E. D. v. State of Vermont, Department of Education (October 21, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR

Elizabeth DeCoste	)	Opinion No. 62-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
State of Vermont,	)	For: Patricia A. McDonald
Department of Education	)	Commissioner
	)	
	)	State File No. U-11303

Hearing held in Montpelier on January 21, 2005 followed by the completion of the deposition on Dr. Landvater on August 25, 2005
Record Closed on September 19, 2005

APPEARANCES:

Mark H. Kolter, Esq., for the Claimant
Nicole Reuschel-Vincent, Esq., for the Defendant

ISSUES:

1. Did claimant's right arm and shoulder injuries arise out of her employment with the Department of Education or were they caused by her fall on ice at home?

2. Even if claimant's work caused an injury, was it the non work-related fall that precipitated the need for the surgery?

3. What, if anything, is owed for reasonable necessary medical treatment?

EXHIBITS:

Claimant:

A. Deposition of Lise Kowalski, M.D.
B. Deposition of Stephanie Landvater, M.D. Part I
C. Deposition of Victor Gennaro, D.O.
D. X-rays and Photographs
    1. 12/25/03 x-ray
    2. 12/25/03 x-ray
    3. 2/9/05 Surgical Photographs with attachments
E. Medical Records

Defendant:

A. Letter dated 1/7/05 from Troy Stratton, PT
B. Memorandum from Margaret Schelley

FINDINGS OF FACT:

1. Claimant has worked for the State of Vermont since 1987, at first for the Forest and Parks Department, then at the Business Office at Vermont State Hospital. In both those jobs she performed data entry using a computer keyboard in a less than ergonomic settings.

2. Claimant first noticed right arm and shoulder problems in 1995 while working at the hospital. However, she did not seek medical care then because her symptoms subsided with frequent breaks at work.

3. In July 2001 claimant began working for the State Department of Education as a Special Education Auditor. She worked there until May 30, 2004.

4. During her first year or two as auditor, claimant worked substantial overtime because she and her coworkers were charged with auditing 60 supervisory unions throughout the state. The team met many mornings at the central office, loaded cars with computers, books and equipment, drove to the site, unloaded equipment, worked on laptops wherever they could find a space during the audit, reloaded the cars, often went to a hotel where they worked in the evening, requiring unloading a reloading the cars there. The next day they repeated the procedure. Each day required lifting, carrying and considerable data entry. Claimant is a small woman.

5. As a result of her work, claimant developed right shoulder pain that her primary care physician, Lise Kowalski, M.D., treated conservatively in 2002.

6. On March 20, 2002, Dr. Kowalski noted tenderness over the biceps tendon. At that time, it was painful for claimant to abduct and adduct her arm (move it toward and away from her body).

7. In May of 2002 a physical therapist noted that claimant had "spasm within the levator scapular area."

8. Between May of 2002 and December 2003, claimant returned to Dr. Kowalski with problems including insomnia. The records do not reflect complaints or shoulder problems.

9. Claimant's work in 2003 was primarily in the Berlin office with an ergonomic workstation. The traveling work had ended.

10. On December 24, 2003 claimant fell on the ice outside her home. She had no warning and fell backward on her back and head. At the emergency department shortly afterwards, it was noted that her right elbow and right shoulder were sore. She had some swelling over the elbow.

11. On January 9, 2004, claimant saw Dr. Kowalski who noted weakness in claimant's right shoulder.

12. On January 29, 2004, claimant saw an orthopedic surgeon, Stephanie Landvater, M.D., who recorded claimant's history of a 1½ year history of right shoulder pain. Dr. Landvater documented atrophy of some shoulder muscles, rounding of the shoulder and difficulty getting an examination because of tenderness. The atrophy seen would not have developed in the brief time between the claimant's fall at home and that examination. The shoulder impingement test was normal. X-rays and MRI scan were done. Because of spacing seen on x-ray, Dr. Landvater concluded that claimant had a "chronic tear of the rotator cuff or inability to use the rotator cuff muscles." Dr. Landvater determined that the tear was work related.

13. Dr. Landvater performed surgery on February 9, 2004, then released claimant to work with restrictions on April 12, 2004.

Expert Medical Opinions

14. Doctors Kowalski, Landvater and Gennaro all gave testimony under oath at deposition and were subject to cross-examination.

15. Dr. Kowalski, claimant's primary care treating physician, noted that claimant's shoulder pain was worse after a work day, particularly after she had been traveling to schools where she worked at makeshift desks.

16. Dr. Landvater, the orthopedist who saw claimant on several occasions and observed her shoulder during surgery, opined that the rotator cuff tear is work related, caused by years of work in less than ergonomic settings, and work lifting heavy objects. She opined that the rotator cuff was already torn in 2002. She based that opinion on: 1) makeshift work spaces claimant used; 2) heavy lifting at work; 3) history of sleep problems common with her diagnosis; 4) Dr. Kowlaski's findings on examination on March 20, 2002, which indicated impingement; 5) evidence that claimant was substituting different muscles to move her arm because of the undiagnosed tear; 6) a May 2002 physical therapy note documenting spasm that was evidence that she was overusing one area in substitution.

17. In Dr. Landvater's opinion, the fall on the ice in December 2003 did not cause the shoulder pathology requiring surgery. It was not the type of fall where one can feel it coming then puts out an arm to break the fall. On the contrary, claimant's fall had no warning. She slipped and fell backward. Although she had an abrasion on her elbow, there is no evidence that she fell on the arm or shoulder. Therefore, the fall cannot explain the tear.

18. X-rays demonstrating that the subacromial space was decreased confirmed the Landvater opinion that the tear was chronic.

19. Dr. Gennaro evaluated the claimant and her records for the defendant. He, too, is an orthopedic surgeon. In his opinion, the full thickness rotator cuff tear first diagnosed in January 2004 was causally related to her fall at home on December 24, 2003 and not to her work. In Dr. Genarro's opinion, the shoulder symptoms claimant had in 2002 were due to rotator cuff tendonitis or impingement, not to a tear. No treatment was required after a course of physical therapy until after her fall at home in December. He based his opinion on: 1) the full range of motion claimant had when Dr. Kowalski examined her in March 2002, indication tendonitis, not a tear; 2) claimant had no treatment for her shoulder between the Spring of 2002 until January 2004, nor did shoulder symptoms affect her daily activities; 3) the physical findings claimant had in 2004 clearly were worse than any she had had before. They included limitations in motion and marked weakness; 4) the mechanism of the fall indicates that claimant contracted muscles to stabilize herself, forcing the shoulder up at the time of the fall, thereby causing the tear.

20. Dr. Genarro conceded that the narrowing of the subacromial space could indicate chronicity of the tear. In this case, even if claimant had a partial chronic tear, the fall in December 2003 completed the tear, resulting in a full thickness tear when Dr. Landvater saw her. Only when symptomatic is surgery an option for a patient with such a tear, Dr. Gennaro explained.

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. "The progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause. Larson's Workers' Compensation Law, § 10 at 10-1 (2000).

5. In this case all the experts offer credible opinions. Claimant's work indeed caused shoulder symptoms, sending her for treatment in 2002. In all likelihood, those symptoms indicated tendonitis as well as a partial thickness tear. Dr. Landvater's findings on chronicity prove as much.

6. However, it is impossible to ignore the circumstances before and after the fall on ice in December of 2003. Before the fall, claimant had not complained of shoulder problems for more than a year. She was no longer doing the work that took her out of the office at less than ergonomic workstations. Any shoulder pathology she had was quiescent and did not require any treatment.

7. After the fall, the shoulder tenderness was so severe an examination was difficult. Surgery was necessary. It is more likely than not that a work related partial thickness tear was extended by the non-work related fall. Accordingly, the 2003 fall broke the chain of causation. Under the Larson's principle quoted above this claim is not compensable.

ORDER:

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

Dated at Montpelier, Vermont this 21st 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.