

C. R. v Fairfax Salvage & Repair, Inc.

(July 2, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

C. R.

Opinion No. 28-08WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer
Adam Sherwin
Law Clerk

Fairfax Salvage & Repair, Inc.

For: Patricia Moulton Powden
Commissioner

State File Nos. W-2010 & W-06718

Formal Hearing held in Montpelier on October 26, 2007

APPEARANCES:

Christopher McVeigh, Esquire, for the Claimant
Marion T. Ferguson, Esquire for the Defendant

ISSUES:

1. Whether Mrs. Renaudette's bilateral elbow problems are causally related to her work at Fairfax Salvage & Repair, Inc.
2. If a causal connection is found, what, if any, benefits are due.

EXHIBITS:

Joint Exhibit 1: Medical Records

Claimant's Exhibit 1: Dr. Foerster's deposition testimony

Defendant's Exhibit 1: Independent Medical Examination ("IME")

Defendant's Exhibit 2: Ergovention Report

CLAIM:

1. Medical and hospital benefits pursuant to 21 V.S.A. § 640.
2. Attorney fees and costs pursuant to 21 V.S.A. § 678(a).
3. Legal interest pursuant to 21 V.S.A. § 664.

FINDINGS OF FACT:

1. Claimant was an owner of Fairfax Salvage & Repair, Inc. and worked as an office manager for seven years. Her duties included office management, data entry, and customer service. The job required her to use the computer approximately seven hours a day. She was 48 at the time of the injury and left hand dominant.
2. Around May 2003, Claimant developed pain in her right shoulder and right elbow. In July 2003, her first doctor, Dr. Raymond Long, diagnosed her with rotator cuff syndrome for the right shoulder and lateral epicondylitis for the right side. He injected her with medication that successfully relieved the pain for the next several months.
3. On September 3, 2003, during a follow-up examination, Claimant told Dr. Long that she was completely pain free.
4. On March 24, 2004, during another follow-up examination, Claimant stated that pain in her right shoulder returned. Dr. Long diagnosed this as a recurrence of lateral epicondylitis, and gave her another injection of cortisone.
5. During November 2004, Dr. Bruce V. Foerster took over care for Claimant. He also diagnosed her condition as lateral epicondylitis for the right elbow, and treated it through the use of a wrist splint, an elbow strap, icing, and physical therapy. Additionally, Dr. Foerster believed that the right elbow included a diagnosis of radial tunnel syndrome; although he testified there is no test that can establish that diagnosis with certainty.
6. Claimant testified that she did not regularly use a computer at home nor did she do any rigorous physical activities. She also testified that during the weekends, when she was not using the computer, there was less pain in her arm.
7. On January 6, 2005, Claimant met with Dr. Foerster for a follow-up on the treatment. She stated that the symptoms from her right elbow were getting worse again, and noted that she was having trouble using the computer at work. Because of this, she began using her left hand for most of her heavier activities. Dr. Foerster gave her another injection of cortisone, and advised her to continue with the other treatments.
8. On March 31, 2005, Claimant met with Dr. Foerster for another follow-up. She stated that while there was less pain in her right elbow, her left elbow was now hurting as well. Dr. Foerster found mild tenderness over the lateral epicondyle of the right elbow and significant tenderness over the lateral epicondyle on the left side. He diagnosed this as again being work related, and gave her a cortisone injection for the left elbow. He again advised her to continue with the same treatment.
9. On June 7, 2005, Claimant met with Dr. Foerster for another follow-up. She stated that her right elbow felt about the same, but her left elbow is much worse. Dr. Foerster gave her a wrist strap and discussed other treatment options with her.

10. On August 30, 2005, Claimant met with Dr. Foerster for another follow-up. She stated that she has noticed increasing and persistent pain in the left elbow, but the pain in her right elbow was somewhat stable. Dr. Foerster gave her a cortisone injection into the left elbow and recommended that she proceed with work place improvements that had been previously proposed.
11. On November 22, 2005, Claimant met with Dr. Foerster for another follow-up. She stated that the last cortisone injection helped with the left elbow but did not completely cure the pain. He advised her that the work place improvements would help her condition, and that she should continue with the previous treatment.
12. On August 8, 2006, Claimant met with Dr. Foerster for another follow-up. She stated that the pain in her left elbow is much worse than the right. Dr. Foerster gave her another cortisone injection into her left elbow.
13. On December 12, 2006, Claimant met with Dr. Foerster for an evaluation of bilateral upper extremity problems. She had cancelled a scheduled appointment a month ago because her elbows were feeling better. Now, she stated she had increasing problems in her arms and hands, with the right side being worse than the left. Dr. Foerster prescribed some medication, and did a number of tests to check for possible causes of her condition.
14. Overall, Dr. Foerster treated Claimant for over three years using conservative treatment. Because this did not relieve her condition, Claimant chose to undergo surgery.
15. In February 2007, Claimant had surgery for her right elbow.
16. On March 6, 2007, Claimant met with Dr. Foerster for a follow-up from the surgery. He noted that she had symptoms and findings of radial tunnel syndrome, but was not completely sure of this diagnosis. He gave her a prescription for both physical therapy and medication, and advised her to gradually increase her physical activities.
17. On April 17, 2007, Claimant met with Dr. Foerster for another follow-up from the surgery. She said that she had no further pain in the right elbow. Dr. Foerster observed that the surgery successfully treated the epicondylitis. However, he recommended that she only pursue surgery for the left elbow if the pain became worse. He made this recommendation because there was no guarantee that surgery for the left elbow would be as successful as the previous surgery.
18. On June 20, 2007, Claimant had surgery for her left elbow.
19. On November 5, 2004, an ergonomic specialist visited Fairfax Salvage and Repair and evaluated Claimant's workstation. He found that the setup of her worksite resulted in increased force to her upper extremities, and an awkward posture of her back, neck, and shoulders. He made several recommendations on how to avoid these conditions.

20. Dr. Mark Bucksbaum did an IME of Claimant on June 5, 2006. He concluded that her left lateral epicondylitis was not causally related to her work place injury. He also found that her right shoulder rotator cuff injury and right epicondylitis also did not have a clear causation within a reasonable degree of medical certainty to her work activities. In his report, Dr. Bucksbaum noted that because she is left hand dominant, there is a low probability that she would manifest right sided symptoms. He also wrote that keyboarding is not expected to cause a rotator cuff injury, and that there is no record of an injury for the left upper extremity. He concluded that it is not likely that she developed left lateral epicondylitis from guarding the right elbow. Additionally, he found that Claimant's delay in seeking treatment for the right upper extremity is the reason why she needed prolonged treatment.
21. Dr. Foerster disagreed with the findings of the IME. He argued that based on his own experience, the hand dominance of a patient does not dictate the location of tendonitis. He also disagreed with Dr. Bucksbaum's conclusion that Claimant's left lateral epicondylitis was not related to her work activity. Dr. Foerster testified that repetitive keyboarding and using the mouse are common causes of lateral epicondylitis. Based on a reasonable degree of medical certainty, he believed these work activities were the cause of Claimant's injuries.
22. The claimant has presented an itemized statement for \$1,481.67 in costs and attorney's fees based on the statutory rate of \$90.00 for 42.2 hours of time.

CONCLUSIONS OF LAW

1. In a worker's compensation claim, it is the burden of the claimant to establish all facts essential to support his claim. *King v. Snide*, 144 Vt. 395 (1984); *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963). Sufficient competent evidence must be submitted verifying 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. Where the causal connection between an accident and an injury is obscure and a lay person would have no well-grounded opinion as to causation, expert medical testimony is necessary to establish the claim. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979). "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." *Brown v. E.B. & A. C. Whiting*, Opinion No. 21-94WC, (Aug.1, 1994); *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

3. When evaluating and choosing between conflicting medical opinions, the Department has traditionally considered several factors: (1) the nature of treatment and length of time there has been a patient-provider relationship; (2) whether accident, medical and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination; and (5) the qualifications of the experts, including professional training and experience. *Morrow v. VT Financial Services Corp.*, Opinion No. 50-98WC (Aug. 25, 1998); *Durand v. Okemo Mountain*, Opinion No. 41S-98WC (Sept. 1 & July 20, 1998); *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (Aug. 4, 1997).
4. Three doctors have examined Claimant: (1) Dr. Raymond A. Long/orthopedic surgeon (2) Dr. Bruce V. Foerster/orthopedic surgeon (3) Dr. Mark J. Bucksbaum/physical medicine and rehabilitation specialist. Dr. Long and Dr. Foerster were Claimant's doctors, and Dr. Bucksbaum was an independent medical examiner. While Dr. Long initially treated Claimant for her injuries, he made no diagnosis as to what was the cause of the epicondylitis.
5. Dr. Foerster treated Claimant for over three years. He met with her for numerous follow-up examinations and performed surgery on both of her elbows. Dr. Bucksbaum, however, has met with Claimant for only one examination.
6. Because of Claimant's extensive relationship with Dr. Foerster, I find his medical opinion more persuasive.
7. The next factor requires consideration of each physician's access to the claimant's medical records. Here, the evidence shows that both Dr. Foerster and Dr. Bucksbaum had an opportunity to review all records relating to Claimant's injuries.
8. I then must decide whether the report or evaluation at issue is clear and thorough and includes objective support for the opinions expressed. Here, each physician supports his opinion based on their experience treating this condition. Neither physician offers any objective evidence, beyond their own opinions, as to the cause of Claimant's epicondylitis. While each physician made a credible case in supporting their opinion, the other physician reached the opposite conclusion based on a similarly persuasive argument. Neither physician has offered objective support to prove that their opinion is more likely to be true than the opposing opinion. Therefore, on the basis of each physician's testimony alone, I find each opinion equally persuasive.
9. However, I do find objective support for Claimant's argument in the ergonomic specialist's report. Here, this report shows that Claimant's workstation resulted in excess force to her upper extremities and an awkward position of her back, neck, and shoulders. The recommendations made to fix this problem all relate to the job functions that Dr. Foerster claim were the cause of her injuries. Therefore, I find that the report provides objective support that Claimant's work was the cause of her epicondylitis.

10. Next, I have looked at the comprehensiveness of each examination. Here, I find that each physician had an opportunity to do a thorough examination of Claimant. However, given that Dr. Foerster treated Claimant for over three years, compared to Dr. Bucksbaum's single examination, I find Dr. Foerster's examination to be more comprehensive than Dr. Bucksbaum's examination.
11. Finally, I have looked at each physician's qualifications. Here, Dr. Foerster is an orthopedic surgeon who specializes in hand and upper extremity surgery. Dr. Bucksbaum specializes in physical medicine. I find each physician to have an equal level of education and experience. However, I find Dr. Foerster's opinion to be more persuasive because he has diagnosed and treated many patients for epicondylitis.
12. Based on these factors, I find Dr. Foerster's opinion to be most persuasive. Dr. Foerster has treated Claimant for several years and frequently treats epicondylitis. His opinion is supported by evidence that proves Claimant's workstation caused excessive force on her body.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Fairfax Salvage & Repair is ORDERED to pay Claimant:

1. Medical and indemnity benefits, plus statutory interest.
2. Reasonable attorney fees and costs; a total combined amount of \$90.00 per hour at 42.2 hours and reasonable costs of \$1,481.67.

DATED at Montpelier, Vermont this 2nd day of July 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.