

Brill v. Bestfoods Baking Co. (11/07/03)

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

Susan M. Brill)	Opinion No. 43-03WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Bestfoods Baking Co.)	For: Michael S. Bertrand
)	Commissioner
)	
)	State File No. R-05208

Hearing Held in Montpelier on September 12, 2003
Records Closed on September 26, 2003

APPEARANCES:

Susan M. Brill, pro se, for the Claimant
William J. Blake, Esq., for the Defendant

ISSUE:

Is claimant’s right elbow condition compensable as causally related to her work-related shoulder injury of August 2000?

EXHIBITS:

Claimant’s Exhibit 1: Medical Records in this Department’s file
Defendant’s Exhibit A: Defense compilation of medical records

STIPULATIONS:

1. Claimant is an employee within the meaning of the Workers’ Compensation Act.
2. Bestfoods/Bouyea-Fassetts is an employer within the meaning of the Workers’ Compensation Act.
3. Travelers Insurance Company is the workers’ compensation insurance carrier for the claim.

FINDINGS OF FACT:

1. Claimant made a claim, accepted by the defendant, in August of 2000 for an injury to her upper arm and shoulder.
2. Conservative treatment, including physical therapy, and surgery on claimant's shoulder followed the August 2000 injury.
3. On September 25, 2002, Dr. Lon Howard, her treating orthopedist, noted that she had diffuse tingling into her arm. On October 2, 2000 a physical therapist documented claimant's complaint that "pain may spread to elbow if she pushes it too much."
4. On November 27, 2000 claimant again reported that pain extended from her shoulder to her elbow. On December 6, 2000 claimant reported the pain traveled down the lateral aspect of her arm.
5. On January 23, 2001, claimant reported "increased" elbow discomfort after sleeping on her right arm.
6. Claimant did not complain of elbow pain during physical therapy during March and April of 2001.
7. Claimant has been diagnosed with tendonitis of the elbow.
8. Dr. John Johansson saw claimant for an independent medical examination on August 31, 2001. He placed her at medical end result for her shoulder with a 1% whole person impairment.
9. On October 25, 2001, Dr. Johansson issued a supplemental report in which he addressed the causal relationship between claimant's elbow and her shoulder. He concluded that the two conditions are not related and that the elbow problems are not work-related.
10. The bases for Dr. Johansson's opinions are: she had no complaints of elbow pain before January 23, 2001 when she complained to her physical therapist; there was no mention of elbow discomfort in Dr. Howard's notes; the complaint followed a night when she was sleeping on her right arm; she was not working at the time she developed elbow pain and she had an osteoarthritic spur that clearly was pre-existing.

11. On November 9, 2001, Dr. Howard wrote in an office note: “Within a reasonable degree of medical certainty, the problem she is having with the tendonitis of the triceps in the right elbow is related to the shoulder injury at work. This is due to the altered mechanics of the shoulder and clearly the excursion of the triceps spans both of these joints which I think is the reason for the causal relationship.”
12. Dr. Johansson was called to testify for the defense at the hearing; Dr. Howard’s opinion was introduced through his records.

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. Contrary to the defense assertion, claimant did complain of elbow pain before January of 2001. And even if she was not working at the time she developed elbow pain, normal activities involve the use of one’s arm. Therefore, the mechanism described by Dr Howard in his note of November 8, 2001 convinces me that it is more probable than not that claimant’s elbow tendonitis is related to her work-related shoulder injury and is, therefore, compensable.

ORDER:

Based on the Foregoing findings of fact and conclusions of law, Bestfoods/Travelers is ORDERED to adjust this claim for a work-related elbow condition.

Dated at Montpelier, Vermont this 7th day of November 2003.

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.