

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Richard Brosam

Opinion No. 14-17 WC

v.

By: Phyllis Phillips, Esq.
Administrative Law Judge

United Parcel Service, Inc.

For: Lindsay H. Kurrle
Commissioner

State File No. GG-54226

OPINION AND ORDER

Hearing held in Montpelier on April 28, 2017
Record closed on September 1, 2017

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Jason Ferreira, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant's left shoulder condition causally related to his compensable October 3, 2014 right shoulder injury?
2. Should Claimant's average weekly wage and compensation rate include employer-paid group health insurance premiums paid during the 26 weeks preceding his injury?

EXHIBITS:

Joint Exhibit I: Medical records, December 2005 through April 2017

Claimant's Exhibit 1: Preservation deposition of John Macy, MD, June 27, 2017

Defendant's Exhibit A: *Curriculum Vitae*, Daniel O'Neill, MD

Defendant's Exhibit B: Dr. O'Neill medical records review, September 24, 2016

Defendant's Exhibit C: Excerpts from the *AMA Guides to the Evaluation of Disease and Injury Causation* (2nd ed.)

Defendant's Exhibit D: Preservation deposition of Dr. O'Neill, April 20, 2017

Defendant's Exhibit E: Agreement for Temporary Compensation (Form 32), approved May 7, 2015

Defendant's Exhibit F: Affidavit from Defendant's Finance Manager Maureen Rotondo, April 25, 2017, with health insurance premium calculations

CLAIM:

Additional workers' compensation benefits referable to his left shoulder condition to which Claimant proves his entitlement as causally related to his October 3, 2014 right shoulder injury; and

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 the Vermont Workers' Compensation Act.
2. Judicial notice is taken of all forms and correspondence in the Department's file relating to this claim.
3. Claimant is a 57-year-old man residing in Richmond, Vermont. In 1988, he began working for Defendant; three years later, he became a package car driver. In that position, he drove a pre-loaded vehicle to various delivery locations and carried packages to the recipients. At first, the job required him to lift, carry and move up to 70 pounds. Later, the weight requirement for moving packages increased to 150 pounds.

Claimant's Right Shoulder Injuries and Subsequent Medical Course

4. Claimant has a history of work-related right rotator cuff injuries. He was first injured in April 2007 and underwent surgery with Dr. Macy, an orthopedic surgeon, in August 2007. He reached an end medical result for this injury in August 2008, with a two percent whole person permanent impairment, and was released to full duty work with no restrictions.
5. Claimant re-injured his right rotator cuff in September 2011, for which he underwent repeat surgery with Dr. Macy in January 2012. He reached an end medical result for this injury in November 2012, with a five percent (cumulative) whole person permanent impairment, and again returned to full duty work with no restrictions.
6. On October 3, 2014 Claimant sought medical treatment for tingling and numbness in his right fingers. Shortly thereafter, his right shoulder began to feel sore. His primary care physician, Dr. Penney, diagnosed him with cervical radiculopathy, referred him to physical therapy and released him to return to work with restrictions.
7. Initially Claimant worked in a modified-duty capacity. When work within his restrictions became unavailable, on November 3, 2014 he began receiving temporary total disability benefits. The parties executed an Agreement for Temporary Compensation (Form 32), which the Commissioner's designee approved on May 7, 2015.

8. Claimant testified that following the onset of right arm and shoulder symptoms in October 2014, he began using his left arm more frequently, using his right arm mainly for guidance and help. He did not testify as to his level of activity during this time, the nature or frequency of the activities he performed with either arm, or how much he used his right arm for guidance, help or any other activities.
9. Claimant engaged in physical therapy to treat his right-sided cervical radiculopathy and shoulder pain. He also underwent two epidural steroid injections to the right side of his neck, in April and June 2015. The physical therapist's notes include the following:
 - In March 2015, his exercise intensity had reached a fairly high level with minimal reports of symptom irritation. *Joint Exhibit I* at 265.
 - In May 2015, he continued to demonstrate normal shoulder strength and tolerated all treatments well; he reported intermittent right arm symptoms, but they did not limit performance of his exercise program or increase with continued use. *Joint Exhibit I* at 322.
 - In July 2015, he demonstrated the capacity to carry, pull and push 40 pounds bilaterally. He reported intermittent right shoulder pain with some use, but the pain did not linger when the activity was done. He also lifted 60 pounds bilaterally from floor to knuckle. *Joint Exhibit I* at 398-99.
 - On August 3, 2015, after riding a bicycle and being very active over the weekend, he reported that everything has been fine. *Joint Exhibit I* at 403-05.
 - On August 14, 2015, he reported that his right shoulder was tired from various activities around the house, including stacking wood (during which he hurt his back).¹ *Joint Exhibit I* at 420. On August 19th, he reported that his back still hurt, but his shoulder and arm were fine. *Joint Exhibit I* at 424.
 - On September 4, 2015, Claimant reported: I had to help my son move over the last few days. Shoulder is tired but not that sore. Tried to take it easy but had to do some lifting.² *Joint Exhibit I* at 436.
10. I find that the contemporaneous physical therapy notes likely convey an accurate account of Claimant's ability to engage in activities involving his right shoulder and are therefore credible.

¹ Claimant initially testified that he stacked wood with just his left arm, but conceded on cross examination that he used both arms.

² Claimant testified that his assistance consisted of driving his Jeep to Maine and moving small items, including a lamp and some pillows and blankets. Given his report of a tired shoulder to the physical therapist, I infer that he used his right arm to lift and carry at least some of the items he moved.

11. In July 2015 Claimant saw Dr. Jewell, a neurosurgeon, to follow up on his cervical radiculopathy. Dr. Jewell noted that his radicular symptoms had responded well to the steroid injections he had undergone in April and June. He did not recommend cervical spine surgery, but suggested instead that Claimant return to Dr. Macy for evaluation of his lingering right shoulder pain.
12. In August 2015 Claimant reported to Dr. Macy that his right shoulder pain was better. On examination, Dr. Macy noted:

excellent active motion nearly symmetric to the opposite side with approximately 150 [degrees] of flexion on the right versus 160 on the left. External rotation is approximately 60 on the right versus 70 on the left. He can reach behind to the L3 level on the right versus the L1 level on the left. He has essentially 5/5 strength for internal and external rotation as well as abduction bilaterally. *Joint Exhibit I* at 408.
13. Nevertheless, as Claimant's pain persisted, Dr. Macy recommended a magnetic resonance angiogram (MRA) of his right shoulder. The MRA identified a small partial tear in his rotator cuff, for which Dr. Macy recommended revision surgery.
14. On September 23, 2015 Claimant's right shoulder strength measured 5/5, and he told his physical therapist that his right arm pain was at worst a one on a ten-point pain scale. *Joint Exhibit I* at 466-67.
15. Claimant continued his physical therapy. In February 2016, he underwent right shoulder surgery with Dr. Macy to repair a small re-tear of the supraspinatus tendon.

Claimant's Left Shoulder Condition

16. In August 2015, Claimant met with a dietician to address his overall health and weight. In recent years, his weight has fluctuated between 220 and 280 pounds, giving him a body mass index that registers in the obese to morbidly obese category.
17. In early September 2015, Claimant and his wife worked together to stain the floor of their outdoor deck at home. Claimant estimated the deck at ten feet wide by 22 to 30 feet long. It took them several days to complete the project.
18. Claimant used his right arm to apply the stain with a paintbrush, leaning on his left arm for support and balance while variously sitting, kneeling or lying on the deck on his left side. Within a few days of maintaining these awkward postures, Claimant's left shoulder was extremely sore. He was concerned, because he had never had a problem with that shoulder before.
19. On September 9, 2015, Claimant first reported left shoulder pain to his primary care physician, Dr. Penney. Dr. Penney's history reflected that Claimant had been experiencing left shoulder pain for one day, from lying on his left side and leaning on his left elbow while staining his deck.

20. At Defendant's request, on September 21, 2015 Dr. White, an occupational medicine physician, performed an independent medical examination of Claimant's right cervical spine and shoulder. During the exam, Claimant reported that he was experiencing left shoulder pain, which he attributed to overuse from favoring his right shoulder. Dr. White reported that Claimant's right-sided symptoms were "mild." He did not specifically attribute his left shoulder pain to overuse.
21. On September 28, 2015, Claimant underwent an evaluation with Matt Salter, a physician's assistant in Dr. Macy's practice. Mr. Salter noted Claimant's report of left shoulder soreness for three weeks, since staining his deck at home. An x-ray revealed mild degenerative changes and some sclerosis, but Mr. Salter thought that Claimant's left shoulder pain was consistent with a posterior rotator cuff tear. He recommended an MRI to confirm that diagnosis.
22. On October 2, 2015, Claimant fell asleep while driving on the interstate and crashed his car into a tree. The first responders noted abrasions on Claimant's left posterior shoulder as a result of the accident. Nevertheless, at the emergency department Claimant complained only of left elbow pain, not left shoulder pain.
23. On Oct 29, 2015, an MRI of Claimant's left shoulder revealed a small full-thickness tear of the rotator cuff with no retraction. Claimant began a course of left shoulder physical therapy that continued through the following summer.
24. In October 2016 Dr. Macy surgically repaired Claimant's left rotator cuff. Claimant was released to return to restricted duty work on April 26, 2017 and to regular duty work on June 26, 2017.

Expert Medical Opinions

25. The parties presented conflicting expert medical testimony as to whether Claimant's left shoulder condition was caused by overuse occasioned by his work-related right shoulder injury.

(a) Dr. Macy
26. Dr. Macy graduated from the University of Medicine and Dentistry of New Jersey. He completed a four-year residency in orthopedics at the University of Vermont, followed by a one-year shoulder fellowship in 2001. He is board certified in orthopedic surgery and focuses his surgery practice at Copley Hospital on shoulder treatment. Dr. Macy testified by preservation deposition.
27. Dr. Macy has been Claimant's treating surgeon since 2007. He credibly testified that Claimant suffers from degenerative arthritis and rotator cuff disease, as a result of which he underwent right rotator cuff surgeries in 2007, 2012 and 2016. The typical rehabilitation protocol following such surgeries requires the patient to wear an immobilizing sling for four to six weeks, followed by three to five months of physical therapy.

28. In his deposition testimony, Dr. Macy described an “overuse phenomenon” by which a patient who has suffered a rotator cuff tear on one side can develop a progression of rotator cuff pathology on the other side. The phenomenon, which in Dr. Macy’s experience is not unusual, may occur following surgery, when the patient’s arm is immobilized in a sling. The patient compensates by using the other arm “a lot more.” *Macy deposition (Claimant’s Exhibit 1)*, at 17.
29. Based entirely on Claimant’s assertion that he began overusing his left arm after his right shoulder became symptomatic in October 2014, Dr. Macy concluded that the two conditions were causally related. Notably, however, his opinion was limited solely to Claimant’s left shoulder *pain*; he refrained from making a causal connection between Claimant’s right shoulder condition and his left shoulder rotator cuff tear.
30. Dr. Macy acknowledged that when Claimant developed left shoulder pain in September 2015, his right arm was no longer immobilized in a sling. He further acknowledged that Claimant was not suffering from significant or disabling right shoulder pain, that he had equal strength and good range of motion in both arms and that no functional restrictions had been imposed. Indeed, the contemporaneous physical therapy records document that Claimant was using his right arm to carry, push and pull up to 40 pounds and to lift up to 60 pounds. Dr. Macy’s apparent failure to consider these facts significantly weakens his causation opinion.
31. More generally, Dr. Macy failed to define with any specificity the circumstances under which the “overuse phenomenon” typically arises, and did not cite to any medical literature that might aid in understanding its parameters. I cannot discern from his testimony for how long one arm has to be immobilized before the other arm becomes “overused,” or the different types of activities or restrictions that are more or less likely to cause “overuse.” Beyond that, although Dr. Macy acknowledged that age and obesity are strong risk factors for the development of rotator cuff injuries, he failed to explain why he rejected these as causative in Claimant’s case. These omissions further weaken his causation opinion.

(b) Dr. O’Neill

32. At Defendant’s request, Dr. O’Neill reviewed Claimant’s medical records and offered an opinion as to whether Claimant’s left shoulder condition was causally related to his compensable right shoulder injury. Although Dr. O’Neill did not physically examine Claimant, he credibly testified that a physical examination would not have added any useful information to his analysis. Dr. O’Neill testified by preservation deposition.
33. Dr. O’Neill graduated from the SUNY Stony Brook Medical School and later earned a Doctorate in Sport and Exercise Psychology from Boston University. He completed a one-year general surgery internship, an orthopedic residency program and a sports medicine fellowship. He is board certified in orthopedic surgery and has a clinical practice at Littleton (NH) Regional Healthcare, as well as a medical-legal consulting practice.

34. Dr. O'Neill's causation opinion was based in part on the *AMA Guides to the Evaluation of Disease and Injury Causation* (2nd ed.) (*AMA Causation Guides*). The *AMA Causation Guides* are a distillation and quantification of the relevant medical literature on disease and injury causation; the second edition is the most recent one.
35. With regard to contralateral (opposite limb) rotator cuff disease, Dr. O'Neill referenced the following summary in the *AMA Causation Guides*:

In summary, the articles reviewed do not support favoring as a reasonable cause for development of symptoms in the contralateral shoulder. Rotator cuff lesions are seen with aging and are often asymptomatic. Typically, activity is beneficial, not detrimental. Although workplace risk factors may contribute to shoulder symptoms, as outlined in this book, it appears that most shoulder conditions develop at a similar rate. In most cases favoring is not a probable cause of shoulder pathology. Thus, even if symptoms in the second limb develop after symptoms are present in the first limb (a temporal relationship), there is no scientific support for the concept that having symptoms in the first limb causes an increased rate of disease in the second limb.

AMA Causation Guides (Defendant's Exhibit C) at 766.

36. In Dr. O'Neill's opinion, even in a case where a patient's arm is amputated, the other shoulder does not normally break down, because people do not typically use their bodies to maximum capacity. Thus, he testified, the development of opposite side pathology due to overuse is very unusual. I find this analysis credible.
37. According to Dr. O'Neill, the evidence in Claimant's case does not support the conclusion that his left shoulder symptoms were caused by overuse occasioned by the inability to use his right shoulder. First, his left shoulder symptoms did not start for almost a year after he resumed treatment for his right shoulder symptoms, making it hard to relate one to the other temporally. Second, the medical records corroborate that during the summer of 2015 his right shoulder was doing reasonably well and he was using his right arm for activities of daily living and other chores. Accordingly, he had adequate use of his right arm when his left shoulder symptoms developed. In Dr. O'Neill's opinion, which I find credible, these circumstances undermine rather than support overuse as the cause of Claimant's left shoulder symptoms.
38. Although Dr. O'Neill conceded that the overuse phenomenon might be a factor in some cases of shoulder pathology, he was confident that it was not a factor here. In his opinion, Claimant's left shoulder condition is most likely due to his age, his physiology and his obesity. Notably, the *AMA Causation Guides* cite age and obesity as non-occupational risk factors for rotator cuff tears for which there is very strong or strong evidence.³

³ The *AMA Causation Guides* conclude that there is very strong evidence for age and strong evidence for higher body mass index as a cause of rotator cuff pathology.

39. I find Dr. O'Neill's causation opinion to be clear, persuasive and well-supported by Claimant's medical records and the medical literature.
40. Dr. O'Neill testified that Claimant's October 2015 car accident likely resulted in trauma to his left arm, but did not specifically offer an opinion that it affected his left shoulder condition. In light of that, and given that Dr. Macy's physician's assistant, Mr. Salter, had raised concerns about a possible left-sided rotator cuff tear four days prior to the accident, I find that the evidence is insufficient to establish any causal relationship between that event and Claimant's left shoulder condition.

Average Weekly Wage

41. Defendant paid one hundred percent of Claimant's health insurance premiums until it discontinued doing so on April 1, 2016. For the 26 weeks prior to Claimant's September 27, 2014 right shoulder injury, Defendant paid \$9,679.24 in health insurance premiums on his behalf.
42. The employer-paid cost of Claimant's health insurance premiums was not included in his average weekly wage and therefore was not part of the calculation of his weekly compensation rate.
43. As noted above, Finding of Fact No. 7 *supra*, Claimant and Defendant entered into an Agreement for Temporary Compensation (Form 32) on March 10, 2015. The agreement specified Claimant's compensation rate at a level that did not include the employer-paid health insurance premiums.⁴ The Commissioner's designee approved the agreement on May 7, 2015.

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, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), 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, supra* at 19; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993). A claimant cannot meet his burden of proof with speculative testimony. *Daignault v. State of Vermont Economic Services Division*, Opinion No. 35-09WC (September 2, 2009).

⁴ The Agreement stated Claimant's pre-injury average weekly wage as \$1,479.62 and his compensation rate as \$1,006.41, including two dependents.

Compensability of Claimant's Left Shoulder Condition

2. The primary factual dispute here is whether Claimant's left shoulder condition is causally related to his compensable right shoulder injury. Claimant asserts that his right shoulder injury caused him to overuse his left arm, resulting in his left rotator cuff tear. Defendant contends that the two conditions are not causally related.
3. The parties presented conflicting expert medical testimony on this issue. 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 primarily on the second and third factors, I conclude that Dr. O'Neill's causation opinion is more persuasive than Dr. Macy's. Dr. O'Neill reviewed the relevant medical records and provided an opinion with clear, thorough and objective support. In doing so, he referenced Claimant's medical history and a meta-analysis of the medical literature on the causation of rotator cuff injuries. Noting that the overuse phenomenon is very unusual, he credibly explained how the fact that Claimant was able to use his right arm to the extent that he did seriously undermined any claim that his left shoulder pathology was due to overuse.
5. In contrast, by his own admission Dr. Macy's opinion was based solely on Claimant's report that he developed left shoulder pathology because he was not able to use his right arm. Dr. Macy failed to review the relevant medical records to determine whether they corroborated Claimant's account. He also failed to define the circumstances under which the overuse phenomenon is likely to develop, or to reference any medical literature to support his opinion.
6. I acknowledge that Dr. Macy was Claimant's treating physician and that Dr. O'Neill's opinion was based on a medical records review rather than a physical examination. Nevertheless, I find in this case that Dr. O'Neill's opinion is better supported by the evidence. *See, e.g., Rivers v. University of Vermont*, Opinion No. 05-09WC (February 10, 2009) (physician performing a medical records review more persuasive than treating physician who relied on claimant's assertion of a causal relationship).
7. In the final analysis, I conclude that Dr. O'Neill offered a clear, thorough and objectively supported analysis, whereas Dr. Macy did not. On these grounds, I conclude that Dr. O'Neill's opinion is the most credible. I thus conclude that Claimant has failed to sustain his burden of proving the necessary causal relationship between his left shoulder condition and his compensable right shoulder injury.

Including Employer-Paid Group Health Insurance Premiums in Average Weekly Wage and Compensation Rate Calculation

8. The remaining dispute is a purely legal one. Claimant challenges the calculation of his average weekly wage and compensation rate. He claims that the amounts his employer paid in group health insurance premiums during the 26 weeks prior to his injury should have been included in the calculation.
9. Vermont's workers' compensation statute defines "wages" as including "bonuses and the market value of board, lodging, fuel, and other advantages which can be estimated in money and which the employee receives from the employer as a part of his or her remuneration." 21 V.S.A. §601(13).
10. The Vermont Supreme Court squarely addressed the question whether employer-paid health insurance premiums fall within the statutory definition of "wages" in *Lydy v. Trustaff, Inc.*, 2013 VT 44. Affirming the Commissioner's long-held interpretation, *see, e.g., Pelissier v. Hannaford Brothers*, Opinion No. 26-11WC (September 9, 2011), it decided that they do not. The Court explained its reasoning as follows, *id.* at ¶14:

The employer's cost in providing health insurance measures neither the employee's benefit nor his compensation. Employer health insurance rates are based on the plans offered, which can vary tremendously. The costs are not tied to the employee's labors and instead are based on factors unconnected to the employee . . . While the employer may contribute a set figure for the coverage, the employee may enjoy medical services that far exceed the cost to the employer or, if lucky in health, the employee may never gain any tangible benefit from the coverage. As such, we find that the employer's contribution for health insurance, though determinable, does not accurately reflect the employee's labors or compensation as defined through wages.

11. Claimant contends that his situation is distinguishable from the one presented in *Lydy*. There, the claimant had sustained a work-related injury while working for one employer, returned to work for a different employer and then incurred a subsequent period of disability causally related to her original injury, for which the first employer remained liable. The health insurance premiums that she sought to include in her wages were paid by the second employer, not the first employer.
12. Here, Claimant's injuries and subsequent periods of disability all occurred while working for the same employer, and it is the value of that employer's health insurance premium payments that he seeks to include in his average weekly wage and compensation rate calculation. He argues that this justifies a different result from the one obtained in *Lydy*.

13. Claimant has not himself suggested any legal analysis to support the distinction he claims should be made. Conceivably, one might argue that it would have been unfair for the Court in *Lydy* to have saddled the earlier employer with responsibility for paying indemnity benefits based on a higher average weekly wage when it was a subsequent employer's health insurance premium contributions that caused the increase to occur. Yet the same result would have obtained had the second employer simply paid higher wages than the first. In that situation, both the statute and the workers' compensation rules put the onus on the earlier employer to pay indemnity benefits at the higher rate. 21 V.S.A. §650(c); Workers' Compensation Rule 8.1651.
14. In any event, the Court's holding in *Lydy* did not rely on the distinction Claimant attempts to draw here. The same analysis applies, therefore. As was the case in *Lydy*, the health insurance premiums that Claimant's employer paid here do not "accurately reflect the employee's labors or compensation as defined through wages." *Id.* Similarly, the Court's determination that it is better left to the legislature to engage in a "robust . . . debate" prior to changing longstanding policy, *id.* at ¶19, is as defensible a rationale today as it was in *Lydy*. The Court having itself quite recently reaffirmed its holding in *Lydy*, see *Haller v. Champlain College*, 2017 VT 86, it is for now settled law.
15. I conclude that Defendant's group health insurance premium payments were properly excluded from Claimant's average weekly wage and compensation rate calculations.
16. As Claimant has failed to prevail on either of his claims, he 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 workers' compensation benefits referable to his left shoulder condition is hereby **DENIED**. Claimant's claim that Defendant's group health insurance premium payments should be included in his average weekly wage and compensation rate calculation is also **DENIED**.

DATED at Montpelier, Vermont this 20th day of October, 2017.

Lindsay H. Kurrle
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.