STATE OF VERMONT
DEPARTMENT OF LABOR

Christian Conway

v.

United Parcel Service, Inc.
d/b/a UPS

Opinion No. 05-24WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. SS-59749

OPINION AND ORDER

Hearing held via Microsoft Teams on November 2, 2023
Record closed on December 11, 2023

APPEARANCES:

Carey C. Rose, Esq., for Claimant
James M. O'Sullivan, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant suffer an injury arising out of and in the course of his employment with Defendant?

2. If so, to what benefits is he entitled?

EXHIBITS:

Joint Medical Exhibit ("JME")

FINDINGS OF FACT:

Claimant's Physically Demanding Job

1. Claimant is a 35-year-old man whom Defendant has employed as a delivery driver since approximately November 2019.

2. In his work as a delivery driver, Claimant handles and delivers packages ranging in size from envelopes to boxes weighing up to 150 pounds. In his delivery truck, he maneuvers packages from the floor and moves items to and from two shelves, the higher of which is roughly at his chin level. Moving items to and from this shelf requires significant overhead reaching, and moving items on the truck floor often requires crouching and getting into awkward positions. Although the heaviest packages are generally on the truck floor, it is not uncommon for packages weighing as much as 40 or 50 pounds to be on one of the shelves.

3. Beginning with the onset of the Covid-19 pandemic, Claimant's work volume became extremely heavy. For approximately two years, he routinely delivered between 250 and 270 packages per day and worked 55 to 60 hours per week.

Claimant's Exercise of FMLA Rights and Expression of Frustration with Work Volume

4. For much of Claimant's tenure with Defendant, he was required to work Saturday shifts, which he found psychologically stressful.

5. At some point in late 2022, Defendant granted him leave under the Family and Medical Leave Act ("FMLA"),[1] permitting him to forego Saturday shifts so that he could spend time bonding with his young son.

6. Although he was no longer working Saturdays, Claimant's total hours per week remained substantially unchanged. He still worked up to 60 hours per week, compressed into the remaining days of the week.

7. Claimant renewed his FMLA leave in February 2023.

8. Also in mid-February 2023, Claimant expressed his continued frustration with his work volume by writing with his finger in the snow on the back of his truck to the effect of "overworked and ready to strike."[2]

Claimant's Acute Onset of Left-Sided Neck and Shoulder Pain on February 24, 2023

9. There is no evidence that Claimant had any significant history of cervical spine or left shoulder pain or medical treatment before February 24, 2023. On that date, between approximately 4:00 and 5:00 PM while working for Defendant, he experienced an onset of pain in his left shoulder and the left side of his neck. He could not pinpoint a specific package that precipitated this onset of pain; it simply began as a sensation of general soreness. He continued to work through the pain for an additional four or five hours and completed his shift.

10. After work that evening, Claimant went home, where the pain continued to worsen, but he was able to sleep that night. Although he rested most of that weekend, his pain worsened to such a degree that he felt need to seek emergent medical care that Sunday night. His girlfriend drove him to the University of Vermont Medical Center's emergency room that night because he felt that he was in too much pain to drive. There, Claimant told his providers that his pain began on Friday while delivering packages for Defendant. His treatment records from this visit note that Claimant repetitively had to put his neck in odd angles and perform heavy lifting while working approximately 55 hours per week

[1] Family and Medical Leave Act of 1993, Public Law 103-3 (February 5, 1993), 107 Stat. 6, 29 U.S.C. 2601 *et seq.* (as amended).

[2] Defendant's supervisor Michael Chambers credibly testified that many delivery drivers were frustrated with their hours during this period of elevated delivery volume.

over the previous two years. Claimant received a left trapezius lidocaine injection at the emergency room (JME 2),[3] which helped somewhat, but his pain remained.

Claimant's Subsequent Medical Treatment and Time Away from Work

11. Claimant "booked out" of work for the following Monday and Tuesday due to his pain. Defendant's practice is that an employee may "book out" of work and will not start back until he or she "books in."

12. Claimant called supervisors on both Monday and Tuesday of the week following his symptom onset to let them know that he would not be at work those days. They did not ask why he would be absent, and he did not mention that it was a workplace injury.

13. On March 1, 2023, Claimant saw his primary care provider, Kelly Dobler, NP, for left sided neck soreness extending into his left elbow. The record from this visit notes that Claimant reported these symptoms as having begun during the previous Friday at work. (JME 12-13).

14. That same day, Michael Chambers, a supervisor with Defendant different from the ones he had spoken with the prior two days, called Claimant to ask why he was not at work. Claimant advised that he had booked out of work and had not booked back in. In response to Mr. Chambers's follow-up questions, Claimant confirmed that he had begun experiencing pain the previous Friday evening during work hours and suspected that he may have pinched a nerve. Mr. Chambers conferred with Defendant's safety personnel, and Defendant reported Claimant's workers' compensation claim. Defendant then denied liability for this claim, citing, *inter alia*, Claimant's alleged personal motivations.

15. Mr. Chambers credibly confirmed that it is not Defendant's typical practice for a supervisor to ask an employee whether he or she is injured when the employee calls out or books out.

16. On March 6, 2023, Claimant visited Champlain Urgent Care for evaluation and treatment at Defendant's request. His providers there noted in their records, "causality: work related." (JME 9).

17. Claimant saw NP Dobler multiple times between March and May 2023 for his cervical spinal complaints. She diagnosed him with cervical radiculopathy due to the pattern of his pain radiating down his left arm with numbness and tingling in his left hand and fingers, as well as loss of some left-handed strength and dexterity. She took him out of work due to this injury on March 8, 2023. (*See generally* JME 16-31).

18. On May 12, 2023, NP Dobler recorded her opinion that Claimant's neck and upper back injury was "more likely than not due to his repetitive overuse at UPS which occurred over time with sharp onset of pain and radicular symptoms on 2/24/23." (JME 11).

[3] The medical records from this emergency room visit reflect the date of Monday, February 27, 2023, rather than the preceding Sunday; time stamps from individual entries show that Claimant was not discharged from the emergency room until 3:24 A.M. that Monday morning.

19. Claimant had received chiropractic care from Kelly Rybicki, DC, on an ongoing basis for low back complaints before his workplace injury. He visited her again on March 3, 2023, approximately one week after his injury. In her records from that visit, Dr. Rybicki noted that Claimant was experiencing acute left sided neck and posterior shoulder pain and left upper arm pain radiating into his left forearm and into his first and second fingers, as well as tingling and weakness in those fingers. He reported that this condition began on February 24, 2023 while performing repetitive work for Defendant. In her opinion, this was "definitely a new injury for this patient" and that based on his reporting, "the causation was from being overworked with repetitive motion traumas occurring for a long period of time." (JME 76).

20. I find Dr. Rybicki's characterization of Claimant's reported symptoms as new issues when she saw him in March 2023 particularly persuasive, given that she had regularly seen Claimant for musculoskeletal care before his injury.

21. On June 28, 2023, Claimant visited Aimee Nazeeh Ahari, PA-C at UVM Medical Center. She noted that although Claimant was reporting improvement with his symptoms, he continued to experience pain and paresthesia in his left arm and neck despite ongoing physical therapy, chiropractic care, steroids, and nonsteroidal anti-inflammatory drugs. She ordered a cervical MRI to rule out nerve impingement and offered Claimant gabapentin, though he declined to take that drug. (JME 35-37).

22. On July 11, 2023, NP Dobler released Claimant to work without restrictions as of July 17, 2023. (JME 41). Consistent with that work release, Claimant returned to work for Defendant full time and full duty on July 17, 2023.

23. Claimant continues to work for Defendant, at least as of the date of the formal hearing in this case. There is no evidence or contention that his return to work has been anything but successful.

24. Since his return to work, Claimant's ongoing medical treatment has been conservative, focused primarily on chiropractic visits. As of the time of the formal hearing, the MRI that PA-C Ahari ordered remained "in the works."

Expert Medical Testimony

25. On or about September 19, 2023,[4] at Claimant's attorney's request, Claimant saw board-certified orthopedic surgeon Douglas Kirkpatrick, MD, for an independent medical examination ("IME") to address the causal mechanism of his injury. (JME 96-105).

26. Dr. Kirkpatrick reviewed Claimant's medical records, interviewed him to receive a history of his complaint, and physically examined him. He diagnosed Claimant with radiculopathy at the C6 level based on his symptoms including cervical and trapezius

[4] This is the date of Dr. Kirkpatrick's IME report; it is not clear whether he saw Claimant on the same day as he authored this report.

pain from his neck down his left shoulder and left arm, tingling and numbness in his index finger and thumb, and the loss of strength in his left thumb. This diagnosis is consistent with the impression of Claimant's treating providers.

27. In Dr. Kirkpatrick's opinion, Claimant's cervical radiculopathy resulted from his work as a UPS delivery driver. In particular, he noted that Claimant's work involved repetitive awkward neck postures, repetitive lifting from floor to waist and repetitive heavy overhead lifting to the top shelf of his delivery truck. This overhead lifting, according to Dr. Kirkpatrick, involves the hyperextension of the cervical spine at levels C5-6 and C6-7, which can accelerate changes in the cervical vertebrae. He also noted that Claimant's repetitive lifting, pushing, pulling, and carrying of packages can injure the cervical spine through cumulative strain and microtrauma, increasing the risk of injury and degeneration over time. In his opinion, these repetitive movements were the most likely cause of Claimant's neck and shoulder complaints. (*See* JME 99).

28. In Dr. Kirkpatrick's opinion, NP Dobler's decision to take Claimant out of work was reasonable, as it provided Claimant a chance to recover. Additionally, he found all the medical treatment reflected in the JME to be reasonable and causally related to Claimant's workplace injury. He also believes that an MRI would be a reasonable next step in Claimant's treatment.

29. I find Dr. Kirkpatrick's opinions credible, clear, and persuasive in all regards.

30. Defendant did not present any expert testimony at the formal hearing and left Claimant to his burden of proof.

Medical Expenses

31. Claimant has submitted invoices for medical services received as a result of his February 24, 2023 workplace injury totaling $12,550.70. (JME 106-126).

32. Based on Dr. Kirkpatrick's persuasive testimony, I find that these charges are reasonable, necessary, and causally related to Claimant's workplace injury.

CONCLUSIONS OF LAW:

1. Claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He 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, 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).

Claimant Has Sustained His Burden of Proof on the Question of Compensability

2. All the medical evidence on the key disputed issue in this case, whether Claimant sustained a work-related cervical spinal injury, is unanimous: he did.

3. The record is devoid of any alternative hypothesis concerning the origin of Claimant's complaints. His treating chiropractor who had seen him both before his injury and approximately one week thereafter noticed a marked shift in his presentation. There is no evidence that Claimant had any relevant preexisting condition or that there was any significant nonindustrial event that immediately preceded his reported injury.

4. It is true that the persuasiveness of the medical opinions in this case depends in significant part on Claimant's credibility regarding the timing of his symptoms' onset, his reports concerning his activities over the last weekend in February 2023, and his provision of an accurate medical history. However, nothing in the record provides any significant reason to doubt Claimant's testimony on any of these issues.

5. There is no evidence suggesting that Claimant exaggerated his symptoms, made inconsistent statements, or otherwise engaged in any conduct that would seriously call his truthfulness into question. Any concerns about the timeliness of Claimant's reporting of his injury to Defendant are trivial at best. Any speculation that *something* might have happened at home over the weekend before Claimant booked out of work is entirely unsupported by extrinsic evidence. Neither Claimant's exercise of his federal statutory rights under the FMLA, nor his expression of frustration written in the snow on his work vehicle, undermines his credibility in any way. A worker can be both frustrated and honest.

6. Nor does the fact that Claimant's symptom onset was unwitnessed discredit his testimony. Indeed, given the solitary nature of his work, it was unlikely that anyone would be around to witness it.

7. Nor is there anything implausible or suspicious about the asserted mechanism of Claimant's injury. He worked a physically demanding job involving long hours, heavy lifting, and repetitive movements. After more than two years of this work at elevated volumes, he suffered an overuse injury of a kind that his treating providers and his expert witness believe would likely flow from the activities Claimant performs while working.

8. I fully credit all of Dr. Kirkpatrick's opinions concerning Claimant's diagnosis, causation, the reasonableness of treatment received as of the time of his testimony, the reasonableness of an MRI, and the reasonableness of Claimant's treating nurse practitioner's decision to take him out of work to recover from his injury from March 8 through July 16, 2023.

Specific Benefits

9. When an injured worker is unable to work because of a work-related injury, the worker is entitled to temporary total disability benefits until he or she reaches an end medical result or successfully returns to work. 21 V.S.A. §§ 642, 642a, 643a; *Felion v. Church Street Hospitality, Inc.*, Opinion No. 20-23WC (December 18, 2023). Based on Claimant's treating providers' notes and Dr. Kirkpatrick's persuasive opinion testimony, Claimant was completely unable to work beginning March 8, 2023. Based on his apparent success in returning to work on July 17, 2023, I conclude that this disability lasted through July 16, 2023. Claimant is therefore entitled to temporary total disability benefits from March 8, 2023 through July 16, 2023.

10. Additionally, 21 V.S.A. § 640(a) requires that an employer pay for "reasonable" medical treatment. Vermont law defines reasonable treatment as treatment that is medically necessary and causally related to the work injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010). Based on Dr. Kirkpatrick's persuasive opinion testimony and the tabulation of medical invoices submitted into evidence, I conclude that all of the medical treatment detailed in the invoices submitted into evidence in this case, totaling $12,550.70, was reasonable. Defendant is therefore financially responsible for such treatment. Defendant also bears responsibility for any other reasonable medical treatment for Claimant's February 24, 2023 workplace injury, including any future reasonable medical care related thereto, specifically including a cervical MRI as recommended by PA-C Ahari and Dr. Kirkpatrick.

11. Claimant has satisfied his burden of proof as to the compensability of this claim and all benefits he seeks, specifically including temporary total disability benefits, medical benefits, interest, and attorneys' fees.

ORDER:

For the reasons detailed above, Defendant shall adjust Claimant's claim for his February 24, 2023 injury as compensable under 21 V.S.A. § 618, and shall pay the following benefits accordingly, in addition to any future benefits whose relation to this injury becomes apparent:

1) Temporary total disability benefits from March 8, 2023 through July 16, 2023 pursuant to 21 V.S.A. § 642, with interest thereon as provided in 21 V.S.A. § 664;

2) Medical benefits pursuant to 21 V.S.A. § 640 for services related to his compensable work injury; and

3) Attorneys' fees and costs in amounts to be proven, pursuant to 21 V.S.A. § 678.

DATED at Montpelier, Vermont this 2 of May 2024.

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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.