

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

EDWARD LEGACY)	File Nos. D-23140, Z-17184
)	
)	By: Frank E. Talbott
v.)	Contract Hearing Officer
)	
)	For: Barbara G. Ripley
TOWN OF SHAFTSBURY and)	Commissioner
BURGESS BROTHERS)	
)	Opinion No. 23-93WC

Hearing held August 24, 1993, in Montpelier, Vermont.

APPEARANCES

Sam Mason for the claimant
Edward Kiel for the defendant Town of Shaftsbury
William O'Rourke for the defendant Burgess Brothers

ISSUES

1. Whether there was a new injury on February 17, 1991, arising out of and in the course of employment with the Town of Shaftsbury such as to relieve Burgess Brothers of liability for the claims asserted in this hearing.
2. The degree of permanent partial impairment to the claimant.

THE CLAIM

1. Permanent partial disability compensation under 21 V.S.A. § 648 for 198 weeks beginning August 24, 1992.
2. Medical and hospital benefits under 21 V.S.A. § 640.
3. Attorney fees and costs under 21 V.S.A. § 678(a).

STIPULATIONS

1. On February 2, 1987:
 - a. The claimant, Edward W. Legacy, Jr., was employed by the defendant, Burgess Brothers, Inc., of Burlington, Vermont, as an equipment operator.

b. The defendant was an employer within the meaning of the Workers' Compensation Act.

c. The claimant suffered a personal injury when he fell while getting off a loader, causing injury to his lower and mid-back.

d. The claimant's injury arose out of and in the course of employment with the defendant.

e. The Maine Bonding and Casualty was the workers' compensation carrier for the defendant on February 2, 1987.

2. On June 19, 1987, the claimant and the defendant entered into an Agreement for Temporary Total Disability Compensation (Form 21) in which the defendant agreed to pay the claimant \$218.05 a week, including dependency benefits of \$10.00, beginning on February 20, 1987.

3. On February 21, 1989, the defendant Burgess Brothers discontinued temporary total disability compensation being paid the claimant.

4. On May 8, 1989, the claimant and the defendant Burgess Brothers entered into an Agreement for Permanent Partial Disability Compensation (Form 22) in which the defendant agreed to pay the claimant as a result of the injury, causing 30% impairment to the spine.

5. On February 21, 1991, the defendant Town of Shaftsbury filed an Employer's First Report of Injury stating that the employee had reported that as he was walking over to tell a co-employee to put sand on the road, he slipped on ice, injuring his upper back and right arm.

6. On February 21, 1991, the claimant was employed by the defendant Town of Shaftsbury and the Town of Shaftsbury was an employer within the meaning of the Workers' Compensation Act.

7. Travelers Insurance Company was the workers' compensation carrier for the Town of Shaftsbury on February 21, 1991.

8. On June 7, 1991, the claimant filed a Notice of Injury and Claim For Compensation to the Town of Shaftsbury for injury to his "back, shoulders, cervical, legs," due to having "slipped and fell on an icy roadway at the landfill."

9. On February 17, 1991, the claimant was earning \$6.00 per hour and working 20 hours per week working for the Town of

Shaftsbury.

10. Judicial notice may be taken of the documents in the Department's file.

11. The following documents are offered into evidence without objection:

Claimant's Exhibit 1	:	58 pages of medical records and medical/pharmacy bills for treatment from the following: -Dr. Keith R. Edwards -Dr. Robert S. Block -Empire Medical Imaging -Southwestern Vermont Medical Center -Bennington Physical Therapy
Claimant's Exhibit 3	:	Transcript of deposition of Dr. Keith Edwards
Claimant's Exhibit 4	:	Transcript of deposition of Judith Harris
Defendant's Exhibit A	:	Report of January 28, 1992, by Kuhrt Wieneke, Jr., M.D.
Defendant's Exhibit B	:	Report of Dr. Marcy Jones dated February 8, 1989
Defendant's Exhibit C	:	Report of Dr. Kuhrt Wieneke, dated January 13, 1989
Defendant's Exhibit D	:	Letter from Dr. Keith Edwards dated October 31, 1990
Defendant's Exhibit E	:	Medical records of Dr. Eugene W. Leibowitz
Defendant's Exhibit F	:	Report of Dr. Scovner dated February 15, 1989
Defendant's Exhibit G	:	Office Notes of Dr. Keith Edwards
Defendant's Exhibit H	:	Office note of Dr. Keith Edwards dated October 31, 1990

FINDINGS

1. Stipulations one through 11 are true.

2. During the hearing the following additional exhibits were offered and received into evidence:

Claimant's Exhibit 2 : May 6, 1993 letter from Dr. Edwards to Sam Mason, Esq.

3. Before the record closed, the following exhibit was offered and received in evidence without objection:

Defendant's Exhibit I : Report of Dr. Kuhrt Wieneke dated August 31, 1993

4. Defendant Burgess Brothers, or its insurer, paid the claimant 99 weeks of compensation benefits based on a 30% permanent impairment to the spine.

5. On February 17, 1991, the claimant was working at the landfill for the Town of Shaftsbury, when he slipped and fell on icy ground, injuring his upper back and right arm. He reported this incident to the Town Clerk and sought medical treatment from Dr. Keith Edwards.

6. The claimant experienced additional symptoms after the fall in 1991. Dr. Edwards found that the claimant had increased pain and numbness down his right arm along with increased right shoulder pain, which he saw as all new symptoms since the claimant's injury of February 17, 1991.

7. Dr. Edwards also testified that although there have been no changes in the claimant's x-rays since the 1987 injury, there has been a change after the 1991 injury in the claimant's degree of mobility, spasm and muscle tenderness. Thus, Dr. Edwards believes that the claimant suffered some new nerve root injury attributed to the 1991 slip and fall at the landfill.

8. Dr. Edwards testified that the claimant currently has a 35% permanent partial impairment of his spine; 12½% permanent partial impairment of his right upper extremity; 12½% permanent partial impairment of his left upper extremity; 12½% permanent partial impairment of his right lower extremity; and 12½% permanent partial impairment of his left lower extremity. These impairment ratings were calculated according to the AMA Guides to Permanent Impairment.

9. Dr. Edwards released the claimant to work a maximum of 20 hours per week on August 24, 1992.

10. Dr. Edwards cannot separate specifically the degree of permanency attributable solely to the 1991 incident. Since claimant was determined to have a 30% permanent partial disability to his spine after the February 2, 1987 injury, the recent injury

evidently caused only an additional 5% impairment to the spine .

11. The claimant's weekly compensation rate as of August 24, 1992, was \$130.94. On July 1, 1993, it increased to \$138.01.

CONCLUSIONS

1. In workers' compensation actions, the claimant has the burden of establishing all facts asserted. McKane v. Capital Hill Quarry Co., 100 Vt. 45 (1929); Goodwin v. Fairbanks, Morse, and Co., 123 Vt. 161 (1962). The claimant must establish by sufficient competent evidence the extent and nature of his injury as well as the causal connection between the injury and the employment. Rothfarb v. Camp Awanee, Inc., 116 Vt. 172 (1950).

2. An "aggravation" of an existing condition means "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." Rule 2(j), Processes and Procedure for Claims Under the Vermont Workers' Compensation and Occupational Disease Acts. In this case the fall on the ice in February 1991 was an aggravation and new injury.

3. If expert medical evidence establishes a causal connection between an aggravated or accelerated medical condition and a work-related injury, the aggravated or accelerated condition is compensable. Jackson v. True Temper Corp., 151 Vt. 592, 595, 563 A.2d 621 (1990); Campbell v. Savelberg, Inc., 139 Vt. 31, 35-36, 421 A.2d 1291 (1980); Marsigli's Estate v. Granite City Auto, 124 Vt. 95, 103, 197 A.2d 799 (1964).

4. Where a claimant has a pre-existing permanent impairment prior to his work-related injury, the Commissioner is not required by the workers' compensation statute to make a determination of the relative contributions of the accident at issue and the prior injury to the end result. Stamper v. University Apartments, Inc., 147 Vt. 552, 554, 522 A.2d 227 (1986). The Commissioner may do so where the respective proportions are clear.

5. The claimant has requested an award of attorney's fees. The purpose of 21 V.S.A. §678(a) is to discourage any unnecessary expense and unreasonable delay in the resolution of the workers' compensation claims. Morrisseau v. Legac, 123 Vt. 70, 79, 181 A.2d 53 (1962). The claimant was not responsible for any unnecessary delays, and has prevailed on this claim. However, claimant did not present any evidence as to the amount or reasonableness of attorney's fees incurred. Rule 10(d) of the Processes and Procedure for Claims Under the Vermont Workers' Compensation and Occupational Disease Acts provides that evidence establishing the amount and reasonableness of attorney's fees and costs shall be offered no later than the date upon which proposed findings of fact and conclusions of law are to be submitted.

Failure to do so may result in denial of an award for attorney's fees.

ORDER

IT IS THEREFORE ORDERED, that the Defendant, Town of Shaftsbury, immediately pay to the claimant:

1. One-hundred and twenty-four weeks of permanent partial disability compensation (5% for the additional impairment for the spine and 12.5% for the impairment to each of the extremities) beginning August 24, 1992, at the rate of \$130.94 per week, to be adjusted annually pursuant to 21 V.S.A. § 650.

2. All medical and hospital benefits under 21 V.S.A. § 640.

3. All other benefits payable under the Vermont Workers' Compensation Act pursuant to the terms of this opinion and order.

Claimant's request for attorney fees is Denied.

DATED in Montpelier, Vermont this 24th day of November, 1993.



Barbara G. Ripley
Commissioner