D. T. v. IBM (October 24, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR

Debra Tirrito	)	Opinion No. 63-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Liberty Mutual as Insurer for IBM	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. U-51570

Pretrial conference on March 7, 2005
Hearing held in Montpelier on August 11, 2005
Record Closed on September 6, 2005

APPEARANCES:

Ronald A. Fox, Esq., for the Claimant
Nicole Reuschel-Vincent, Esq., for the Defendant

ISSUES:

1. Did claimant tear her biceps tendon on her January 20 to January 21, 2004 shift at IBM?

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

3. Is claimant entitled to attorney fees and costs? If so, how much?

EXHIBITS:

Claimant's Exhibits:

1. Emails from claimant
2. IBM Investigative Report
3. Biceps tear illustration
4. Medical Records

Defendant's Exhibits:

A. Payroll Records
B. Calendar 2004
C. Maintenance Records
D. Tool Report 1 and 2
E. Curriculum vitae of Verne Backus, M.D.

FINDINGS OF FACT:

1. At all times relevant to this claim, claimant was an employee and IBM her employer within the meaning of the workers' compensation Act and rules.

2. Liberty Mutual was the workers' compensation insurance carrier for IBM.

3. Claimant began working for IBM in 1979 manufacturing computer chips and wafers.

4. In January 2004 claimant was assigned to the Burn-In Unit at IBM, where she was to become certified. That unit stress tests modules under heat to ensure that they work when inserted in a computer.

5. In January 2004 claimant also worked for the Visiting Nurse Association (VNA)as a nurse 24 to 36 hours per week.

6. In January 2004 claimant also worked for the State of Vermont and Folsom School District one day a week caring for a single patient (hereinafter "private patient"). She dressed the patient, cared for her, transported her to a pool and did aquatherapy with her weekly.

7. Claimant's first two shifts on the Burn-In Unit were Sunday, January 18 and Monday January 19, 2004, when she learned the operation.

8. Claimant worked with the burn-in boards on Tuesday, January 20 to Wednesday January 21 on her 7:00 p.m. to 7:00 a.m. shift. During that shift, she loaded modules into sockets on the boards; loaded boards into ovens; replaced units needing replacement; and removed boards from the ovens.

9. Four ovens were in operation during that shift, although claimant remembered that there had been 10. The heaviest board used that shift weighed 18.5 pounds. Claimant remembered that it was as heavy as 40 pounds.

10. During the twelve-hour shift three employees, including the claimant, handled a total of 140 boards. The work was divided proportionally. Loading began at about 9:30 in the evening. Claimant remembered that she alone had handled 100 and that she worked continuously on the shift.

11. Claimant developed arm pain during the shift. At the end of the shift, she drove home.

12. When she arrived home, claimant sent an email to her manager, describing "left pain and soreness in left arm and elbow, as well as back problems." She also expressed her interest in continuing on the Burn-In Unit.

13. Claimant worked her usual job at the VNA on January 21 and 22, 2004.

14. On Friday, January 23, 2004 claimant reported for her usual work with her private patient, who weighs 55 pounds. She worked with that patient unassisted. Claimant drove the patient to the Racquet's Edge for Aquatherapy, parked the vehicle, helped the patient off the lift onto the wheelchair, wheeled her to the locker room, prepared her for the pool, carried her down three steps and into the pool.

15. Claimant did not report to IBM on her regular shift on January 25, 2004. She sought medical care on January 27, 2004. At that visit, she reported having lifted 100 pounds repeatedly, "having to pull them towards her and lift, causing elbow discomfort by the end of the day." She was given a 10-pound lifting restriction. Despite that restriction, she continued to work with her private patient until June 2004, which required lifting 55 pounds.

16. Claimant attended physical therapy from January 27, 2004 to March 12, 2004.

17. Dr. Shafritz evaluated the claimant on March 15, 2005, recording a history of lifting 30-pound metal boards repetitively.

18. An MRI of May 13, 2004 revealed a partial biceps tear.

19. On March 18, 2004 claimant saw Dr. Backus who noted that she "felt increased pain from lifting 55 pounds of deadweight into the pool." She told him that her pain went from a dull soreness to burning after she lifted the patient.

20. On January 17, 2005, claimant followed up with Dr. Shafritz who gave her a 30-pound lifting restriction and asked her to consider surgery.

21. In July 2005 claimant returned to Dr. Shafritz, reporting her decision to undergo the surgery. Days before that visit, she completed an Ironman Competition, with a 26.2 mile run, 112-mile bike, and 2.4-mile swim.

22. Claimant is an athlete who has participated in many such competitions. None of her symptoms have prevented her from participating in any marathons, bike races or the Ironman Competition.

Expert Medical Opinions

23. Dr. Verne Backus performed an independent medical examination for defendant on March 18, 2004. He reviewed her medical records and interviewed claimant about her work duties at IBM, the VNA and with her private patient. Dr. Backus also examined the claimant and drafted a written report.

24. Dr. Backus is board certified in Occupational and Environmental Medicine.

25. Dr. Backus opined that claimant did not tear her biceps tendon working at IBM. He based that opinion on the following: the type of tear claimant ultimately had typically produces a burning sensation. Although she had soreness after her shift at IBM, the burning pain did not occur until she lifted the 55-pound patient into the pool. Further, claimant finished her shift at IBM, despite the soreness. A biceps tear usually occurs when the arm is forced from a flexed position to an extended position, a likely occurrence as she carried the patient into the pool. Dr. Backus did not consider that loading and unloading of the boards created the force necessary for such a tear.

26. Dr. Jonathan Fenton performed an IME for the claimant in May 2005, sixteen months after the incident at question. He is board certified in Physical Medicine and Rehabilitation. Dr. Fenton opined that her work with the burn-in boards was the mechanism responsible for her biceps tear. That opinion is based on a history that included burning in her arm at the end of the shift, not consistent with what she reported to her supervisor or to Dr. Backus shortly after the incident. Further, the opinion was based on claimant's description that the boards weighed more than what the actually weighed and her memory that she had worked with more boards than were used that night. Further, he opined that lifting the patient was not the cause of the tear because her hands were not in supination. Yet, he had inaccurate information that claimant had help while lifting that patient, when in fact claimant lifted her alone. The only description of supination is in Dr. Fenton's note describing claimant's description of her work at IBM. No records more contemporaneous with that incident describe that mechanism in any of her work.

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 claim fails because the medical opinion supporting it is based on erroneous assumptions. The burning pain indicative of a tear did not occur until days after claimant's work at IBM and only after she carried a 55-pound patient. The weight and volume of work claimant performed at IBM were less than her estimates. She was able to do her work at VNA and with the private patient after the IBM work. She was able to continue vigorous athletic endeavors, even those involving the arm.

5. It would be impermissible speculation to conclude that work on a single shift at IBM was the causative mechanism here.

ORDER:

Therefore, based on the foregoing Findings of Fact and Conclusions, this claim is DENIED.

Dated at Montpelier, Vermont this 24th day of October 2005.

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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.