

STATE OF VERMONT  
VERMONT DEPARTMENT OF LABOR AND INDUSTRY

John N. Smiel, Jr.	)	File Nos. D-10745 and E-9359
	)	
v.	)	By: David J. Blythe,
	)	Hearing Officer
Okemo Realty Development	)	
Corp.	)	For: BARBARA G. RIPLEY,
v.	)	Commissioner
	)	
Delphia Construction	)	Opinion No. 10-93WC

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER

This matter came on for final hearing before David J. Blythe, Hearing Officer and designee of the Commissioner of Labor and Industry on June 2, 1993. Claimant John N. Smiel, Jr. was not present and was not represented at the hearing. The claimant is represented in this matter by Todd Kalter, Esq. Attorney Kalter was not present at the hearing. The hearing was held to determine which of the two defendants is liable for those compensation benefits to which the claimant is entitled. The claimant reserved his right to be heard at a later time if a dispute about benefits arises.

Defendant Okemo Realty Development Corp. and its workers' compensation insurer, Aetna Casualty and Surety Company, were represented by Kaveh S. Shahi, Esq. Defendant Delphia Construction and its workers' compensation insurer, Liberty Mutual Insurance Company, were represented by Keith J. Kasper, Esq.

The only witness testimony at the final hearing was telephone

testimony by Dorothy E. Ford, M.D., an orthopedic physician.

Based upon facts stipulated by the parties, evidence properly before the Commissioner and representations of counsel, the Commissioner makes the following Findings of Fact, Conclusions of Law and Order:

#### **FINDINGS OF FACT**

1. On November 19, 1990, the claimant, John N. Smiel, Jr., was employed by Okemo Realty Development of Ludlow, Vermont (hereinafter, "Okemo") as a laborer.
2. Okemo was an employer within the meaning of the Worker's Compensation Act on November 19, 1990.
3. The claimant suffered a back injury on November 19, 1990 during the course of his employment when he attempted to lift a log which was frozen to the ground.
4. The claimant's injury arose out of and in the course of his employment with Okemo.
5. The Aetna Casualty and Surety Company (hereinafter, "Aetna") was the workers' compensation carrier for Okemo on November 19, 1990.
6. The claimant's average weekly wage for the 12 weeks preceding the accident was \$252.00 resulting in weekly compensation rate of \$168.00. During the 12 weeks prior to the accident the claimant worked 8 hours a day, 5 days a week.
7. The claimant had no dependents under the age of 21.

8. In November 1990, the claimant was 28 years of age, and not married; he currently resides in Rutland, Vermont.

9. On November 21, 1990, Okemo filed a First Report of Injury.

10. On December 7, 1990, the claimant filed Notice of Injury and Claim for Compensation.

11. On January 7, 1991, the claimant and Okemo/Aetna entered into an agreement for temporary total disability compensation (Form 21) in which Okemo/Aetna agreed to pay the claimant \$187.00 per week beginning on November 22, 1990.

12. On July 31, 1991, Okemo/Aetna discontinued temporary total disability compensation on the basis that the claimant was released for work. A Form 27 (Notice of Intention to Discontinue Payments) was mailed to the claimant in connection with that discontinuance.

13. On or about December 4, 1991, the claimant filed a Notice of Injury and Claim for Compensation (Form 5) in connection with his August 10, 1991 injury.

14. In April of 1991, the claimant was examined by Dorothy E. Ford, M.D., an orthopedic surgeon, following an incident in which, while playing frisbee, the claimant experienced an episode of "back pain, muscle spasm, and inability to stand upright." (Joint Exhibit 1 at 26 - Report of Dr. Ford dated April 24, 1991).

15. On June 26, 1991, prior to beginning to work for Delphia Construction Co. (hereinafter, "Delphia"), the claimant began

treating with Arnold R. Kirbach, D.C., a chiropractic physician. As part of his initial evaluation, Dr. Kirbach performed certain reflex and range of motion studies on the claimant. (Joint Exhibit 1 at 27E-27H).

16. In July of 1991, Joseph E. Vargas, M.D., an orthopedic surgeon treating the claimant, released the claimant to return to work. (Joint Exhibit 2 at 23-25, - Deposition of Claimant dated May 21, 1992)

17. In July of 1991, the claimant returned to work for Delphia.

18. On August 10, 1991, Delphia was the claimant's employer within the meaning of the Worker's Compensation Act. Liberty Mutual Insurance Co. (hereinafter, "Liberty Mutual") was Delphia's workers' compensation carrier on that date.

19. On August 10, 1991, while in the course and scope of his employment for Delphia, the claimant experienced back pain while bending over in the process of varnishing doors. The claimant went to the emergency room at Rutland Regional Medical Center for treatment. (Joint Exhibit 1 at 18) The claimant had visited the Rutland Regional Medical Center emergency room numerous other times in connection with back pain. (Joint Exhibit 1 at 11-17B)

20. On September 4, 1991, Dr. Kirbach examined and/or treated the claimant. At that time, Dr. Kirbach repeated the reflex and range of motion studies he performed on June 26, 1991. (Joint Exhibit 1 at 27M) Dr. Kirbach's clinical assessment on September 4, 1991

was essentially the same as the one he performed on June 26, 1991.  
(Joint Exhibit 1 at 27E-27H, to be compared with 27M)

21. In her telephone testimony at the final hearing, Dr. Ford testified that the clinical findings in Dr. Kirbach's reports of June 26 and September 4, 1991 indicated "essentially normal" findings with regard to range of motion. Dr. Ford expressed doubt about whether the claimant had suffered any permanent impairment at all. She further testified that, based on her review of Dr. Kirbach's records, the claimant had returned to his baseline condition as of September 4, 1991.

22. Claimant repeatedly stated in his deposition that his back pain, muscle spasm and the numbness in his legs were the same before and after the August 10, 1991 incident. (Joint Exhibit 2 at 52-55) This testimony is consistent with Dr. Kirbach's clinical findings and with Dr. Ford's testimony.

23. There was no evidence submitted which established that the incident of August 10, 1991 contributed to the claimant's permanent condition. Rather, the evidence establishes that the incident of August 10, 1991 for which the claimant sought medical attention at Rutland Regional Medical Center was a "flare-up" of his pre-existing condition.

24. Dr. Ford testified that in her opinion the incident of August 10, 1991 was an aggravation of the pre-existing condition rather than a recurrence of the earlier injury. However, she also

testified that the utilization by the Commissioner of the terms "aggravation" and "recurrence" is not the same as the meaning of those terms as used by medical professionals. She testified, further, that she understood the meaning of the terms within the context of a workers' compensation proceeding and was using them in that context.

25. While Dr. Kirbach's reports (Joint Exhibit 1 at 32-32D) are not models of specificity, it is clear from them that Dr. Kirbach, in five reports between July 11, 1991 and November 12, 1991, believed the November 1990 injury to be the sole cause of the back injury or condition for which he was treating the claimant.

#### CONCLUSIONS OF LAW

1. This claim presents the question of which of two employers is liable to the claimant for compensation benefits under the Workers' Compensation Act, 21 V.S.A. Chapter 9.

2. The first issue presented is whether the burden of proof is on the claimant's employer as of the date of the incident in question - August 10, 1991 - under the provisions of 21 V.S.A. § 662(c). The statute provides, in pertinent part, as follows:

- (c) Whenever payment of a compensable claim is refused on the basis that another employer or insurer is liable, the Commissioner, after notice to interested parties and a review of the claim shall order that payments be made by one employer or insurer until a hearing is held and a decision is rendered. For the purposes of this review, the employer or insurer at the time of the most recent

personal injury for which the employee claims benefits shall be presumed to be the liable employer or insurer and shall have the burden of proving another employer's or insurer's liability. Payments pursuant to this subsection shall not be deemed an admission or conclusive finding of an employer's or insurer's liability nor shall payments preclude subsequent agreement under subsection (a) of this section or prejudice the rights of either party to a hearing or appeal under this chapter.

3. Title 21 V.S.A. § 662(c) limits the payments that can be made pursuant to an interim order of the Commissioner prior to a final hearing. The plain language of the statute specifically limits this presumption of liability to those situations in which the Commissioner makes an initial determination as to liability prior to the formal hearing on the merits. The statute specifically contemplates further formal proceedings on the merits and that prior payments pursuant to this initial determination shall not "prejudice the rights" of the insurer initially presumed to be responsible for the claim. Therefore, the traditional burden of proof rules, rather than the statutory presumption, apply in these situations at the formal hearing stage.

4. As a matter of administrative and judicial necessity, however, it is necessary to establish which party bears the burden of proof. In the instant matter, it is not the claimant, as is the case in most workers' compensation claims. See, e.g., Goodwin v. Fairbanks, Morse and Co., 123 Vt. 161 (1962).

5. In this case, the claimant has claimed that an incident on August 10, 1991 has given rise to a claim for compensation benefits. Delphia was the claimant's employer on that date. It is not disputed that the claimant experienced an episode of pain and immobility following an activity within the course of his employment with Delphia. Therefore, a presumption arises, based not upon the operation of 21 V.S.A. § 662(c) but upon the facts and circumstances presented, that the incident (and any compensation benefits payable in connection therewith) is attributable to the claimant's employer as of the date of the incident. In this case therefore, the burden of proof is upon Delphia/Liberty Mutual.

6. This case presents the question of whether the claimant suffered a recurrence or an aggravation of an earlier injury. As a general matter of law, if the Commissioner finds that the injury of August 10, 1991 is a recurrence, then the earlier employer (i.e., the claimant's employer at the time the underlying compensable injury was sustained) is liable. In this case, the "earlier employer" is Okemo/Aetna. On the other hand, if the Commissioner finds that the injury is an aggravation of the underlying injury, then the claimant's present employer (Delphia/Liberty Mutual) is liable. See Russell v. Paisley Maintenance Inc. Opinion No. 39-92WC (May 7, 1993); Bostwick v. Pownal Tanning, Opinion No. 37-92WC (May 5, 1993); Downs V.



Weyerhauser, Opinion No. 35-92WC (April 13, 1993); Liberty v. Lebel and Raines Sprinkler Inc., Opinion No. 34-92WC (April 19, 1993).

7. The basis for the Commissioner's determination as to an aggravation has been well defined in the Commissioner's prior decisions. "In order to show that there has been an aggravation, it must be shown that the second episode contributed independently to the final disability. LARSON, THE LAW OF WORKMENS' COMPENSATION, §§ 95.22 - 95.23." Gardner v. Vermont Tap and Die Co., Opinion No. 10-90WC at 12. See also Paul v. Huntington Homes, Opinion No. 18-92WC (October 30, 1992).

8. In this case, the evidence established that the August 10, 1991 incident caused a temporary episode of pain and partial immobility, but did not add to the claimant's permanent condition in any medically or legally significant way. The objective testing done by Dr. Kirbach, as offered by Delphia/Liberty Mutual and as interpreted in her testimony by Dr. Ford, established that as of September 4, 1991 (25 days after the incident complained of), the claimant's back condition returned to its baseline condition.

9. When a later incident results in a "flare-up" of pain with a period of disability, the original injury remains the basis for permanency benefits and/or on-going medical benefits after the claimant returns to his or her baseline condition. See Russell,

supra:

It is most likely that the pain experienced by the claimant after [the second incident] was a temporary and relatively short-lived episode of the longstanding pattern of chronic pain experienced by the claimant since [the original injury] . . . [The second incident] may best be described as a transient aggravation which is separately compensable only until the claimant returned to her previous condition of chronic pain and disability.

Id. at 7.

10. In the instant case, Claimant's condition caused by the August 10, 1991 incident resulted in one of his frequent trips to the local emergency room and no temporary total disability benefits. Claimant had returned to his baseline of pain and disability by September 4, 1991. There exists no evidence that this transient flare-up of Claimant's compensable back injury resulted in any increase of his permanent impairment.

11. The Claimant experienced a period of compensable injury between August 10, 1991 and September 4, 1991 for which Delphia/Liberty Mutual is liable. As of September 4, 1991, the claimant had returned to his baseline condition, and any subsequent benefits to which claimant may be entitled are the liability of Okemo/Aetna.

#### ORDER

A) Delphia/Liberty Mutual shall pay to the claimant or to his medical providers any benefits for the period August 10, 1991

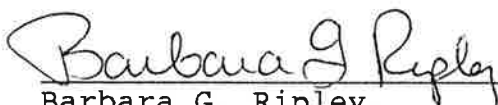
through and including September 4, 1991.

B) To the extent that Okemo/Aetna paid any such benefit during that period, Delphia/Liberty Mutual shall reimburse Okemo/Aetna for such payments. Because it is not practically possible to distinguish between the medical necessity of, and benefit to the claimant of treatments scheduled before August 10, 1991 and provided during the period in question from treatments necessitated by the August 10, 1991 incident, Delphia/Liberty Mutual is found to be liable for and shall pay all such medical benefits due for that period.

C) With the exception of the period August 10, 1991 through and including September 4, 1991, Okemo/Aetna is liable for compensation benefits to which the claimant is entitled.

D) No award of costs or attorneys fees is made.

**DATED** at Montpelier, Vermont, this 24<sup>th</sup> day of August, 1993.

  
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Barbara G. Ripley,  
Commissioner