

STATE OF VERMONT

DEPARTMENT OF LABOR AND INDUSTRY

Charles Cooney)	State File Nos. E-9370, A-22736
)	
v.)	By: Jill Broderick
)	Hearing Officer
Norton Brothers, Inc.)	
)	
)	For: Barbara Ripley
)	Commissioner
)	
)	Opinion No. 32-93WC

Decided without hearing
Record Closed: November 1, 1993

APPEARANCES

Attorney for Defendant, Aetna Life and Casualty - Keith Kasper, Esq.
Attorney for Defendant, CIGNA - William O'Rourke, Esq.

ISSUE

The parties do not dispute that Claimant's back problem is work related, and that he is, therefore, entitled to compensation under the Act. The sole issue in this case is which of the Defendants is liable for temporary total benefits, medical bills and attorney's fees.

STIPULATIONS

The parties have stipulated to the following:

1. The Claimant was an employee of the Defendant, Norton Brothers, Inc., on April 25, 1988, and September 27, 1991.

2. The Defendant is an employer within the meaning of the Workers' Compensation Act.

3. The Claimant's injuries arose out of and in the course of his employment.

4. Aetna was the workers' compensation carrier for the Defendant on April 25, 1988, and CIGNA was the carrier on September 27, 1991.

5. There is no objection to the admission of the following exhibits:

Joint Exhibit 1	Deposition transcript of the Claimant.
Joint Exhibit 2	Deposition transcript of Dr. Krag.
Joint Exhibit 3	Attorney Authorization

FINDINGS

Based on the evidence and testimony presented at the hearing, I find:

1. The stipulations set forth above are true and the exhibits listed above are admitted into evidence.
2. The Claimant's back was injured in a work related accident in February 1988, when he fell out of his truck and landed on his back.
3. The Claimant began treating with Dr. Krag on April 26, 1988, who has been his treating physician since that time.
4. Dr. Krag gave the Claimant facet injections on May 10, 1988. He noted that a CT scan revealed "moderate facet arthrosis."
5. On May 27, 1988, Dr. Krag examined the Claimant and noted that the Claimant has some "tingling" down his leg, but otherwise felt "fine." Dr. Krag released the Claimant for work two weeks later with no restrictions.
6. On July 12, 1988, Dr. Krag examined the Claimant, who stated that he was "90%" improved, had returned to full work with minimal discomfort, and only had discomfort when he put in a long day. Dr. Krag noted that the Claimant would return if he experienced increased discomfort or pain and consideration would then be given to repeat facet injections.
7. On December 6, 1988, the Claimant again saw Dr. Krag, who noted that the Claimant's pain had "completely resolved by 10/88", that he was driving a truck 70-80 hours per week, and that he was experiencing a sensation of "water running down my leg" but no back pain. Dr. Krag again released the Claimant for work without specific restrictions.
8. On February 17, 1989, the Claimant again returned to Dr. Krag "complaining of new symptoms for the past few weeks, no acute onset, no known cause." The Claimant denied significant low back pain and did not return for his follow-up appointment on March 30, 1989. Dr. Krag stated that the Claimant's condition was stable between 1988 and 1991.
9. The Claimant stated that after the facet injections he "felt pretty good" and had only "minor" back pain until September 1991.

10. In September, 1991, the Claimant began experiencing the same back pain he had in 1988. The Claimant cannot recall any specific incident which precipitated the increase in his back pain.

11. In his September 27, 1991, office note Dr. Krag stated that the Claimant had "done quite well" since the 1988 facet injections until a "few months ago," when the Claimant began to have a gradual return of the right leg symptoms and moderate back pain.

12. The September 16, 1991, CT scan showed "multiple degenerative changes," and Dr. Krag's diagnosis was "degenerative disc disease, with probably an L5 or S1 nerve root encroachment."

13. Dr. Krag diagnosed the Claimant's condition as spinal stenosis, which is enlargement of the joints and a narrowing in the amount of space between the joints resulting in pinching of or pressure on the spinal nerves.

14. Dr. Krag testified that the Claimant's worsening symptoms were the result of the natural consequences of the 1988 injury, which made the Claimant's back more fragile or more susceptible to injury. He agreed it was fair to state that there may have been a temporary remission of the Claimant's back pain and then a return of symptoms. However, he also stated that there was a relationship between the Claimant's work and his back condition and that sitting for long periods of time driving truck and loading and unloading the trucks could contribute to the Claimant's back problem. Dr. Krag could not state with reasonable medical certainty that the Claimant's work activities did not exacerbate his back condition.

15. The Claimant stated that he drove an 18 wheeler truck sometimes six or seven days a week, ten hours a day from his 1988 injury to September 1991. He stated that "wrestling the gears" of the trucks bothered his back. His job also involved loading the trucks. He stated that he wrapped between 18 and 30 pallets with a two foot wide roll of paper for each truckload. He stated that the wrapping involved alot of twisting and pulling, and that he eventually changed his method of wrapping to take some of the strain off his back. The Claimant also testified that he often had to stand three or more hours while his truck was being loaded and that was difficult for him.

16. The Claimant's Notice of Injury and Claim for Compensation dated December 11, 1991 states that the cause of his injury was "strain and vibration caused by duties as over-the-road driver."

CONCLUSIONS

Based on the foregoing findings of fact, I conclude the following:

1. In workers' compensation cases the claimant has the burden of establishing all facts essential to the rights asserted. King v. Snide, 144 Vt. 395 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion, or surmise, that the incident complained of was the cause of the injury. Burton v. Holden and Marting Lumber Company, 112 Vt. 17 (1941).

2. The issue in this case is whether the Claimant's 1991 back problem was a recurrence or an aggravation of his 1988 injury. 21 V.S.A. 662(c) provides that when an employer or insurer asserts that another employer or insurer is responsible for paying the compensation, 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." The Claimant has alleged that his injuries arose on or about September 27, 1991 as a result of a "recurrence" and not an "aggravation."

3. Department of Labor and Industry Rule 2(j) and (k) defines "aggravation" as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events" and defines "recurrence" as "the return of symptoms following a temporary remission." The Department has held that "recurrence (is) a continuation of a problem which had not previously resolved or become stable," and it has defined "aggravation" as "a destabilization of a condition which had become stable, although not necessarily fully symptom-free." Jaquish v. Bechtel Const. Co., Opinion No. 30-92WC (Dec. 29, 1992).

4. An injurious event need not be instantaneous to be found an aggravation, but "may be the result of cumulative trauma over an extended period of time." Gardner v. Vermont Tap & Die, Opinion No. 10-90WC (Nov. 8, 1991).

5. An expert medical opinion is necessary to determine whether the Claimant's current condition is a recurrence or an aggravation. See Marsigli's Estate v. Granite City Auto Sales, Inc., 124 Vt. 95 (1964). Dr. Krag did not state with reasonable medical certainty that the Claimant's work activities between 1988 and 1991 exacerbated his back condition, but neither did he testify that they did not. Therefore, CIGNA has not met its burden of proof in this matter.

ORDER

Therefore, based on the foregoing CONCLUSIONS and FINDINGS CIGNA's claims for reimbursement and attorney's fees are denied. CIGNA is responsible for Claimant's temporary total disability compensation, medical bills, and any compensation for permanent partial impairment related to the September 27, 1991 onset of work related back pain.

Dated at Montpelier, Vermont this 11th day of January, 1994.


Barbara G. Ripley
Commissioner