

Connie Lozell v. Hannaford Brothers

(March 8, 2010)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Connie Lozell

Opinion No. 10-10WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Hannaford Brothers

For: Patricia Moulton Powden
Commissioner

State File No. AA-01092

OPINION AND ORDER

Hearing held in Montpelier, Vermont on November 23, 2009

Record closed on December 23, 2009

APPEARANCES:

William Skiff, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUE PRESENTED:

Was Claimant's right total knee replacement causally related to her September 3, 2008 work injury?

EXHIBITS:

Joint Exhibit 1: Medical records

Claimant's Exhibit 1: Deposition of David Halsey, M.D., November 18, 2009

Claimant's Exhibit 2: Wage Statement (Form 25)

Claimant's Exhibit 3: *Curriculum vitae*, David Halsey, M.D.

Defendant's Exhibit A: *Curriculum vitae*, Philip Adamo, M.D.

CLAIM:

Workers' compensation benefits causally related to Claimant's right total knee replacement 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 at Defendant's supermarket for six years, the last two as a full-time maintenance person. Among her job duties are cleaning out the milk coolers, vacuuming the carpets at the front of the store, and picking up and sorting trash.
4. On September 3, 2008 Claimant was depositing some trash into a bin when she caught her shoelace in a pallet and fell to the cement floor. Claimant landed directly on her right knee. Her knee immediately became painful and swollen, to the point where Claimant had to leave work and seek treatment at the hospital emergency room.
5. Claimant was diagnosed with a fracture of her right kneecap, or patella. In addition, imaging studies revealed evidence of long-standing osteoarthritis in her right knee. Claimant had suffered a previous right patellar fracture in a 1986 motor vehicle accident. She had recovered completely from that injury. Aside from an episode of right knee pain in 2004, prior to September 2008 Claimant had not treated for any other symptoms in her right knee.
6. At the time of her September 2008 fall at work Claimant was 66 years old. She enjoyed a very active lifestyle, which included line dancing and playing with her grandchildren. Witnesses described her "wrassling" with the children in the snow and pulling them in a wagon. Claimant testified credibly that she did not experience any knee pain whatsoever associated with these or any other activities, and did not feel functionally limited to any extent prior to September 2008.
7. Initially Claimant treated conservatively for her injury. Her symptoms improved with physical therapy, to the point where she was able to return to work part time in October 2008. When she attempted to return to work full time, however, her symptoms worsened again. After only two weeks of full time work, Claimant's physician restricted her again to half-time shifts.
8. Ultimately Claimant was referred to Dr. Halsey, an orthopedic surgeon, for further evaluation and treatment. Dr. Halsey determined that because her symptoms had failed to resolve with conservative management, she was an appropriate candidate for joint replacement. Claimant underwent right total knee replacement surgery on March 24, 2009. She made a full recovery thereafter, and returned to work full time in June 2009.

9. In Dr. Halsey's opinion Claimant's September 2008 fall at work "permanently exacerbated" the pre-existing arthritis in her right knee. Dr. Halsey acknowledged that this underlying condition already had caused significant cartilage loss, rated as Grade 4 (of 4) osteoarthritis, but noted that it had not caused any chronic pain, instability or functional limitation prior to September 2008. Dr. Halsey testified that by itself, evidence of even Grade 4 cartilage loss on imaging studies, without accompanying disabling symptoms, provides insufficient justification for joint replacement surgery. The purpose of the surgery is to address symptoms that have failed to resolve with conservative management. According to Dr. Halsey, in Claimant's case these symptoms were caused, and Claimant's underlying osteoarthritis worsened, by her September 2008 fall at work.
10. Defendant's medical expert, Dr. Adamo, an occupational medicine practitioner, disagreed with Dr. Halsey's analysis. Dr. Adamo did not examine Claimant personally but reviewed her pertinent medical records. Based on that review Dr. Adamo concluded that Claimant's total knee replacement was necessitated by her underlying osteoarthritis, not by her September 2008 fall at work. In making this determination, however, Dr. Adamo acknowledged that he was unaware of Claimant's level of functioning prior to that incident. He also mistakenly understood that Claimant had resumed her pre-injury activities and successfully returned to full time work by mid-October 2008. In fact, as noted above Claimant was only able to manage full-time work for two weeks before her ongoing symptoms prompted her physician to restrict her again to part-time shifts.

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).

3. I find Dr. Halsey's opinion to be the more persuasive one here. Dr. Halsey credibly explained that Claimant's knee replacement surgery was undertaken not merely because osteoarthritis was present in her joint, but rather because her September 2008 fall had exacerbated that underlying condition to the point of causing chronic disabling symptoms. In contrast, Dr. Adamo's opinion was rendered less credible at least in part because he was not aware of the extent of Claimant's ongoing pain and resulting functional limitations after that event.
4. It is axiomatic that when a work injury aggravates or accelerates an underlying condition, the resulting disability and/or need for medical treatment is compensable. *Miller v. Engleberth Construction Co.*, Opinion No. 45-04WC (November 5, 2004), citing *Marsigli's Estate v. Granite City Auto Sales*, 124 Vt. 95 (1964). I find from the credible medical evidence that that is what occurred here. I conclude, therefore, that Claimant is entitled to workers' compensation benefits causally related to her March 24, 2009 knee replacement surgery.
5. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$3,247.43 and attorney fees totaling \$3,969.00. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded. As for attorney fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded as well.

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 March 24, 2009 right total knee replacement, with interest as appropriate in accordance with 21 V.S.A. §664; and
2. Costs totaling \$3,247.43 and attorney fees totaling \$3,969.00.

DATED at Montpelier, Vermont this 8th day of March 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.