L. P. v. Greer's Drycleaning (December 30, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR

Linda Pidgeon	)	Opinion No. 73-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Peerless as insurer for	)	
Greer's Drycleaning	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. U-11519

Pretrial conference on January 31, 2005
Hearing held in Montpelier on October 14, 2005
Record closed on October 31, 2005

APPEARANCES:

Heidi S. Groff, Esq., for the Claimant
Bonnie B. Shappy, Esq., for the Defendant

ISSUES:

1. Are claimant's current right shoulder, arm and wrist injuries causally related to the fall she sustained at work on January 22, 2004?

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

EXHIBITS:

Joint:

I: Medical Records
II: Supplemental Records
III: Deposition and curriculum vitae of Dr. Benoit

Claimant:

1. Incident Report
2. Job Contacts

Defendant:

A. Curriculum Vitae of Dr. Backus

CLAIM:

1. Medical and hospital benefits pursuant to 21 V.S.A. § 640;
2. Temporary total disability benefits pursuant to 21 V.S.A. § 642 from June 11, 2004 to the present an ongoing;
3. Permanent partial disability benefits pursuant to 21 V.S.A. § 648 to be determined when claimant reaches medical end result;
4. Interest on all benefits as they became due pursuant to 21 V.S.A. § 664;
5. Attorney fees and costs pursuant to 21 V.S.A. § 678(a) and WC Rule 10.

FINDINGS OF FACT:

1. Claimant was an employee and Greer's House of Cleaning her employer within the Workers' Compensation Act at all times relevant to this action. Peerless was the workers' compensation insurer for Greer's.

2. On January 22, 2004, claimant's average weekly wage was $247.29.

3. Claimant's job duties at Greer's included marking in dry cleaning, washing, drying and folding laundry, getting laundry for customers and taking payment.

4. On Thursday, January 22, 2004 claimant was working for defendant in its Winooski store. While waiting on a customer, she walked over to the conveyor belt. In the process, she noticed that a light fixture was about to fall, so she reached to catch it. In the process, she fell forward, landing on her right wrist, and rolled onto her right side onto the concrete floor. The laundry cart hit her right arm.

5. Claimant did not feel immediate pain after the fall. She did not report the incident that day. She simply did not think it was a big deal.

6. The next day, claimant's hand was swollen. She had neck, shoulder and right arm pain. She reported the incident to her manager who recommended that she make an appointment with Occupational Health and Rehabilitation, but not for that day because she was needed at work.

7. On an accident report, claimant wrote that her problem was "wrist shoulder—right side."

8. Before the incident at issue here, claimant had been diagnosed with carpal tunnel syndrome and treated with splinting and medication. Her symptoms were primarily numbness in the index and middle fingers. Before the work-related fall, she did not have pain in her neck, shoulder arm or wrist since at least 2001. In fact, on January 15, 2004, a week before that incident, Neurologist Dr. Dean Kindler, noted that claimant's CTS was stable on the medication Neurontin. Although surgery for CTS had been discussed some time before January 2004, that option no longer seemed necessary.

9. After the fall, medical records are replete with references to right sided neck, forearm, wrists and hand pain.

10. The day after the incident at issue claimant saw her primary care physician for a previously scheduled appointment. She reported a "a right shoulder injury at work yesterday. Fell on outstretched hand."

11. The Monday following the fall, claimant kept the appointment her employer asked her to make with Occupational Health and Rehabilitation, Inc. Dr. Mercia, the examining physician described her history as "Ms. Pidgeon tripped on a concrete step at work, pitched forward landing on right extended wrist and rolled onto right side. No immediate discomfort but next day woke with pain in right wrist, right arm/shoulder, and right trapezius area. She reports that her right carpal tunnel symptoms were worse with extension of numbness from index and middle fingers to all fingers. Pain is achy [and] constant, radiates from wrist area proximately to right shoulder and right side of neck." Dr. Mercia diagnosed exacerbation of CTS, right upper extremity and rhomboid/trapezius strain and possible double crush. He recommended modified duty work with no lifting more than five pounds, no overhead or above shoulder lifting with her right arm and no pushing or pulling.

12. In February of 2004, claimant saw Dr Mercia as well as Dr. Smith-Horn. Both physicians noted that claimant's symptoms persisted, prompting Dr. Mercia to reduce her lifting capacity to one pound. Dr. Smith-Horn suspected a triangular fibrocartilage (TFCC) tear, although the MRI suggested only a possibility.

13. An April 21, 2004 MRI of the right wrist revealed a small TFCC tear and partially torn ulnar attachment of the triangular fibrocartilage.

14. A May 5, 2004 record from the Community Health Center in Burlington notes that there had been "difficulty getting problems with the Rt [right] arm resolved."

15. Claimant continued to work at Greer's after the fall and worked until June 10, 2004, a week after Dr. Mercia called the employer to say that claimant was not to use her right hand and arm for any work activities. He released her to return to work with restrictions on July 19, 2004.

16. Greer's was not able to meet the restrictions placed on the claimant, nor were other potential employers. Despite her good faith search for employment, claimant has not yet secured a job.

Expert Medical Evidence

17. On July 22, 2004, Dr. William Mercia at Occupational Health and Rehabilitation wrote: "It is my opinion that the right wrist injury sustained while working on 1/22/04 and subsequently diagnosed as a tear of the TFCC and an exacerbation of a pre-existing carpal tunnel syndrome is work-related." Despite this opinion from a physician in the very practice where the employer had sent claimant for an evaluation, the claim was denied.

18. Dr. Benoit, the surgeon who operated on claimant's hand and arm, opined that the fall at work in January 2004 worsened her underlying carpal tunnel syndrome.

19. EMG studies were performed before and one week after the injury at issue here. They demonstrate a worsening in her condition.

20. Dr. Fenton, Osteopathic Physician Board Certified in Physical Medicine, also opined that claimant suffered a work related injury. Specifically, he explained that she had a strain/sprain in her neck, shoulder, elbow, wrist and hand; that she aggravated her preexisting carpal tunnel syndrome, had a tear of the Triangular Fibrocartilage Complex (TFCC) and that she had a C5-6 double crush syndrome. By falling on to an outstretched hand, she placed a load on the carpal tunnel. The force then went up her arm to the neck because the arm was extended. In the process the arm went through more than one cycle of flexion and extension.

21. Dr. Fenton further supported his opinion with the history claimant provided from the outset, the change in EMG studies that showed a worsening sooner than would be expected with the natural history of the syndrome, and medical records preceding the injury showing that claimant's condition had been stable.

22. Dr. Backus, a physician board certified-in Occupational and Environmental Medicine, testified for the defense in this matter. In his first opinion letter rejecting causation in this case, Dr. Backus based his opinion in part on the erroneous belief that claimant had not reported right shoulder pain when she saw a physician the day after the accident because the page in the records documenting that complaint was missing from the packet of records he reviewed. A later review of the missing page did not change his opinion that claimant's work related fall did not aggravate her carpal tunnel syndrome or cause her other upper extremity painful problems.

23. Dr. Backus based his opinion regarding a lack of causation on his examination of the claimant and her medical history. Other than tenderness at the right elbow groove, his exam of the claimant was normal. He relates her carpal tunnel and other complaints to a preexisting condition and other medical problems, including diabetes, high blood pressure and obesity.

TTD Claim

24. Claimant continued to work at Greer's after the fall and worked until June 10, 2004, a week after Dr. Mercia called the employer to say that claimant was not to use her right hand and arm for any work activities. He released her to return to work with restrictions on July 19, 2004.

25. Greer's was not able to meet the restrictions placed on the claimant, nor were other potential employers. Despite her good faith search for employment, claimant did not secure a job.

26. On August 27, 2004 Dr. Benoit performed a right carpal tunnel release on the claimant. Claimant was released to return to work on December 18, 2004.

27. On January 26, 2005 Dr. Benoit performed a right lateral epicondylar release and extensor tendon origin repair. On August 23, 2005 she was released to return to work for 20 hours per week. She has continued to search for a job within her limitations, but has not succeeded.

Claim for fees and costs

28. Claimant presented evidence of her fee agreement with her attorney and documentation of litigation costs totaling $2,150.63.

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. This is a case requiring such expert testimony and a choice between conflicting opinions. In weighing expert's opinions the department considers: 1) whether the expert has had a treating physician relationship with the claimant; 2) the professional's qualifications, including education and experience; 3) the evaluation performed, including whether the expert had all relevant medical records in making the assessment; and 4) the objective bases underlying the opinion. *Yee v. International Business Machines*, Op. No. 38-00WC (2000).

5. Dr. Mercia saw the claimant shortly after her injury and several times afterwards. He supported causation within a year of the fall with an opinion Dr. Fenton later confirmed. Therefore, the claimant has an advantage with the first criterion. Because all physicians who rendered opinions are well qualified by training and experience, neither party has an advantage with the second criterion. Dr. Backus's initial evaluation was based on an incomplete record that was missing a crucial page. Although his opinion remained unchanged even after he received that page, the strength of his opinion was weakened by his first written report in which he emphasize the absence of a symptom that actually was present. Accordingly, claimant has the advantage with the third criterion. The final criterion examines the objective bases for the opinions. Dr. Backus opined that claimant's CTS was not stable before the injury, but the records suggest otherwise. This is not to say that she was without symptoms, only that those symptoms were stable. Dr. Backus suggests that other conditions, such as her obesity, contribute to her symptoms, and characterizes the work related incident as minor. However, falling onto an outstretched arm does not seem to be a minor incident, especially for an overweight woman with a history of CTS.

6. More convincing are the opinions of Dr. Mercia, Dr. Benoit and Dr. Fenton. It is black letter law that employers take employees as they are found. *See Petit v. No. Country Union High Sch*., Op. No. 20-98WC (Apr. 28, 1998). An unfortunate series of consequences, superimposed on claimant's preexisting conditions, were set in motion because of claimant's fall, not all of which were evident from the outset. However, nerves and tendons were injured, leading to the need for rest, medication and surgery. Claimant has met her burden of proving causation and the need for medical treatment.

7. Further, she has proven entitlement to temporary total disability compensation. 21 V.S.A. § 642. Early attempts to return her to work were short-lived. Dr. Mercia reduced her lifting capacity first to five pounds, then one pound, then took her out of work completely when the limitation was not successful.

8. Even after the claimant was released to work again, her attempts to find work within her restrictions failed. Therefore, she is entitled to TTD until she reaches medical end result or returns to work.

9. Interest on benefits due claimant shall be computed from the date each benefit would have been due until paid. 21 V.S.A. § 664.

10. As a prevailing claimant, she is entitled to reasonable attorney fees and necessary costs. 21 V.S.A. § 678(a), WC Rule 10. The request for 20% of the total award or $9,000, whichever is less, is an appropriate reflection of the effort and skill involved pursuing this claim and is proportional to the success. Finally, the costs incurred were necessary in the pursuit of this claim.

ORDER:

THEREFORE, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to adjust this claim, including the payment of:

1. Medical benefits;
2. Temporary total disability benefits from June 11, 2004 and ongoing;
3. Statutory interest from the date each benefits was due;
4. Costs of $2,150.63.
5. Attorney fees of 20% of the total award, or $9,000, whichever is less.

Dated at Montpelier, Vermont this 30th day of December 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.