus reviewed all of Claimant's medical records, some of which documented neurological symptoms in her left arm in the weeks prior to her work injury. This suggested to him that Claimant's C6-7 condition predated her work injury and was not affected by it. His analysis was thus more thorough and objectively supported.
5. In contrast, Dr. Barnum's opinion was based upon an erroneous understanding of Claimant's mechanism of injury, as well as a flawed understanding of her previous medical history. Because Claimant bears the burden of proof on the causation issue, in the final analysis it is her expert's credibility that matters most. In this case, Dr. Barnum's opinion does not carry the necessary weight.
6. I thus conclude, based on the evidence presented, that Claimant has failed to sustain her burden of proving the necessary causal relationship between her work injury and her neck condition and resulting surgery to establish compensability.
7. As Claimant has not prevailed on her claim for benefits, she is not entitled to an award of costs and attorney fees.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Claimant's claim for indemnity and medical benefits for her neck condition as causally related to her accepted work injury is **DENIED**.

DATED at Montpelier, Vermont this 2nd day of June 2015.

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.