

Baker v. Burlington Public Schools (May 23, 1995)

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

<i>Richard D. Baker</i>)	<i>File No. C-11208</i>
)	
)	<i>By: Sheldon A. Keitel</i>
)	<i>Hearing Officer</i>
<i>v.</i>)	
)	<i>For: Mary S. Hooper</i>
<i>Burlington Public Schools</i>)	<i>Commissioner</i>
)	
)	<i>Opinion #10-95WC</i>

Heard in Montpelier, Vermont on September 13, 1994
Recessed and continued until October 3, 1994
Record closed November 21, 1994

APPEARANCES

James S. Suskin, Esq. for the claimant
Glenn S. Morgan, Esq. for the defendant

ISSUES

- 1. Was claimant's average weekly wage computed correctly with respect to compensation already paid?*
- 2. Is claimant entitled to additional workers' compensation for a psychological condition related to injuries arising out of and in the course of employment with defendant?*

THE CLAIM

- 1. Temporary total disability compensation under 21 V.S.A. §642 from May 21, 1992 to the present and continuing.*

2. *Medical and hospital benefits under 21 V.S.A. §640.*
3. *Attorney's fees and costs under 21 V.S.A. §678(a).*

STIPULATIONS

1. *The claimant, Richard D. Baker, was employed by defendant, Burlington Public Schools of Burlington, Vermont, as a teacher on all relevant dates as hereafter specified.*
2. *The defendant was at all times relevant to this claim an employer within the meaning of the Workers' Compensation Act.*
3. *On November 7, 1989, the claimant slipped and fell at Burlington High School, twisting his left knee. The employer notified its workers' compensation carrier, Illinois National Insurance Company, and the claim was handled by American International Adjustment Company (now American International Group Claim Services, Inc.).*
4. *The claimant returned to work full-time about four weeks following the initial injury, but he developed back pain either as a complication of the knee injury or a latent injury from the fall itself and sought treatment for that problem as well. Claimant again became totally disabled and was placed back on temporary total disability compensation which he received continuously from December 1990 through May 20, 1992, at which time he was determined to be at end medical result with a 22.5% permanent disability of the spine. Claimant received benefit payments for 74.25 weeks corresponding to 22.5% permanent disability of the spine. Claimant does not dispute either the permanency rating or the date of EMR, but does dispute the computation of the compensation rate.*
5. *Claimant contends that at some point during the second period of disability he developed psychological problems which he believes also arose out of and in the course of employment and on which the present claim is based.*
6. *On October 14, 1993, claimant's attorney filed a Notice and Application for Hearing (Form 6).*

7. *The claimant is currently 52 years of age; claimant's current mailing address is 20 Latham Court, Burlington, Vermont.*

8. *Judicial notice may be taken of the following documents in the Department's claim file:*

*Form 1: Employer's First Report of Injury
Form 6: Notice and Application for Hearing
Forms 13: Affidavits as to Payment of Compensation
Form 21: Agreement for Temporary Total Disability Compensation
Form 22: Agreement for Permanent Partial Disability Compensation
Form 24: Agreement for Temporary Partial Disability Compensation
Form 25: Wage Statement
Forms 27: Dated 1/16/90, 7/3/91, 5/22/92 and 9/30/93*

9. *The following documents were offered into evidence without objection:*

Joint Exhibit (J.E.): Medical records (24 indexed tabs)

Claimant's Exhibit 1: Deposition transcript (Dr. Edwards)

Claimant's Exhibit 2: Deposition transcript (Dr. Gomez)

Claimant's Exhibit 3: Deposition transcript (Dr. King)

Defendant's Exhibit A: Deposition transcript (Dr. Borden)

10. *Defendant's Exhibit A includes five exhibits, four of which are included with Def. Exh. A and labelled Deposition Exhibits 1, 2, 3 and 4. Deposition Exhibit 5 referenced in the index of the deposition transcript (claimant's medical records reviewed by Dr. Borden) was not submitted as part of the present record to avoid duplication, but is to be considered by agreement of the parties the same as the Joint Exhibit.*

FINDINGS

1. *Stipulations 1 through 3 are true. Stipulation 4 is true as modified by Findings 14 and 18 below. Stipulations 5 through 7 and Stipulation 10 are true.*

2. *Judicial notice was taken of the documents listed in Stipulation 8. The documents referred to in Stipulation 9 were admitted into evidence.*

3. *The following document was admitted into evidence at the hearing:*

Defendant's Exhibit B: Letter dated March 9, 1988

4. Prior to obtaining his degree and completing his student teaching, claimant worked for New England Telephone for about seven years.

(Testimony of claimant.)

5. Claimant has been a teacher in the Burlington Public School system since approximately 1970. His initial teaching experience was in special education. Because of "philosophical problems" with the practice of "mainstreaming" (the integration of special needs individuals into regular classrooms), claimant transferred to a regular elementary classroom in 1972.

6. In the course of his career, claimant has held certifications in the areas of handicapped education, K-6 (elementary), social studies (secondary), industrial arts, trade & industry (electronics), vocational career guidance, and as a principal. (Testimony of claimant.)

7. In 1979, claimant became Coordinator of Vocational Special Needs for the Burlington Vocational Center (part of Burlington High School). He was responsible for establishing and developing a resource room for teachers at the Vocational Center. He then took a sabbatical and completed his Master's Degree in 1981.

8. Claimant held the title of "Coordinator" until the position was eliminated in 1991 pursuant to a reduction in force (RIF), although his duties in the years prior to that time were essentially those of a "resource room teacher." When the position was eliminated, there were three levels of supervisory personnel above claimant in the administrative hierarchy of the Vocational Center. (Testimony of claimant.)

9. Claimant's medical history dating back to 1973 includes chronic headaches, variously described as tension, tension-vascular, and migraine headaches, controlled by medication (or combinations of medications).

(J.E.,

1, 23). In 1981, claimant's headaches were deemed to be "stress related."

10. Medical records dated 1/13/87 indicate "Not happy with job. Finds work stressful to point that he is frustrated, irritable. Impacts on family life. In past Dr. Poser placed him on Meprobamate 200 mg TID which patient states

helped him." Meprobamate is a tranquilizer, which was again prescribed with the caution that learning stress coping strategies was preferable to the use of medications. (J.E., 1; Defendant's Exhibit A, p. 52.)

11. Following the 1987-1988 school year, claimant took a leave of absence from teaching for the following school year. Claimant gave as reasons for taking the leave of absence the need to "shake [himself] out" and plan for the next five to ten years; to spend more time with his family; and a "mental health factor" ("I really need to examine my goals and priorities at this time"). (Defendant's Exhibit B.)

12. Claimant spent the leave of absence in New Mexico at the vacation/retirement home which he and his wife had recently purchased. He traveled frequently between New Mexico and Vermont during the 1988-1989 school year because his wife (who also teaches) did not accompany him to New Mexico. (Testimony of claimant.)

13. Claimant returned to his Vermont physician regarding headaches upon return from the leave of absence; his medications were again adjusted. (J.E., 1, 9/19/89.) Claimant resumed his teaching duties at the start of the 1989-1990 school year. (Testimony of claimant.)

14. On November 7, 1989, claimant slipped and fell while at work (at Burlington High School), sustaining the knee injury referenced in Stipulations 3 and 4. The knee complaints resolved within a couple of weeks and the focus shifted entirely to claimant's back. Claimant missed about three weeks of work but returned to his teaching duties on a part-time basis as of Nov. 27, 1989. (J.E., 2; Forms 24 and 27 dated 1/16/90 and 1/17/90.)

15. Claimant underwent physical therapy and was followed by Dr. Talley, who noted he was "doing well and performing his full level of work" as of 2/15/90 (J.E., 2). Claimant's headaches were under control as of 3/16/90 (J.E., 1). He finished the school year without incident and again went to New Mexico for the summer, as he and his wife do every year. (Testimony of claimant.)

16. Claimant started the 1990-1991 school year in bandages as the result of burns from a gasoline explosion while working on an automobile purchased in New Mexico for resale in Vermont (J.E., 4). He has some permanent scars (but no disability or obvious disfigurement) resulting therefrom. (Testimony of claimant.)

17. Claimant did not seek medical attention again for back problems until Nov. 7, 1990 (with Dr. Graveline, whom he had never previously seen for his back). (J.E., 10.)

18. Claimant testified that, although he missed some time from work because of recurring back pain during the Fall of 1990, neither his physical condition nor the time he lost from teaching duties affected job performance, but that in January 1991, without prior notice that his superiors had concerns, he was instructed to vacate the building without so much as clearing his desk and to remain out of work until he was "100%" and given a "clean bill of health" by his doctors. (Testimony of claimant; according to documents filed by the insurer, claimant was totally disabled and received temporary total disability compensation continuously from December 11, 1990 through the date of end medical result (Form 13 date stamped 12/8/93.)

19. Claimant's position was eliminated in March 1991 (see Finding 5 above). Claimant felt victimized and betrayed. He believed that school officials were trying to get rid of him. (Testimony of claimant; J.E., 17.) Claimant testified that he desperately wanted to return to work; that his entire well-being, self-esteem and sense of self-worth were pulled out from under him by the actions of the school district; and that it was only from January 1991 and after that he became depressed and developed the emotional problems and other debilitating symptoms which have disabled him ever since.

20. Claimant testified that headaches increased in frequency and severity in the Spring of 1991 as part of his deteriorating health which led eventually to total disability in September 1992. Medical records do not include references to complaints of, or treatment for, headaches between March 1990 and

November 1991. 21. Claimant embarked in December 1990 and January 1991 on a long string of referrals and an extensive course of diagnostic tests over the 18 month period of his disability including x-rays, CT scan and MRI; injections; chiropractic; medications; and pain management counseling, none of which resulted in objective physical findings or permanent relief. (J.E., 11 thru 14.)

22. On 9/19/91, Dr. Talley noted claimant's "increased alcohol intake" and a level of depression which she felt to be interfering with claimant's progress. (J.E., 2.) Claimant was "referred for evaluation of psychosocial variables associated with his presentation of chronic pain" on 9/27/91. (J.E., 6). The "clinical impression" of his therapists at the Spine Institute of New England (SPINE) was carried through end medical result in May 1992 and his to return to work: somatoform pain disorder.

23. Claimant's treating physician in the Fall of 1991 and an independent medical examiner both found that claimant was physically capable of returning to work at that time. (J.E., 6, 15.) School officials objected for reasons not entirely clear on this record, but at least in part because of issues involving claimant's medications. (J. E., 15.) Medical records substantiate that his providers' longstanding concerns about habit-forming medications became paramount during the Fall of 1991. (J.E., 6; see also Finding 9 above.)

24. Dr. Talley surmised in January 1992 that "other personnel issues at hand" were a complicating factor in claimant's remaining out of work. (J.E., 2). Claimant's testimony at the formal hearing that his suspension from teaching duties in January 1991 was, in his mind, wholly unwarranted and unexpected is inconsistent with other evidence (J.E., 6, Oct. 17, 1991; Occupational Therapist noted that he "thinks it was precipitated by his missing an early morning staff meeting"). Dr. King's notes of 3/23/92 describe condition as a "narcissistic wound" and document claimant's desire not to return to work for this employer. (J.E., 17.)

25. The insurer assigned a rehabilitation consultant in December 1991 to facilitate claimant's return to gainful employment; her reports through April 1992 (J.E. 17) and other records (J.E. 22) document continuing tensions between claimant and his employer. Claimant viewed one position offered to him by school officials (library aide) as a personal insult and an affront to his professional abilities. (Testimony of claimant; J.E., 2, 4/16/92.)

26. *With the assistance of legal counsel, claimant secured a contract for the 1992- 1993 school year in a special education position acceptable to him.*

(Testimony of claimant; J.E., 22). He again spent the summer of 1992 in New Mexico and, except for one remaining, potentially explosive issue between claimant and his employer, everything seemed to be on track for claimant's return to work in September 1992.

27. *Claimant knew as early as March 1992 that there was a question about whether he had a sufficient number of continuing education credits for renewal of a needed endorsement (recertification) to his teaching license. (J.E., 22.) Claimant admits that it was his individual responsibility to meet continuing education requirements, but he believed that he had done so and he disagreed with a peer review board's determination that not all continuing education credits earned by claimant were acceptable for recertification. Claimant was again notified by employer during the summer of 1992 that he was short of credits; claimant began the 1992-1993 school year still at odds with his employer about his endorsement and was given until October 19, 1992 to obtain the needed credits. (Testimony of claimant; J.E., 22.)*

28. *Claimant's rehabilitation consultant reported that claimant left his teaching post on September 21, 1992 following a meeting regarding the licensing requirement. (J.E., 22.)*

29. *Claimant testified that he never fully recovered from the emotional blow of being out of work, the uncertainty surrounding his employment status, and what he views as unfair treatment by his employer. He turned to alcohol to "fortify" himself before school and to "self-medicate" after school and in the evening; claimant acknowledged that alcohol consumption in combination with the medication he was taking had an adverse effect on his teaching in September of 1992. (Testimony of claimant.)*

30. *Claimant testified that his fragile emotional state and apprehension about returning to teaching in September 1992 culminated in an incident in which he broke down in tears in his supervisor's office; for fear that it would*

happen in front of his students, claimant again left work, never to return. He adamantly denied a crying episode in the classroom or in front of students, contrary to the understanding of two of his treating physicians (Claimant's Exhibit 1, page 32; Claimant's Exhibit 3, pages 27-28) and Dr. Borden (Defendant's Exhibit A, page 54).

31. There are no medical records between June of 1992 and the start of the 1992-1993 school year to substantiate claimant's allegation of continuing medical or psychological problems. Claimant did not seek professional help again until September 23, 1992. (J.E., 17.)

32. Claimant left the care of the Clinical Health Psychology Service of SPINE on June 4, 1992 with instructions to follow up in five weeks or as needed. He did not return again until 9/25/92, at which time his depression was found to be "beyond the framework of pain management"; it was recommended that claimant "work with a psychiatrist/psychologist in this regard." (J.E., 7.) Dr. King advised claimant on 10/16/92 to return to work because he would not support a claim of continuing disability. (J.E, 17.) Claimant stopped seeing Dr. King, remained out of work, and appealed the decision regarding his endorsement to the Vermont Department of Education. (Testimony of claimant.)

33. Claimant did not go back to SPINE to follow-up on their September 1992 recommendation that he seek psychological help until 3/5/93. His counselor's assessment of the situation was that "underneath the anxiety, agitation and depression, is a lot of anger about what he perceives has happened to him over the last year or two. It will be important to help him identify some of the cognitive distortions that he may not be aware of." (J.E., 3.) Claimant began therapy with Dr. Edwards in April of 1993 and terminated his treatment at SPINE after six sessions. (J.E., 3 & 24.)

34. Claimant's appeal of the school district's decision on the certification issue was denied. Claimant still believes he was wronged, but he decided not to pursue the appeal any further after being found eligible for disability benefits under both Social Security (in June 1993, effective as of

February 1992) and the Teachers' Retirement System. (Testimony of claimant; J.E., 21.)

35. The diagnosis of defendant's independent psychiatric examiner was the same as that of claimant's therapist at SPINE (somatoform pain disorder):

A somatoform disorder is a modern current term for what we used to call conversion reaction or emotional overlay. It means the conversion of an emotional state into a physical symptom. And in this case it's the conversion of the emotional pain of depression -- that's what depression is -- into physical pain.

And he's experiencing it in two forms. In the beginning he experiences it in his headaches. His headaches in my opinion are a symptom of the beginning of his depression. Okay. Then it got focused on his back, and the back problems and the pain he experiences is a function of the underlying emotional pain of the depression, which he experiences as physical pain.

[...H]e says this both directly and indirectly. Directly he says I don't want to see a psychiatrist because I'm too ashamed of my feelings. It's okay if I go to the Spine Institute. If it's put as a back problem, that's okay. But I don't want this to be an emotional problem He really is experiencing depression as physical pain.

Defendant's Exhibit A, pp. 34-35.

36. Claimant's average weekly wage in 1989 was determined to be \$736.02, two-thirds of which was paid to claimant as weekly temporary total disability compensation. (Form 21.) The computation was based on claimant's salary of \$38,273 per year (as reported by employer on the Form 25) divided by 52; however, that salary represents approximately 180 teaching days for a regular school year (September through June) exclusive of summer months. Claimant and other employees had the option of receiving the balance of the contract amount in a lump sum on July 1 of each year rather than continuing periodic payments over the summer and received additional pay (pro-rated daily based on contract

amount) for teaching during the summer session. (Testimony of claimant.)

CONCLUSIONS OF LAW

1. Entitlement to compensation arises if a worker receives a personal injury by accident arising out of and in the course of employment. 21 V.S.A. §618. Ordinarily, if an injury occurs during the course of employment, it also arises out of it unless the circumstances are so attenuated from the condition of employment that the cause of the injury cannot reasonably be related to the employment; as there are no hard and fast rules to determine when an injury arises out of employment, the outcome of each case is determined only after taking all the facts and circumstances into account. *Shaw v. Dutton Berry Farm*, 160 Vt. 594 (1993).

2. A workers' compensation claimant has the burden of showing that an injury comes within the scope of this chapter and of showing the causal connection between the accident causing the injury and the employment. *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979). The employer's election not to call witnesses or to present its side of the story other than what can be inferred from the written record is mildly troublesome and made this decision more difficult than it otherwise might have been, but claimant must still carry the ultimate burden of persuasion if he is to prevail.

a. Claimant's testimony about what caused his disabling condition, described by one treating psychiatrist as a "narcissistic wound" (Finding 23), filtered through what another therapist termed claimant's "cognitive distortions" (Finding 33), is largely self-impeaching on grounds of competency and its self-serving nature. The claimant is not a malicious liar, however; he is an intelligent, sensitive and articulate individual. The difficulty in reaching a decision in this case was to a great extent a function of how thoroughly convinced claimant is, and how compellingly he describes himself, as a deserving, sympathetic and helpless victim.

b. Inconsistencies in his testimony (Findings 19, 24) and discrepancies between his testimony and other evidence (Findings 20 and 24; Findings 28 thru 31) cast doubt on claimant's credibility. Claimant's testimony, and his demeanor while testifying, regarding alcohol use was an exercise in

rationalization and denial (has never "abused" alcohol but admits drinking at times "to excess"; can easily stop drinking but does not recognize that he has difficulty controlling the urge to start; the minimal extent of problem acknowledged by claimant is inconsistent with number of references to alcohol in the medical records).

c. There is a common theme in all medical opinions in evidence: claimant's passivity, denial and avoidance strategies in the absence of effective coping skills). Dr. Edwards did not begin treatment until April of 1993 (Finding 32); his retrospective involvement in claimant's care therefore does not situate him significantly better than defendant's expert in rendering an opinion. Treatment by Dr. Gomez was limited primarily to headaches; his records are inconclusive at best as to whether they were causally related to claimant's employment or pre-existing and coincidental. (Findings 9, 10 and 20.) Dr. King acknowledged that he and claimant never did develop a satisfactory patient-physician relationship. (Claimant's Exhibit 3, page 25.)

d. Claimant downplayed the effects of family and other personal issues on his mental state, but his testimony and the written record provide ample evidence of numerous pre-existing and continuing non-work related psychological issues in addition to the alleged job-related stresses (e.g., Findings 11 and 22). Claimant also attempted to discredit defendant's expert with factual discrepancies reported by him (e.g., date of death of claimant's brother), but other challenges to Dr. Borden's understanding of claimant's medical history are in fact corroborated by the records of other physicians (Finding 30). On balance, the foundation for Dr. Borden's opinion was sufficiently and convincingly in accord with the non-medical evidence to be adopted as a legal conclusion based on competent and credible medical opinion:

The psychiatric diagnosis is dysthymia, chronic depression, with a somatoform pain disorder.

[. . . F]indings indicate the depressive condition predates the back injury and the non-work related issues have compounded the depressive condition. His work situation is neither the source of his depression nor is it a contributing factor. Rather, the findings indicate the depression has interfered in his ability to work as well as impaired his relationships in the workplace. The work situation appears to be a result of his depression, rather than the reverse.

[. . . C]onsiderable complex emotional problems have become displaced to the work situation as a defensive distraction from the real source of his emotional pain.

(Defendant's Exhibit A, Deposition Exhibit 1.)

3. *"When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct." 1 Larson, The Law Of Workmen's Compensation, §13.00. The lack of documentation of alleged continuing problems (physical or psychological) during the period between June of 1992 until after he quit work in September, followed by Dr. King's refusal in October to support a continuing disability claim, make it impossible to conclude that:*

(a) claimant's present psychological disability flowed as a natural consequence of the 1989 knee/back injury or events preceding his return to work in September of 1992,

or that

(b) absence from work in September 1992 leading to eventual loss of employment can be linked to anything other than his intentional removal of himself from the work place and refusal to comply with recertification requirements.

4. *Mental injuries are compensable only when caused by actual conditions at work; a psychiatric disability cannot be compensable without evidence that the job related stress complained of actually existed. The inquiry does not end there, however; the claimant must also show that these real stresses are of a significantly greater dimension than the daily stresses encountered by all employees. Wilson v. Quechee Lakes, Commissioner's Opinion 9-87WC (November 4, 1987); Mazut v. General Electric Co., Commissioner's Opinion 3-89 (October 26, 1990). This record does not reveal the whole truth of the circumstances*

surrounding claimant's departures from the workplace in either January of 1991 or September of 1992; the picture is not only incomplete but its outlines are blurred. Giving claimant the benefit of all doubt, the stresses, real or perceived, imposed as conditions of employment and of which he was the victim appear to have been resolved with the signing of the teaching contract for the 1992-1993 school year and claimant's return to work at that time; to the extent they were not, legal remedies other than workers' compensation exist. The unanswered charges regarding employer's behavior suggest but fall short of actual proof that employer's conduct was both sufficiently out of the ordinary and the cause in fact of a disabling mental condition to entitle the claimant to workers' compensation.

5. *"The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings...." 2 Larson, §60.11(f). The calculation of claimant's compensation rate by the insurer (Finding 36), and the compensation paid as a result, were a fair approximation of his future earning capacity, an approximation that accorded most consistently with the manner in which claimant in fact received pay from the employer for the nine month contract over the full 52 week calendar year. The argument that compensation should have been based on accrued earnings for the contract year is tenable only if claimant were to agree to a corresponding waiver of compensation during the summer months, just as he could have foregone regular payments of salary during the summer by opting for larger periodic payments in the course of the nine month school year. Claimant's argument that he could have worked over the summer and thereby augmented his yearly income (thereby increasing the amount of actual wages on which the computation of workers' compensation was based) is unavailing in the absence of evidence of any such income in the years preceding the period of claimant's disability herein. (Claimant testified that he did in fact restore for resale autos which he drove back from New Mexico during the period of his "disability" (see Finding 16) which only undercuts the claim that he continued to be disabled from any type of gainful employment for purposes of workers' compensation and*

underscores the somewhat duplicitous have- my-cake-and-eat-it-too character of this claim.)

ORDER

Based on the findings and conclusions above, the claim for additional temporary total disability compensation is DENIED. The claim for additional permanent partial disability compensation based on a recomputation of claimant's average weekly wage is DENIED. Claims for medical benefits pursuant to treatment after September 21, 1992 are DENIED. As claimant has not prevailed on any claims, attorney's fees are also DENIED.

DATED at Montpelier, Vermont this _____ day of May, 1995.

*Mary S. Hooper
Commissioner*