

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Kenneth Lamont

Opinion No. 16-16WC

v.

By: Phyllis Phillips, Esq.
Administrative Law Judge

Agri-Mark, Inc.

For: Anne M. Noonan
Commissioner

State File No. GG-00980

OPINION AND ORDER

Hearing held in Montpelier on December 16, 2015, 2016

Record closed on January 21, 2016

APPEARANCES:

Daniel McCabe, Esq., for Claimant

Keith Kasper, Esq., for Defendant

ISSUE PRESENTED:

1. Did Claimant suffer an overuse injury to his left shoulder causally related to his work for Defendant?
2. If yes, to what workers' compensation benefits is he entitled?

EXHIBITS:

Joint Exhibit I: Medical records

Joint Exhibit II: Stipulation

Claimant's Exhibit 1: Job descriptions, Crew Member Cut & Wrap and Cheddar Box/Tower Operator

Claimant's Exhibit 2: Pictures and video

Defendant's Exhibit A: Video

Defendant's Exhibit B: *Curriculum vitae*, William Boucher, M.D.

Defendant's Exhibit C: Time detail, April 2014

CLAIM:

All workers' compensation benefits to which Claimant proves his entitlement as causally related to his alleged left shoulder injury

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 and correspondence contained in the Department's file relating to this claim.
3. Claimant worked for Defendant as a cheese table operator for more than ten years. He worked second shift in the "cheddar room," at a job with varied responsibilities. Many of his duties were physically strenuous, and barring equipment breakdowns, on most nights there was little down time. Claimant credibly testified that he frequently worked overtime; the time detail for a twenty-day period in April 2014 documents an average of 9.2 hours nightly.
4. As of September 3, 2014 Claimant's average weekly wage was \$766.36, which yielded a weekly compensation rate of \$512.91. Claimant has no dependent children.

Detailed Description of Claimant's Job Duties

5. One of Claimant's primary duties was salting vats of cheddar cheese. This was a multi-step process, which, alternating with a co-employee, he did at least every other night. First, he removed 50-pound bags of salt from a stack in the storeroom, opened them and poured the contents into a wheeled cart. Then he wheeled the cart back to the cheddar room and scooped the salt into a bucket, which sat on a scale. When the bucket was filled to the appropriate weight (between 42 and 45 pounds), he began the salting process itself. Holding his right arm around the bucket, he walked up and down alongside one of three "tables," or vats of cheese, and used his left (dominant) arm to throw the salt across the table as he went, in a motion he credibly described as "like feeding chickens."
6. In an eight-hour shift, Claimant likely salted six to eight vats of cheese. Each vat required three buckets of salt, plus other flavorings as well depending on what kind of cheese was being processed. Thus, over the course of an evening he likely would fill and spread 18 to 24 buckets. In addition, each wheeled cart held approximately 300 pounds of salt, meaning that he would have to return to the storeroom and refill the cart three or four times per shift.
7. Many aspects of the salting process involved bending, reaching and repetitive movements. For example, filling a bucket with salt required reaching down into the cart, which was 36 inches deep, to fill the scoop, and then emptying it into the bucket, which was at approximately chest height. From the video evidence admitted at hearing, I find that Claimant reached repetitively with his left shoulder engaged and his arm outstretched while performing these activities. Throwing the salt across the vats was also repetitive, though this action involved more left elbow than shoulder movement.

8. Apart from the salting process itself, Claimant regularly performed other duties as well that involved reaching at or above chest level. Twenty-two times each night, he and a co-worker would have to switch out one of two automated devices ó either a 20-pound agitator or a wide metal shovel weighing 50 pounds ó that traveled back and forth above each of the three cheese tables. This task required reaching out across the table to a distance of approximately 24 inches, and then up approximately five feet overhead in order to disconnect one device and reconnect the other.
9. Six to eight times per shift (once for each vat of cheese), Claimant and his co-worker would have to rake and shovel the curds in from the end of the table, so that the automated agitator could reach them. Claimant typically did the shoveling, using a motion akin to shoveling wet snow. The shovel weighed approximately 20 pounds when full, and the task typically took about five minutes of forceful and repetitive left shoulder and arm motions to complete.
10. When not directly engaged in the salting process (typically mid-way through his shift), Claimant would remove 38-pound wheels of cheese from their bands and stack them on racks to dry. This task required some repetitive lifting from approximately waist to shoulder height.
11. Over the course of his shift, Claimant performed other routine tasks that did not involve any repetitive or forceful use of his left shoulder. These included breaking up cheese balls with his fingers as he walked up and down the cheese tables, operating a forklift and occasionally reaching above shoulder height to access a computer touch screen.
12. Claimant credibly testified that of all the job duties he performed during the course of a normal shift, the most physically taxing one was the process of filling and weighing the salt buckets so many times during the night.
13. Claimant's supervisor, Fred Hart, corroborated Claimant's testimony regarding the fast pace at which the cheese table operators worked. Mr. Hart credibly testified that while the job was not among the most physically demanding ones at the facility, it required constant movement from one task to the next, with only limited break times.
14. Mr. Hart credibly described Claimant as a good employee who worked independently. Prior to filing the pending worker's compensation claim, he had never complained about the physical demands of his job, nor had he ever reported that the job caused him to suffer shoulder pain.

15. Susan Murray, Defendant's regional safety coordinator, has worked for Defendant for 25 years. She credibly testified that neither state safety inspectors nor workers' compensation insurance consultants have ever raised concerns regarding the repetitive nature of Defendant's cheese operation. Nevertheless, as an example of Defendant's ongoing commitment to injury prevention, Ms. Murray described its practice of scheduling "micro breaks" throughout each shift whereby, upon hearing a musical cue played over the intercom, employees are encouraged to stop and stretch for a few minutes. However, she acknowledged that if Claimant and his co-worker were in the midst of salting when the cue was played, they would not be able to stop and stretch at that moment. The evidence does not establish whether and to what extent Claimant availed himself of these mini-stretch breaks.

Claimant's Prior Medical History of Right and Left Shoulder Pain

16. Claimant has a history of right shoulder and neck pain dating back to 2009, following a non-work-related incident involving heavy lifting. He was diagnosed with right rotator cuff and biceps tendon tears, for which he underwent arthroscopic surgery in November 2009. Dr. Chen, his treating orthopedic surgeon, also noted degenerative changes in his acromioclavicular joint at the time.
17. Claimant recovered well from surgery. In March 2010 he was released to return to full time, full duty work. Thereafter, he continued to report pain with overhead lifting and heavy weights, but these symptoms were not disabling.
18. Claimant first complained of pain with movement in his left shoulder in July 2011. His primary care provider, Christopher Laurent, a family nurse practitioner, reported the following history:

Patient denies history of injury but reports that he lifts 45-pound buckets at work several times a day. He uses both arms. He states that the shoulder mostly hurts with movement, but is very uncomfortable at night. Patient recently had right shoulder rotator cuff repaired and states that this feels "the same."
19. Mr. Laurent's assessment was non-specific "left shoulder pain." As treatment, he prescribed medications for joint pain and advised Claimant to limit lifting to ten pounds with both arms. It does not appear that Claimant informed Defendant of this restriction or made any attempt to abide by it himself.
20. Claimant did not treat again for left shoulder pain until the following year. In July 2012 he returned to Mr. Laurent with complaints of worsening pain and episodic weakness in his left arm. As before, Mr. Laurent reported that he "works in a job that requires repetitive lifting with both arms of about 45 pounds." X-rays were "essentially normal," and again Mr. Laurent's diagnosis was non-specific.

21. Claimant treated again with Mr. Laurent for complaints of left shoulder pain in April and November 2013. As before, Mr. Laurent noted his history of repetitive use at a job that required lifting up to 50 pounds. Treatment was conservative, and consisted of pain medications and an injection. Throughout, Claimant continued to work full time without restrictions, notwithstanding ongoing pain and limited range of motion.

Claimant's May 2014 Work Injury

22. While lifting a bucket of salt during his shift on May 22, 2014 Claimant felt a sharp, intense pain across his left chest and radiating into his left arm. He immediately fell to the floor. Soon after, he was transported by ambulance to the hospital emergency room.
23. Initially, Claimant suspected that he had suffered a heart attack. Cardiac tests were negative, however, and later he was diagnosed with a costochondral chest strain. Defendant accepted this injury as compensable and began paying workers' compensation benefits accordingly.
24. Claimant missed approximately two weeks of work following this injury, during which Defendant paid both medical and temporary disability benefits. In early June he returned to work in a modified duty position, with a restriction against lifting more than 20 pounds with either arm.
25. Concurrent with his modified duty work, between May and September 2014 Claimant also worked at times for Early Bird Cleaners, the janitorial service with whom Defendant had contracted to clean its facility. Claimant typically worked one hour per night, running the floor polisher, cleaning toilets and washing windows. He acknowledged that the latter tasks required some reaching and overhead work.

Claimant's Medical Course after September 2014

26. On September 3, 2014 Claimant reported to his primary care provider, Mr. Laurent, that despite two months of lifting restrictions his left shoulder was still stiff and tender, and that if he tried to lift more than 20 pounds, he would have pain for two or three days thereafter. Claimant also reported a new complaint of low back pain, which he attributed as well to repetitive lifting at work. On the basis of these complaints, Mr. Laurent determined that he was totally disabled from working.
27. As treatment for Claimant's left shoulder pain, Mr. Laurent prescribed narcotic medications, physical therapy and injections. Later, diagnostic imaging studies revealed both a rotator cuff tear and acromioclavicular degenerative joint disease. Mr. Laurent attributed these conditions to both the repetitive nature of Claimant's work and the May 2014 lifting incident. In Mr. Laurent's opinion, the severe chest discomfort Claimant had experienced during that event was likely due to inflammation in his left shoulder. I find this analysis credible.

28. Claimant's symptoms failed to abate with conservative therapy. In July 2015 he underwent arthroscopic surgery with Dr. Chen, the same surgeon who had repaired his right rotator cuff tear in 2009. Initially, he reported that his recovery was progressing well. As of the formal hearing, his strength remained diminished, however. He had not been able to afford formal physical therapy, such that his treatment was limited to a home exercise program.

Expert Medical Opinions

(a) Dr. Spina

29. At his attorney's referral, in March 2015 Claimant underwent an independent medical examination with Dr. Spina, an orthopedic surgeon. Dr. Spina has retired from a surgical practice focusing primarily on knees and hips, though he has treated hundreds of rotator cuff injuries as well over the course of his career. He also has experience treating work injuries in a manufacturing setting, and in that context he toured Defendant's facility some twenty years ago to assist his understanding of the cheese making process. Prior to issuing his report in this claim, Dr. Spina physically examined Claimant and reviewed his medical records. More recently, he reviewed Defendant's independent medical examiner's report and also viewed the video evidence submitted at hearing.
30. Dr. Spina diagnosed Claimant with a phenomenon called "dead arm syndrome," with findings consistent with rotator cuff degeneration, tearing and possible instability. He acknowledged that Claimant's age (59 as of May 2014) and genetic predisposition are "always" contributing factors in the development of these conditions. However, in his opinion, to a reasonable degree of medical certainty the primary cause was his work for Defendant.
31. Dr. Spina specifically identified having to fill and carry heavy buckets, scooping salt and reaching overhead to stack cheese wheels as the type of job duties likely to cause rotator cuff pathology. The tissues in that area are poorly vascularized; as a result, the joint's propensity for healing is poor. Having worked for more than ten years at a rigorous job that required repetitive use of his left shoulder, as well as forceful pulling and prolonged reaching, Claimant likely caused damage that became chronic. The May 2014 lifting incident was the event that finally caused the joint to fail "the straw that broke the camel's back," as it were. I find this analysis credible.
32. Dr. Spina admitted to having no knowledge of Claimant's work with Early Bird Cleaners during the summer of 2014. He acknowledged that washing windows likely required overhead work of a type that would be conducive to rotator cuff injury. However, given a documented history of left shoulder complaints that long predated these activities, Dr. Spina doubted that they were causative. I find this analysis persuasive.
33. Dr. Spina concurred with Dr. Chen's ultimate diagnosis, and also with his surgical treatment plan.

(b) Dr. Boucher

34. At Defendant's request, in April and May 2015 Dr. Boucher reviewed Claimant's medical records and three pages of written job descriptions provided him by Defendant. He also viewed the video evidence submitted at hearing. Dr. Boucher is board certified in occupational medicine. He did not personally examine Claimant, and has never visited Defendant's facility, though he testified to having worked in the past with a similar employer in Maine.
35. In Dr. Boucher's opinion, to a reasonable degree of medical certainty there was no causal relationship between Claimant's work for Defendant and his left shoulder pathology. Citing to the *AMA Guides to the Evaluation of Disease and Injury Causation*, a compilation of pertinent medical literature, Dr. Boucher declared that the incidence of shoulder arthritis and degenerative rotator cuff tears is the same in laborers as it is in the general population; in either case, the condition becomes increasingly prevalent after age 50. With that in mind, he concluded that Claimant's condition was likely due solely to age-related degeneration.
36. Dr. Boucher acknowledged that the studies upon which he relied were very general, and did not specifically examine particular activities similar to the ones Claimant regularly performed. For that reason, at least he described them I find that the studies have only limited value.
37. According to Dr. Boucher's interpretation of the video evidence, most of the job tasks in which Claimant engaged, such as salting the vats, stacking cheese wheels, breaking up cheese balls and occasionally operating the computer, required shoulder movement at or below chest level, which would put little strain on his rotator cuff. In Dr. Boucher's analysis, none of these activities was sufficiently forceful or repetitive to cause or aggravate his shoulder condition.
38. Notably, Dr. Boucher failed to address in his testimony the one activity that Claimant identified as the most bothersome, which was repetitively scooping the salt from the cart and into the buckets so many times during his shift. As to some of the others, he did not know important details, for example, how many times per shift Claimant had to switch out the automated devices suspended over each vat, and how high he had to reach to do so. I find these gaps in his analysis troubling.
39. Dr. Boucher admitted that the written job descriptions upon which his understanding of Claimant's job duties was based in fact pertained to two other positions in Defendant's facility, not Claimant's, and therefore did not accurately portray the duties Claimant actually performed. Nevertheless, Dr. Boucher claimed to have gleaned sufficient knowledge of Claimant's job duties from his experience with a "similar employer" in Maine. Aside from this vague reference, he offered no further information from which I might determine whether and to what extent the jobs were comparable to Claimant's. Again, as a result I have reason to question his analysis.

40. As Dr. Spina had, Dr. Boucher concurred with Dr. Chen's ultimate diagnosis, and also agreed that Claimant's July 2015 surgery was medically reasonable.

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 probably 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 suffered an overuse injury to his left shoulder causally related to his work for Defendant. The parties presented conflicting expert medical evidence on this issue. In such cases, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive, considering (1) the nature of the treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all of the 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).
3. With particular reliance on the third factor, I conclude here that Dr. Spina's opinion was the most credible. His analysis of the forceful and repetitive nature of Claimant's various job tasks, and the manner in which they likely resulted in stress to his left shoulder, was clear, thorough and objectively supported. His analysis of the relationship between the damage caused by repetitive stress and the joint's ultimate failure following the May 2014 lifting incident was equally persuasive.
4. In contrast, Dr. Boucher's analysis was based on an inaccurate description of Claimant's job duties and failed to account for tasks that were clearly repetitive. Given the other credible evidence in the record, his reliance on the medical literature to support his opinion fell far short of the mark, furthermore. The question is not whether Claimant was equally likely to suffer from a degenerative shoulder condition regardless of his work activities; it is whether the facts in this case justify the conclusion that the condition was caused or accelerated in any way by his work. *Compare Brace v. Jeffrey Wallace, DDS*, Opinion No. 28-09WC (July 22, 2009) (evidence deemed sufficient to establish work-related causation notwithstanding non-occupational risk factors), *with Goodwin-Abare v. State of Vermont Agency of Human Services*, Opinion No. 41-11WC (December 14, 2011) (evidence deemed insufficient to establish work-related causation). I conclude that they do, and for that reason I find Dr. Boucher's opinion unpersuasive.

5. I conclude that Claimant has sustained his burden of proving that his left shoulder condition arose out of and in the course of his work for Defendant, and is therefore compensable.
6. As Claimant has prevailed on his claim for workers' compensation 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 decision 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. All workers' compensation benefits to which Claimant establishes his entitlement as causally related to his compensable left shoulder injury; and
2. Interest, costs and attorney fees, in amounts to be determined, in accordance with 21 V.S.A. §§664 and 678.

DATED at Montpelier, Vermont this ____ day of September 2016.

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.