

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Lyle Gadapee

Opinion No. 08-22WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

United Parcel Service, Inc.

For: Michael A. Harrington
Commissioner

State File No. Z-57676

OPINION AND ORDER

Hearing held via Microsoft Teams on February 23, 2022
Record closed on March 25, 2022

APPEARANCES:

Daniel D. McCabe, Esq., for Claimant
James M. O’Sullivan, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant’s current right shoulder condition causally related to his accepted 2007 right shoulder injury?
2. If so, to what workers’ compensation benefits is he entitled?

EXHIBITS:

Joint Exhibit I: Joint Medical Exhibit (“JME”)

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. § 642
Permanent partial disability benefits pursuant to 21 V.S.A. § 648
Medical benefits pursuant to 21 V.S.A. § 640(a)
Interest, costs and attorney fees pursuant to 21 V.S.A. §§ 664 and 678

FINDINGS OF FACT:

1. Claimant was an employee and Defendant was his employer as those terms are defined in the Vermont Workers’ Compensation Act.
2. I take judicial notice of all forms in the Department’s file relating to this claim.

Claimant's Employment with Defendant

3. Claimant is a 66-year-old man who lives in St. Johnsbury, Vermont. He began working for Defendant in 1997, initially as a package "feeder." After about five years, he began a new position with Defendant loading packages onto the delivery trucks.
4. Working as a "loader," Claimant would stand next to a conveyor belt and look for packages that bore the number for the truck he was loading. He would grab those packages, walk four to five feet to load those packages onto the truck, and then return to the conveyor belt for more packages. Every time Claimant loaded a package, he had to step up into the truck. He placed the heavier packages on the truck floor and lighter packages weighing up to 35 pounds on the side racks. Loading the side racks required him to reach overhead, as they extended up seven feet. Sometimes, when work was especially busy, Claimant would not have time to place the packages into the truck as they came off the conveyor belt. When that happened, he would stack them outside the truck and load them later.
5. Packages ranged in weight from 2 to 150 pounds. Employees were permitted to seek assistance from a coworker to lift any package weighing over 70 pounds, but as a practical matter, there was often not enough time to find a coworker to help. Claimant credibly estimated that he handled between 800 and 1,200 packages per shift. He worked five shifts per week, except during the holiday season, when he often worked more. Claimant worked as a package loader for Defendant for 19 years, until he retired in October 2021.
6. In addition to his work for Defendant, Claimant also worked throughout the years as an electrician, generally doing a few hours of residential work in the afternoons after his shift for Defendant ended. Claimant credibly testified that, when his right shoulder hurt, he did not perform any electrical work that required overhead reaching. The parties presented no evidence of any shoulder injury related to Claimant's work as an electrician.

Claimant's 2007 Work Injury and Subsequent Medical Course

7. In October 2007, Claimant was placing a package in the truck when he accidentally stepped off the dock and lost his grip on the package. When he tried to grab the package, he felt pain in his right upper extremity. Claimant promptly sought medical treatment from his primary care physician at the Alpine Clinic in Franconia, New Hampshire.
8. On October 20, 2007, Claimant saw orthopedic surgeon Andrew Chen, MD, at the Alpine Clinic for evaluation of right shoulder pain. Claimant told Dr. Chen that he had experienced some shoulder soreness over the past few years, but there is no record that he ever sought treatment prior to October 2007, nor does Claimant recollect any prior shoulder injury. Dr. Chen ordered an MRI study to see whether Claimant had a labral tear. (JME 12-13). The MRI found a SLAP lesion and glenohumeral ligament

tears. The radiologist also noted “prior trauma to the scapula and humeral head, age indeterminate.” (JME 14).

9. When Claimant returned to Dr. Chen on November 13, 2007, the doctor diagnosed him with a SLAP tear, a partial thickness rotator cuff tear, glenohumeral degenerative joint disease, and subacromial impingement syndrome. (JME 17). Dr. Chen recommended right shoulder arthroscopy, rotator cuff and labral tear repairs, and shaving chondroplasty. (JME 20).
10. Claimant underwent the shoulder procedures on March 5, 2008. Based on his observations during the surgery, Dr. Chen confirmed his pre-operative diagnoses and also identified a near complete tear of the proximal biceps tendon and glenohumeral joint synovitis. (JME 57). He performed right rotator cuff repair, labral debridement, glenohumeral joint synovectomy, subacromial decompression with acromioplasty, biceps tenodesis, and a shaving chondroplasty of the glenohumeral surface. (JME 57).
11. Claimant engaged in post-operative exercise and returned to Dr. Chen on July 17, 2008. At that time, Dr. Chen noted that he was doing well and had returned to work full time for Defendant. (JME 67). In October 2008, Claimant reported to Dr. Chen that he had occasional biceps soreness with repetitive lifting, but otherwise no right upper extremity symptoms. (JME 72).
12. Claimant experienced just some intermittent shoulder pain between 2008 and 2013, but he began experiencing more significant shoulder symptoms again during the 2013 holiday season. He participated in more physical therapy and continued to work.
13. Claimant returned to Dr. Chen in February 2015, complaining of a loss of range of motion and a constant aching sensation in his right shoulder. (JME 77-78). Dr. Chen assessed him with right shoulder osteoarthritis. Specifically, Dr. Chen referenced x-rays that showed bone-on-bone degenerative joint disease of the glenohumeral joint. According to Claimant’s credible testimony, Dr. Chen told him at that time that that he could do more physical therapy but that he would likely need a shoulder replacement eventually. Claimant began another course of physical therapy. (JME 76, 148).
14. On March 5, 2020, Claimant saw orthopedic surgeon Eric Mullins, MD, at the Alpine Clinic for right shoulder pain and range of motion issues. (JME 103). Dr. Mullins assessed Claimant with right shoulder osteoarthritis in the glenohumeral joint and a retroverted glenoid. (*Id.*). On April 15, 2020, Dr. Mullins offered Claimant a total right shoulder arthroplasty (replacement) as a reasonable treatment option, and Claimant decided to proceed with that surgery. However, due to the Covid-19 pandemic, his surgery was delayed to December 2020. (JME 107).
15. Claimant underwent total right shoulder replacement surgery on December 4, 2020. (JME 112). On December 7, 2020, at Defendant’s request, Leonard Rudolf, MD, performed a medical records review to consider whether the procedure was causally related to Claimant’s accepted shoulder injury. (JME 235). On December 22, 2020, Claimant called Dr. Mullins’ office to report that Defendant had denied payment for

his shoulder replacement surgery and to request documentation that the procedure was work-related. (JME 114).

16. Claimant saw Dr. Chen on January 14, 2021. Dr. Chen noted:

I do believe that in 2007 his concurrent rotator cuff tear made his symptoms of glenohumeral osteoarthritis worse. He did not develop osteoarthritis instantaneously at the time of his injury; in this regard, I do believe that his injury resulting in rotator cuff tear did make his symptoms of osteoarthritis worse.

(JME 119).

17. In March 2021, Claimant returned to Dr. Chen's office for a follow up visit. That record reflects that he was still engaging in physical therapy and working to regain range of motion in his shoulder. (JME 126). Claimant returned to work for Defendant on May 1, 2021 and was discharged from physical therapy on May 6, 2021. (JME 233).
18. Claimant lost time from work in connection with his shoulder replacement surgery from December 4, 2020 through May 1, 2021.

Medical Opinions Concerning Claimant's Right Shoulder Condition

19. Claimant presented expert testimony from Victor Gennaro, DO, in support of his claim that his current right shoulder condition, including the need for a total shoulder replacement, was causally related to his accepted right shoulder injury. Defendant did not present any expert testimony at the hearing; instead, it relies on the written report of Leonard Rudolf, MD.

(a) *Victor Gennaro, DO*

20. Dr. Gennaro is a board-certified orthopedic surgeon with more than 30 years' experience. He now works part time, seeing patients, performing surgeries, covering the emergency department, and performing independent medical examinations.
21. On March 12, 2021, at Claimant's request, Dr. Gennaro performed an independent medical examination of him. (JME 006-011). Dr. Gennaro interviewed Claimant, physically examined him, and performed a review of his medical records dating back to 2007, including the right shoulder operative reports from 2008 and 2020.
22. In Dr. Gennaro's opinion, to a reasonable degree of medical certainty, there is a causal relationship between Claimant's 2007 work injury, which necessitated the 2008 shoulder procedures, and the progression of his right shoulder osteoarthritis that eventually required shoulder replacement surgery in 2020.

23. First, Dr. Gennaro noted that Claimant underwent multiple procedures on his right shoulder in 2008, including a shaving chondroplasty of the articular surfaces of his humerus head and glenoid. Dr. Gennaro explained that shaving the articular surface of a joint is a controversial procedure, as it causes the surface to wear out faster and the joint to deteriorate more quickly. As an orthopedic surgeon who performs joint replacement procedures, Dr. Gennaro does not perform shaving chondroplasty on his patients for this reason. Further, he credibly testified that many orthopedic surgeons also decline to perform shaving chondroplasty for the same reason. Dr. Gennaro explained that, at the time of Claimant's 2008 surgery, he had a chondromalacia or deterioration to the articular surface of his humerus and his glenoid for which he underwent abrasion chondroplasty. According to his written report, it is "well-recognized that chondroplasty accelerates the degeneration of the articular surfaces with the progression of osteoarthritis much quicker than the natural history of the disease." (JME 011-012). In Dr. Gennaro's opinion, within a few years of undergoing chondroplasty, Claimant had significant progression of his shoulder osteoarthritis as a result of the procedure.
24. Further, Dr. Gennaro offered his opinion that, even after successful rotator cuff surgery, Claimant still had ongoing rotator cuff dysfunction, including mechanical disadvantages, weakness, and some shoulder instability. Continuing to perform heavy repetitive lifting at work after his surgery also accelerated the progression of Claimant's shoulder osteoarthritis, especially in his dominant right upper extremity. Dr. Gennaro noted that Claimant's left shoulder, the side of his body that did not suffer a work injury, still displays normal movement, unlike his right shoulder.
25. I find Dr. Gennaro's opinion to be clear, well-grounded in Claimant's medical history, and well-supported by his knowledge, training and experience as an orthopedic surgeon.

(b) Leonard Rudolf, MD

26. Leonard Rudolf, MD, is an orthopedic surgeon.
27. On December 7, 2020, at Defendant's request, Dr. Rudolf reviewed Claimant's medical records and offered his written opinion as to the causal relationship between Claimant's work activities and the right shoulder replacement surgery that he underwent on December 4, 2020. (JME 235-238). Dr. Rudolf never provided medical treatment to Claimant, nor did he ever meet or examine him.
28. In Dr. Rudolf's opinion, Claimant's shoulder replacement surgery was made necessary by the natural progression of his osteoarthritis and was therefore not causally related to his employment. He wrote in his report:

Based on the information for the right shoulder as far back as 2007 documenting prior 5 to 6 years of shoulder problems with established degenerative joint disease already noted in the shoulder at the time of the first presentation, and with 13 years of interval until an indication

for total shoulder arthroplasty, it is concluded that the recommendation for the right total shoulder replacement is based on the established shoulder degenerative joint changes, with the anticipated natural progression of shoulder degenerative joint disease. The initial involvement to the shoulder is noted to be posttraumatic, based on the MRI findings showing old injury involving the intraarticular portion of the shoulder.

(JME 238).

29. Accordingly, in Dr. Rudolf's opinion, Claimant's need for total shoulder replacement was due to the natural progression of his degenerative joint disease over an extended period of time, independent of his accepted work injury and his specific work activities. (JME 238).
30. Dr. Rudolf did not offer any explanation of the impact of Claimant's accepted 2007 right shoulder injury on his degenerative joint disease, nor did he address the concerns raised by Dr. Gennaro about the shaving chondroplasty's accelerative effect on the progression of osteoarthritis. Nor did his report address whether Claimant's shoulder condition after the 2008 surgery made him more susceptible to the progression of osteoarthritis from continued heavy and repetitive lifting at work.
31. For these reasons, I find Dr. Rudolf's opinion to be incomplete, not well explained, and overall, not persuasive.

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).
2. Where the causal connection between employment and injury is obscure, and a layperson could have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395-96 (1979).

Causal Relationship Between Claimant's Current Shoulder Condition and his Work Injury

3. The parties presented conflicting evidence concerning the causal relationship between Claimant's current right shoulder condition and his accepted 2007 work injury. 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. Here, both Dr. Gennaro and Dr. Rudolf are experienced orthopedic surgeons, and neither was a treating physician. Thus, neither expert has an advantage under the first or fifth *Geiger* factors.
5. However, the other *Geiger* factors all weigh in Dr. Gennaro's favor. Dr. Gennaro reviewed all pertinent records, including both operative reports, and performed a physical examination and interview of Claimant. In contrast, Dr. Rudolf performed just a medical records review that did not include the December 2020 operative report. Although there is a place for medical records reviews, an in-person evaluation often provides a sounder basis for a medical opinion, as the examination process allows the physician to check any assumptions with the examinee and to ask pertinent questions. *See, e.g., Gregorek v. Dynapower Corp.*, Opinion No. 03-21WC (January 28, 2021). This is especially important when a party simply submits an expert's written report into evidence, without calling the expert to testify at the hearing, as was done by Defendant here. Thus, Dr. Gennaro's opinions here have a clear advantage over Dr. Rudolf's under the second and fourth *Geiger* factors.
6. Finally, Dr. Gennaro clearly and thoroughly explained how the chondroplasty procedure weakened Claimant's shoulder joint and accelerated the progression of his osteoarthritis. In contrast, Dr. Rudolf did not explain why he attributed the entire progression of Claimant's shoulder condition to an unknown trauma that was mentioned on one MRI study from 2008, without addressing the possible impact of the 2007 shoulder injury, the 2008 shaving chondroplasty, or Claimant's continued performance of heavy lifting at work for 19 years. For all of these reasons, the third *Geiger* factor squarely favors Dr. Gennaro's opinion as the most complete and persuasive.
7. Therefore, based on the clear, thorough and well-supported opinion of Dr. Gennaro, I conclude that Claimant's current right shoulder condition, including his need for total shoulder replacement surgery, is causally related to his accepted 2007 workplace right shoulder injury.

Workers' Compensation Benefits to which Claimant Is Entitled

8. As his current right shoulder condition is causally related to his employment for Defendant, Claimant is entitled to temporary disability benefits pursuant to 21 V.S.A. § 642 for the time period during which he was unable to work as a result of the December 2020 surgery and his recovery therefrom. Claimant was temporarily totally disabled from work from the date of his shoulder surgery on December 4, 2020

through the date he returned to work for Defendant on May 1, 2021. Claimant is also entitled to interest on these benefits, pursuant to 21 V.S.A. § 664.

9. Further, Claimant is entitled to reasonable medical services for his current right shoulder condition, including the December 4, 2020 shoulder replacement surgery and related medical services as set forth in 21 V.S.A. § 640(a).
10. In his proposed findings, Claimant also seeks an award of permanent partial disability benefits in an amount “to be determined when [he] reaches a point of maximum medical improvement, with appropriate offsets for previously paid permanency for the same shoulder.” *Claimant’s Proposed Findings*, at 9. As Claimant’s proposed findings implicitly recognize, any award of permanent partial disability benefits would be premature at this time, as Claimant has not yet established end medical result or any permanent impairment related to his shoulder replacement surgery.

Costs and Attorney Fees

11. As Claimant has prevailed, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. § 678(e), he shall have 30 days from the date of this opinion within which to submit his itemized claim.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Defendant is **ORDERED** to pay:

1. All workers’ compensation benefits to which Claimant proves his entitlement as causally related to his current right shoulder condition, including:
 - (a) Temporary total disability benefits from December 4, 2020 through May 1, 2021, with interest thereon; and
 - (b) Medical benefits related to Claimant’s current right shoulder condition, including the December 4, 2020 total shoulder replacement surgery and related medical services.
2. Costs and attorney fees in amounts to be determined.

DATED at Montpelier, Vermont this 28th day of March 2022.

Michael A. Harrington
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.