

**STATE OF VERMONT
DEPARTMENT OF LABOR**

J. T.) Opinion No. 49-05WC
)
)
v.) By: Margaret A. Mangan
) Hearing Officer
)
Solo Cup Co. A/K/A The Fonda)
Group and University of Vermont) For: Patricia A. McDonald
) Commissioner
)
) State File Nos. L-17815; M-07516; 83-11672

Pretrial conference held January 10, 2005
Hearing held June 30, 2005
Record closed July 12, 2005

APPEARANCES:

William B. Skiff, II, Esq., for the Claimant
David R. McLean, Esq., for defendant, University of Vermont
Defendant, Solo Cup Co. a/k/a The Fonda Group did not enter an appearance

ISSUES:

1. Was claimant's October 28, 2002 elbow surgery the result of a work-related injury? If yes, who is the responsible party under workers' compensation law?
2. Is the claimant owed payment based on the permanent partial disability in 1984?

EXHIBITS:

Joint Exhibits:

1. Claimant's medical record.
2. Department of Labor forms relating to claimant.

Claimant's Exhibits:

3. January 27, 2004 letter from William Garrity, Esq. to Fonda Group
4. September 14, 2004 letter from Timothy Ryan, Esq. to Attorneys Skiff and McLean
5. January 11, 2005 letter from Hearing Officer Margaret Mangan, Esq. to Attorneys Skiff and McLean and The Fonda Group
6. April 29, 2005 letter from Hearing Officer Margaret Mangan, Esq. to Attorneys Skiff and Mclean and The Fonda Group
7. July 29, 2004 letter from Timothy Ryan, Esq. to Attorneys Skiff and McLean
8. September 16, 2004 letter from William Skiff, Esq. to Solo Cup Co.

Defendant's Exhibits:

4. May 11, 2005 letter from David McLean, Esq. to Hearing Officer, Margaret Mangan, Esq.
5. October 1, 1998, Fonda's Form 1 First Report of Injury

CLAIM:

1. Payment of medical expenses pursuant to 21 V.S.A. §640;
2. Temporary total disability benefits from October 28, 2002 through March 10, 2003;
3. Permanent partial disability benefits; and
4. Attorney fees and necessary costs of litigation.

STIPULATED FACTS:

1. In 1983, the claimant incurred an injury arising out of and in the course of her employment that led to a radial head excision in her right elbow on October 17, 1983.
2. The claimant reached medical end result for this injury approximately one year after the date of the radial head excision. At that time, Dr. Trevino, the treating physician, opined that there were no further surgical interventions indicated for her condition.
3. In 1984, Dr. Trevino and Dr. Kuhlmann rated claimant at 25% upper extremity impairment, or 53.75 weeks of PPD benefits.
4. Dr. Verne Backus' 2004 permanency rating does not create additional permanency owed.
5. Claimant's compensation rate at the time of the medical end result was \$184.97.
6. Based upon the 1984 25% upper extremity rating, permanent partial benefits would amount to \$9,942.13.
7. The claimant was paid permanent partial disability benefits for the period from April 19, 1984 to October 12, 1984, which totaled \$6,143.93.
8. Claimant began work for the Fonda Corporation (Fonda) in 1992.
9. Claimant began to experience pain in her hands and right elbow in 1998 while employed by Fonda.
10. Claimant underwent reconstructive surgery of her right elbow on October 28, 2002.
11. At the time of reconstructive surgery, claimant was employed by Scot.

12. As a result of the surgery, claimant was out of work from October 28, 2002 through March 10, 2003.
13. On October 28, 2002, and thereafter, claimant had no dependents within the meaning of the Vermont Workers' Compensation Act.

FINDINGS OF FACT:

1. Claimant is a fifty-eight year-old female, who was working for defendant, University of Vermont (UVM), at the time of her 1983 work-related right elbow injury.
2. From the time of her 1983 surgery until 1998, claimant had a waxing and waning of pain in her right elbow, but no increase in symptoms. No requests for surgery were made during this period, and claimant was capable of managing the symptoms on her own.
3. On October 1, 1998, claimant injured her right elbow while employed by Fonda. Claimant was attempting to lift a credenza when she experienced a sharp, shooting pain up her right forearm. Prior to the injury, claimant worked many overtime hours at Fonda.
4. Fonda filed a First Report of Injury on October 1, 1998.
5. Claimant's pain continued to increase after the October 1, 1998 injury and she could no longer independently manage her pain.
6. Claimant left Fonda in December of 1998, and her subsequent employment did not increase the symptoms in her right elbow, but she still had burning pain.
7. In 2002, Dr. Bruce Foerster, M.D. recommended right elbow anterior submuscular ulnar nerve transposition and ulnar collateral ligament reconstruction as a possible surgical option. On October 28, 2002, Dr. Foerster performed the surgery on claimant.
8. In 2002, employer hired Dr. John Johansson, D.O. to perform an IME, and to state his opinion regarding the necessity of the proposed surgery and the causation of the right elbow injury. Dr. Johansson opined that the injury did not relate to claimant's employment at UVM. He cited the lack of evidence of ulnar neuritis prior to 1998, and the beginning of her subjective complaints in 1998 as evidence to conclude that her work at Fonda was most likely the cause of her injury.
9. In 2003, claimant hired Dr. Verne Backus, M.D., to perform an IME and to state his opinion regarding claimant's permanency and the causation of the recent surgery. Dr. Backus opined that claimant's most recent symptoms were directly related to her work at Fonda. He cited the lack of increasing symptoms until claimant's work at Fonda to support his conclusion that her surgery was a result of an aggravation while working at Fonda.

1984 Permanent Partial Disability Payments

10. Claimant does not remember a settlement agreement with University of Vermont in 1984, and does not remember receiving any payment.
11. UVM's workers' compensation insurance carrier, CNA, forwarded permanent partial disability benefits based on a 25% upper extremity impairment rating, but ceased paying them because it believed the 25% rating to be in dispute.
12. Dr. Kuhlman, who was hired in 1984 by CNA to perform an independent impairment rating, also found that claimant was at medical end and had a 25% upper extremity impairment rating. It is dispute whether CNA ever resumed payments.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
2. 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 inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
4. Both parties agree that claimant's right elbow pain increased from working at Fonda in 1998. At issue in this case is whether claimant's right elbow injury was an aggravation or a recurrence of the 1983 injury suffered while working at UVM.
5. In cases such as this when a claimant has had two injuries, the insurer on the risk when the first injury occurred remains liable "if the second accident did not causally contribute to the claimant's disability." *Pacher v. Fairdale Farms* 166 Vt. 626, 629 (1997) (mem). However, if the second incident "combined with a preexisting impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an 'aggravation,' and the second employer becomes solely responsible for the entire disability at that point." *Id.*
6. Aggravation is an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. WC Rule 2.1110. A recurrence means the return of symptoms following a temporary remission. WC Rule 2.1312.

7. Our law is clear that the aggravation or acceleration of a pre-existing condition by an employment accident is compensable under the workers' compensation law. *Jackson v. True Temper Corp.*, 151 Vt 592, 595 (1989). In aggravation-recurrence cases, the employer when the aggravation occurred has the burden of proving that another carrier or carriers is liable. *Bushor v. Mower's News Service*, Op. No. 75-95WC (1995).
8. The injury caused by claimant's work at Fonda in 1998 increased her right elbow symptoms, and resulted in her 2002 surgery. Claimant's doctor, Dr. Backus, and defendant's doctor, Dr. Johansson, both opined that the 2002 surgery was directly related to claimant's work at Fonda. Claimant had no signs of ulnar neuritis prior to 1998, and she reported no increase in pain for nearly fourteen years. Further, the claimant was able to manage her symptoms for these fourteen years and no doctor ever suggested that surgery on the right elbow might be necessary in the future. The moving of the credenza and the overuse of her right elbow were the intervening events at Fonda that caused the aggravation of her right elbow injury.

Default Judgment

9. Fonda has failed to carry its burden of proving that UVM is liable for the 1998 aggravation of the right elbow. In fact, Fonda failed to make an appearance in this case and make any defense. This has not been from a lack of notice. Both the Department, and the parties in this case, repeatedly contacted Suzanne Chabot of Fonda by certified mail, electronic mail, and phone since January of 2004. However, these contacts did not result in Fonda's appearance in this case.
10. Default judgment is appropriate where a defendant has not appeared in an action, and is not an infant or incompetent person. *See* V.R.C.P. 55. Fonda is neither an infant nor incompetent.
11. Default judgment is entered against Fonda on both the issue of the compensability of the 1998 right elbow injury, and its liability for the same right elbow injury.
12. After a default judgment has been ordered, if it necessary to determine the amount of damages, the Commissioner may order a showing of evidence as deemed necessary and proper to make a final ruling. *See* V.R.C.P. 55(b)(3).
13. The claimant has provided no evidence to support an amount for TTD benefits. Claimant has also failed to provide any past medical bills for expenses due. The Commissioner cannot enter a default judgment for a sum certain without evidence to support these claims. Therefore, the claimant is asked to submit documentation in support of her TTD claim and in support of reimbursement for medical care and expenses.

1984 Permanent Partial Disability Payments

14. Claimant has not met her burden of proving that she did not receive the full amount of permanent partial disability payments for her 1983 work-related injury. The record only demonstrates that payments were stopped until Dr. Kuhlman could examine the claimant. After Dr. Kuhlman examined the claimant, there is no evidence that the payments were not resumed. In fact, since the injury occurred over twenty years ago, the claimant cannot even remember if she received any payments. The Department would be unwise to open the door for future claimants to come forward with minimal evidence claiming that their past settlements had not been paid. In conclusion, claimant has not provided sufficient evidence to demonstrate that UVM did not fulfill its obligation of permanent partial disability payments.

Attorney Fees and Costs

15. A prevailing claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678(a). In this case, where the claimant partially prevailed, she is entitled to a partial award of fees. However, since a default is entered against Fonda, claimant must submit an amended request for fees proportionate to the degree of success. The amended request should include the amount of fees proportionate to claimant's success of the TTD claim and medical expenses. The fees proportionate to the PPD claim against UVM must be excluded.

ORDER:

Therefore, based on the foregoing Findings of Fact and Conclusions of Law claimant's request for additional permanent partial disability is denied. A default judgment is entered against Fonda on both the issue of the compensability of the 1998 right elbow injury, and its liability for the same right elbow injury. However, claimant must submit evidence in support of her temporary total disability from October 28, 2002 through March 9, 2003, all past medical expenses associated with the October 2002 surgery; and attorney fees and necessary costs related to the success of her claims.

Dated at Montpelier, Vermont this 9th day of August 2005.

Patricia A. McDonald
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.