State of New Hampshire Supreme Court

NO. 96-729

1997 TERM

JUNE SESSION

APPEAL OF GEORGE H. FISHER, Jr.

RULE 10 APPEAL FROM FINAL DECISION OF
DEPARTMENT OF LABOR, WORKERS' COMPENSATION APPEALS BOARD

BRIEF OF CLAIMANT/APPELLANT, GEORGE FISHER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Hampshire Cases

Other State Cases

New Hampshire Statutes

Other Authorities

QUESTIONS PRESENTED

1. When an injury is employment related, is a further injury, which occurred during exercises required for recuperation, also employment related for the purposes of workers' compensation?

2. When an employee's condition is such that he is unable to perform the duties associated with the work for which he is qualified, does the person have a continuing disability for the purpose of workers' compensation disability benefits?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In 1991 George Fisher injured his neck while shoveling snow as part of his employment with Radio Shack in Milford. There is no dispute that his neck injury is related to his employment. As part of the treatment for his neck injury, some bone was taken from his hip and grafted onto his neck. Since then, his hip has been a constant source of pain and disability. Following these operations, Mr. Fisher's doctors recommended that he participate in physical therapy, which included walking a certain distance each day. Because of the weather, Mr. Fisher was doing his walking exercises in the long hallway of the apartment complex where he lives. As he walked past the door to his apartment, he heard his phone ring. Turning from left to right to answer it, he felt a sharp pain in his buttocks, hip, and back.

Radio Shack began proceedings to reduce Mr. Fisher's workers' compensation payments. Radio Shack claimed that the problems with Mr. Fisher's hip and back were not employment related and are therefore not compensable, and that Mr. Fisher is capable of light-duty work. Mr. Fisher countered that his hip and back problems occurred in the course of recuperation from an employment injury and are therefore casually related to his employment, and that his physical injuries taken as a whole render him totally disabled and entitle him to permanent total disability benefits.

The Workers' Compensation Appeals Board found for Radio Shack, and Mr. Fisher appealed.

SUMMARY OF ARGUMENT

Mr. Fisher first argues that the injuries to his back and hip arose out of the course of employment because they occurred during therapy intended to repair the original injury to his neck which all concede arose out of the course of employment. He also argues that the Workers' Compensation Appeals Board confused medical and legal causation.

Mr. Fisher then argues that he has a continuing disability because his medical condition does not allow him to realistically do any work. He also argues that because the Appeals Board failed to hear any evidence on market conditions, it cannot have lawfully reached a conclusion on the matter.

ARGUMENT

I. Mr. Fisher's Subsequent Injuries Are Employment Related

It is undisputed that the injury to Mr. Fisher's hip was caused by the operation necessary to repair his employment-related neck injury. *Decision*[1], NOA[2] at 12; *Huffman*, APPENDIX TO BRIEF at 3; *Transcript*[3] at 9. Likewise it is undisputed that the injury to Mr. Fisher's back occurred during his physical therapy exercises. *Decision*, NOA at 13; *Huffman*, APPENDIX TO BRIEF at 3; *Transcript* at 6-8.

New Hampshire's workers' compensation law defines compensable injuries as those "arising out of and in the course of employment." RSA 281-A:2, XI. This court construes the statute liberally, resolving all reasonable doubts in favor of the injured employee in order to give the broadest reasonable effect to the remedial purposes of the workers' compensation laws. *Appeal of Griffin*, 140 N.H. 650 (1996).

The "arising out of" and "in the course of" prongs defining the relation to the employment are not independent requiring the presence of both, but rather they "interact and produce a kind of composite work-connection test in which the two elements are merged. Thus a strong 'arising out of' element will make up for a weak 'course' element. . . . Similarly a strong 'course element will make up for a weak 'arising out of' element." 1 A.Larson, THE LAW OF WORKMEN'S COMPENSATION § 13.11(d); *see Appeal of Griffin*, 140 N.H. at 650.

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[1]"Decision" refers to the decision of the Workers' Compensation Appeals Board, Jan. 26, 1996.

[2]"NOA" refers to the Notice of Appeal.

[3]"Transcript" refers to the transcript of the hearing before the Workers' Compensation Appeals Board, Oct. 25, 1996.

"In order to prove that the injury arose out of the employment, the claimant must demonstrate that the injury resulted from a risk created by the employment." *Anheuser-Busch v. Pelletier*, 138 N.H. 456, 458 (1994). When an employee gets hurt, an employer surely can expect that the employee will seek therapy for it and that there will be a period of recuperation. Thus, a further injury occurring during the therapy associated with Mr. Fisher's recuperation from the original employment-related injury are within the risk created by the employment. In *Whitham v. Gellis*, 91 N.H. 226 (1940), a filling-station employee was injured when he crossed a highway to return to work after making a personal purchase. This court found that his injury was compensable because the activity was reasonably expected and was naturally incident to the conditions of his employment. Mr. Fisher's recuperation was reasonably expected and naturally incident to his employment-related injury.

To prove that an injury occurred in the course of employment, the claimant need not prove that the injury occurred on the employer's premises. *White v. Boulia-Gorrell Lumber Co.*, 85 N.H. 543 (1932). Likewise the injury need not necessarily occur during work hours. *See Anheuser-Busch v. Pelletier*, 138 N.H. at 456. The claimant must merely prove that the injury was "within the zone of his employment." *Whittemore v. Sullivan County Homemaker's Aid Service*, 129 N.H. 432, 436 (1987) (quotation and citation omitted). Injuries are compensable if they are reasonably to be expected, or if they are "incidental to and inextricably interwoven into the fabric of employment." *Cook v. Wickson Trucking Co.*, 135 N.H. 150, 156 (1991) (quotation and citation omitted).

Mr. Fisher's injuries to his back and hip, while not occurring during work hours, were within the zone of his employment. Because they occurred during recuperation, they could

reasonably be expected and are part of the fabric of his employment. Accordingly they are compensable.

Moreover, all New Hampshire employees covered by the workers' compensation statute have a duty to participate in reasonable medical care. *Cate v. M.S. Perkins Machine Co.*, 102 N.H. 391 (1960). Unless some sort of experimental therapy was recommended, Mr. Fisher had no choice but to undergo the bone graft from his hip, and to comply with prescribed physical therapy exercises. Thus any injury occurring in the course of his medical care is compensable. *See Harris v. Mackin & Associates*, 641 A.2d 938 (Md. App. 1994).

In *Wood v. State Acc. Ins. Fund,* 569 P.2d 648 (Or. App. 1977), the claimant suffered a compensable low back injury. Subsequently, while participating in a mandatory vocational rehabilitation program, he re-injured his back when he slipped in a puddle of grease. The court found the rehabilitation "was a direct and natural consequence of the primary compensable injury," *id.* at 651, and that therefore the subsequent injury was also compensable.

In *Harris v. Mackin & Associates*, 641 A.2d 938 (Md. App. 1994), the claimant received workers' compensation for an injury sustained in course of employment. While entering a building to receive prescribed physical therapy for his compensable injury, he fell on ice and suffered more injuries, for which he sought additional compensation. In holding the subsequent injuries compensable, the court found that "because the employer has a statutory duty to provide medical care for the earlier compensable injury and the employee has a statutory duty to submit to and accept that care, the work-related injury effectively causes the journey." *Id.* at 939.

In *Capon v. Grumman Corp.*, 549 N.Y.S.2d 220 (1989), the claimant's decedent suffered a fatal heart attack an hour after he had completed a session of physical therapy which had been

prescribed to alleviate symptoms resulting from a compensable injury. The court held that the heart attack was compensable under the workers' compensation death benefit.

In *Imperial Place v. Dawson*, 715 P.2d 1318 (Nev. 1986), the claimant was injured in a car accident on his way to a physical therapy session for a compensable back injury. The court held that injury sustained in the accident was a compensable consequence of reasonable medical treatment.

Wood, *Harris*, *Capon*, and *Imperial Place* show that when a claimant sustains injuries in the course of medical treatment for a compensable injury, the subsequent injuries are also compensable. Similarly, a subsequent injury caused by a body part that was weakened by a compensable injury is also compensable, 1 A.Larson, THE LAW OF WORKMEN'S COMPENSATION § 13.12, as is a subsequent aggravation of an original compensable injury. 1 A.Larson, THE LAW OF WORKMEN'S COMPENSATION § 13.20 *et seq.* It is undisputed that Mr. Fisher's subsequent injuries occurred during the course of treatment for a compensable injury. Thus the injuries to his hip and back are compensable.

The sole evidence upon which the Workers' Compensation Appeals Board relies for the conclusion that Mr. Fisher's back problems are not compensable is a report by a Dr. Shea. He stated that as a *medical* opinion "[t]here is no evidence . . .that would connect the low back problem . . . with his work." *Decision,* NOA at 13. However, the medical record is replete with references to treatments to Mr. Fisher's hip and back. *Physical Therapy Preliminary Assessment* APPENDIX TO BRIEF at 1-2; *Dr. Wachs' Notes*, APPENDIX TO BRIEF at 9 *et seq.*;

Medical and legal causation are not the same thing. 1A A.Larson, THE LAW OF WORKMEN'S COMPENSATION § 38.83(a). What constitutes medical causation is an interesting

medical topic, but is not relevant here. For workers' compensation purposes, causation is a matter of law and the Appeals Board is required to apply legal rather than medical standards. RSA 281-A:2, XI. Thus, a doctor's ability or inability to "connect" a medical problem with employment is not relevant evidence for the Appeals Board. For the purposes of relevancy to a decision of the Appeals Board, the doctor's opinion stops at the point where the doctor identifies a medical problem or condition. The doctor simply is not qualified as a *legal* expert to perform the *legal* analysis required to "connect" a medical condition to employment; that is the job of the Appeals Board. *See Appeal of Newcomb*, __ N.H. __ (decided March 12, 1997). The Board's reliance on a doctor's opinion on causation is an application of the wrong standard of causation and is an unlawful secession of authority.

II. Mr. Fisher has a Continuing Disability

This court will reverse the Workers' Compensation Appeals Board when there is no competent evidence in the record supporting the Board's finding that the claimant does not have a continuing disability. *Appeal of Normand*, 137 N.H. 617 (1993).

An inability to get "gainful employment" constitutes a disability for the purposes of the workers' compensation law. *Xydias v. Davidson Rubber Co.*, 131 N.H. 721 (1989). "Gainful employment" is that which "reasonably conforms with the employee's age, education, training, temperament and mental and physical capacity to adapt to other forms of labor than that to which the employee was accustomed." RSA 281-A:2, X-a. If an employee can only do part time or limited work, he can still be considered totally disabled. *Servetas v. King Chevrolet-Oldsmobile Co., Inc.*, 117 N.H. 1061 (1977). "[I]f an employee cannot perform services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, he may well be classified as totally disabled." *Xydias v. Davidson Rubber Co.*, 131 N.H. at 724.

It is clear from the record that Mr. Fisher cannot do the work that he was doing at Radio Shack. The job requires bending and lifting. *Transcript* at 2. Despite his desire to work, Mr. Fisher has been able to little more than catalog his record collection, and this only for short spans of time. *Transcript* at 15.

Mr. Fisher's undisputed testimony was that he can sit or stand for only short periods, that he has constant dizziness, that he has to move around often to be comfortable, that even working at a typewriter for short periods hurts him, and that his ability to work is very limited by his various injuries. *Transcript* at 10, 15, 25-26.

The medical records show that at best, according to Dr. Shea, hired by the employer, that Mr. Fisher can work, but only in "sedentary jobs." Dr. Shea found that [h]e would not be able to return to manual labor. Dr. Shea reported that Mr. Fisher could work provided that the job would not require him "to lift more than twenty pounds," would "allow him to change positions frequently between sitting and standing," and would not require commuting or travel as "[h]e would not be able to spend long periods of time in his motor vehicle." Dr. Shea's August 1992 Letter, APPENDIX TO BRIEF at 36; Dr. Shea's February 1993 Letter, APPENDIX TO BRIEF at 40; Dr. Shea's January 1994 Letter, APPENDIX TO BRIEF at 43. Dr. Shea also reported that Mr. Fisher could not do any work that would require him to use a ladder or negotiate heights. Dr. Shea's January 1994 Letter, APPENDIX TO BRIEF at 43.

Dr. Shea also reported that it was his belief that Mr. Fisher's disability would not improve any further. Dr. Shea's February 1993 Letter, APPENDIX TO BRIEF at 40; Dr. Shea's January 1994 Letter, APPENDIX TO BRIEF at 43.

Dr. Wachs is Mr. Fisher's treating physician. His conclusions were that Mr. Fisher could return to light-duty work, but only on a trial basis. Dr. Wachs' Letter, APPENDIX TO BRIEF at 30.

Thus, Dr's Shea and Wachs both conclude that Mr. Fisher's has some limited ability to work. But Dr. Wachs goes on to say that the limitations on Mr. Fisher's ability to work are so severe, that finding work for which he is qualified is a "fairy tale."

> "Mr. Fisher, as you will note in reading through this, did not work and hasn't worked since I saw him in March of 1991. He was thought perhaps briefly, as mentioned in this report, to have had a very minimal capacity, but realistically speaking, this was not a functinal [sic] capacity and was not something that would have allowed him to really do anything. He would have been extremely limited by his lifting ability, use of his arms, ability to be up and around, and the prolonged rest periods required. So it was basically a fairy tale type work capacity

and not a real one."

Dr. Wachs' Letter, APPENDIX TO BRIEF at 30.

Disability must be measured both by medical and market analyses. *Xydias*, 131 N.H. at 721; *Servetas*, 117 N.H. at 1061; *Armstrong v. Lake Tarleton Hotel*, 103 N.H. 450 (1961). The Appeals Board heard no evidence that Mr. Fisher could find a job for which he was qualified given his medical limitations recognized by both doctors. Thus the Board had no competent evidence on which to find Mr. Fisher's disability had lapsed, and Mr. Fisher must be considered to have a continuing disability.

CONCLUSION

Based on the foregoing this Court should reverse the decision of the Workers' Compensation Appeals Board.

Respectfully submitted,

George Fisher,
By his Attorney,

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Dated: December 30, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for George Fisher requests that Attorney John A. Wolkowski be allowed 15 minutes for oral argument.

I hereby certify that on December 30, 2000, a copy of the foregoing will be forwarded to Sean M. Dunne, Esq.

Dated: December 30, 2000

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APPENDIX