Robin Houle v. Ethan Allen (February 25, 2010)

STATE OF VERMONT
DEPARTMENT OF LABOR

Robin Houle

v.

Ethan Allen

Opinion No. 09-10WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. P-03516

OPINION AND ORDER

Hearing held in Montpelier, Vermont on September 21, 2009
Record closed on October 30, 2009

APPEARANCES:

Patricia Turley, Esq., for Claimant
Wesley Lawrence, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant's right shoulder condition compensable?

2. Was the Department's review and approval of Defendant's discontinuance appropriate?

EXHIBITS:

Joint Exhibit 1: Medical records

Claimant's Exhibit 1: Deposition of Andrew Chen, M.D., September 1, 2009
Claimant's Exhibit 2: *Curriculum vitae*, Andrew Chen, M.D.
Claimant's Exhibit 3: Deposition of Bruce Latham, D.O., August 4, 2009

Defendant's Exhibit A: Brad Baker statement, February 13, 2008

CLAIM:

Workers' compensation benefits causally related to Claimant's right shoulder condition
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 began working at Defendant's furniture manufacturing factory in 1997. Initially she was assigned to the "trim and wax" process. This job involves removing drawers from a finished dresser, sanding and waxing them, installing hardware and then returning them to the dresser.

Claimant's Left Shoulder Injury

4. In August 1999 Claimant injured her neck and left shoulder while pulling on a drawer to remove it from its dresser. She treated conservatively for this injury, which was diagnosed variably as a left elbow, wrist and/or shoulder strain, tendonitis, or cervical radiculopathy. Claimant reached an end medical result in December 2000 and received permanent partial disability benefits in accordance with a 9.5% impairment referable to her neck.

5. Following her 1999 injury Claimant continued to experience pain and weakness in her left shoulder and arm. Her medical providers imposed modified duty restrictions that precluded her from using her left arm for reaching, lifting more than 10 pounds or repetitive motion, including sanding. In order to comply with these restrictions, Defendant reassigned Claimant away from the "trim and wax" process and into an inventory control/stockroom clerk position.

6. Claimant's duties in the inventory control position were quite varied. She counted shelves, hardware bags, sanding pads, screws and other materials, and distributed them to workers on the manufacturing floor. She monitored the contents of the trucks that arrived and departed from the factory to ensure that they were loaded and routed correctly. She ordered parts and supplies and made sure that each shift of workers had the materials they needed to complete their assigned tasks. Throughout the day she fielded telephone calls from co-workers who needed supplies and dealt with other inventory issues as they arose.

7. Interspersed among these duties, Claimant also wrapped finished shelves to prepare them for shipping. Depending on production needs, and also on the number of interruptions she encountered, she might wrap as many as 200 to 250 shelves in a day.

8. Until 2007 Claimant performed all of her duties in an enclosed area called "the cage." Claimant testified that she had arranged her work space in a way that was well-suited to her needs and took into account her left shoulder restrictions. She had a small table for wrapping shelves and was easily able to fit that activity in around her inventory control and stockroom tasks. Claimant testified that she was comfortable with her duties in the cage and was able to manage all of her assigned tasks without using her left arm repetitively.

9. In October 2007 Defendant changed Claimant's job responsibilities, by reassigning her to the "trim and wax" process. Initially this assignment was to have been limited to no more than one hour per day, but Claimant testified that after a time she was assigned to the task for as much as two hours daily. Claimant was unhappy with the assignment, as she believed it conflicted with her modified duty restrictions, but she did the work nonetheless.

10. Also in October 2007 Defendant moved Claimant's work station from the cage out to the production floor. In Claimant's opinion, the move was ill-advised. The space was more cramped, and the set-up required her to turn and reach more in order to access some of the materials she needed to complete tasks. Other materials were still located in the cage, and in order to retrieve the heavier items Claimant had to use a jack or trolley to pull them to her work station.

11. Claimant testified that the combination of being reassigned to "trim and wax" and moving to a work station that was not well-suited for her caused increased stress to her left shoulder and required her to use her right arm more to compensate.

12. On February 6, 2008 Claimant's supervisor assigned her to work on the "sand and seal" line. Using a wet rag, Claimant's job was to wipe the dust from dressers and prepare them to be lacquered. The task required repetitive motions with both arms, and also some reaching overhead. Claimant's supervisor worked with her, and did most of the areas Claimant could not easily reach. Even with this assistance, however, after just thirty minutes at the job Claimant began to feel burning pain in her neck and shoulders. She remained at the task for approximately an hour and a half, and then returned to her other job duties.

13. The next day, February 7, 2008 Claimant reported to Defendant's nurse that her neck and left shoulder were very painful and that she needed to seek medical treatment. Defendant subsequently determined that it could no longer accommodate Claimant's modified duty work restrictions. Consequently, Claimant did not return to work after February 6, 2008.

Claimant's Right Shoulder Symptoms

14. Initially Claimant treated for the increased symptoms in her shoulder and neck with Dr. Latham, her primary care provider. Dr. Latham in turn referred her to Dr. James, an orthopedist, for further evaluation. Dr. James evaluated Claimant on May 15, 2008. He noted that she was complaining not only of left shoulder and neck pain but also, to a lesser extent, right shoulder pain as well. Dr. James indicated that without comparison records he did not have a complete diagnostic history, but he suspected that Claimant's left shoulder complaints most likely were due to her repetitive work for Defendant. As for her right shoulder pain, however, Dr. James felt it unlikely that these symptoms were in any way related to Claimant's prior history of work-related left shoulder pain. Instead, he attributed them to the normal wear and tear to be expected in someone of Claimant's age group.

15. Claimant was dissatisfied with Dr. James' evaluation. She voiced her concern that Dr. James somehow was biased in Defendant's favor to Dr. Latham. Dr. Latham responded by referring her to Dr. Chen, an orthopedic surgeon, for further evaluation and treatment.

16. Dr. Chen first evaluated Claimant in July 2008. Notably, Dr. Chen reported that according to Claimant she injured *both* of her shoulders in August 1999, not just her left shoulder. Dr. Chen reviewed a May 2008 MRI of Claimant's left shoulder, which revealed both degenerative changes in her acromioclavicular joint and also a small rotator cuff tear. To repair the tear, Claimant underwent arthroscopic surgery in November 2008.

17. As to the right shoulder, an August 2008 MRI revealed findings indicative not only of degenerative changes (as in the left shoulder) but also of two rotator cuff tears – an inferior labral tear and a "bucket handle" SLAP tear.[1] Although further diagnostic imaging was recommended to enhance the accuracy of these findings, Dr. Chen testified that given the severity of the tear he was confident in this diagnosis.

18. According to Dr. Chen, the combination of Claimant's repetitive work for Defendant and her need to compensate for the pain and weakness in her left shoulder most likely resulted in a "cumulative dose injury" to her right shoulder. Rather than one major trauma, an accumulation of smaller injuries, or micro traumas, ultimately caused a significant rotator cuff tear. In reaching this conclusion, Dr. Chen acknowledged that SLAP tears often result from the natural wear and tear of the aging process. In his opinion, however, the tears Claimant appears to have suffered – a bucket handle SLAP tear combined with an inferior labral tear – most commonly are associated with either trauma or repetitive motion, not simply aging.

[1] "SLAP" is an acronym referring to a tear of the superior labrum from anterior to posterior.

19. Dr. Chen admitted that he lacked detailed information as to the nature of Claimant's work for Defendant, particularly the type, extent and duration of any repetitive activities her job assignments required. He noted, however, that it would be quite common for a person with a long-standing history of symptoms in one shoulder to overcompensate and thereby develop problems in the other shoulder as well.

20. Dr. Latham concurred with Dr. Chen's analysis. Again, however, in concluding that Claimant's right shoulder condition was causally related to her work for Defendant Dr. Latham lacked any detailed information as to the specific requirements of Claimant's job assignments. To the contrary, Dr. Latham made erroneous assumptions about the extent to which Claimant must have engaged in repetitive heavy lifting based on solely on his own understanding of what goes on in a furniture manufacturing plant.

21. Both Dr. Wieneke, an orthopedic surgeon, and Dr. Johansson, an osteopath, disagreed with Dr. Chen's analysis. At Defendant's request, Dr. Wieneke performed a medical records review in April 2009. He also reviewed Claimant's deposition and from that became aware of her specific job duties. Dr. Johansson conducted a similar review, and also performed an independent medical evaluation of Claimant in August 2009. Both doctors concluded that Claimant's right shoulder symptoms most likely were the result of the degenerative changes in her joint rather than any rotator cuff tear. As to the latter, Dr. Wieneke asserted that even if such tears exist (which in his opinion has not yet been conclusively determined), the medical literature does not support any causal association whatsoever with the type of light duty repetitive work Claimant performed for Defendant.

22. Claimant testified credibly that she used her right arm predominantly for most job-related tasks during the last year of her work for Defendant. Prior to Dr. James' evaluation in May 2008, however, her medical records contain only brief occasional references to pain or other symptoms in her right shoulder or arm.

23. As of the date of the formal hearing, it was unclear what further treatment Claimant might undergo for her right shoulder symptoms. Dr. Chen testified that because her recovery from left shoulder surgery was less than optimal, he was as yet unsure whether to recommend right shoulder surgery.

Procedural History

24. In the aftermath of the events of February 6, 2008 Defendant accepted Claimant's neck and left shoulder symptoms as compensable, but denied any responsibility for her right shoulder condition as not causally related. Defendant's Form 2 to that effect was filed on September 16, 2008. As supporting evidence Defendant relied on Dr. James' May 15, 2008 evaluation (*supra*, Finding of Fact No. 14).

25. Claimant disputed the denial. Following an informal conference, on January 22, 2009 the Department's Workers' Compensation Specialist determined that Defendant had produced evidence sufficient to reasonably support its position. On those grounds, and citing the Commissioner's decision in *Jurden v. Northern Power Systems*, Opinion No. 37-08WC (October 8, 2008), the Specialist denied Claimant's request for an interim order of benefits.

26. Claimant next requested that the Workers' Compensation Division Staff Attorney review and reconsider the Specialist's determination. After reviewing all of the medical evidence submitted to date, including the medical reports of Drs. James, Latham and Chen, on April 22, 2009 the Staff Attorney reversed the Specialist's determination and issued an interim order directing Defendant to pay benefits covering Claimant's right shoulder condition.

27. Defendant next filed a Notice of Intention to Discontinue Benefits (Form 27), effective May 14, 2009, in which it purported to discontinue "any and all benefits that could be claimed under the Department's April 22, 2009 interim order." As support for the discontinuance, Defendant submitted Dr. Wieneke's April 27, 2009 records review (*supra*, Finding of Fact No. 21), in which he declared that Claimant's right shoulder condition most likely was not causally related to her employment.

28. What followed was a confusing series of communications by which Defendant's proposed discontinuance was routed first to the Staff Attorney, then to the Specialist and finally back to the Staff Attorney for her review. Ultimately, the Staff Attorney determined that the discontinuance was reasonably supported and allowed Defendant to terminate Claimant's benefits. In doing so, the Staff Attorney observed that in her opinion Dr. Wieneke's report had sufficiently addressed the deficiencies she previously had noted when reviewing Defendant's evidence prior to issuing her April 22nd interim order.

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. 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 (Sept. 17, 2003).

Compensability of Right Shoulder Condition

3. The medical evidence here is difficult to evaluate, as both parties' expert opinions are deficient in some respects. Neither Dr. Latham nor Dr. Chen endeavored to understand the specifics of Claimant's job activities. Their conclusions as to the repetitive nature of her work and its probable impact on her right shoulder condition are somewhat suspect, therefore. As for Defendant's experts, while both Dr. Wieneke and Dr. Johansson focused their attention on the light duty nature of Claimant's work, neither adequately addressed the extent to which Claimant still may have overused her right arm in order to compensate for the deficits in her left shoulder.

4. Although it is a close question, I am persuaded both by Claimant's credible testimony and by Dr. Chen's status as her treating orthopedic surgeon that Claimant's right shoulder condition is causally related to her work. Whether it resulted directly from her job activities, and/or from overcompensation for her work-related left shoulder injury, in either event it is compensable.

Procedural Issues

5. In addition to the substantive issue of compensability, Claimant also has raised procedural concerns as to the Department's approval of Defendant's May 2009 discontinuance. She argues that because the Department already had issued an interim order in response to Defendant's denial of Claimant's right shoulder claim, it applied both the wrong process and the incorrect legal standard when it later approved Defendant's discontinuance.

Defendant's May 2009 Discontinuance

6. The statutory authority for the issuance of an interim order following an employer's denial or discontinuance flows from 21 V.S.A. §§643a and 662(b).[2] The intent of the statute is to protect injured workers from having their claims disallowed or their benefits terminated abruptly by mandating, in appropriate circumstances, that benefits continue "until a hearing is held and a decision is rendered."

[2] Section 643a governs the issuance of interim orders in the context of an employer's proposed discontinuance; §662(b) governs the issuance of interim orders when a claim has been denied from the outset. The standard of review is the same in both cases. For the purposes of this discussion, therefore, both situations can be considered together. *See T.B. v. University of Vermont*, Opinion No. 06-08WC (February 12, 2008) at Conclusion of Law No. 3, note 1.

7. What Defendant did here was to disguise its objection to the Department's April 22, 2009 interim order, which had issued in response to Defendant's *denial* of Claimant's right shoulder claim, as a *discontinuance* instead. The evidence it submitted in support did not suggest that Claimant's condition had changed in any way, such that ongoing benefits were no longer appropriate. To the contrary, Defendant's evidence consisted simply in providing another medical opinion to challenge the causal relationship between Claimant's work and her right shoulder condition. This was exactly the defense it had asserted in its original denial, exactly the defense that the Specialist initially accepted as reasonably supported, and exactly the defense that the Staff Attorney later rejected in issuing her interim order.

8. Once the interim order issued, Defendant's recourse under the statute was to proceed to formal hearing while continuing to pay benefits in the meantime. What the Department allowed it to do instead was to discontinue benefits barely a month later. This was improper. Unless Defendant presented evidence establishing that benefits once started now were inappropriate – because Claimant had refused a suitable return-to-work offer, for example, or because the medical treatment she was receiving was no longer reasonable and necessary – its proposed discontinuance should have been rejected.

The "Jurden" Standard

9. Claimant also argues that the Department applied the wrong standard to its review of Defendant's discontinuance. She claims that the so-called *Jurden* standard represents an incorrect application of the statute.[3]

10. The standard enunciated in *Jurden* requires the Commissioner to review a denial or discontinuance of benefits with an eye towards the employer's burden of producing evidence, not the claimant's. This mandate comes directly from the language of the statute, which requires the commissioner to order that benefits be paid pending a formal hearing "if the evidence does not reasonably support" the employer's position. 21 V.S.A. §§643a and 662(b). As was noted in *Jurden*, this is a different inquiry from one that asks whether the evidence reasonably supports the claimant's claim. It places the burden of production on the employer, not the claimant.

11. Claimant correctly notes that in analyzing the employer's evidence in order to determine if it reasonably supports a denial or discontinuance the Commissioner is obligated to consider "the record as a whole," taking into account "whatever in the record fairly detracts" from the weight of the evidence so produced. 21 V.S.A. §601(24). Nothing in *Jurden* states otherwise.

[3] Here, the Department applied the *Jurden* standard not only when it reviewed Defendant's original claim denial but also when it granted Defendant's May 2009 discontinuance. Notwithstanding my determination that the discontinuance was improper given the context in which it was proposed, I find it necessary nonetheless to clarify the standard by which all interim order requests are considered.

12. Reading §601(24) and either §643a or §662(b) together, however, what *Jurden* acknowledges is that the burden of production matters. The question, "Viewing the record as a whole, has the employer produced enough evidence to reasonably support its denial or discontinuance?" is different from the question, "Viewing the record as a whole, has the claimant produced sufficient evidence to support his or her claim?" In reviewing the evidence for and against an interim order both questions easily might be answered affirmatively. The statute requires the Commissioner to ask the former question, not the latter one.

13. I conclude that the Department correctly applied the statute in determining whether to approve Defendant's discontinuance, but that it did so in the wrong context given the procedural posture of the claim. Having determined that Claimant's right shoulder injury is compensable in any event, the Department's error does not affect the ultimate result.

14. As Claimant has prevailed, she is entitled to an award of costs and attorney fees pursuant to 21 V.S.A. §678. In accordance with §678(e), Claimant shall have 30 days from the date of this decision within which to submit her 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 proves her entitlement as causally related to her compensable right shoulder injury;

2. Interest, costs and attorney fees in accordance with 21 V.S.A. §§664 and 678.

DATED at Montpelier, Vermont this 25th day of February 2010.

_____
Patricia Moulton Powden
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.