Groman v. Peck Auto and Glass and Middlebury College (March 13, 1995)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Richard Groman	*)*	*State File No. G-8805*
	)	
v.	*)*	*By: Jill Broderick*
	)	*Hearing Officer*
Peck Auto and Glass	*)*	
and Middlebury College	*)*	*For: Mary S. Hooper*
	)	*Commissioner*
	)	
	)	*Opinion No. 3-95WC*

Heard in Montpelier, Vermont on October 14, 1994
Record Closed: December 13, 1994

APPEARANCES

Attorney for Claimant - Andy Jackson, Esq.
Attorney for Defendant, Middlebury College - Phyllis Severance, Esq.

ISSUE

The parties have stipulated that Middlebury College is liable for the Claimant's workers' compensation. The remaining issue is: "What is the Claimant's average weekly wage for purposes of workers' compensation benefits?"

THE CLAIMANT SEEKS

1. Additional temporary total and permanent partial benefits due to an increased average weekly wage.

2. Attorney fees and costs.

STIPULATIONS

The parties have entered into the following stipulations:

1. The Claimant was employed by Middlebury College on April 30, 1993 and by Peck Auto and Glass on October 26, 1993.

2. Both defendants were employers within the meaning of the Workers' Compensation Act on such dates.

3. TransAmerica Insurance Group was the workers' compensation carrier for Middlebury College on April 30, 1993 and Peerless Insurance was the carrier for Peck Auto and Glass on October 26, 1993.

4. The Claimant has received temporary total compensation for the period beginning October 26, 1993 and ending July 25, 1994 and is not entitled to temporary total compensation for any additional time.

5. The Claimant's injury is work related, and either Middlebury College or Peck Auto and Glass is liable for his benefits.

6. The Claimant has a permanent partial disability of 5% of each hand.

7. The Claimant's medical bills are related to his carpal tunnel surgery and are reasonable in amount.

8. Medical bills presented to Peerless have been paid in full. Peerless has also paid temporary total compensation and permanent partial compensation.

EXHIBITS

Joint Exhibit 1	*:*	*Claimant's medical records*
Claimant's Exhibit 1	*:*	*Statement of Attorney's Fees*
Defendant Middlebury College Exhibit 1	*:*	*Employment Application*
Defendant Middlebury College Exhibit 3	*:*	*Unemployment Claim Statement*
Defendant Middlebury College Exhibit 6	*:*	*Memorandum of Norm Cushman of December 8, 1992*

Defendant Middlebury College Exhibit 7	:	*Memorandum of Norm Cushman of February 19, 1993*
Defendant Middlebury College Exhibit 8	:	*Memorandum of Norm Cushman of March 23, 1993*
Defendant Middlebury College Exhibit 9	:	*Memorandum of Norm Cushman of April 30, 1993*
Defendant Middlebury College Exhibit 11	:	*Employer's First Reports of Injury*
Defendant Peck Auto and Glass Exhibit 1	:	*Videotape*
Defendant Peck Auto and Glass Exhibit 2	:	*Job description.*

FINDINGS

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

1. The exhibits listed above are admitted into evidence.

2. The stipulations set forth above are true.

3. The Claimant began working for Middlebury College in September, 1984 as a member of the grounds crew, performing tasks such as shovelling, jack-hammering coal and moving furniture.

4. In 1985 the Claimant started with the electrical crew at Middlebury College. At that time he worked an average of 50 to 60 hours per week.

5. The electrical work involved jobs such as carrying and using hand tools, climbing ladders, pulling wires through conduit, and bending pipe.

6. The Claimant became the foreman of the electrical crew in February, 1991. It was about this time that the Claimant's hands first started to hurt; however, the pain was not significant and did not affect his ability to perform his job.

7. As foreman the Claimant was responsible for assigning duties to the crew. His wrist pain gradually increased, and in the winter of 1992 he began

to assign himself lighter duty work, such as maintenance jobs, rather than the "project" work which involved heavier tasks.

8. The Claimant did not inform his supervisors that his wrists hurt. He testified that he believed he simply had to "bite the bullet" and that he was concerned that he might lose his job if he filed a workers' compensation report.

9. The Claimant began experiencing marital difficulties in August of 1992, which caused him to miss work fairly often. He testified that "his head was not on his work."

10. In November, 1992, Norm Cushman, the Claimant's supervisor, sent the
Claimant a memorandum setting forth concerns about the Claimant's job performance, and in February, 1993 the Claimant was placed on probation.

11. The Claimant testified that the last six months on the job at Middlebury College were "pure hell" on his wrists, but he did not inform his employer because he knew his job was already in jeopardy and did not want to lose it.

12. On April 30, 1993 the Claimant was fired from his job at Middlebury College.

13. The Claimant was unemployed from April 30, 1993 to September 13, 1993.
During that time his wrist symptoms did not improve.

14. The Claimant began working for Peck Auto & Glass on September 13, 1993,
as a salesperson. He worked at the counter, running the cash register and selling auto parts.

15. The Claimant hoped that he could manage this lighter duty work, but on October 26, 1993, he could no longer tolerate the wrist pain and sought medical treatment that day at the Porter Hospital emergency room. He never
returned to work at Peck Auto & Glass.

16. The Claimant filed a First Report of Injury on November 1, 1993.

17. The Claimant treated initially with Dr. Kniffin, who diagnosed bilateral carpal tunnel syndrome and referred him to Dr. Mogan for further treatment. Dr. Mogan concurred with this diagnosis and performed bilateral carpal tunnel
release surgeries in December, 1993 and January, 1994.

18. Dr. Kniffin stated that the Claimant's wrist problem began while he was employed at Middlebury College.

19. Dr. Mogan also stated that he believed the Claimant's carpal tunnel started while he was employed at Middlebury College.

CONCLUSIONS

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

1. 21 V.S.A §650 provides: "Average weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the twelve weeks preceding an injury . . . ." The issue in this case is what is the date of injury for purposes of the wage calculation.

2. The Claimant seeks compensation based on his wages at Middlebury College. The Defendant maintains that such compensation should be based on his wages at Peck Auto & Glass. The Defendant argues that October 26, 1993, the date on which the Claimant quit work at Peck Auto & Glass, is the date of injury for wage calculation, because that is the date on which the Claimant could no longer work due to his carpal tunnel. The Defendant cites McKearney v. Miguel's Stoweaway Lodge, Opinion No. 6-94WC (March 27, 1994) in support of its position. One of the issues in McKearney was the date of injury for purposes of determining which carrier was liable for the claimant's benefits. 21 V.S.A. §662(c) provides that "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..." The Department in McKearney noted that application of this "last injurious exposure" rule frequently meant that the carrier on the risk at the time a claimant can no longer work because of his injury is the responsible carrier. The Defendant's argument, however, is incorrect for two reasons.

First, even if the Department were to apply McKearney to this case, the date of the Claimant's "most recent personal injury" would be deemed to be April 30, 1993 and not October 26, 1993. As the parties have agreed, the Claimant's work at Peck did not constitute an aggravation of his wrist injury, otherwise Peck's carrier would have been liable for the benefits. Thus, application of the "last injurious exposure" rule in this case would

produce an injury date of April 30, 1993, the Claimant's last day of work at Middlebury College. Although, as the Department indicated in McKearney, the carrier on the risk at the time when the Claimant can no longer work is frequently liable, this is not always true.

Second, McKearney is not relevant to this case, since it applies only to §662 issues. The parties in this case have agreed that Middlebury College is liable for the Claimant's benefits; therefore, no §662 issue exists. The sole issue is calculation of the average weekly wage under §650. The appropriate standard for determining the date of injury for §650 purposes is set forth in Hartman v. Ouellette Plumbing & Heating Corp., 146 Vt. 443 (1985). The Vermont Supreme Court has held that "'the date of injury' for purposes of giving notice and filing a claim pursuant to 21 V.S.A. §656 . . . is the point in time when an injury becomes reasonably discoverable and apparent." Id. at 447. We apply this same standard to the §650 inquiry in the present case. The Claimant's testimony establishes that his wrist injuries were "reasonably discoverable and apparent" during his employment at Middlebury College, and the opinions of Drs. Kniffin and Mogan corroborate this conclusion. Although the record does not indicate on what date the injuries were first discoverable, they were certainly so by April 30, 1993. Therefore, I conclude that the date of injury for purposes of the §650 wage calculation is April 30, 1993.

3. The claimant, having prevailed is entitled to his reasonable costs and to attorney's fees. 21 V.S.A. §678(a); Morrisseau v. Legac, 123 Vt. 70 (1962). Claimant submitted documentation of 30 hours of attorney time, he is therefore entitled to attorney fees in the amount of $1,050 (30 x $35.00/hour) pursuant to Rule 10.

ORDER

Therefore, based on the foregoing CONCLUSIONS and FINDINGS the Defendant or in the event of its default Transamerica Insurance Company is hereby ORDERED to

1. Pay the Claimant additional temporary total compensation and permanent partial compensation based on his wages at Middlebury College during the twelve weeks preceding April 30, 1993.

2. Attorneys fees in the amount of $1,050.

3. Pay the Claimant his costs.

DATED in Montpelier, Vermont this 13th day of March, 1995.

_____

Paul Harrington, Deputy Commissioner
as designee for Mary S. Hooper, Commissioner