Conway v. Eveready Battery Co. (June 30, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Christopher Conway	)	Opinion No. 38-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
	)	For: Laura Kilmer Collins
Eveready Battery Co.	)	Commissioner
	)	
	)	State File No. U-02403

Pretrial conference held on January 24, 2005
Hearing held on April 20, 2005
Record Closed on May 10, 2005

APPEARANCES:

Beth Robinson, Esq., for the claimant
Andrew Boxer, Esq., for the defendant

CLAIM:

1. Payment by carrier of proposed surgeries by Dr. Ketterer, as well as any other reasonable medical expense
2. Attorney's fees and costs of litigation
3. Any other benefit consistent with this opinion

ISSUE:

Had claimant suffered an injury, or injuries, to his left shoulder arising out of and in the course of his employment?

EXHIBITS:

Claimant 1: Medical records of Christopher Conway
Claimant 2: Deposition of Dr. Ketterer
Claimant 2a: Deposition of Dr. Ketterer
Claimant 2b: Deposition of Dr. Ketterer
Claimant 2c: Dr. Ketterer Preservation Testimony
Claimant 3: Deposition of Dr. Carroll

FINDINGS OF FACT:

1. Claimant worked at Eveready Battery Co. for over 29 years. For 25 of those years claimant's position was as a "mix and pellet" manufacturer. Since 1993, claimant has primarily been assigned to the air electrode department.

2. Claimant's main duties in the air electrode department were to manufacture mixes, bake the mixes in an oven, remix with Teflon, cook them again, then imbed them into foil which is then rolled and sliced.

3. This process required much use of claimant's arms. The first part required claimant to scoop 12-14 scoops of chemicals into a mixer, then reach up over his head to pour liquid nitrate into the mix. While blending, claimant had to scrape residue off the side of the bowls. Claimant usually made 14 to 15 mixes a day, typically scooping chemicals 168 to 210 times, and scraping the bowls for more then half an hour.

4. Prior to 1999, claimant was predominantly right handed in the scooping.

5. In early 1999, claimant sustained an injury to his right shoulder at work. In September 1999, he sought treatment for the injury from his primary care provider, Dr. Dundas and from the company physician, Dr. Carroll. Dr. Carroll referred claimant to Dr. Ketterer, an orthopedic surgeon, who treated claimant's right shoulder injury. During this time, claimant continued to work as a mix and pellet manufacturer.

6. In April 2000, claimant visited Dr Carroll, the company doctor, who noted that claimant was feeling pain in his left shoulder due to compensation of his right shoulder. Carroll diagnosed a possible impingement. Dr. Carroll did not believe that the shoulder pain was work related, as he believed claimant did not move his shoulders enough to cause such pain. Shortly after this time, Dr. Ketterer performed surgery on claimant's right shoulder. After the surgery, claimant was out of work until March 5 2001, returning to his job with a release from Dr. Ketterer.

7. Claimant returned to his position as a mix and pellet manufacturer, performing the full range of duties he had performed prior to his surgery. Because the surgery had left his right shoulder sore, claimant used his left shoulder much more during the scooping and scraping. Instead of predominantly using his right hand, claimant switched hands as each one became tired.

8. On September 6 2001, claimant met with Dr. Carroll and reported left shoulder pain. Dr Carroll noted that although the claimant had full range of motion in the left arm, the claimant's left shoulder pain indicated a possible left shoulder impingement. Over the next few years, claimant did not report any left shoulder pain. During these years he would occasionally see Dr. Carroll for physicals.

9. In May 2003, Dr. Carroll met with claimant for a cardiovascular examination. During this examination, Dr. Carroll indicated that the claimant's shoulder pain was "stable" though not resolved.

10. In August 2003, claimant changed jobs to a utility operator, due to his supervisors' dissatisfaction with the speed of his work. His first assignment involved "cell transfer" which required him to transfer small batteries into plastic "daisies" for packaging. This job required claimant to extend his arm forward over a countertop while moving his arms left and right. Claimant claims that after this job change, his left shoulder began getting sorer.

11. After the August 2003 job change, claimant felt increased pain while relaxing at home. Claimant reported that he arrived home and raised his arm to put it on the back of the couch. He felt a painful locking sensation, and had difficulty lowering his arm. Claimant saw a company nurse the next day regarding this problem. On August 14 and 28, 2003, claimant saw Dr. Carroll about his left shoulder pain. When asked where the shoulder locking occurred, claimant originally stated it occurred at work, not at home. Dr. Carroll noted limited abduction of left shoulder and a positive impingement sign. Dr Carroll referred claimant to Dr. Ketterer, who treated the left shoulder pain. Dr. Ketterer did not find out about the couch incident until February 18, 2005.

12. In November 2003, claimant changed his position to lithium loader. This position involved cutting open boxes, stacking trays and moving stacked trays onto a cart. These tasks required the use of his arms in an extended position.

13. Claimant met with Dr. Ketterer again on January 4, 2004. Although Dr. Ketterer noted some improvement due to the injections previously administered, claimant still had a positive impingement sign. Claimant had an MRI taken on March 10, 2004.

14. After the MRI, Dr. Ketterer diagnosed a rotator cuff impingement that accounted for the majority of claimant's pain. Dr. Ketterer also diagnosed arthritic changes in the AC joint. Dr. Ketterer recommended an arthroscopic anterior acromioplasty for the impingement problem as well as distal clavicle excision to ease the pain caused by the arthritis. Dr. Ketterer concluded that the claimant's left shoulder pain was caused by claimant's work place routine due to the constant use of his shoulders. Defendant declined to pay for either of the proposed surgeries.

15. On March 21, 2005, Dr. Kurt Weineke performed an evaluation of Mr. Conway on behalf of the defendant. Dr. Weineke concluded that without any specific injury at work, claimant's left shoulder pain could not be attributed to work. He opined that due to claimant's "large bump" as well as his age, the claimant's work routine would not cause the arthritic changes in the claimant and that any injury occurred at claimant's home. This was due to a sensitive rotator cuff that becomes increasingly sensitive with age.

16. All three doctors agree that claimant has certain conditions that make it more likely for him to suffer an impingement. These include a larger bump above the rotator cuff, as well as diabetes that can slow down the healing process in the shoulder. Furthermore, all experts agree that as a person grows older, it is more likely for the rotator cuff to increase in sensitivity thus increasing the chance of a shoulder impingement. All three doctors also agree that it is highly likely that claimant's arthritis is hereditary, and that his work routine did not cause the left shoulder arthritis.

17. Claimant requests an award of litigation costs and attorney's fees on an hourly basis pursuant to Rule 10.1210 as well as reasonable medical expenses, including payment of the surgical procedures recommended by Dr. Ketterer. Claimant submitted evidence that his attorney spent 72.55 attorney hours and 24.6 paralegal hours on this case and incurred $2,433.75 in costs.

CONCLUSIONS OF LAW:

1. The issue to be decided in this case is whether the claimant's injury arose out of and in the course of his employment. 21 V.S.A. § 618.

2. In worker's compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

3. 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 proven must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941). 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). Claimant in this case to prove causation, must show that the repetitive use of his shoulders at work caused the impingement to his shoulder, as well as aggravating a pre-existing arthritic condition.

4. In this case, expert medical testimony is required in order to establish a causal connection between the claimant's left shoulder injuries and his work routine. Claimant relies on the testimony of his orthopedic surgeon, Dr. Ketterer, to establish a causal connection. The defendant relies for the most part, on the testimony of Dr. Weineke, an orthopedic surgeon, and to a lesser extent, on the notes and opinions of Dr. Carroll, the company doctor.

5. Claimant argues that a causal connection exists between his left shoulder injury and his work place routine. There are two different injuries that claimant seeks compensation from the defendant: arthritis in the clavicle and a rotator cuff impingement. Claimant argues that the impingement injury resulted from repetitive use of his arms at work, causing the rotator cuff to become inflamed, creating the pain associated with the impingement. With regard to the arthritis, claimant argues that despite the fact that all of the experts consider this a pre-existing condition, his work routine aggravated the arthritis, causing a previously asymptomatic condition to become symptomatic.

6. Defendant argues that no injury occurred in the workplace and that claimant does not suffer from any soreness or inflammation of the rotator cuff. Through Dr. Weineke's opinion, defendant argues that the pain felt by claimant has simply been brought about by age, which brings about an ever increasing sensitive rotator cuff. Therefore, the impingement was caused by claimant's "naturally large bump" and an aging, sensitive rotator cuff. Furthermore, the event that caused the sensitive rotator cuff to become impingened was at claimant's home, not his workplace.

7. When evaluating the amount of weight to be given to expert testimony in worker's compensation decisions, the following factors are used: 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)*; Yee v. International Business Machines,* Opinion No. 38-00WC (Nov. 9, 2000).

8. Dr. Carroll's contact with the patient is limited, as is his expertise in the area of orthopedics in comparison to the other two testifying experts. Both Dr. Weineke and Dr. Ketterer are experienced orthopaedic surgeons. Dr. Ketterer has the advantage of treating the claimant's left shoulder injury since 2003. Both experts have the advantage of reviewing all relevant medical testimony. Both have objectively reviewed the claimant's left shoulder. To the extent that Dr. Ketterer did not have all the facts when making his conclusion is irrelevant in this case. Dr. Ketterer's opinion is based on the fact that claimant put a lot of strain on his shoulders at work. Although the brunt of the pain may have come about with the couch incident, according to Dr. Ketterer the condition already existed, having been caused by claimant's work duties. Thus, knowledge of the couch situation would not have changed Dr. Ketterer's conclusion. Because Dr. Ketterer has an established treating relationship with the patient and the expertise in orthopedics, his opinion should be granted the most weight.

9. With regards to claimant's injury, both experts agree that there has been no tearing of the rotator cuff. Thus the issue to decide is whether the affected area was inflamed, as per Dr. Ketterer's opinion, or was only a symptom of age and a sensitive (non work related) rotator cuff, per Dr. Weineke's opinion. Claimant has met the burden of proof in this case, and that the work routine caused the left shoulder impingement.

10. All experts in this case are in agreement that repetitive use of the shoulders can cause a shoulder impingement. Dr. Carroll concluded that work could not be a factor based on the erroneous assumption on the amount of times claimant exerted his shoulders. Dr. Weineke agreed with Dr. Ketterer, that work could be a factor, but only if the claimant had previously complained about shoulder pain. With all these opinions in mind, as well as granting most weight to Dr. Ketterer's opinion, the more probable hypothesis is that the constant motion of the left shoulder caused the claimant's shoulder impingement.

11. Claimant suffers from a multitude of pre-existing conditions that make it more likely that defendant will suffer from an impingement, including age causing a sensitive rotator cuff, as well as a large "bump" and diabetes that could slow the healing process. Although these conditions would make it possible for the claimant to suffer these problems regardless of whether he worked or not, it is more probable that his workplace routine aggravated these conditions. 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. *Campbell v. Heinrich Savelburg, Inc*., 139 Vt. 31, 35 (1980).

12. The defendant's argument that the arm movement on the couch caused the impingement is unlikely in this situation. Although such a shoulder impingement could spontaneously occur, the weight granted to the expert opinion coupled with the underlying facts regarding claimant's work routine, would make the claimant's work routine the more probable cause of the shoulder impingement.

13. Furthermore, the pain associated with claimant's arthritis, a pre-existing condition, is also compensable. Medical treatment is compensable if the claimant's work routine proved to be a substantial factor in causing an underlying asymptomatic condition to become symptomatic. See *Zostant v. C &W Wholesale Grocers*, Opinion No. 40-96 (June 28, 1996). The work- related injury to the right shoulder caused the claimant to put more strain on the left shoulder, aggravating the underlying pre-existing condition. Because none of the experts could find any other activity undertaken by claimant that would cause an aggravation of the arthritis, the more probable hypothesis would be that the constant motion of claimant's arms at work caused the arthritis to become symptomatic.

14. Having prevailed, the claimant is entitled to reasonable attorney's fees as a matter of discretion and costs as a matter of law pursuant to 21 V.S.A §678(a) and Rule 10. Because of the amount of work and time required to establish a causal connection in this case, claimant is awarded $8,374.50 in attorney's fees, in compliance with Rule 10 at a rate of $90/ hour attorney time and $75/ hour paralegal time. Claimant is also awarded $2,433.75 in costs.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to pay for:

1. Surgical procedures proposed by Dr. Ketterer, and any other reasonable medical expenses.
2. Attorney's fees of $8,374.50 (72.55 x $90/hour, 24.6 x $75/hour) and costs of $2,433.75 in expenses.

Dated at Montpelier, Vermont this 30th day of June 2005.

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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.