

Stannard v. Stannard Company, Inc.

(June 6, 2005)

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

James Stannard)	Opinion No. 32-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Stannard Company, Inc.)	For: Laura Kilmer Collins
)	Commissioner
)	
)	State File No. L-23315

Pretrial conference held on November 15, 2004

Hearing held in Manchester on April 1, 2005

Record Closed on May 18, 2005

APPEARANCES:

Mary C. Welford, Esq., for the Claimant

Christopher McVeigh, Esq., for the Defendant

ISSUE:

Did inactivity from claimant's work related knee injuries aggravate his preexisting conditions, including sleep apnea and cor pulmonale?

EXHIBITS:

Joint: Medical Records

Claimant's Exhibit: Dr. Michael Polifka's deposition

HISTORY OF THE CASE:

This is the second *Stannard* opinion brought before the department. In the first, Opinion No 33-01WC (2003), the Commissioner held that claimant's bilateral knee osteoarthritis was work-related and that CNA was the responsible carrier. The superior court made the same finding. On appeal to the Supreme Court, 175 Vt. 549 (mem), CNA's liability was affirmed.

FINDINGS OF FACT:

1. Claimant worked in his family's plumbing business for 32 years. He was one of the large workers at the business who did much of the heavy lifting in the overall physically demanding work. Most of his exercise was from his plumbing work, although in July of 1987 his primary care physician, Michael Polifka, M. D., noted that claimant was jogging 3 miles a day.
2. During the time claimant worked as a plumber, and as a result of that work, claimant's knees lost cartilage, causing bone to ride on bone.
3. In addition to knee problems, claimant has had other health problems for years: asthma since infancy for which he has used inhalers daily, high blood pressure, diabetes mellitus, sleep apnea and cor pulmonale (enlargement of the right ventricle that can progress to right-sided heart failure) diagnosed in 1994, and obesity.
4. In 1993 Dr. Polifka suspected claimant was developing sleep apnea "predisposed by his weight and underlying inactivity." In 1994 Dr. Polifka treated claimant for cor pulmonale and asthma. He noted the long-term issue is "continued control of his obesity." On October 7, 1994, claimant weighed 318 pounds.
5. On October 27, 1994, Dr. David Gannon evaluated claimant for sleep apnea that the doctor thought would improve with weight loss. The sleep apnea manifested itself with daytime sleepiness and restless sleep at night, symptoms that were relieved with the nighttime use of nasal CPAP. In a later letter to Dr. Polifka, Dr. Gannon suggested that claimant might not need the CPAP in the future if he could lose a significant amount of weight, which he suggested was about 50 pounds.
6. Claimant then went on to lose weight although he continued to need the CPAP. In November of 1994 his weight was at 274 pounds; in February of 1995 it was 239 pounds; in April of 1995, 225 pounds. By September of 1997 it was up to 293, but stayed below 300 pounds for at least a year.
7. In a May 1996 letter to Dr. Block, Dr. Polifka noted that claimant's "heart, asthma and cor pulmonale have been stable." However, Dr. Polifka was concerned about weight gain and suggested a walking program.
8. Claimant has not worked since June 5, 1998 when he left his job to have knee surgery. At that time he weighed 300 pounds.
9. Since 1998 claimant has been hospitalized five times for cardiac and respiratory problems.
10. In 1999 claimant had asthma exacerbations that were treated with prednisone and antibiotics.

11. In 2001, claimant had six weeks when his CPAP was not working and he was fatigued during the day. Dr. Polifka noted that claimant's weight reduction was hampered by inability to exercise because of his knee. Also in 2001, claimant had an asthma exacerbation.
12. On November 20, 2001, Dr. Polifka noted that claimant had lost 20 pounds, likely due to the use of diuretics to reduce swelling.
13. In February of 2003 claimant had another asthma exacerbation. Six months later it was noted that he had "cor pulmonale secondary to sleep apnea and asthma, both of which are worse."
14. In September of 2003, claimant again had trouble with the CPAP mask, causing him to feel tired during the day.
15. In June of 2004 claimant was hospitalized for treatment of pulmonary difficulties.
16. Dr. Polifka noted that claimant's respiratory problems prevented claimant from performing aerobic activity.
17. At present claimant is dependent on oxygen he receives through a nasal cannula.

Expert Medical Opinions

18. Dr. Polifka has treated the claimant for 20 years. He opined that claimant's osteoarthritic knee condition prevented him from exercising, which increased his weight thereby worsening his right-sided heart failure. In his opinion, the right-sided heart failure, worsened by asthma, prevents claimant from working.
19. Dr. Adam Kunin, a cardiologist, has treated the claimant since July 2003. Dr. Kunin noted that claimant had disease that was well compensated when he was working. He described the claimant as "motivated and resilient" while in the work force. In contrast, today he is chronically ill, unable to exercise vigorously. Dr. Kunin agrees with Dr. Polifka that claimant's inability to lose weight after he stopped working impacted his multiple medical conditions, including cor pulmonale and sleep apnea. If claimant could exercise, in Dr. Kunin's opinion, his overall health would be improved with the probability that his cardiac condition would not have progressed to the point it is now.
20. Dr. Bartholomew Bonazinga, cardiologist since 1981, reviewed claimant's medical records and examined him. He noted that claimant's electrocardiogram showed evidence of right-sided heart changes in 1994. In his opinion, claimant's asthma has caused his right-sided heart failure. That is because he had a buildup of fluid in his lungs with the asthma and many infections, which put stress on the right side of the heart. In his opinion, claimant's weight had nothing to do with his heart problems.

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). He 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. "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). When making such a determination, it is not necessary to determine, whether left to itself the disease would have inevitably caused a disability, but whether the disability came upon the claimant earlier than otherwise would have occurred. See *Gillespe v. Vermont Hosiery & Machine Co.*, 109 Vt. 409, 415. Thus, we must determine whether claimant's disabling heart problems would have occurred sooner had he not had the work related knee injury.
5. In making this critical determination it is necessary to consider expert opinions from Doctors Polifka, Kunin and Bonazinga and in doing so weigh the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (Aug. 4, 1997); *Gardner v. Grand Union* Op. No. 24-97WC (Aug. 22, 1997).
6. Doctors Polifka and Kunin have the advantage of knowing claimant and treating him for years. Dr. Bonazinga has the advantage in the area of expertise because of his specialty and years of practice. Dr. Bonazinga also has the advantage of objectivity, review of all records and overall comprehensiveness of the evaluation. Hence his opinion is given the most weight.

7. Claimant argues that the work related knee injury prevented defendant from engaging in exercise in order to lose weight. He contends that the lack of exercise and weight gain/retention aggravated the pre-existing sleep apnea, which in turn caused his right-sided heart failure leading to total and permanent disability. In this sense, claimant's theory relies primarily on the connection between the weight gain due to lack of exercise (caused by the injured knee) and the heart failure. Dr. Kunin and Dr. Polifka both testified to this effect, that if claimant could exercise, his overall health would be improved with the probability that his cardiac condition would not have deteriorated to the point it is now.
8. However, Dr. Bonazinga opined that the heart failure was not caused by weight gain due to lack of exercise. Rather, factors such as claimant's asthma and related pulmonary problems caused the heart failure. Even without the knee injury, claimant's severe asthma would have denied claimant the benefits of aerobic exercise.
9. Under the burden established in *Burton* claimant must show that the lack of exercise and inability to lose weight more likely than not aggravated claimant's heart condition. That burden has not been established. Even accepting claimant's evidence that lack of exercise has prevented claimant from exercising, it does not appear that claimant has established that lack of exercise, leading to weight gain, accelerated claimant's pre-existing condition. Claimant suffers from a multitude of illnesses, including hypertension, high blood pressure, severe asthma and diabetes.
10. Even if claimant never exercised prior to the accident, what matters is whether potential exercise after the knee injury would have helped him. Aerobic exercise could have helped the claimant; his heart condition might not be as bad as it is now. However, this possibility falls short of the necessary burden of proof.
11. The chronic respiratory and cardiac conditions that predated any work related injury disable claimant now. Those conditions were not accelerated or aggravated by the work related injury, as claimant argues, but by their natural progression worsened by frequent infections.
12. As such, claimant has not met his burden of proof.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 6th day of June 2005.

Laura Kilmer Collins
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.