

**STATE OF VERMONT
DEPARTMENT OF LABOR**

H. L.)	Opinion No. 60-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
State of Vermont,)	For: Patricia A. McDonald
Department of Corrections)	Commissioner
)	
)	State File No. R-18775; U-03183

Pretrial conference held on March 28, 2005
Hearing held in Montpelier on August 17, 2005
Record closed on September 6, 2005

APPEARANCES:

Heidi S. Groff, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUES:

1. Did claimant suffer a compensable work-related injury to his left shoulder necessitating the June 7, 2004 surgery on March 19, 2001, and/or August 16, 2003, and/or December 22, 2003 during the course of his physical therapy treatment of his compensable back condition?
2. If the shoulder condition is compensable, for what period of time is claimant entitled to temporary total disability benefits?

EXHIBITS:

Joint I:	Medical Records
Joint II:	Physical Therapist Brasillere's deposition transcript
Joint III:	DOL Forms
Claimant's 1:	Job search documentation
Defendant's A:	CV of Dr. Nelson Haas

CLAIM:

Claimant seeks temporary total disability benefits from the date of their termination on April 10, 2004 until he returned to work on March 30, 2005, medical benefits pursuant to WC Rule 40 for all reasonable and necessary treatment of his left shoulder condition and, if successful, an award of attorney fees and costs of the litigation process and interest on each benefit as it became due.

STIPULATION:

1. Claimant has been an employee of defendant within the meaning of the Vermont Workers' Compensation Act (Act) since April 1, 1990.
2. Defendant has been claimant's employer within the meaning of the Act during the same time frame.
3. On March 19, 2001, the State accepted claimant's claim that he suffered a personal injury by accident to his back arising out of and in the course of his employment.
4. On August 16, 2003, the State accepted claimant's claim that he suffered an aggravation of his prior back condition.
5. On August 15, 2003, claimant had an average weekly wage of \$836.31 resulting in an initial compensation rate of \$557.54.
6. On August 16, 2003 and at all times thereafter, claimant has had no dependents within the meaning of the Act.
7. Claimant began losing time from work as a result of his work related injury on August 17, 2003.
8. Defendant terminated claimant's temporary total disability benefits pursuant to a Form 27 effective April 10, 2004 on the basis that claimant had reached medical end result for his work-related back condition.
9. Claimant underwent rotator cuff surgery on his left shoulder on June 7, 2004.
10. Claimant returned to work for defendant on March 30, 2005 but engaged in no other gainful employment for defendant or any other employer between August 17, 2003 and March 30, 2005.

FINDINGS OF FACT:

1. Claimant began working for the Vermont Department of Corrections on April 1, 1990. He began as a CO I (correctional officer one), an entry-level position, then worked up to CO II in 1995 where he has remained.
2. The first incident relevant to this claim occurred on March 19, 2001 during a self-defense training session. A coworker flipped claimant in the air. He landed in an awkward position on his left shoulder and right knee. A medical record from March 28th documents that incident. His pain was in the back, right knee and left shoulder, although range of motion in the left arm was normal.
3. The First Report of Injury identifies the injury as one to “left shoulder/ribs, right knee, neck, pain/stiffness.”
4. Subsequent treatment focused on the back and knee. In February 2002, claimant had back surgery for a disc herniation and lower extremity radiculopathy, followed by physical therapy.
5. In March 2002, claimant complained to the physical therapist of sharp left shoulder blade pain.
6. Also in March of 2002, claimant returned to light duty work. Then, in June or July 2002, he resumed full duty full time work. He continued to take neurontin for pain.
7. On August 16, 2003, claimant was injured again, this time when he slipped on a wet floor at the top of stairs at work. He reached out with his left arm to break a fall, hyper extending his back in the process.
8. The 2003 incident was reported and back injury accepted. During treatment for his back, claimant had physical therapy with Becky Basiliere from November 2003 to February 2004. That therapy included upper extremity strengthening exercises. Repetitions increased from session to session. However, because of claimant’s complaint of bilateral deltoid pain and some limitation with abduction of his left shoulder, Ms. Basiliere eliminated the shoulder exercises and performed a myofascial release on the left shoulder. She recommended that a physician evaluate the shoulder.
9. In a February 5, 2004 note, Dr. Rickman wrote that claimant’s shoulder pain had resolved. However, a week later it was noted that he had stiffness in the left shoulder. By March, Dr. Rickman noted normal range of motion, but weakness on abduction.

10. Claimant was referred to Dr. Richard Gagnon who in April 2004 ordered an MRI, which revealed a left rotator cuff tear.
11. On April 27, 2004 the State denied the compensability of the shoulder injury as unrelated to the 2001 work related injury based on a report from Dr. Haas. Claimant appealed that denial.
12. In May 2004 claimant signed a Form 21 (for temporary total disability benefits) and a Form 22 (for permanent partial disability benefits) for the August 16, 2003 injury for “ruptured protruding herniated spinal disc causing pain/soreness-right multiple parts.” No mention is made on either form of a shoulder injury. He had reached medical end result for his back and leg injuries at the time he signed those forms.
13. Dr. Gagnon surgically repaired the torn rotator cuff on June 7, 2004.

Medical Opinions: Causation

14. Claimant’s primary care physician, Dr. Rickman, and surgeon, Dr. Gagnon, opined that claimant’s left shoulder injury is causally related to his work related injuries at two levels. First, he injured that shoulder in the training session in 2001, but did not receive much treatment for it because the focus was on the more severe back injury. Next, in the course of physical therapy, the shoulder flared up and worsened, eventually necessitating the surgery.
15. The defense medical expert, Dr. Haas, an internist and occupational medicine specialist, opined that the claimant’s rotator cuff tear is not work related. He bases that opinion on what he considers a short-term shoulder problem from the 2001 incident, what he considers inconsistent and contradictory reports from the claimant, a physical examination, and the natural history of the disease. In his opinion, the records show the resolution of left shoulder problems after the 2001 incident, despite claimant’s assertions to the contrary. On examination, claimant had full shoulder range of motion in the left shoulder, a finding inconsistent with claimant’s assertion that he could not lift his arm above the shoulder. The natural history of rotator cuff tears involves heavy lifting or downward pulling activities, age and degeneration. Dr. Haas believes the take down incident at training in 2001 caused no more than a contusion or strain, that grabbing a bar to stop a fall in 2003 could not have caused the tear because claimant’s arm was not over his head and that the physical therapy is unlikely to have caused the tear because claimant was only using light weights. Dr. Haas’s original opinion was based on erroneous assumption that claimant’s shoulder complaints were on the right side, not the left. He did not revise the opinion when he received the correct information. However, he agreed that the slip on the stairs in 2003 could have caused or exacerbated a rotator cuff tear, if claimant forcefully twisted his arm, although it is not the most typical cause of the problem.

Work search

16. Claimant received temporary total disability benefits until April 2004 when he reached medical end result for his back, but was still disabled by the shoulder injury.
17. In September 2004 Dr. Gagnon released claimant to work in a non-prisoner contact job. Claimant looked for jobs, but only with the State of Vermont because he did not want to lose retirement benefits.
18. Claimant received an unrestricted work release on November 8, 2004 but did not return to work until March 30, 2005 when he was offered his previous job.

Attorney fees and costs

19. Claimant's counsel submitted an itemization of necessary expenses in this case totaling \$226.08 and a copy of the fee agreement.

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. In considering conflicting expert opinions, this Department has traditionally examined 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).

5. Claimant's treating physicians have the advantage with the first criterion. All physicians who rendered opinions are well qualified by professional training and experience, with Dr. Gagnon having an advantage with his surgical expertise. Objective bases for opinions are the crux of the controversy in this case. Claimant's treating physicians base opinions on direct observation of this claimant over the years. Dr. Haas bases his opinion on considerable knowledge and research as well as a search for a specific and precise mechanism of injury. However, I fail to understand how such precision is possible on the facts in this case. How realistic is it to expect that a person who was flipped and thrown to the ground with a resultant back injury requiring surgery should be able to recount precisely the position of his arm during the takedown process, as Dr. Haas suggests? Certainly claimant reported a shoulder to his employer and to doctors, although he was not precise.
6. While it is true that records do not corroborate claimant's assertion that his left shoulder pain was unrelenting, the focus of initial treatment was on the more serious back condition. Dr. Gagnon diagnosed and surgically treated the claimant's rotator cuff tear. He cogently explained that the shoulder injury occurred in two ways, with the first incident in 2001 and later with physical therapy. The force involved in the 2001 incident and physical therapy emphasis on upper body strength are facts supporting Dr. Gagnon's opinion, an opinion I accept in support of the conclusion that claimant's work, or natural consequences from that work, caused the rotator cuff tear. All the natural consequences that flow from a work-related injury are compensable. A. Larson and L.K. Larson, Larson's Workers' Compensation Law, § 10.01 at 10-01. This includes an aggravation of the original injury by medical or surgical treatment, id. § 10.09 at 10-24, or as in this case, physical therapy.
7. A work connection is further bolstered by Dr. Haas's testimony at hearing where conceded that the 2003 work related incident could have been a causative factor.
8. Accordingly, defendant is obligated to provide "reasonable surgical, medical and nursing ..." services for the treatment of claimant's left shoulder injury. 21 V.S.A. § 640(a).
9. Next is the question of temporary total disability benefits. Claimant seeks 51 weeks of TTD benefits, from the discontinuance on April 10, 2004 until claimant returned to work in March 2005.
10. However, it cannot be ignored that claimant was released to return to work in September 2004, albeit in non-prisoner contact jobs. Limiting his job search to state jobs is understandable given claimant's desire to hold onto his retirement benefits. But it cannot be used as a basis to extend TTD benefits in the face of a medical work release. Therefore, claimant is entitled to TTD from the date of discontinuance until the September 2004 work release.

11. As a claimant who prevailed on this issue or causation, he is entitled to the necessary costs incurred. Because he partially prevailed on the TTD claim, he is entitled to 20% of the total benefits, not to exceed \$9,000. 21 V.S.A. § 678(a); WC Rule 10.000. Interest is due from the date each of the benefits became due. 21 V.S.A. § 664.

ORDER:

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

1. Adjust this claim for claimant's left shoulder injury, including payment of TTD from the date of discontinuance in April 2004 until September 2004;
2. Pay claimant costs of \$226.08 and fees of 20% of the total award, not to exceed \$9,000;
3. Pay interest at the statutory rate from the date each benefit was due until it is paid.

Dated at Montpelier, Vermont this ____ day of September 2005.

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.