

D. B. v. Vergennes Auto Inc.

(October 9, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

D. B.

Opinion No. 42-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Vergennes Auto Inc.

For: Patricia Moulton Powden
Commissioner

State File No. U-02969

Hearing held in Montpelier on June 21, 2006

Record closed on July 10, 2006

APPEARANCES:

Mary G. Kirkpatrick, Esq., for the Claimant

Andrew C. Boxer, Esq., for the Defendant

ISSUES:

- 1) Is Claimant's left shoulder condition causally related to her 2003 right shoulder injury?
- 2) Did Claimant reach medical end result in the summer of 2005?
- 3) Did the Defendant waive its right to contest left shoulder claims by voluntarily paying related medical bills?

EXHIBITS:

Claimant:

1. Letter of June 10, 2005 from adjuster to Claimant
2. Office note of June 1, 2005 from Dr. Nichols
3. A June 23, 2005 Travelers form signed by Dr. Nichols
4. An April 4, 2005 claim form which has work restrictions
5. Surveillance video (on CD) of April 27, 2005
6. Transcript from Claimant's deposition

Defendant:

1. Post-it note from Dr. Claude Nichols
2. Reverse side of Defendant 1

FINDINGS OF FACT:

1. Claimant has a long history of manual labor work.
2. Claimant was an employee and Vergennes Auto her employer within the meaning of the Vermont Workers' Compensation Act. She had been working for Vergennes Auto for about a year and a half at the time of her work related injury in July 2003.
3. American Zurich Insurance Company was the workers' compensation insurance carrier for Vergennes Auto on July 30, 2003.
4. It is undisputed that Claimant suffered a work related injury to her right shoulder on July 30, 2003 when a car hood fell on that shoulder. She is left hand dominant.
5. After the injury, Claimant received medical and physical therapy treatment for the right shoulder.
6. By November 2003 she was diagnosed with a full thickness rotator cuff tear. She had surgery on December 16, 2003. Two weeks later she was released to work with her right shoulder still in a sling.
7. Physical therapy continued even after Claimant's return to work. Although she was left hand dominant, she was using that arm even more than usual.
8. Claimant was given restrictions against using the right arm in certain activities. A Spring 2004 MRI revealed that the right shoulder muscle was not completely healed.
9. Pain developed in her left shoulder as she used that arm more. In July 2004 she noted marked left shoulder pain that prompted her to seek medical attention when she lifted a gallon of milk from her refrigerator.
10. Claimant was diagnosed with impingement syndrome in the left shoulder.
11. Because of persistent pain and positive objective tests, Dr. Nichols performed a second operation on Claimant's right shoulder in January 2005. Medical efforts then focused on her left shoulder.
12. Dr. Nichols diagnosed a full thickness tear in Claimant's left shoulder, similar to what she had on the right side.
13. Physicians agree that the blood supply to the rotator cuff is poor, increasing the likelihood that with age and with manual labor, the rotator cuff would tear. Often such tears are asymptomatic.
14. Claimant continued physical therapy in an effort to quiet both shoulders. The insurance carrier paid for the treatment.

15. Claimant's pain in both shoulders continued. In June 2005, Dr. Nichols noted that Claimant had a work capacity for three to four hours a day at the sedentary level. He predicted that she would reach medical end result by July of that year, 2005.
16. Dr. Nichols recommended surgery on Claimant's left shoulder, but in June 2005 she declined. Her condition has remained essentially unchanged since then.
17. In July 2005, Dr. John Johansson determined that Claimant had reached medical end result.
18. Dr. Lefkoe, a physiatrist, began treating Claimant for pain in July 2005. He determined that she had not yet reached medical end result because better pain management would improve her function. In his opinion, pain management is not merely palliative because functional outcome can be improved. Shoulder range of motion measurements have improved slightly under his care. Activities of daily living are easier for her.
19. Claimant continues to complain of pain in her left shoulder. Although she has received several treatment modalities, the only relief she has enjoyed is about an hour after a massage.
20. Although Claimant used her left arm more when the right was restricted, that use did not reach the level of overuse for the shoulder because it did not involve repetitive motions with her left arm elevated.
21. The carrier has paid for treatment of both shoulders, without accepting the left shoulder as compensable.

Causation

22. In 2006 Dr. Johansson opined that Claimant's left shoulder condition is not causally related to her work related injury, although in his permanency report of 2005 he suggested that it was. He reasoned that the more likely cause of the left sided rotator cuff tear was normal aging since women of Claimant's age have been known to develop such tears insidiously.
23. Dr. Claude Nichols, treating orthopedic surgeon, was called by the Claimant to testify at the hearing. He opined that it is more probable than not that Claimant's left shoulder pain is related to the right shoulder work-related injury because of overuse of her left shoulder, although he could not say that the rotator cuff tear was caused by the overuse. In fact, the left sided tear could have happened before the work related injury.

Medical End Result

24. Dr. Johansson opined that Claimant reached medical end result in the summer of 2005. At that time he predicted that no further treatment was required except home exercises.
25. According to Dr. Nichols, Claimant had reached medical end result once she decided against surgery.

CONCLUSIONS OF LAW:

Waiver

1. Claimant argues that Defendant waived its right to contest liability for her left shoulder tear because it had paid medical bills for both shoulders.
2. "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
3. 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 (2006). (citing *Holden & Martin Lumber Co. v. Stuart*, 118 Vt. 286, 289 (1954)).
4. While Defendant paid some medical bills related to the left shoulder injury, this alone is insufficient to show acceptance of a claim. *Briggs v. Maytag Homestyle Repair*, Opinion No.18-00WC (2000). The facts indicate that the Defendant made these payments in good faith, before it was certain whether or not the claim was actually compensable.
5. In short, the Defendant paid these medical bills without knowledge of all the relevant facts and, as a result, could not have waived its right to contest the claim. (See *Hojohn v. Howard Johnson*, Opinion No. 43-04WC at 6 (2004). Accordingly, the question of causation must be addressed.

Causation

6. 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).
7. To prevail on the contested issue Claimant must prove that her left shoulder injury arose out of and in the course of her employment. 21 V.S.A. § 618. Although not directly injured the day the car hood fell on her right shoulder, the left shoulder pain is compensable if it is a natural consequence of the right-sided injury. See 1 Larson's Workers' Compensation Law § 10.

8. However, a temporal relationship alone is an insufficient basis for an award. *Norse v. Melsur Corp.*, 143 Vt. 241, 244 (1983).
9. Here, the requisite causal relationship between the right and left sided conditions has not been proven. No physician, including her treating surgeon, was able to say when the left sided tear occurred. Although Claimant used her left arm more than usual, the evidence does not support her argument that such use rose to the level of shoulder overuse because it did not involve repetitive movements with her arm elevated. In all likelihood it was the natural progression of years of hard labor and the normal aging process, not as a result of the right-sided injury. Accordingly, the left sided condition is not compensable.

Medical End Result

10. Next is the question of medical end result, which is “the point at which a person has reached a substantial plateau in the medical recovery process, such that significant improvement is not expected, regardless of treatment.” WC Rule 2.1200.
11. Also called “maximum medical improvement,” this is a “condition or state that is well-stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not expected.” AMA Guides to the Evaluation of Permanent Partial Impairment, 5th Ed. at 601.
12. Although Claimant continues to receive treatment for pain with the hope of an increase in functionality, she has been at a plateau since the summer of 2005, as determined by Dr. Johansson. Minor increases in range of motion and modest improvements in basic activities of daily living do not rise to the substantial change necessary to counter the defense of medical end result.
13. In sum, Claimant’s left sided shoulder condition is not work related. Further, the defense position that Claimant had reached medical end result in the summer of 2005 is accepted.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions, of law:

- 1) Defendant did not waive its right to contest the compensability of the left shoulder injury;
- 2) Claimant's left shoulder claim is not compensable;
- 3) Claimant reached medical end result in 2005.

Dated at Montpelier, Vermont this 9th day of October 2006

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.