

R. O. v. Buttura & Sons

(December 15, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

R. O.

Opinion No. 52-08WC

v.

By: Jane Gomez-Dimotsis, Esq.
Hearing Officer

Buttura & Sons

For: Patricia Moulton Powden
Commissioner

State File No.X-03956

OPINION AND ORDER

Hearing held in Montpelier on September 5, 2008

Record closed on October 10, 2008

APPEARANCES:

Craig Jarvis, Esq., for Claimant

Eric Johnson, Esq., for Defendant

ISSUE:

Is Claimant's right shoulder injury causally related to his employment and if so, to what workers' compensation benefits is he entitled?

EXHIBITS:

Claimant's Exhibit 1: Medical records

Claimant's Exhibit 2: Photographs of exterior of Claimant's home

Defendant's Exhibit A: Medical records

Defendant's Exhibit B: Dr. Landvater's fee schedule

CLAIM:

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

Medical benefits pursuant to 21 V.S.A. §640;

Permanent partial disability benefits pursuant to 21 V.S.A. §648;

Interest pursuant to 21 V.S.A. §664;

Attorney's fees and costs pursuant to 21 V.S.A. §678;

FINDINGS OF FACT:

1. At all times relevant to these proceedings Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all forms contained in the Department's file relating to this claim.
3. Defendant is a granite shed business. Claimant is a monumental granite draftsman and worked for Defendant for several years.
4. Defendant has a lay-off period in the winter. When work slows down Defendant's workers clean up the facility in part by disposing of file boxes or by filling boxes with old files and moving them upstairs for storage.
5. On January 9, 2006 Claimant returned from vacation. He helped move file boxes from the first floor to the second floor.
6. Claimant was over fifty and was told he did not need to help move boxes. However, he was not explicitly prohibited from doing so.

The Incident

7. Claimant helped move four boxes. He raised the first three boxes from desk level and carried them upstairs. The last box was on the floor. When Claimant bent down to pick it up he tossed it up to get a better grip on it and then held it by its sides.
8. Claimant testified that when the box landed in his arms from the toss, he felt pain in his right shoulder. He stated that upon placing the box down, he told his co-workers that he had hurt his shoulder. All of the men present with Claimant at that time testified at hearing. Only one stated that he heard Claimant say something about the box but he did not recall exactly what was said.
9. Claimant continued to work for the next two weeks without mentioning any pain or shoulder complaints to his co-workers. After this incident but within the next several weeks Claimant lifted one or two boxes of frozen chicken at work for reasons unrelated to this claim. He testified that he did so with his left arm and shoulder so that he would not hurt his right arm.
10. On January 23, 2006 Claimant informed his supervisor, Michael Piro, that he had injured his right shoulder while moving boxes at work on January 9th and that he was going to see a doctor.

Medical History

11. Claimant saw his primary care provider, Dr. Peter Dale, on January 23, 2006. Dr. Dale's office note for that date states: "1/9/06 – lifting boxes at work 30-40 lbs – new pain on top of shoulder [increased pain at night, minor pain during the daytime]." In his assessment, Dr. Dale wrote, "lifting related acute onset pain." Dr. Dale ordered an MRI, which revealed a rotator cuff tear, and then referred him to Dr. Stephanie Landvater for surgical treatment.
12. On March 9, 2006 Dr. Dale took Claimant out of work pending his examination with Dr. Landvater. Dr. Landvater examined Claimant on March 14, 2006 and determined that he was totally disabled from working.
13. Claimant underwent surgical repair of his right shoulder rotator cuff tear on March 20, 2006. Dr. Landvater stated that when she viewed the injury during surgery it appeared to have an "acute" look and that its location was more consistent with a chronic tear. Relying primarily on Claimant's account of the January 9th lifting incident, Dr. Landvater determined that the rotator cuff tear was work-related. Later Claimant had a recurrent tear due in part to possible infection of the previous wound. He underwent a second surgical repair on April 27, 2006.
14. At Defendant's request, Dr. John Peterson saw Claimant for an independent medical examination on May 7, 2006. Based on the reported mechanism of injury, Dr. Peterson found that Claimant's right shoulder rotator cuff tear was work-related. Later, however, Dr. Peterson reviewed Dr. Leon Ensalada's IME report, which found Claimant's injury to be unrelated to his employment. After reading the report, Dr. Peterson then changed his opinion on causation and stated that he agreed with Dr. Ensalada.
15. Given the circumstances of this claim, the fact that both Dr. Landvater and Dr. Peterson relied on Claimant's subjective report of how the injury occurred in determining it to be work-related is troublesome. First, the alleged incident was unwitnessed, and Claimant's co-workers could not even corroborate his testimony that after lifting the box he told them he had hurt his shoulder. Second, Claimant delayed reporting his injury, continued to work and did not seek medical treatment for two weeks after the January 9th incident. Last, as noted *infra*, Finding of Fact 22, Claimant's inconsistent statements, both at the hearing and in the context of other legal and financial matters, render his credibility suspect.
16. Dr. Leon Ensalada conducted an independent medical examination on November 8, 2006. Dr. Ensalada determined that Claimant's shoulder injury was not work-related because "the manner in which the Claimant claims to have lifted the box would have no effect on his subacromial space" and thus would not cause the injury that occurred. Dr. Ensalada also disputed Dr. Landvater's ability to discern whether an injury is acute or the result of a longstanding degenerative process merely by viewing it during surgery.

17. Dr. Ensalada found that Claimant had chronic rotator cuff tendonitis caused by a decreased subacromial space. The decrease in the space caused chronic rubbing of the rotator cuff tendons against the subacromial arch and an abnormal configuration of his acromion in addition to arthritic spurs, inflammation and swelling. This process continued until the frayed rotator cuff tendons failed completely and tore. Dr. Ensalada found objective evidence of these findings in the February 22, 2006 MRI.
18. Dr. Ensalada also testified that if Claimant had torn his rotator cuff while lifting the box on January 9, 2006 he would not have been able to continue to work without complaint for almost three weeks thereafter, due to the amount of pain he would have had.
19. Both experts agreed that Claimant had a severe degenerative condition in his shoulder that could have caused his rotator cuff to tear at any time.
20. Dr. Landvater placed Claimant at end medical result on March 7, 2007. She rated him with a 5% whole person permanent impairment and released him to work on March 20, 2007.
21. In a medical procedure unrelated to this claim, Claimant underwent rotator cuff surgery on his left shoulder in 2008, performed by Dr. Michael Imobersteg. Of note is Dr. Imobersteg's report stating that prior to surgery he informed Claimant that the tear might not be repairable due to the chronicity of the problem.

Claimant's Credibility

22. Claimant has had significant legal and financial problems in the past in which his credibility reasonably might be deemed suspect. On one occasion, he was involved in a fight where he lied to the police regarding facts about a gun. Although he later corrected his statement, the fight led to a conviction for assault. There also was credible evidence that Claimant was terminated or asked to quit his former job due to some missing funds. Claimant has been sued three times for failure to pay debts. Perhaps most relevant to the current matter, Claimant made statements in his testimony regarding this claim that were inconsistent with prior statements.

CONCLUSIONS OF LAW:

1. Unfortunately, the truth will never be known as to whether Claimant really injured his right shoulder while lifting a box at work on January 9, 2006. Given that he delayed two weeks before reporting his injury, Claimant's credibility is a key issue in resolving the causal relationship question. With an unwitnessed accident, a late report, a delay in seeking treatment and Claimant's inconsistent statements, the factual evidence must be evaluated with great care. *K.C. v. Windham Northeast Supervisory Union*, Opinion No. 45-06WC (November 17, 2006), citing *Fanger v. Village Inn*, Opinion No. 5-95WC (April 25, 1995). It is black-letter law, furthermore, that Claimant bears the burden of proving by competent credible evidence both the character and extent of his injury and the causal connection between the injury and the employment. *Goodwin v. Fairbanks, Morse & Company*, 123 Vt. 161 (1962).
2. Claimant's credibility was damaged by both his prior conduct and his inconsistent statements at hearing. As a result, I find that he has failed to meet his burden. Dr. Dale's report relied on Claimant's subjective statements, as did Dr. Peterson's initial finding. Dr. Landvater as well relied to a large extent on Claimant's statements. When medical personnel rely on a patient's history of a work-related incident that proves not to be credible, however, their opinions lose their crucial base. *M.M. v. Mack Molding*, Opinion No. 58-05WC (September 9, 2005).
3. Because Dr. Ensalada's opinion was based on objective evidence rather than Claimant's subjective and inconsistent report, I find his opinion to be the most credible one. I conclude, therefore, that although Claimant proved that he suffered a right shoulder rotator cuff tear, he did not provide sufficient credible evidence to establish that the January 9, 2006 work incident was what caused the tear to occur.
4. Because Claimant has not prevailed, he is not entitled to an award of costs or attorney's fees. As a separate matter, however, Claimant has requested an award of the costs related to Dr. Landvater's second deposition, a total of \$400.00. I find that under the circumstances Defendant should bear responsibility for this cost, and I therefore award this amount.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits causally related to his right shoulder injury is hereby **DENIED**. Defendant is **ORDERED** to pay \$400.00 in costs in accordance with Conclusion of Law 4 above.

DATED at Montpelier, Vermont this 15th day of December 2008.

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.