

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

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| |) | State File No. P-10988 |
| |) | |
| Wayne Derry |) | By: Margaret A. Mangan |
| |) | Hearing Officer |
| v |) | |
| |) | For: R. Tasha Wallis |
| Fab-Tech |) | Commissioner |
| |) | |
| |) | Opinion No. 43-00WC |

Hearing Held in Montpelier on September 18, 2000.
Record Closed on October 6, 2000.

APPEARANCES:

Vincent Illuzzi, Esq. for the claimant.
John W. Valente, Esq. for the employer.

ISSUE:

Did the claimant suffer an injury that arose out of and in the course of his employment with Fab-Tech on July 14, 1999?

EXHIBITS ADMITTED:

Claimant's Exhibit 1: Transcript of the deposition of Douglas Campbell with a) one page prescription pad note; b) Fletcher Allen Health care notes and c) Dr. Campbell's notes.

Claimant's Exhibit 2 b: Photograph.

FINDINGS OF FACT:

1. The claimant, Wayne H. Derry, was an employee and defendant, Fab-Tech, his employer as those terms are defined in the Vermont Workers' Compensation Act and Rules.
2. Claimant began his employment with Fab-Tech in 1996 and worked there continuously until several days after the injury he claims occurred on July 14, 1999. The claimant testified that the highest grade he completed in school was seventh grade.
3. As a tig welder, the claimant was required to lift on and tug heavy pieces of stainless steel ductwork. He testified that as the pieces were assembled, some weighed from 200 and 300 pounds to 500 and 600 pounds if they were made of quarter inch thick stainless

steel rings.

4. The claimant testified that when he arrived for work on July 14, 1999 he was not experiencing any problems with his right shoulder. Although he had a history of right shoulder problems, he said that until July 14 he had not had any difficulty for five years. As he began his work, claimant said he found a stainless steel heating duct elbow in his way. He estimated that the duct weighed between 500 and 600 pounds. He testified that in order to move the object, he began to pull and drag it. When the rings that circled the elbow got caught in the grooves of the cement floor, he said he needed to jerk it to keep it moving.
5. The claimant further testified that the jerking motion caused a stinging, burning sensation in his right shoulder, with pain that was so severe he almost lost consciousness. He said he cried with the pain that was a 9 on a scale from 1 to 10, with 10 being the highest.
6. Despite the pain the claimant said he was experiencing, he remained at work for the rest of the day, although he said he was not able to do much work that day. He said that it took all that he had in him to put away his tools.
7. The claimant testified that he told David Stewart, one of his day time supervisors, that he injured his right shoulder jerking and tugging on a heavy piece of duct work. Because he did not have a good relationship with Ross Brown, the overall shop supervisor, the claimant said he asked David Stewart to tell Brown about the injury.
8. According to the claimant, he went to Brown's office and advised that he had injured his right shoulder. Brown denies that claimant ever told him about a work-related injury.
9. After he left work, the claimant said he went to Dr. William Newman's office on Pine Street in Burlington but that the doctor was too busy to see him that day. He then went to the Fletcher Allen Health Care (FAHC) Emergency Department. The claimant testified that he told the staff in the emergency department that he had injured himself at work.
10. The FAHC note for that day makes no reference to a work-related injury. In terms of history, the note states that the claimant complained of "right shoulder pain that began after going fishing Saturday. Patient has had a long history of arthritis in right shoulder. Pain constant ache worsened by movement."
11. At discharge from the emergency department, the claimant was instructed to limit the use of the shoulder for 7 to 10 days, not to work for one day and to follow up with an orthopedist (Dr. Mahoney) in 5 to 7 days if the pain persisted.
12. The claimant believes that there was some miscommunication between him and the health care professional who attended him in the emergency department. He believes

that a telephone interruption distracted the examiner. When that person asked the claimant if had been in an accident, he said that he had not. When asked if he did things like play golf, he said that he went fishing from time to time. He believes that there was a misunderstanding that prompted the examiner to attribute the pain to fishing.

13. The claimant testified further that he had not been fishing since Father's Day weekend, June 18, 1999. He said that the weekend before the claimed midweek injury, he worked on Saturday and watched television on Sunday.
14. The claimant returned to work a few days after July 14, 1999. He testified that he could not do most of his work and that Brown sent him home because he did not have a doctor's note. When presented with the FAHC emergency department note, the claimant said that Brown responded with a statement to the effect that he did not care about such a record and suggested throwing it in the trash.
15. One day soon after the incident at issue here the claimant walked into his supervisor's office, told him he was sick of it and quit.
16. On July 23, 1999 the claimant went to Associates in Orthopaedic Surgery where both Dr. Mahoney and Dr. Campbell practice. Robert Lavalette, orthopedic nurse practitioner, took a history and examined the claimant. Mr. Lavalette documented a history of right shoulder problems that recently flared-up. He also noted that that the claimant "denies any new injuries" and that he worked as a welder.
17. The claimant testified that he has no ill feelings toward his employer. He testified that he never told Brown that he had injured his shoulder while fishing.
18. Dr. Douglas Campbell testified on behalf of the claimant. He was familiar with the claimant's history, having treated him for several problems, including a tendonitis in the right shoulder in 1996. Dr. Campbell opined that while working the claimant ruptured his biceps tendon and further tore his rotator cuff.
19. On September 27, 1999 Dr. Campbell diagnosed a possible full thickness tear based on snapping in the claimant's shoulder and palpation of a defect. In his opinion, it is extremely unlikely that the claimant would have sustained such an injury while fishing.
20. On a form designed for prescriptions with Dr. William Newman's letterhead, dated December 15, 1999 is this note: "Mr. Derry came walking to our office on 7/14 and wanted an office visit. But we did not have an opening so we sent patient to MCHV ER for shoulder pain. Patient came in from work." The note is signed, presumably by Dr. Newman.

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, Morse Co.*, 123 Vt. 161 (1962). He 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).

2. The claimant testified to a specific incident of July 14, 1999 that simply cannot be corroborated. His testimony is not sufficient to overcome contemporaneous medical records that make no mention of an incident at work. The note from Dr. Newman's office created several months later does no more than state that the claimant sought medical care on July 14, not that he did so because of a work-related injury.
3. The claimant argues that his limited education and inability to communicate in a clear way hampered his ability to provide an accurate history to his health care providers. However, those problems cannot account for the absence of any contemporaneous record of a work related incident, especially given the specificity he provided at the hearing. Although Dr. Campbell provided logical and persuasive testimony, his opinion is based on a specific history that I find unpersuasive. Accordingly, his opinion that the claimant's problems stem from a July 14, 1999 incident at work cannot be accepted.
4. In sum, the claimant has failed to prove that a July 14, 1999 incident at Fab-Tech caused his shoulder problems.

ORDER

Based on the Foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 28th day of December 2000.

R. Tasha Wallis
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.