

James Dearmin v. Surge Resources, Inc.

(May 27, 2010)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

James Dearmin

Opinion No. 19-10WC

v.

By: Sal Spinosa, Esq.
Hearing Officer

Surge Resources, Inc.

For: Patricia Moulton Powden
Commissioner

State File No. Y-01064

OPINION AND ORDER

Hearing held in Montpelier on January 21 and 22, 2010

Record closed on March 24, 2010

APPEARANCES:

David Lynch, Esq, for Claimant

Craig Matanle, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant develop post traumatic stress disorder (PTSD) as a result of his August 17, 2006 work injury?
2. If yes, to what worker's compensation benefits is he entitled?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Claimant's restaurant earnings and related tax data

Claimant's Exhibit 2: Photograph of Claimant's head injury

Defendant's Exhibit A: Three surveillance tapes and related report

Defendant's Exhibit B: Claimant's work and pay records from 10/02/04 to 7/07/07

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642

Temporary partial disability benefits pursuant to 21 V.S.A. §646

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 his 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. Defendant is in the roofing business; Claimant worked for Defendant as a roofer.

Claimant's Work Injury and Initial Treatment

4. On August 17, 2006 Claimant was roofing when a fellow worker accidentally struck him with a nail gun,¹ thereby discharging a nail into Claimant's forehead above his left eye. Co-workers helped Claimant from the roof and drove him to the Fletcher Allen emergency room.
5. At Fletcher Allen Claimant reported that he had a headache and was dazed, but denied that he had experienced a seizure or had lost consciousness. A CT scan confirmed that the nail had not fractured or penetrated Claimant's skull, but rather was lodged in soft tissue. The scan showed no evidence of intracranial hemorrhage or other abnormalities. Emergency room providers described the injury as minor and removed the nail with surgical pliers. They prescribed pain medication and discharged Claimant in good condition with no restrictions except to avoid work for three days.
6. Dana Shappy, Claimant's boss and a very believable witness, confirmed that Claimant was able to climb down a ladder after the accident and never lost consciousness. In fact, he testified that Claimant was relaxed, even joking, while at the hospital.

Conflicting Accounts of Claimant's Return to Work and Post-Injury Behavior

7. Claimant showed up for work the very next day. Out of concern over Claimant's injury, Mr. Shappy sent him home. When Claimant returned a few days later, he resumed his same duties and exhibited no behavioral or attitudinal changes. Claimant continued to work with and around nail guns, showing no reluctance to do so. He worked well with co-employees and took instruction appropriately. Mr. Shappy testified that to his observation Claimant did not exhibit any memory deficits or difficulty completing work projects. Nor did he complain of any headaches, nightmares or flashbacks. However, Mr. Shappy did testify that Claimant displayed some anxiety about starting up a future restaurant business.

¹ A nail gun is a hand held carpentry tool that when engaged drives a nail by means of a sudden burst of compressed air.

8. Claimant, on the other hand, testified that when he returned to work after the accident he was cautious, moved slower, lacked confidence and reacted to the sound of the nail gun. He testified to persistent headaches, memory and concentration difficulties, and personality changes that included explosive anger, flashbacks and nightmares. He further testified that he was afraid to use or be around nail guns and would experience flashbacks at the sound of the gun in use.
9. On August 29, 2006 Claimant saw Dr, Starr, a neurologist, complaining of headaches. Dr. Starr found no evidence of a post-concussive condition but instead diagnosed post-trauma tension headaches. He prescribed over-the-counter pain medication and expected Claimant to return to baseline soon.
10. Two months after his return to work, Claimant opened a restaurant with family members. He continued to work part time for Defendant. After approximately six months, during which Claimant engaged in periodic disagreements with his family members over how best to run the business, he left the restaurant. In May 2007 Claimant returned to full time roofing for Defendant.
11. Mr. Shappy, his sister Deanna Raymond, who also worked for Defendant, and E. Marie Goo, Claimant's mother, all testified that Claimant had been excited about leaving his roofing job to open the restaurant and was disappointed when he had to depart and return to full-time roofing. In contrast, Claimant testified that he was neither excited about opening a restaurant nor disappointed that once it failed he had to resume his roofing work.
12. After leaving the restaurant Claimant returned to his same roofing duties with Defendant. According to Mr. Shappy, Claimant continued to show no concern about using nail guns and no reluctance to work around others who used them. Mr. Shappy testified that Claimant did not exhibit any unusual behavior or complain of any other job-related difficulties. Initially, Claimant maintained the same high quality job performance that had typified his work for Defendant over the years.
13. One month after his return to full-time roofing, Claimant became uncooperative and disruptive at work. That led to an extended argument with Deanna Raymond, his supervisor at the time, which in turn led to his firing in early July 2007. Thereafter Claimant continued to work other jobs in the construction trade, including work as a roofer.

Claimant's Medical Treatment and Assessments

14. On July 26, 2007 Claimant returned to Dr. Starr, the neurologist who had evaluated him shortly after his injury, complaining of headaches, inattention, raging mood swings and hostility. Claimant also reported mild imbalance and staring spells. Dr. Starr ordered a brain MRI, an EEG and serum studies to rule out the possibility that Claimant's symptoms might be due to a tumor, seizures or metabolic dysfunction. All test results were normal. As treatment, Dr. Starr suggested a modification to Claimant's medications and psychiatric follow up.

15. Through August and September 2007 Claimant treated with Drs. Starr and Shulman, a family practitioner. He continued to complain of chronic headaches, explosive behavior and severe irritability. Claimant's providers continued him on prescribed medication; Dr. Shulman arranged a second neurological examination.
16. In October 2007 Claimant saw Dr. Patel, a neurologist. Claimant reported that his symptoms followed gradually after his work injury and, in addition to headaches, that he was now experiencing visual and auditory hallucinations. Dr. Patel confirmed that Claimant's imaging studies showed no abnormalities and proposed a possible diagnosis of neurotransmitter imbalance and mood disorder. He adjusted Claimant's medications and recommended psychiatric treatment.
17. In November 2007 Claimant returned to Dr. Shulman, continuing to report headaches, irritability, explosive behavior, mood swings, depression and hallucinations. Dr. Shulman opined at that time that Claimant suffered from complex, partial seizure-like symptoms associated with traumatic brain injury caused by his work injury.
18. Between June 2008 and July 2009 Claimant treated regularly at the White River Junction, Vermont Veteran's Administration facility. Based on their observations, treatment and testing the providers there concluded that Claimant met the criteria for post traumatic stress disorder (PTSD). Dr. Summerall, who treated Claimant for most of this period, noted in particular that Claimant exhibited symptoms of "irritability, avoidance, hypervigilance and re-experiencing." According to Dr. Summerall, Claimant reported that his symptoms began after his work injury, that the nail gun incident was the source of his functional difficulties and that the injury was a "particularly terrifying and traumatic incident."
19. In December 2009 Claimant underwent a defense medical evaluation with Dr. Van Uitert, a neurologist. Based on his review and examination, Dr. Van Uitert confirmed that Claimant had not suffered either a traumatic brain injury or a concussion following his work injury. He suspected that Claimant's headaches most likely were muscle contraction tension type headaches. Dr. Van Uitert could find no neurological basis for Claimant's behavior, but suggested further neurological treatment nonetheless. As for PTSD, Dr. Van Uitert acknowledged that it was a possibility, but declined to offer a conclusive opinion on that diagnosis.

Expert Psychiatric Opinions as to Post Traumatic Stress Disorder

20. At Defendant's request, Claimant has undergone two independent psychiatric examinations with Dr. Drukteinis, a forensic psychiatrist and medical-legal consultant. The first evaluation occurred in March 2008. The second evaluation occurred more than a year later, in November 2009. In the course of his evaluations, Dr. Drukteinis reviewed Claimant's personal history and medical records, personally examined him and administered a battery of psychological tests.

21. Dr. Drukteinis concluded, first of all, that Claimant had not suffered a traumatic brain injury as a result of his August 2006 work injury. Dr. Drukteinis' own testing revealed no evidence of cognitive deficits, and the timing and progression of Claimant's reported symptoms both were inconsistent with that diagnosis.
22. Dr. Drukteinis next considered the possibility that Claimant was suffering from PTSD. According to the *Diagnostic and Statistical Manual for Mental Disorders IV* (the "DSM-IV"), PTSD is a severe anxiety disorder diagnosed in accordance with the following six criteria:
 - Exposure to an extreme stressor involving actual or threatened death or serious injury, the response to which involves intense fear, helplessness or horror;
 - Persistent re-experiencing of the traumatic event;
 - Persistent avoidance of stimuli associated with the trauma;
 - Persistent symptoms of increased arousal;
 - Duration of symptoms for more than one month; and
 - Significant impairment in social, occupational or other important areas of functioning.
23. Dr. Drukteinis concluded that Claimant did not suffer from PTSD and that his current symptoms were not causally related to his August 2006 work injury. In reaching this conclusion, Dr. Drukteinis made the following observations:
 - There is significant overlap between the signs and symptoms of PTSD and those attributable to other anxiety disorders.
 - Claimant emphasized his PTSD symptoms to a far greater extent in his November 2009 evaluation than he had in his March 2008 evaluation. In particular, Claimant reported both nightmares and persistent re-experiencing of the nail-gun event in the context of Dr. Drukteinis' November 2009 evaluation, but had made no mention of these symptoms during his March 2008 evaluation.
 - Claimant exhibited no symptoms of avoidance of stimuli associated with the trauma. To the contrary, he continued to work as a roofer, both using nail guns himself and working around others who did.
 - Claimant did not report any changes in his behavior until at least six months after his injury, and his medical records did not document any symptoms indicative of PTSD until nearly two years after the event.

24. In making these observations Dr. Drukteinis placed particular emphasis on the absence of any defensive avoidance behavior, which he characterized as the most valid indicator for PTSD. He emphasized as well the fact that Claimant had not reported any behavioral changes or PTSD-like symptoms for many months after the nail-gun event. Dr. Drukteinis acknowledged that while it is possible to experience the delayed onset of PTSD symptoms, there must be a trigger for the symptoms to occur when they do. The trigger in Claimant's case, according to Dr. Drukteinis, would have been the point at which he was re-exposed to a nail gun. Yet Claimant's symptoms did not appear until six months later.
25. Dr. Drukteinis did find sufficient evidence from which to conclude that Claimant likely suffers from both moderate to severe depression and an anxiety disorder. In Dr. Drukteinis' opinion, the latter condition most likely is related to Claimant's failed restaurant endeavor, his sense of being trapped in his current work circumstances and his relationship with his girlfriend. In fact, Dr. Drukteinis observed that the onset of at least some of Claimant's emotional symptoms – his anger and explosive behavior, for example – were more temporally associated with his involvement in the restaurant venture than they were with the nail-gun incident.
26. Claimant's expert witness, Dr. Kessler, disagreed with Dr. Drukteinis' analysis. Dr. Kessler, a psychologist, performed an independent psychological examination of Claimant in November 2009. Based on his review of Claimant's medical records, his personal interview with Claimant and the psychological testing that he administered, Dr. Kessler proposed a variety of possible diagnoses to account for Claimant's symptoms, including anxiety, major depression, personality disorder and PTSD. Of these diagnoses, Dr. Kessler determined that major depression and PTSD were the most appropriate, both causally related to Claimant's August 2006 work injury.
27. According to Dr. Kessler, Claimant reported that while he did not avoid using a nail gun himself, he did avoid his fellow workers. In Dr. Kessler's opinion, this was sufficient evidence of avoidance behavior to satisfy that element of the *DSM-IV's* diagnostic criteria for PTSD. Dr. Kessler concluded from Claimant's psychological test results that the other criteria were satisfied as well.
28. Dr. Kessler determined that Claimant might still benefit from psychotherapy and medications, and therefore was not yet at end medical result. As for work capacity, in Dr. Kessler's opinion Claimant's psychological injuries preclude him from maintaining the consistency, focus and pace required to sustain a full-time job over a reasonable period of time. As a result, Dr. Kessler believes that Claimant remains temporarily totally disabled.

29. Dr. Drukteinis questioned Dr. Kessler's conclusions, noting the following:
- Dr. Drukteinis questioned whether Dr. Kessler had reviewed all of Claimant's relevant medical records prior to rendering his diagnostic conclusions.
 - Contrary to Dr. Kessler's assertion that Claimant had provided a "consistent" history as to the progression of his symptoms, Dr. Drukteinis noted important factual discrepancies relating to the temporal relationship between Claimant's return to work for Defendant, his failed restaurant venture and the onset of his symptoms. According to Dr. Drukteinis, meeting the diagnostic criteria for PTSD depends heavily on establishing an accurate timeline, which in his opinion Dr. Kessler did not do.
 - Given that Dr. Kessler's testing relied heavily on Claimant's subjective responses, Dr. Drukteinis questioned whether Dr. Kessler's conclusions truly could be said to have been based on "objective measurements." Without access to the raw data from which Dr. Kessler drew his conclusions, Dr. Drukteinis asserted that it was difficult to determine whether they were supportable or not.
 - Dr. Drukteinis characterized Dr. Kessler's determination that Claimant met the avoidance criterion of the PTSD diagnosis by virtue of the fact that he avoided his co-employees as "a stretch." With reference to a surveillance video showing Claimant using a nail gun with no apparent difficulty, Dr. Drukteinis reiterated that Claimant's continued use of the very tool by which he had been injured effectively negated any finding of avoidance behavior sufficient to sustain a PTSD diagnosis.
 - Last, Dr. Drukteinis asserted that even if Claimant did suffer from PTSD, given that he has continued to work as a roofer when jobs are available clearly he still has a work capacity.
30. Dr. Kessler did not review the surveillance video showing Claimant working with a nail gun in no apparent distress. He also apparently was unaware of the descriptions that Claimant's co-workers gave of Claimant's behavior immediately following his return to work after the nail gun incident. As noted above, Claimant exhibited no apparent behavioral or attitudinal changes for many months after his initial return to work; to the contrary, these did not appear until after his failed restaurant venture.

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. To establish a so-called "physical-mental" claim, one involving a mental injury that results from a work-related physical injury, Claimant must prove a causal nexus between a compensable physical injury and a psychological impairment. *Merrill v. Town of Ludlow*, 147 Vt. 186 (1986); *Blais v. Church of Christ of Latter Day Saints*, Opinion No. 30-99WC (July 30, 1999).
3. At issue here is whether Claimant's mental state and behavioral issues are causally related to his work injury. Claimant contends that his August 17, 2006 work injury caused PTSD, which in turn produced his mental and behavioral abnormalities.² Defendant argues that based on witness accounts of Claimant's own conduct, the substance and timing of his reported symptoms, its own psychological analysis and a credible alternate cause for his symptoms, Claimant has not proven that he developed PTSD as a result of his work injury.
4. To determine whether Claimant has met his burden of proof requires careful review and analysis of conflicting medical evidence. 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 (September 17, 2003).
5. Applying this test to the expert medical opinions offered in the current claim, I find Dr. Drukteinis' to be the more reliable and credible. I am particularly persuaded by his comprehensive evaluations and reporting along with the objective support he provides for his opinion.

² Throughout Claimant's years of treatment for his work injury his providers periodically suspected that his psychological and behavioral symptoms were due to either a traumatic brain injury or a concussion. Claimant underwent multiple examinations and diagnostic testing to confirm or refute these suspicions. With the exception of one early provider, all of the medical professionals who treated or evaluated Claimant ultimately rejected these diagnoses. Consequently, I concur that neither is the cause of Claimant's condition.

6. In contrast, by failing to explain adequately the basis for his finding that Claimant met the diagnostic criteria for PTSD, Dr. Kessler's opinion was rendered less persuasive. The gaps in his reasoning are particularly significant where, as here, Claimant's credibility was in question.
7. In addition, while Dr. Kessler did find support for a work-related PTSD diagnosis, his call for further testing in order to achieve a clear conclusion as to other, non-work-related diagnoses muddies the waters and weakens his opinion considerably.
8. Last, I am unconvinced by Dr. Kessler's conclusion that Claimant displayed sufficient avoidance behavior to satisfy that diagnostic criterion for PTSD. Instead, I am compelled to accept Dr. Drukteinis' assertion that for Claimant to continue to work with nail guns is remarkably inconsistent with a PTSD diagnosis.
9. I conclude that Claimant has not sustained his burden of proof that he suffers from PTSD causally related to his August 17, 2006 work injury.
10. Having failed to prevail, Claimant is not entitled to an award of costs or attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits causally related to his August 17, 2006 work injury is hereby **DENIED**.

DATED at Montpelier, Vermont this 27th day of May 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.