

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Charles Beede

Opinion No. 25-22WC

v.

By: Stephen W. Brown
Administrative Law Judge

Polycor Vermont, Inc.

For: Michael A. Harrington
Commissioner

State File No. PP-50554

OPINION AND ORDER

Hearing held via Microsoft Teams on July 25, 2022
Record closed on September 9, 2022

APPEARANCES:

Steven P. Robinson, Esq., for Claimant
Jennifer Meagher, Esq., for Defendant

ISSUES PRESENTED:

1. Are Claimant's bilateral shoulder conditions and treatment, including the December 8, 2021 shoulder surgery, causally related to his July 2, 2020 workplace incident?
2. Has Defendant waived its right to contest the compensability of Claimant's shoulder conditions?

EXHIBITS:

Joint Medical Exhibit ("JME")

Preservation Deposition of Christian Bean, M.D. ("Bean Depo.")

Claimant's Exhibit 1: Photograph of Claimant standing by Drill Press on Defendant's Premises

Claimant's Exhibit 2: *Curriculum Vitae* of Dr. Bean

Defendant's Exhibit A: Employee Questionnaire for Workers' Compensation Injuries

Defendant's Exhibit B: *Curriculum Vitae* of Leonard Rudolf, M.D.

Defendant's Exhibit C: Medical Records Review by Dr. Rudolf

Defendant's Exhibit D: Independent Medical Examination Report by Dr. Rudolf

FINDINGS OF FACT

1. Claimant is a 65-year-old man who resides in Graniteville, Vermont. Defendant owns and operates a large granite quarry in Barre, Vermont.
2. Defendant and its predecessors have employed Claimant for approximately 45 years, primarily in maintenance roles. Claimant's work duties throughout his employment have been physically demanding and have often involved repetitive and strenuous use of his upper extremities.

Claimant's Accepted 2016 Shoulder Injury and Surgery; No Shoulder Trauma or Symptoms Between Post-Surgical Recovery and July 2020

3. Claimant has sustained multiple work-related injuries over the course of his tenure with Defendant. Relevant here is an accepted 2016 right shoulder and neck injury for which Claimant underwent surgery with orthopedic surgeon Christian Bean, MD in December 2017. Dr. Bean's intra-operative report from that 2017 surgery did not reflect any findings associated with the bursa tendon, which he repaired in connection with the injury giving rise to this claim. (JME 28-39). Claimant's shoulder repair following his 2017 injury was successful, and he considered himself completely healed approximately one year after surgery.
4. Between approximately 2018 and July 2020, Claimant was substantially symptom free, and he did not experience any other traumatic events during this period. He worked full-time for Defendant year-round without shoulder restrictions during that time as well.
5. Claimant had private health insurance during this time, as well as an open accepted workers' compensation claim for his neck and shoulder. As such, he would likely have been able to obtain any treatment for his shoulder during this time if he believed he needed it.
6. Claimant's out-of-work hobbies include driving vintage cars and officiating Thunder Road race events, neither of which involve significant stress to his upper extremities.

July 2, 2020 Workplace Injury; Subsequent Evaluations and Treatment

7. On July 2, 2020, Claimant was operating a large gear-driven drill press while working on Defendant's premises.
8. As he was drilling a hole in a piece of steel and holding it in place, the drill spun the steel. The drill press's motion suddenly jerked and torqued Claimant's upper body, causing immediate pain to his left hand, wrist, both shoulders, and neck. However, the most acute injury following that incident was to his left thumb.

9. At the formal hearing, Claimant introduced a photograph of himself standing next to the drill press in question, demonstrating that the machine is taller and wider than Claimant himself, with a large press surface near his hip level. (Claimant's Exhibit 1).
10. Claimant promptly reported the drill press incident to Defendant. Defendant accepted this injury as compensable as it related to his left thumb and has paid some benefits accordingly. The parties dispute whether that incident also caused Claimant to suffer a bilateral shoulder injury.
11. Shortly after the drill press incident, Defendant sent Claimant an "Employee Questionnaire" (Defendant's Exhibit A) as part of its early investigation for this claim. Claimant had limited direct memory of completing this form, although he had general memory of his wife assisting him with "paperwork" after his injury. Claimant is left-handed and suffered the most acute injury to his left hand, so his wife would read the questions aloud and record his oral responses. In his questionnaire response dated July 22, 2020, Claimant described the injury as follows: "[d]rilling a hole with a drill press and caught and spun vise that I was holding on job." In response to a question that asked him to describe his symptoms, he stated "pain + swelling in thumb + wrist." (Defendant's Exhibit A).
12. Claimant attended multiple medical visits and physical therapy appointments for wrist and thumb pain between July and October 2020. Medical records from these visits reflect complaints of thumb and wrist pain but not shoulder pain. (*E.g.*, JME 58-59, 61-63, 67-69, 71-79, 80-83, 88-89).
13. On December 3, 2020, Claimant saw Dr. Bean, the same orthopedic surgeon who had performed shoulder surgery in connection with his 2016 workers' compensation claim. (JME 90-92).
14. Although Dr. Bean's medical records from this visit do not reflect any shoulder-related complaints, Claimant credibly testified that he recalled sharing all his symptoms with Dr. Bean, including his shoulder complaints, but that the focus was on his left wrist and thumb, which hurt the most. In Claimant's recollection, Dr. Bean indicated that the initial plan was to focus on the thumb and wrist first.
15. Dr. Bean credibly testified that did not have an independent recollection of what Claimant did or did not say during their December 2020 visit, but he was not in a position to dispute Claimant's account. He credibly acknowledged the possibility that Claimant complained of shoulder pain during his initial visit after the drill press incident, but that he did not record it in his medical records because he was focused on Claimant's thumb. (Bean Depo., p. 6). Based on the totality of circumstances, I find Claimant's account of his communications with Dr. Bean in December 2020 to be credible.
16. On December 14, 2020, Dr. Bean performed a left basal arthroplasty on Claimant's thumb joint, after which Claimant was out of work for approximately four months. (JME, pp. 95-96).

17. On December 23, 2020, Claimant saw physician's assistant Helen Hollenbach, PA-C, for a postoperative follow-up appointment. During that visit, he complained of continued pain around the area of surgery and also left shoulder pain. He stated that his shoulder was hurting before the thumb surgery but was hurting worse after it. (JME 100).
18. Claimant returned to Dr. Bean on January 12, 2021 and expressed a concern that the pain in his left shoulder might be related to his thumb but might have also been related to his earlier neck and shoulder claim. (JME 103-105). Dr. Bean's assessment at that time was shoulder bursitis and cervical degenerative disc disease. He referred Claimant for occupational and physical therapy to maximize his ability to return to work.
19. The following month, Claimant presented to Shannon Rivard, APRN, with complaints of worsening right shoulder pain. An x-ray that same day evidenced small osteophytes or bone spurs, and Ms. Rivard assessed him with atraumatic right sided shoulder pain likely from osteoarthritis. Claimant reported that his left shoulder was feeling better with therapy. (JME 134-139).
20. On March 11, 2021, during a follow-up with Dr. Bean, Claimant reported concerns about the osteophytes shown in his x-ray. (JME 155). During a physical therapy visit on March 22, 2021, he also reported an increase in shoulder soreness, more on his right side than his left. (JME 163-164). Claimant was discharged from physical therapy on April 1, 2021, having made significant progress toward decreasing his bilateral shoulder pain at that time. Specifically, his physical therapist noted that Claimant's left shoulder was no longer causing discomfort, and his right shoulder pain was only intermittent with activity. (JME 165-166). He returned to work on April 5, 2021.
21. Approximately five weeks later, however, Claimant reported to Dr. Bean that his right shoulder was again worsening and expressed concern about being able to continue working the additional two or three years that he wanted to before retiring. Dr. Bean ordered bilateral shoulder MRI images based on Claimant's complaints. (JME 169-170).

Medical Records Review and IME After Request for Payment for MRI

22. Defendant paid for several medical bills relating to Claimant's shoulders between January and April 2021, including a left shoulder x-ray and a course of physical therapy visits. (JME 103, 107-167). After receipt of a request for bilateral shoulder MRIs, however, Defendant sent medical records to Leonard Rudolf, M.D. for review.
23. On July 12, 2021, Dr. Rudolf issued a report stating that in his opinion, there was no causal relationship between Claimant's shoulder treatment and the July 2020 drill press incident at work. Relying on that report, Defendant sought to discontinue any

shoulder treatment. Defendant subsequently filed denials of medical bills and requests for further diagnostic studies related to Claimant's shoulder and neck.

24. On November 14, 2021, Dr. Rudolf performed an independent medical examination ("IME") to assess Claimant's permanent impairment for his accepted thumb condition as well as the ongoing dispute regarding the compensability of the right shoulder and Claimant's plan to pursue surgery. His examination and review of additional medical records did not change his opinion that the shoulder complaints were not related to the drill press incident.

December 2021 Right Shoulder Arthroscopy and Bursal Tendon Repair Billed to Private Health Insurance

25. On December 8, 2021, Dr. Bean performed a right shoulder arthroscopy to address Claimant's right shoulder symptoms. (JME 259 *et seq.*).
26. During that surgery, Dr. Bean found that Claimant had a partial bursal sided tear with delamination, which he repaired with a fiber tape suture. He also noted an osteophyte or bone spur, which Dr. Bean burred down and debrided. He also performed an open distal clavicle excision revision. This surgery was billed to Claimant's private health insurer.
27. After recovering from that surgery, Claimant returned to work for Defendant on April 4, 2022.

Expert Medical Opinions

Dr. Bean

28. Dr. Bean is a board-certified orthopedic surgeon whose practice is based at the Central Vermont Medical Center ("CVMC") in Berlin, Vermont. He performed three surgeries on Claimant relevant to this case: two on his right shoulder, and one on his basal thumb joint.
29. While he did not have the entire Joint Medical Exhibit, Dr. Bean reviewed Claimant's medical records available in the "Epic," which is the records database he uses at CVMC. He also reviewed operative notes, Claimant's physical therapy notes, Dr. Rudolf's forensic reports, and certain treatment records from Dr. Austin Sumner and Express Care.
30. In Dr. Bean's opinion, the right shoulder surgery he performed on Claimant in December 2021 was causally related to the July 2020 drill press incident. He noted that there were no other remarkable events that would have suggested another source of trauma to explain Claimant's symptoms. Additionally, in his opinion, a bursal tendon tear like the one he observed on Claimant was more consistent with a traumatic event rather than degenerative etiology.

31. While Dr. Bean acknowledged the possibility that Claimant's partial tendon tear could have been degenerative in origin, he credibly testified that "articular" sided tears are generally more common with degenerative processes, while bursal tears like Claimant's suggested that his shoulder was "pinched with the binding maneuver." (Bean Depo., 11). In his opinion, the tear he observed was consistent with a twisting injury, matching Claimant's narrative of the July 2020 drill press incident.
32. Additionally, Dr. Bean has personal experience using drill presses and has experienced sudden shifting or twisting like the incident Claimant described. He has also treated other patients with similar injuries. Based on his experience, he understands that sudden twisting motions from a drill press can be quite forceful, consistent with Claimant's narrative. (*Id.*, 8).
33. Dr. Bean also found that the result of the 2021 shoulder surgery supported his opinion. Before performing that surgery, he had some concern that the source of Claimant's shoulder pain actually emanated from his neck, in which case the surgery might not be helpful. However, Claimant had an "immediate and significant" response to the surgery, which solidified his belief that Claimant's bursal flap tear generated his pain.

Dr. Rudolf

34. Dr. Leonard Rudolf is a board-certified orthopedic surgeon whom Defendant retained to perform a records review and subsequent IME. He reviewed the Joint Medical Exhibit but acknowledged that he did not review the underlying diagnostic studies either for the 2017 or 2021 shoulder procedures. Dr. Rudolf had previously performed IMEs on Claimant on at least two prior occasions, relating to right shoulder and bilateral knee pain.
35. In Dr. Rudolf's opinion, there was no causal relationship between the bilateral shoulder treatment and the drill press incident. In support of his opinion, he cited the roughly six-month delay in documented shoulder complaints in Claimant's medical records following the drill press incident, the fact that Claimant's initial shoulder complaints following that incident related to his left rather than his right shoulder, and the mechanism of injury, which he did not believe had sufficient force to give rise to Claimant's shoulder injury. He also noted that Claimant had degenerative changes in his shoulder that could have been contributing factors and that prior to the 2021 surgery performed by Dr. Bean, Claimant had full range of motion in his shoulders despite his pain. That said, Dr. Rudolf declined to assert that the 2021 surgery was unreasonable medical care. He also acknowledged that Claimant's symptoms improved after that surgery.
36. With respect to the mechanism of injury, Dr. Rudolf found it unlikely that a drill press torquing Claimant's body in the way Claimant described would generate sufficient trauma to require rotator cuff surgery. However, he had difficulty articulating the amount of force that would be necessary to result in Claimant's injury, except to say that it would need to be more force than the right hand holding onto a lever.

37. Additionally, Dr. Rudolf found Dr. Bean's description of Claimant's bursal tendon tear in his intraoperative report to be more consistent with a degenerative than a traumatic change given the presence of a bone spurs, which in his opinion could irritate the rotator cuff with activities of daily living. He acknowledged, however, that Claimant's 2017 work-related shoulder injury could have made him more susceptible to reinjury, though it was difficult to quantify the degree of increased susceptibility to a torsional injury like the drill press incident at issue here.
38. With respect to Claimant's pre-operative range of motion, Dr. Rudolf acknowledged that it is possible for someone to have full rotator cuff tear and still have full range of motion on clinical examination. In fact, he credibly testified that such tears may exist undetected for extended periods of time, with patients exhibiting normal strength and range of motion. In such instances, the tear may only be discovered after subsequent tissue changes like muscle atrophy or new events that draw attention to the shoulder.
39. Dr. Rudolf also acknowledged that there no was no record of Claimant having a bursal tear in connection with that 2017 surgery and that therefore it was fair to say that Claimant's bursal tear occurred sometime after that surgery.
40. He also acknowledged that after that 2017 surgery, possible causes of this new tear included work activities placing continued stress on Claimant's shoulders, as well impingement by Claimant's osteophyte on his bursal tendon that could have been irritated by activities of daily living.

CONCLUSIONS OF LAW

1. Claimant has the burden of proof to establish all facts essential to the rights he presently asserts. *Goodwin v. Fairbanks Morse & Co.*, 123 Vt. 161, 166 (1962); *King v. Snide*, 144 Vt. 395, 399 (1984). He must establish by sufficient credible evidence the character and extent of the injury, see *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (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*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

Defendant's Mere Payment of Medical Bills for Claimant's Shoulders Between January and April of 2021 Did Not Waive its Right to Contest Liability for Claimant's Shoulder Condition

2. Claimant argues that Defendant waived its right to contest coverage for his bilateral shoulder condition by paying for certain shoulder-related medical bills.
3. A waiver is "the intentional relinquishment of a known right." *Liberty Mutual Insurance Co. v. Cleveland*, 127 Vt. 99, 103 (1968) (citing and quoting *Beatty v. Employers' Liability Assurance Corp., Ltd.*, 106 Vt. 25, 31). The burden falls on the

party asserting waiver to show an “act or an omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right at question.” *M. S. v. Visiting Nurse Association*, Opinion No. 10-06WC at 4 (March 10, 2006).

4. A legal waiver may be express or implied, but before a waiver may be implied, the Department must exercise caution “both in proof and application,” and “the facts and circumstances relied upon must be unequivocal in character.” *Smiley v. State*, 2015 VT 42, ¶ 10 (cits. & punct. omitted).
5. The Department has previously held that an employer’s mere payment of medical bills, without more, does not constitute a waiver of its right to contest a claim. *D. B. v. Vergennes Auto, Inc.*, Opinion No. 42-06WC (“While Defendant paid some medical bills related to the left shoulder injury, this alone is insufficient to show acceptance of a claim. The facts indicate that the Defendant made these payments in good faith, before it was certain whether or not the claim was actually compensable.”) (cits. & punct. omitted); accord *Briggs v. Maytag Homestyle Repair, Inc.*, Opinion No. 18-00WC (June 29, 2000) (“...defendant in good faith has paid some medical bills for claimant's bursa condition does not mean that it accepted the claim as to the compensability of the proposed surgery. Defendant does not seek reimbursement of funds. Payment of those bills alone does not amount to acceptance of the claim.”).
6. In this case, Defendant acknowledges that it paid several medical bills related to Claimant’s shoulders. See Finding of Fact No. 22, *supra*. However, there is no additional evidence of intentional waiver beyond the mere payment of those bills, and I find no basis in the record to conclude that Defendant intended “permanently to surrender the right” to later contest coverage of Claimant’s claim relating to either shoulder. Cf. *M. S.*, *supra*.
7. Without additional evidence of Defendant’s intent, I conclude that Claimant has not sustained his burden to establish waiver under the legal standards above. Therefore, Defendant may contest coverage for Claimant’s bilateral shoulder complaints. As such, I proceed to the evidence concerning medical causation.

Claimant Is Entitled to Workers’ Compensation Benefits Relating to His Right Shoulder, Including the December 2021 Surgery

8. The parties presented conflicting expert medical opinions on the question of whether Claimant’s July 2020 drill press incident at work caused his bilateral shoulder injuries. In such instances, 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).

9. In this case, the first factor weighs in Dr. Bean's favor, as he performed both shoulder surgeries relevant to this case, although Dr. Rudolf was not a stranger to Claimant, having performed multiple IMEs on him before.
10. The second factor slightly favors Dr. Rudolf, as he had access to the complete Joint Medical Exhibit, even if he did not review the radiographic films associated with Claimant's surgeries. That said, Dr. Bean had access to most of the most relevant records through Epic.
11. The fourth and fifth factors weigh evenly in this case. Both Drs. Bean and Rudolf are well-credentialed, board-certified orthopedic surgeons, and I see no evidence that either was less than thorough in examining Claimant.
12. With respect to the third factor, which as in many cases is the most important here, I find that Dr. Bean's causation opinion is more supported by the essential chronology of this case, at least as to Claimant's right shoulder. Claimant had right shoulder surgery in 2017 and did not have a bursal tear in that shoulder at that time. There is no evidence of any significant trauma to his shoulders between his surgeries in 2017 and 2021 except for the July 2020 drill press incident. Dr. Bean provided a clear and persuasive explanation of why he believed that the partial bursal tear he observed during the 2021 surgery was more suggestive of a traumatic rather than degenerative etiology. Dr. Bean also demonstrated stronger knowledge from his own experience of the level of twisting force that a drill press could exert compared to Dr. Rudolf.
13. Moreover, Dr. Rudolf's testimony supports several key aspects of Dr. Bean's causation opinion, even though the two experts disagree in their medical conclusions. For instance, Dr. Rudolf credibly acknowledged that it was fair to say that the partial tear Dr. Bean repaired in 2021 occurred after 2017 and that there was no intervening traumatic event. I also find Dr. Rudolf's acknowledgement that the 2017 surgery could have made Claimant more susceptible to reinjury relevant to assessing the weight of his opinion that the force of a jerking drill press would be insufficient to cause the partial tear at issue here.
14. Dr. Rudolf did raise reasonable questions concerning the temporal gap between Claimant's recorded shoulder complaints in relation to the date of injury giving rise to this case. However, Claimant and Dr. Bean credibly responded to those questions. The delay between Claimant's July 2020 injury and the first time he complained of shoulder pain to Dr. Bean in December 2020, while nontrivial, is understandable in the context of Claimant's more acute thumb and wrist injury that required surgery. Additionally, while it may be desirable from a post-hoc litigation perspective for medical records to reflect every contemporaneous communication between physician and patient, in practice that is not a realistic expectation, especially when the initial treatment focus is on a particular acute condition. Moreover, patients generally have no input into the contents of a medical visit summary. Based on the totality of circumstances in this case, I am not convinced that an absence of recorded shoulder complaints in a medical record that Claimant did not write demonstrates any inconsistency in his symptom reporting.

15. Based on the totality of evidence presented in this case, I conclude that Claimant's 2020 drill press incident caused his right shoulder injury, including the partial bursal tendon tear for which he underwent right-sided arthroscopic surgery in December 2021.

Claimant Has Not Satisfied His Evidentiary Burden as to the Left Shoulder

16. While Claimant's medical records reflect bilateral shoulder complaints, and he credibly testified that he experienced symptoms in both shoulders following the July 2020 drill press incident, there was no significant evidence in the form of an expert opinion concerning Claimant's left shoulder.
17. Dr. Bean discussed Claimant's right shoulder surgery at length, as well as his intraoperative findings that supported his causation opinions as it related to Claimant's right shoulder. However, he did not testify as to any clinical findings, diagnosis, or causation analysis relating to Claimant's left shoulder.
18. As such, I have an insufficient evidentiary basis to find that Claimant has satisfied his burden to prove a causal connection between the July 2020 drill press incident and any injury to his left shoulder.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Defendant shall treat Claimant's right shoulder injury for which he underwent surgery in December 2021 as compensable. However, Defendant shall have no further obligations related to Claimant's left shoulder, as Claimant has not put forth sufficient evidence concerning the causal origin of any left shoulder injury.

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