PATRICIA A. CAUWELS, Employee, v. SCHOTTS, INC. and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer/Appellants, and BLUE CROSS and BLUE SHIELD OF MINN. and FORTIS BENEFITS INS. CO., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 23, 2001

No. [REDACTED SSN]

HEADNOTES

ARISING OUT OF & IN THE COURSE OF - Substantial evidence supports the compensation judge's award of workers' compensation benefits where the employee was on the employer's premises, during work hours, performing work-related activities when she experienced a sharp pain in the right shoulder, and the employee's treating surgeon opined the employee's work activities on April 5, 1999 could have been a contributing factor to the development of her rotator cuff tear.

Affirmed as modified.

Determined by: Johnson, J., Rykken, J., and Pederson, J.
Compensation Judge: Peggy A. Brenden

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal the compensation judge's finding that the employee's rotator cuff tear arose out of and in the course of her employment activities. We affirm.

BACKGROUND

The facts in this case are essentially undisputed. Patricia A. Cauwels, the employee, was born on March 1, 1937, and is currently 63 years old. She began working for Schotts, Inc., the employer, on April 7, 1996. (T. 13.) Schotts manufactures small electrical components which are incorporated into telephones and pacemakers. (T. 14.) The employee's primary duty was parts assembly. This job was performed sitting 80 to 90 percent of the work day and required handling very small, light parts on a repetitive basis. The employee's hands were at table level when she did the assembly work. (Finding 3.)[1] On April 5, 1999, the employee's job changed to working full-time at a soldering machine. The employee had performed this job once or twice previously on a limited basis, filling in while co-workers were on 10 to 15-minute breaks. The soldering job involved placing bobbins onto a spindle of an automatic soldering machine using the left hand. (T. 33.) The machine dipped the bobbins into the solder and the employee would remove the

[1] References are to unappealed findings.

completed part with her right hand. (T. 34.) The employee testified she was supposed to complete two or three hundred pieces an hour, working on eight pieces at a time. She stated she placed two pieces on the spindle and removed two and continued in this fashion using both hands always right at or above shoulder level. (T. 18-19.) The soldering job required the employee to extend both her right and left arms out in front of her, at shoulder level, for extended periods of time. (Finding 5.)

Prior to April 5, 1999, the employee had never seen a doctor for right shoulder complaints. She had no symptoms in her right shoulder, nor had she ever restricted her activities because of a right shoulder problem. (Finding 4.) The employee testified she had no symptoms or pain in her right shoulder on April 4, 1999. (T. 14.)

On April 5, 1999, the employee stated she performed the soldering job all morning without any problems. She took a dinner break and then returned to work. At approximately 1:30 p.m. the employee noticed a sharp pain in her right shoulder running down to the elbow which came on suddenly. (Finding 6; T. 19-20.) The employee immediately told Wendy, a lead person on the line, that her shoulder hurt. The employee continued to work until the end of her shift with continued pain in her right arm. She went home after work and placed an ice pack on her arm. The employee called in sick the next day. (T. 21-22.)

On April 8, 1999, the employee saw J.K. Willett, D.O., at Affiliated Medical Centers, complaining of right shoulder and arm pain which she related to her work with the employer. Dr. Willet noted no weakness of the rotator cuff and prescribed Relafen, an anti-inflammatory medication. The next day the employee saw Dr. Oldland who diagnosed tendinitis and injected her right shoulder. On April 13, 1999, the employee was examined by Dr. Peter K. Rodman, an orthopedic surgeon with the Orthopedic & Sports Medicine Clinic. The doctor ordered an MRI scan which was consistent with a complete tear of the rotator cuff. Dr. Rodman recommended surgery which was performed on May 17, 1999. (Pet. Ex. C.) The employee was off work from April 6, 1999 through September 18, 1999.

The employee filed a claim petition seeking temporary total disability benefits and medical expenses. The employer and insurer denied the employee sustained an injury arising out of her employment with the employer. The case was heard by a compensation judge at the Office of Administrative Hearings on December 15, 2000. In a Findings and Order filed January 9, 2001, the compensation judge found the employee's right rotator cuff tear occurred while the employee was soldering on April 5, 1999. The compensation judge then found the employee's right rotator cuff tear arose out of and in the course of her work activities for the employer and awarded benefits. The employer and insurer appeal.

DECISION

In her memorandum, the compensation judge stated she relied on the case of Duchene v. Aqua City Irrigation, 58 W.C.D. 223 (W.C.C.A. 1998). The judge concluded the employee's rotator cuff tear constituted a neutral risk, that is, a risk that was neither personal to the employee nor obviously related to the employment. The judge described the employee's injury

as an "unexplained accident similar to the injury in Duchene" and concluded the employee's injury was, therefore, compensable. (Mem. at 4.)

On appeal, the employer and insurer contend the compensation judge erroneously awarded benefits in reliance on the Duchene case. Respondents argue any benefit entitlement requires proof by the employee of a causal relationship between her work and an injury or condition from which the employee suffers. The compensation judge's reliance on Duchene, the appellants contend, relieves the employee of her statutory obligation to prove a causal connection between the employment and the injury. Rather, the compensation judge's analysis, appellants argue, force the employer and insurer to disprove causation. Appellants argue this is contrary to Minn. Stat. § 176.021, subd. 1 and 1a, which place on the employee the obligation to prove, by a preponderance of the evidence, that the injury arose out of and in the course of the employment. The employer and insurer assert the compensation judge erred at law, and they request this court reverse the award of benefits.

A personal injury is defined as an "injury arising out of and in the course of employment." Minn. Stat. § 176.011, subd. 16. The "arising out of" requirement is a causation test although "not necessarily in the proximate cause sense." Gibberd v. Control Data Corp., 424 N.W.2d 776, 780, 40 W.C.D. 1040, 1047 (Minn. 1988). For an injury to arise out of the employment, there must be a causal connection between the employment and the injury. Lange v. Minneapolis-St. Paul Metro. Airport Comm'n, 257 Minn. 54, 99 N.W.2d 915, 21 W.C.D. 61 (1959). The requisite causal connection "exists if the employment, by reason of its nature, obligations or incidents may reasonably be found to be the source of the injury-producing hazard." Nelson v. City of St. Paul, 249 Minn. 53, 55, 81 N.W.2d 272, 275, 19 W.C.D. 120, 123 (1957). The burden of proving that a personal injury arose out of the employment is on the employee. Minn. Stat. § 176.021, subd. 1. The issue on appeal is whether the employee sustained that burden.

The primary test for determining whether an injury arises out of the employment is the "increased risk" test. This test requires a showing that the "injury was caused by an increased risk to which the claimant, as distinct from the general public, was subjected by his or her employment." 1 A. Larson and L.K. Larson, Workers' Compensation Law, § 3.00 (1999). In Minnesota, the supreme court has stated, "[t]he 'arising out of' requirement refers to the causal connection between the employment and the injury. This requirement requires a showing of some hazard that increases the employee's exposure to injury beyond that of the general public." Kirchner v. County of Anoka, 339 N.W.2d 908, 911, 36 W.C.D. 335, 337 (Minn. 1983). The injury need not be peculiar to the employment, so long as the injury-producing risk or hazard has its origin or source in the employment. See Larson, § 3.00; Briemhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719, 15 W.C.D. 395 (1949).

In particular situations, some courts in the United States have applied a "positional risk" test. Under the positional risk test, an injury is compensable "if it would not have happened but for the fact that the conditions or obligations of the employment put claimant in the position where he or she was injured." Larson, § 3.05. In other words, the injury occurred because the employment required the claimant to occupy what turned out to be a place of danger. This theory, according to Larson, supports compensation "in cases of stray bullets, roving lunatics, and other

situations in which the only connection of the employment with the injury is that its obligations place the employee in the particular place at the particular time when he or she was injured by some neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment." Larson, § 3.05.[2] The compensation judge here applied a positional risk test to conclude the employee's injury was one arising out of her employment.

We agree the Duchene case is not controlling here. In Bohlin v. St. Louis County/Nopeming Nursing Home, 61 W.C.D. 69 (W.C.C.A. Sept. 20, 2000) (summarily aff'd Jan. 16, 2001), this court reviewed Minnesota case law and discussed, at length, the increased risk test and the positional risk test. The court concluded the Duchene decision does not support the unqualified application of a positional risk test in cases which do not involve a truly neutral risk. Rather, we stated whether there exists the requisite causal connection between the work activities and the disability is a question of fact. The Bohlin court recognized a positional risk test may be appropriate in those cases involving a truly neutral risk.[3] This is not such a case. The risk or hazard of a rotator cuff tear is not neutral. Accordingly, the positional risk test is not applicable here. Rather, the issue is whether the employee met the increased risk test.

Although the "arising out of " and "in the course of" requirements express two different concepts, in practice these requirements are not independent, but "are elements of 'a single test of work-connection.'" United Fire & Casualty. Co. 510 N.W.2d 241, 243 (Minn. Ct. App. 1994) (citing A. Larson, Workmen's Compensation for Occupational Injuries & Death, § 29.00 (1993)). Larson notes that in any given case, a certain minimum level of work-connection must be established. Thus, if the "course" test is weak but the "arising" test is strong, the necessary minimum quantum of work-connection will be met, as it is also if the "arising" test is weak and the "course" factor is strong. But if both the "course" and "arising" elements are weak, the minimum connection to the employment will not be met. Larson, § 29.01.

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[2] Larson divides the risks causing injury to an employee into three categories: (1) risks distinctly associated with the employment; (2) risks personal to the claimant; and (3) neutral risks. See Larson, § 4.00. The first category of risks comprise all of those types of injuries and occupational diseases that result from a hazard of the employment. These risks, Larson states, "fall readily within the increased risk test." Larson, § 7.10. The second category of risks are those totally unrelated to the employment because they are distinctly personal to the employee. Such risks are not compensable. Examples of personal risks are injury or death from natural causes or an assault by a sworn enemy of the employee motivated by personal animosity. The third category, "neutral risks" includes risks that are neither distinctly employment related nor distinctly personal in nature. Examples of neutral risks, according to Larson, are stray bullets, lightning or enemy bombs. Larson, § 4.03.

[3] In Bohlin, the court provided examples of neutral risks such as being struck by lightening, a stray bullet or a car or the risk of a random assault. The court noted that such risks are truly neutral "in that each is clearly neither a risk inherent in the employment nor a risk personal to the employee." Bohlin at 76.

The employee testified to a sudden onset of right shoulder pain while performing her normal work activities on April 5, 1999. The only medical evidence on the issue of causation is that of Dr. Rodman.[4] By report dated September 28, 1999, Dr. Rodman stated:

> Thank you for your letter in regards to Patricia Cauwels. In response to your specific questions:
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> 1. To the best of my knowledge, the patient has been consistent in describing a sudden onset of symptoms while working on April 5, 1999. I feel this, by historical accounts, was the onset of the rotator cuff tear.
>
> 2. Although it is hard to be certain, if the job description that Ms. Cauwels had performed as a soldered [sic] involved repetitive movement of the shoulder and if this motion approached shoulder height on frequent occasions, it could have been a contributing factor to developing the rotator cuff tear.

The employee was on the employer's premises during work hours, performing work-related activities at the time she experienced her right shoulder pain. Clearly, the employee was "in the course" of her employment at that time. Whether the employment was the source of some hazard which caused the rotator cuff tear is more tenuous. Thus, the "arising out of" requirement is weak while the "in the course of" is strong. However, given Dr. Rodman's opinion together with the employee's testimony of a sudden onset of pain while working, we conclude the employee has provided sufficient evidence to sustain her burden of proof. On this basis, we affirm the compensation judge's award of benefits.

[4] The appellants did not request an independent medical examination.