

Karen Hathaway v. C & S Wholesale Grocers, Inc

(November 17, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Karen Hathaway

Opinion No. 39-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

C & S Wholesale Grocers, Inc.

For: Anne M. Noonan
Commissioner

State File No. Z-58166

OPINION AND ORDER

Hearing held in Montpelier on August 26, 2011

Record closed on October 11, 2011

APPEARANCES:

Christopher McVeigh, Esq., for Claimant

J. Christopher Callahan, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant's psychological disorder compensable as a consequence of her January 2, 2008 work-related shoulder injury?

EXHIBITS:

Joint Exhibit I: Medical records

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640

Costs and attorney fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

3. Claimant worked at Defendant's South Burlington, Vermont Grand Union store for more than 29 years. For the last 19 years of her tenure there she was assigned to the deli department, first as assistant manager and then as manager. Claimant was highly invested in her job and took great pride in her abilities. She was so successful at running the deli in her store that at times Defendant would assign her the task of visiting other stores' delis in order to analyze how they might improve their operations.
4. On January 2, 2008 Claimant was exiting the cooler at her store when she slipped on the floor and fell hard on her right shoulder. Claimant suffered a torn rotator cuff as a result of this fall. Defendant accepted the injury as compensable and began paying medical benefits accordingly.
5. Initially Claimant treated conservatively for her injury. Rumors were circulating that the South Burlington store might be closing, and she was as committed as ever to making sure that her deli continued to be profitable. For that reason, even though her shoulder hurt she was reluctant to consider surgery, because she did not want to have to take time off from work to recover.
6. In August 2008 Claimant learned that the South Burlington store was in fact closing. Shortly thereafter, she was contacted by Ray Bouffard, a Grand Union store manager with whom she had worked in the past. Mr. Bouffard offered Claimant a job as deli manager of the store he now owned, the Georgia Market. Claimant accepted the offer with little if any hesitation.
7. Claimant began working at the Georgia Market on August 13, 2008. She was excited to be part of a new, family-oriented operation. Claimant set to work re-organizing the deli, training the staff and making other improvements. Deli sales doubled, and she perceived that Mr. Bouffard was very happy with her job performance.
8. Unfortunately, Claimant's shoulder continued to cause her constant pain and discomfort, particularly when lifting objects overhead or away from her body. Still she struggled to avoid surgery, because she did not want to be away from her job. Instead she intensified her efforts at physical therapy.
9. By February 2009 Claimant acknowledged that her symptoms were such that she could not avoid shoulder surgery any longer. Thereafter, on April 21, 2009 Dr. Lawlis, her orthopedic surgeon, arthroscopically repaired a very large tear in her rotator cuff and re-anchored her biceps tendon with hardware. Claimant continued working until the day before her surgery.
10. Claimant endured a protracted recovery from surgery. Despite aggressive physical therapy, she continued to experience stiffness, pain and weakness in her shoulder. As a result, she was not released to return to work until mid-September 2009. In the interim, Claimant visited the Georgia Market several times, just to check in and also to reassure Mr. Bouffard and her co-employees that she would be returning to work as soon as she was able.

11. Claimant's September 2009 work release restricted her to part-time work, with limitations against lifting more than 5 to 8 pounds, a restriction that Mr. Bouffard was unable to accommodate. Consequently, Claimant remained out of work for another month.
12. In early October 2009 Dr. Lawlis released Claimant to return to work essentially without restrictions, the only caveat being that she be allowed to "back off" whenever her symptoms flared to the point of diminishing her function. Dr. Lawlis also recommended that Claimant return initially to part-time work, and gradually increase her hours back to full time.
13. Consistent with Dr. Lawlis' release, Claimant returned to work at the Georgia Market in October 2009. Her shoulder continued to hurt, particularly with lifting objects out away from her body, but she tried to manage as best she could, as she did not want to go back out of work again.
14. At some point after she returned to work, Claimant began to feel that Mr. Bouffard's attitude towards her had changed. Rather than being reassigned her managerial duties, Claimant found herself relegated to more physical tasks, such as cleaning. Her co-employees in the deli chafed at her attempts to supervise them and when pressed, Mr. Bouffard failed to support her efforts in this regard. Although upset at the apparent loss of her managerial responsibilities, Claimant resolved to soldier on.
15. Matters came to a head on December 17, 2009. Working by herself in the deli, Claimant attempted to pick up a fryer basket, but it was too heavy for her and she dropped it, the contents spilling all over. Claimant broke down in tears and as she described, "totally lost it." In that moment, Claimant recalled, "I knew I was like, doomed, I couldn't do my job, and I was like, scared and like, what am I gonna do now, they're probably realizing that I can't do my job, that's the only thing I know." Feeling panicked, she told the store manager she was sick and then left work.
16. The next day Claimant sought treatment with Mary-Ellen Giroux, a psychologist. In all, Claimant underwent three counseling sessions with Ms. Giroux, the last one in early January 2010. Ms. Giroux has a masters' degree in clinical psychology and has been a licensed psychologist for more than twenty years. She routinely counsels patients with chronic pain, and also provides psychological counseling as part of an interdisciplinary program for people who suffer work-related injuries.
17. Ms. Giroux testified on Claimant's behalf at the formal hearing. She concluded that the stressors associated with Claimant's work-related shoulder injury, including her residual pain and physical restrictions, a demoralizing work environment and the fear of losing her job, all contributed to cause the psychological distress that Claimant exhibited in December 2009. As Ms. Giroux reasoned, Claimant was a person with a strong work ethic, whose work life had always been very important to her. When threatened as a result of her shoulder injury and its residual physical limitations with the prospect of losing her job, she became unable to handle the psychological stress any longer. I find this analysis credible in all respects.

18. Although neither Dr. Hebert, Claimant's primary care physician, nor Dr. Lawlis, her orthopedic surgeon, testified at the formal hearing, both made comments in their office notes consistent with Ms. Giroux's analysis. Following the December 2009 incident, both remarked that Claimant was exhibiting symptoms of depression, anxiety and stress causally related to her physical limitations, which she feared would preclude her from being able to continue with the type of work she had been doing for more than twenty years. Both also noted as an additional stressor Claimant's perception that neither her boss nor her co-workers were supportive of her.
19. After the December 2009 incident Claimant continued to be scared and concerned about her ongoing symptoms. A March 2010 MRI study revealed that one of the biceps tendon anchors in her shoulder had loosened. In June 2010 Claimant underwent additional arthroscopic surgery to address this issue. Her symptoms have persisted, and now a third surgery has been recommended.

Defendant's Offer of Judgment

20. In addition to the question whether Claimant's psychological disorder and subsequent psychological treatment was compensable, initially the parties anticipated that three other issues would be litigated at the formal hearing as well: (1) Whether Claimant's husband was entitled to payment for two days of respite care services that he provided following Claimant's June 2010 surgery; (2) Whether Defendant was obligated to pay for emergency room treatment for pneumonia-like symptoms that developed shortly after that surgery; and (3) Whether Claimant was entitled to temporary total disability benefits for the two-week period from December 19, 2009 through January 2, 2010.
21. Just prior to commencing the formal hearing, Defendant made an offer of judgment, pursuant to V.R.C.P. 68, to resolve all issues other than those related to the compensability of Claimant's psychological disorder. With minor revisions, Claimant accepted the offer, and the hearing proceeded solely on the remaining issue. The offer of judgment did not include any consideration of attorney fees.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she 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). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. Claimant here presents a “physical-mental” claim – one in which a compensable physical injury provokes a psychological injury as well. If there is sufficient medical evidence to establish a causal connection between the former and the latter, then the psychological injury is deemed to have arisen out of the physical injury and therefore becomes compensable. *Vach v. Twin City Subaru*, Opinion No. 02-00WC (March 24, 2000); *Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99WC (July 30, 1999); *see generally*, 3 Lex K. Larson, *Larson’s Workers’ Compensation* §56.03[3] (Matthew Bender, Rev. Ed.), and cases cited therein.
3. To establish the required connection, Claimant presented testimony from her treating psychologist, Ms. Giroux. Ms. Giroux credibly testified that at least in part as a consequence of the physical limitations that resulted from Claimant’s right shoulder injury, she became anxious and depressed. She was frustrated with her prolonged recovery and residual pain, and feared losing her job if she was unable to perform the more physically demanding duties assigned to her. Ms. Giroux thus confirmed a direct causal link between the physical consequences of Claimant’s shoulder injury and the psychological injury that became evident as her attempted return to work stalled.
4. Defendant presented no countervailing expert testimony. It seeks instead to characterize Ms. Giroux’s testimony as establishing Claimant’s distress at the lack of support she perceived from her boss and co-workers as the sole cause of her depression, stress and anxiety. Such “post-injury dissatisfaction with her work environment,” Defendant argues, is an insufficient basis for connecting Claimant’s psychological injury back to her physical injury. *See, e.g., A.B. v. State of Vermont Department of Corrections*, Opinion No. 09-06WC (February 17, 2006).
5. I acknowledge that the unwelcoming environment in which Claimant found herself upon returning to work likely contributed to her psychological distress. I cannot reasonably conclude that this was the sole cause, however. Neither Ms. Giroux’s testimony nor her written reports were nearly so limiting. Other factors more directly related to Claimant’s physical injury were at play as well, and substantially so. Indeed, the immediate cause of Claimant’s panic attack at work on December 17, 2009 was her inability to handle the physical requirements of her job, not any perceived slights from either Mr. Bouffard or her co-workers.
6. Medical causation is often multi-factorial. *Harrington v. John A. Russell Corp.*, Opinion No. 29-10WC (August 30, 2010). The fact that personal stressors may play some part in causing the psychological portion of a “physical-mental” claim to develop is not dispositive unless the medical evidence clearly establishes them to be the superseding cause of the resulting injury. *See Jackson v. True Temper Corp.*, 151 Vt. 592, 597 (1989). That was not the case here.
7. I conclude that Claimant’s evidence amply demonstrates the necessary causal link between her physical injury and her psychological symptoms so as to render treatment for the latter compensable.

8. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$954.14 and attorney fees totaling \$13,168.00, in accordance with Workers' Compensation Rule 10.1210. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded.
9. As for attorney fees, these lie within the Commissioner's discretion. The proper exercise of that discretion is complicated here by the fact that three of the four claims to be litigated were settled by way of Defendant's offer of judgment, which it made literally as the formal hearing was commencing. Awarding fees in such circumstances requires consideration of three competing interests. First, there is a public interest against forcing an injured worker to incur substantial legal fees in pursuing a valid claim only to have the employer settle "on the courthouse steps." There is an equally strong interest, however, in encouraging litigants to settle disputed claims whenever it becomes appropriate to do so. Last, I must acknowledge the Department's important interest, given its scarce judicial resources, in minimizing satellite litigation over attorney fees. *R.M. v. E.F. Wall & Associates, Inc.*, Opinion No. 37-05WC (July 20, 2005).
10. To balance the competing interests here, I have considered not only the extent to which each party's litigation posture was reasonably based, but also whether Defendant's decision to settle was timely presented given the evidence available to it. I also have considered the small number of attorney hours billed that were directly attributable to the settled claims. I conclude that it is appropriate to deduct \$500.00 from the total requested.
11. As for the remaining fees, Defendant has requested additional time to consider whether to challenge their reasonableness. Defendant shall have two weeks from the date of this decision within which to do so.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Medical benefits covering all reasonable and necessary medical and/or psychological services and supplies causally related to treatment of Claimant's compensable psychological injury, in accordance with 21 V.S.A. §640; and
2. Costs totaling \$954.14 and attorney fees in an amount to be determined in accordance with 21 V.S.A. §678 and Conclusion of Law Nos. 9 and 10 above.

DATED at Montpelier, Vermont this 17th day of November 2011.

Anne M. Noonan
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.