

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

Carla Levesque

Opinion No. 40-04WC

v.

By: Margaret A. Mangan
Hearing Officer

Tannery Village, LLC and IBM

For: Michael S. Bertrand
Commissioner

State File No. T-14930

Hearing held in Montpelier on May 3, 2003 and August 5, 2003
Record closed on August 20, 2004

APPEARANCES:

Scott Skinner, Esq., for the Claimant
Stephen D. Ellis, Esq., for Tannery Village, LLC/The Travelers
Jason R. Ferreira, Esq., for IBM/Liberty Mutual

ISSUES:

1. Did the claimant suffer a compensable, work-related injury to her right shoulder?
If so, which employer is liable?
2. What temporary total disability benefits, if any, are due the claimant?
3. Is claimant entitled to attorney fees and costs?

EXHIBITS:

Joint I:	Medical Records
Claimant's 1:	Claimant's Itemization of Benefits Claimed and Forms 25
Claimant's A:	First Report of Injury
Claimant's 3:	Deposition of Bryan M. Huber, M.D.
Tannery 1:	IBM Documents
Tannery 2:	Medical Records
Tannery 3:	Calendar December 2002
Tannery 4:	Calendar January 2003
Tannery 5:	Time Sheets, November and December

FINDINGS OF FACT:

1. Claimant was an employee and Tannery Village and IBM her employers in December 2002.
2. Claimant began working at IBM in June of 1995, in the manufacture of various computer chips and wafers. Her job at IBM was from 7:00 p.m. to 7:00 a.m. every Sunday, Monday and Tuesday and every other Saturday. With such a schedule at IBM, she was able to work on Thursdays and Fridays at Tannery.
3. Claimant's work at IBM included some repetitive motion and lifting under 8 pounds. It never caused pain in her shoulders. However, claimant did sustain a work related thumb injury at IBM.
4. Tannery Village is a horse farm in Cambridge, Vermont owned and operated by Richard and Joy Spanier. Approximately ten employees work at the farm.
5. Claimant began working at Tannery in March of 2002 on Thursdays and Fridays, from 5:30 a.m. to 5:00 p.m. in the summer and fall and from 7:30 a.m. to dark during the winter months.
6. Claimant's work at Tannery included carrying water in five gallon buckets, lifting and carrying hay bales, carrying 50 pound grain bags, lifting and carrying buckets of manure, cleaning the pastures by shovel, grooming and brushing horses and mucking and cleaning horse stalls.
7. In August of 2002 claimant first experienced right shoulder pain. The pain came on after she had done some heavy lifting work at Tannery. Noting that work at Tannery worsened the shoulder pain, claimant reported it to her supervisor.
8. Claimant's shoulder pain worsened. It was at its worst at the end of December 2002.
9. From December 19, 2002 through December 27, 2002, claimant took vacation time from IBM to fill in for a Tannery employee who was on vacation.
10. On December 20, 2002, claimant complained of right shoulder pain to Nurse Practitioner Jennifer Laurent at Family Practice Associates. Ms. Laurent referred her to physical therapy.
11. At the end of December 2002, claimant and Joy Spanier talked about claimant's right shoulder pain and the strenuous work at Tannery. They agreed that claimant would take a break from farm work to see if the shoulder would improve.

12. Claimant resumed her duties at IBM on December 28, 2002. Because she still had shoulder pain, accommodations were made to help her with any carrying and lifting duties.
13. Claimant was later treated with physical therapy, anti-inflammatory medications and injection with lidocaine and cortisone.
14. Orthopedic surgeon, Dr. Bryan Huber, diagnosed right shoulder impingement syndrome and bicipital tendonitis. In his first note, dated February 28, 2003, Dr. Huber mentioned IBM as an employer, but in doing so was not implicating the work there as the cause to claimant's shoulder impingement syndrome.
15. In a follow-up letter dated April 3, 2003, Dr. Huber specifically related claimant's shoulder problems to the farm work at Tannery.
16. On April 8, 2003 claimant returned to work on day shifts at IBM.
17. On May 19, 2003, Dr. Huber performed arthroscopic and subacromial decompression on claimant's right shoulder for impingement syndrome.
18. On June 17, 2003, Dr. Huber released claimant to return to work with limited duty.
19. From August 5, 2003 through November 5, 2003 claimant was taken out of work by her dentist for a problem unrelated to this claim.
20. On October 1, 2003 Dr. Huber noted that claimant had increasing pain in the right shoulder, particularly with cross body movements and lifting.
21. Claimant resigned from IBM on October 16, 2003.
22. From October 30, 2003 to February 4, 2004 claimant worked part time at a Play School where she earned \$2,839.90.
23. Later that month she had an MRI of the right shoulder, which revealed narrowing of the acromial humeral joint, mild bursitis and degenerative changes in the right shoulder.
24. By January 8, 2004, Dr. Huber placed claimant at medical end result for her impingement syndrome.
25. On March 8, 2004, Dr. Huber performed right shoulder arthroscopic surgery to excise the distal clavicle for acromioclavicular arthrosis. According to Dr. Huber's notes, she had an excellent post-operative course.
26. To date, claimant has not been placed at medical end result for the arthrosis.

Medical Opinions

27. Dr. Huber testified for the claimant by deposition in this case, with the opinion that claimant's work at Tannery caused her shoulder injuries, the impingement syndrome as well as the arthrosis. He explained that she had signs and symptoms of both when she first complained of shoulder problems.
28. Dr. Huber ruled out the suggestion that work at IBM caused the claimant's shoulder problems because the work she did there did not place undue stress on her shoulder.
29. Dr. Huber's opinion, given with a reasonable degree of medical certainty, is based on experience treating approximately one hundred shoulder injuries from farm work involving bailing, lifting and carrying and his training and education in orthopedic medicine.
30. Further, Dr. Huber rejected the suggestion that one would need to work full time to incur a shoulder injury from farm work because of mechanical differences among people. One person might work 50 or 100 hours a week for years without an injury while another might develop a problem after two weeks.
31. Finally, Dr. Huber opined that a thumb problem claimant had did not cause her shoulder injury.
32. Dr. Victor Gennaro, also an orthopedic surgeon, testified for the defense in the case after reviewing claimant's medical records. He opined that one could not say with a reasonable degree of medical certainty what caused the claimant's shoulder problems. He agreed with Dr. Huber that the work at IBM did not cause the problems and that the thumb problem was not the source.
33. Dr. Gennaro confirmed that claimant's shoulder problems are based on specific pathology, not solely on subjective pain complaints.

Wage calculations

34. The Form 25 Wage Statement was prepared at Tannery Village on February of 2003, but not filed with the Department until claimant submitted a copy at the time of the hearing. Claimant calculates the total 12-week wage as \$1,664.70.
35. The wage statement from IBM during that period reflects a total wages of \$8,178.50 for the 12 weeks before the injury. On January 21, 2003, Physician Assistant Nella Wennberg took claimant out of work at IBM until further notice because of continued shoulder pain.

36. Claimant claims a compensation rate based on an average weekly wage of \$820.27. This is based on \$1,664.70 earned at Tannery plus \$8,178.50 at IBM for 12 weeks divided by 12, then by two thirds.

Attorney Fees and Costs

37. Claimant presented evidence that her attorney worked 216.5 hours pursuing this claim and incurred \$3,127.03 in necessary costs. Counsel for Tannery asked that it have an opportunity after the decision is issued to respond to the attorney fee request.

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 (1963). 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. This Department weighs several factors when evaluating and choosing between conflicting medical opinions. These factors include (1) the nature of treatment and the length of time there has been a patient provider relationship; (2) whether accident, medical, and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of examination, and; (5) the qualifications of the experts, including professional training and experience. *Miller v. Cornwall Orchard*, Op. No. 2-97WC (1997).
4. Dr. Huber has the advantage of a treating physician who observed the claimant over time. Both experts had relevant medical records. Both are well qualified by education and experience. Dr. Huber's is the more objective and comprehensive opinion, based on knowledge of the development of claimant's symptoms, personal clinical and surgical observations and clear understanding of claimant's work duties at Tannery and at IBM.
5. Because I accept the opinion of Dr. Huber and the uncontested testimony about claimant's job duties, I conclude that her work at Tannery was the probable cause of her shoulder problems, the impingement syndrome as well as the arthrosis. Tannery's evidence about work schedules and claimant's other health problems have not convinced me otherwise.

Temporary Total Disability

6. Considering the issue of temporary total disability benefits, however, necessitates some consideration of claimant's other health problems.
7. The records support claimant's entitlement to temporary disability benefits from January 21, 2003 when Ms. Wennberg took her out of work for shoulder problems until Dr. Huber released her to return to work with restrictions on June 17, 2003. It is unclear why claimant did not return to IBM at that time since the work there did not stress her shoulder.
8. For the period from August 5, 2003 to November 5, 2003, claimant was out of work for unrelated surgery. Therefore, since it was not her shoulder that disabled her during that time, she is not entitled to TTD.
9. Nor is she entitled to TTD or TPD after she voluntarily left her job at IBM in October 2003 since it has not been shown that she left her job because of the work related injury and that she made a reasonable attempt to return to the work force. See *Andrew v. Johnson Controls*, Opinion No.3-93WC (1993) citing, *Pearl v. Builders Iron Foundry*, 73 R.I. 304, 55 A.2d 282 (1947).

Medical Benefits

10. Since, based on the opinion of Dr. Huber, I find that both the shoulder impingement and arthrosis are causally related to her work related injury at Tannery, both shoulder surgical procedures, the one in May of 2003 and the one in March of 2004, are compensable.

Attorney Fees and Costs

11. Pursuant to 21 V.S.A. § 678 (a) and Workers' Compensation Rule 10.000, an award of reasonable attorney fees is discretionary and an award of necessary costs mandatory when supported by the fee agreement and evidence establishing the amount and reasonableness of the request. 21 V.S.A. § 678 (a). At the request of Tannery's counsel, a decision on this issue is deferred for 30 days.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law:

1. The claim against IBM/Liberty Mutual is DISMISSED.
2. Tannery Village/Travelers is ORDERED to adjust this claim for shoulder impingement and arthrosis including:
 - Medical and surgical benefits;
 - Temporary Disability benefits from January 21, 2003 until June 17, 2003.
3. The attorney fee and cost issue is deferred.

Dated at Montpelier, Vermont this 22nd day of September 2004.

Michael S. Bertrand
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.