

Clark v. U.S. Quarried Slate Products (April 21, 1995)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

DONALD CLARK)	State File No. G-7396
)	
V.)	By: David Blythe
)	Hearing Officer
U.S. QUARRIED SLATE PRODUCTS)	
)	For: Mary S. Hooper
)	Commissioner
)	
)	Opinion No. 8-95WC

FINDING OF FACT, CONCLUSIONS OF LAW & ORDER

This matter came on for final hearing on November 11, 1994 before David J. Blythe, Hearing Officer and designee of The Commissioner of Labor & Industry (Commissioner) . Claimant Donald Clark was present and was represented by Edward L. Winpenny, Esq. Defendant U.S. Quarried Slate Products and its workers compensation carrier Travelers Insurance Co. were represented by Stephen D. Ellis, Esq. Based upon evidence presented at the hearing, other evidence properly before the Commissioner and matters of which judicial notice may properly be taken, the Commissioner makes the following FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER:

I. ISSUE PRESENTED

- 1. Is Claimant's back condition the result of an injury arising out of and in the course of his employment on or about October 7, 1993, and therefore compensable?*
- 2. If the back condition in question is a compensable injury, is the proposed spinal fusion surgery reasonable and necessary?*

II. THE CLAIM

1. *Temporary total benefits under 21 V.S.A. § 642 from October 9, 1993 through the present and continuing;*
2. *Medical benefits under 21 V.S.A. § 646, including spinal fusion surgery;*
3. *Vocational Rehabilitation benefits under 21 V.S.A. § 641;*
4. *Permanent partial disability benefits under 21 V.S.A. § 648;*
5. *Attorneys' fees under 21 V.S.A. § 678.*

III. STIPULATIONS

1. *On or about 10/7/93, U.S. Quarried Slate Products (Employer) was an employer within the meaning of the Workers' Compensation Act, and The Travelers was its insurance carrier.*
2. *The medical experts from whom either party has submitted evidence are qualified to render expert medical opinions in this matter.*

IV. JUDICIAL NOTICE

The Commissioner takes judicial notice, under rule 7(h) of the existence and content of the following Workers Compensation forms previously submitted by the parties.

Form 1: First Report of Injury (10/12/93)

Form 6: Notice and Application for Hearing (1/25/94)

Form 10: Certificate of Dependency (4/14/94)

Form 25: Wage Statement (5/27/94)

Form 27: Notice of Discontinuance (4/15/94)

V. EXHIBITS

The parties submitted a Joint Exhibit 1, entitled "DONALD CLARK-MEDICAL RECORDS", which was admitted into evidence and made a part of the record.

VI. FINDINGS OF FACT

1. On October 7, 1993, Claimant was employed by Employer as a tile saw operator.

2. Claimant has an 11th grade education with no further technical training or education. He is able to read only with great difficulty. Since leaving school, Claimant has worked in various capacities in slate quarries, roofing construction, and as a farm hand, all of which have involved substantial manual labor.

3. The normal activities of Claimant's employment with Employer required that he pick up large pieces of slate, weighing between 25 and 100 lbs., turn, take several steps and then place the slate in the proper position on the tile saw for cutting. He would then cut the slate into square tile stock in two sizes; either 11 5/8" square or 40 cm square. He normally engaged in this type of activity for eight hours per day, five to six days per week.

4. Employer provided a protective back support brace for Claimant, which Claimant always wore while working and which he was wearing on the date of his injury.

5. Prior to his injury, Claimant had been employed by Employer for over two years.

6. In the three to four week period prior to October 7, 1993, Claimant experienced, during the course of his work, mild lower back pain, which he treated conservatively each night at home. Each morning he felt well enough to go to work. However, on October 7, 1993, while lifting a piece of slate, Claimant experienced a significantly more intense pain in his lower back, which also radiated down his left leg.

7. At such time, Claimant immediately advised his supervisor, and then advised the office secretary of the onset of the pain. The secretary then made an appointment for Claimant the following day with Dr. Michael Bell at Castleton Health Associates (hereinafter, "Castleton").

8. On October 8, 1993, Claimant was seen by Dr. Bell, who started Claimant on a Medrol dosepack and prescribed pain medication. Dr. Bell ordered a CAT scan of the lumbar spine, which was performed on October 12, 1993. The results of the CAT scan, interpreted by a Dr. R. Silva, showed a "Grade I

spondylolisthesis at L5-S1 secondary to bilateral spondylolysis."

9. On October 15, 1993, Claimant was again examined and treated at Castleton, presumably by Dr. Bell. At that time, the Castleton treatment notes state that Claimant was still experiencing lower back pain, and that Claimant stated that "The [left] leg sometimes feels like it's going to give out."

10. Claimant was then referred to Dr. Joseph H. Vargas, an orthopaedist at Mid-Vermont Orthopaedists, Inc. in Rutland, Vermont. Dr. Vargas reviewed the CAT scan, took and reviewed x-rays and clinically evaluated the Claimant.

11. In an updated treatment note (apparently referring to an initial examination of Claimant), Dr. Vargas found that the Claimant had symptomatic spondylitis. He prescribed a conservative course of treatment including physical therapy, an exercise program and a back brace, together with pain medication. In that note, Dr. Vargas also wrote that "There is no question, however, that he does have instability in his back and certainly a good reason for his pain."

12. In November and December 1993, Claimant completed a course of physical therapy as prescribed by Dr. Vargas. He was next examined and/or treated by Dr. Vargas on December 9, 1993. In his office notes of that date, Dr. Vargas noted that "patient has completed his ten treatments of physical therapy and really is not much better. He persists with low back pain that tends to radiate in his left leg and down to his left knee and occasionally radiates down to his left ankle." Dr. Vargas gave Claimant an injection of Deco Medrol. He also advised Claimant to continue wearing the back brace. Also in his office notes, Dr. Vargas summarized the description of employment activities related to him by Claimant.

13. Dr. Vargas' notes of that date also relate that Claimant "states that he never had back pain or problems prior to this episode. He's never seen a physician during his adult life for any back pain. When he was 12 years of age, he was seen by a physician and told he had a sway back and was overweight. He lost a great deal of weight and never had any other problems." The history related by Claimant to Dr. Vargas on December 9, 1993 was incorrect. Records of Robert M. Cross, M.D., dated August 8, 1983, state

that claimant was complaining of "right lower back pain that began yesterday while lifting a heavy piece of wood, while working at Hilltop Slate. Since that time, he has had discomfort in the right side of his back on moving." Furthermore, Dr. Cross' notes of August 8, 1983, reveal that claimant had a "previous history for back strain about six years ago," meaning possibly as early as 1977. However, it is not clear whether that involved Claimant's lower back.

14. In a letter to Claimant's attorney dated January 4, 1993, Dr. Vargas stated that he based his conclusion and diagnosis in part on the medical history related to him by Claimant. In view of the inaccurate history given to Dr. Vargas by Claimant, that limitation in the diagnostic opinion would be troubling if Dr. Vargas' diagnosis was not supported by other subsequent evidence. Dr. Vargas continued to treat Claimant, and there is no evidence which suggests that the diagnosis of Grade I spondylolisthesis with a superimposed work-related injury is incorrect or rendered less credible solely because of the inaccurate history provided by claimant.

15. Claimant's inability to accurately relate his previous medical history is not dispositive of whether his present condition is work-related or not. Claimant may have had previous lower back pain and treatment therefor, but there is no evidence that it was as severe or as persistent as the present condition. Further, there is considerable evidence that Claimant was essentially asymptomatic with regard to his lower back for a period of several years prior to the onset of the condition for which compensation is claimed.

16. Claimant is found to be a credible witness who testified, inter alia, that he was asymptomatic for lower back and leg pain prior to the onset of the current condition during the 3 or 4 weeks prior to October 7, 1993, at which time he experienced a significant increase in the intensity of pain symptoms while engaged in his normal work activities on behalf of Employer.

17. On January 20, 1994, Dr. Vargas found the Claimant still symptomatic. He prescribed a "Knight spinal brace", and stated, "He's now going on four months since his injury, I have a feeling that he may be a surgical candidate. We've asked him to continue with conservative treatment for another month and we will see him back at that time and recheck him then."

18. On February 15, 1994, Dr. Vargas recommended that Claimant undergo a

posterior spinal fusion, and on March 8, 1994, Claimant was evaluated (second opinion) by Dr. David J. Keller, also at Mid-Vermont Orthopaedists, Inc. Dr. Keller's opinion was stated as follows: "Certainly the patient has had good conservative treatment. He still is having pain. I tried to clearly explain to him that only he can tell how much pain he is having, but, if in spite of the exercise program, he is still having significant pain, it would appear that the appropriate treatment would be a lumbosacral fusion."

19. On April 5, 1994, the Claimant was evaluated by Dr. Kurht Wieneke for an independent examination on behalf of Employer. With respect to the causation issue, Dr. Wieneke states that, " Given the fact that he has a pre-existing spondylitis, and that he has performed heavy work all his life, I believe it was a question of time as to when his low back 'instability' became more symptomatic." Dr. Wieneke does not state that the Claimant's symptomatology did not derive from his heavy manual labor.

20. Dr. Wieneke recommended a conservative approach to treatment, noting that (a) claimant's poor conditioning, (b) heavy smoking and (c) a "large body of evidence suggesting that spine fusions . . . has [sic] a dismal track record in terms of returning people to the work force" all mitigate against spinal fusion surgery.

21. Dr. Wieneke's opinion is addressed by Dr. Vargas in his treatment notes of May 5, 1994. In that note, Dr. Vargas concludes emphatically that while spinal fusion (as with certain other treatment regimens) have a different success rate in populations involving work-related injuries, that the spinal fusion surgery is the appropriate treatment for Claimant in this case.

22. On May 5, 1994, Claimant underwent pre-operative procedures preparatory to spinal fusion surgery scheduled for May 18, 1994. However, on May 17, 1994, Claimant cancelled the surgery because Employer's compensation carrier refused to pay for the treatment and because of Claimant's own inability to pay for the surgery and related expenses.

23. By office note dated August 2, 1994, Dr. Vargas restates his opinion that although congenital, Claimant's spondylitis became symptomatic as a result of a lifting incident at work. Also, Dr. Vargas restates his recommendation for spinal fusion as follows: "In all respects I judge Mr. Clark to be a sincere, honest person. I do not feel he clever enough to

manipulate the system. I feel his pain is genuine and in the absence of improvement with conservative therapy spinal fusion is usually considered. Spinal fusion may not take away all of his pain and it is true that there certainly are the possibility of complications from the surgery but it should be offered to this man as the only solution for his problem".

24. Dr. Vargas is found to be better able to diagnose, evaluate and recommend treatment in this case than is Dr. Wieneke. Consistent with the factors set forth in Rule 14 (RESOLVING MEDICAL DISPUTES), Dr. Vargas is found to have gained special knowledge or insight into Claimant's condition as a direct result of his treatment of Claimant. This is strongly supported by the lengthy course of treatment which Claimant has undergone with Dr. Vargas.

25. It is further found that the recommended spinal fusion surgery may be reasonably anticipated, under the present circumstances as established by the evidence, to prove successful in maximizing Claimant's recovery and functioning.

26. To date, Claimant has consistently followed Dr. Vargas's advice and wants to have the spinal fusion performed. He has agreed to quit smoking (as required by Dr. Vargas) in the event that payment for the surgery is approved.

27. To date, Claimant's symptoms have not resolved, and he continues to experience debilitating lower back and radiating leg pain.

28. Since October 7, 1993, Claimant has been physically unable to return to work. He has also largely been unable to perform domestic chores, such as using a vacuum cleaner for an extended period of time, at a normal level of activity. His leisure activities prior to October 1993 included hunting and fishing on a frequent and regular basis. At the hearing, Claimant testified credibly that he is unable to engage in these activities at any level comparable to his activity prior to October 1993.

29. At the present time, Claimant continues to wear a back brace and takes pain medication three or four times per day, in accordance with his physician's instructions.

30. Claimant's injury arose out of and in the course of his employment.

31. The Claimant received temporary total disability payments in the amount

of \$6,165.00, representing a payment period from October 7, 1993 to April 16, 1994, which was paid to the Claimant in one payment on April 22, 1994, following an order of the Commissioner dated March 11, 1994.

32. Claimant, due in significant part to his inability, for financial reasons, to obtain reasonably necessary medical treatment (the spinal fusion) which is reasonably anticipated to be beneficial to Claimant, has not reached his maximum medical improvement.

33. Claimant has been totally disabled from engaging in employment suitable to his age, education and physical and vocational abilities since October 7, 1993, through and including the present.

CONCLUSIONS OF LAW

1. In workers' compensation cases, a claimant has the burden of establishing all facts essential to the rights asserted. McKane v. Capital Hill Quarry Co., 100 Vt. 45 (1926); Goodwin v. Fairbanks, Morse & Co., 123 Vt. 161 (1963). The claimant must establish, by sufficient competent evidence, the character and extent of the injury and disability as well as the causal connection between the injury and the employment. Egbert v. Book Press, 144 Vt. 367 (1984). An injury arises out of the employment when it occurs in the course of it and is the proximate result of it. Rae v. Green Mountain Boys Camp, 122 Vt. 437 (1961).

2. For a claimant to sustain his or her burden of proof, there must be created in the mind of the trier of fact something more than a possibility, suspicion, or surmise that the incidents complained of occurred and were the cause of the claimed injury, and the inference from the facts must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941)

3. Temporary disability is a "condition of reduced earning power that exists until the injured workman is as far restored as the permanent character of his injuries will permit . . . it is measured by the duration of the healing period . . . "Wroten v. Lamphere, 147 Vt. 606, 609 (1987). It is the only when maximum earning power has been restored or the recovery process has ended that the temporary aspects of the worker's compensation are

concluded. See Moody v. Humphrey, 127 Vt. 52, 57 (1968); Orvis v. Hutchins, 123 Vt. 18, 24 (1962); Sivret v. Knight, 118 Vt. 343 (1954).

4. When a claim is obscure and a lay person could have no well-grounded opinion as to its causation or duration, expert medical testimony is the sole ground for laying a foundation. Lapan v. Berno's, Inc., 137 Vt. 193 (1979).

5. Claimant has met his burden of establishing, by presenting credible testimony and competent expert medical evidence that

(a) He has sustained a compensable, work-related injury while in the employ of Employer;

(b) He has not yet reached a point of maximum medical improvement because of the inability, through no fault of Claimant, to obtain reasonable and necessary medical treatment - in this instance, the spinal fusion surgery and related treatment;

(c) The spinal fusion surgery is both reasonable and necessary, and Employer and Employer's carrier were without justification in refusing to pay for it.

6. Claimant is entitled to temporary total disability compensation beginning October 7, 1993 and continuing through the date of this Order and until it has been established, by competent expert medical evidence, that Claimant has reached his point of maximum medical improvement (MMI) or has returned to work. He has received temporary total disability compensation for the period October 7, 1993 through and including April 16, 1994. He is therefore entitled to a lump sum payment of temporary total disability compensation from April 17, 1994 to and including the date of this Order, and continuing on a weekly basis thereafter until MMI is achieved. Rule 19; 21 V.S.A. § 624.

7. Because Claimant has prevailed in his contested claim, he is entitled to recover of Employer his costs and reasonable attorneys fees under 21 V.S.A. § 678, subject to the limitations set forth in Rule 10(a). Claimant has timely submitted competent evidence of the amount and reasonableness of his attorney's fees. Claimant is therefore entitled to recover costs in the amount of \$203.50, Rule 10(c), and attorneys fees in the amount of \$2261.00,

Rule 10(a), computed as 64.6 hours compensable at the rate of \$35.00 per hour.

8. Employer is responsible for Claimant's reasonable and necessary medical and hospital expenses, including but not limited to the reasonable costs of the spinal fusion surgery, as those cost are determined by application of the Act and the Rules.

9. Claimant has preserved his claim for permanency benefits under 21 V.S.A.

§ 644 or § 641. Neither of these claims were adjudicated in the present proceeding, and are reserved to Claimant.

ORDER

1. Employer or its workers compensation carrier (hereinafter, "Employer") shall pay, in a lump sum, retroactive temporary total disability compensation from April 17, 1994 through and including the date said compensation is paid to Claimant;

2. Employer shall thereafter pay Claimant temporary total disability compensation until Claimant attains his maximum medical improvement, returns to work, or otherwise ceases to be eligible for temporary benefits;

3. Employer shall pay for reasonable and necessary medical and hospital expenses, including but no limited of the cost for the spinal fusion surgery and related treatments, and shall continue to provide medical and hospital benefits as required by 21 V.S.A. § 640;

4. Claimant shall recover of Employer his costs in the amount of \$203.50 and attorneys fees in the amount of \$2,261.00.

Dated at Montpelier, Vermont this _____ day of April, 1995.

*Mary S. Hooper
Commissioner*