Drown v. Cabot Farmers Coop. Creamery (April 26, 1995)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRIES

David Drown	*)*	*File #: B-22249*
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	*For: Mary S. Hooper*
Cabot Farmers Cooperative	*)*	*Commissioner*
Creamery	*)*	
	)	*Opinion # 13-95WC*

Hearing held at Montpelier, Vermont, on March 14, 1995.

APPEARANCES

Michael R. Loignon, Esq., for the claimant
Thomas P. Simon, Esq., for the defendant

THE CLAIM

1. Temporary total disability compensation pursuant to 21 V.S.A. §642 from
August 20 to August 25, 1993, and from November 1 to November 5, 1993.

2. Medical benefits pursuant to 21 V.S.A. §640 in the amount of $571.24.

3. Attorney's fees and costs pursuant to 21 V.S.A. §678(a).

ISSUE

Has the claimant suffered a compensable event with two episodes of symptoms
suffered since the award of permanent partial disability benefits arising out of a work-related injury on March 12, 1989?

STIPULATIONS

1. The parties by and through counsel stipulate to the admission of the following medical records and documents:

a. Medical records of Thomas Turek, D.C., dated 8/28/90, 8/29/90, 8/31/90, 9/4/90, 9/7/90, 8/18/93, 8/20/93, 8/25/93, 9/1/93, 11/1/93, 11/3/93, 11/5/93, and 12/6/93. Dr. Turek's letter to Michael Loignon dated December 15, 1993. Mr. Drown's medical bills from Dr. Turek for 8/18/93, 8/20/93, 8/25/93, 9/1/93, 11/1/93, 11/3/93, 11/5/93, and 12/6/93.

b. Medical records from the Hardwick Health Center dated: 3/15/89, 3/21/89, 3/27/89, 4/10/89, 4/25/89, 6/2/89, 8/2/89, 9/5/90 and 8/18/93. Brendan Buckley, M.D.'s letters to Jane Weekes dated 2/1/93 and Michael Loignon dated March 25, 1994. Hardwick Health Center bill dated 8/18/93.

c. Copley Hospital PT report and notes dated 8/19/93 and bill for 8/19/93.

d. Brook's Pharmacy prescriptions for the following dates: 2/24/92, 9/5/92, 11/9/92, 3/13/93, 6/7/93 and 10/30/93.

2. At hearing, the attorneys also stipulated to the qualifications of Dr. Thomas Turek, D.C., as an expert.

EXHIBITS

1. Joint Exhibit #1--The items listed in stipulation #1(a)-(c).

2. Joint Exhibit #2--The items listed in stipulation #1(d).

3. Joint Exhibit #3--Report of consultative examination, dated February 7, 1990, from Dr. Thomas Turek.

4. Joint Exhibit #4--Curriculum Vitae of W. Thomas Turek, D.C.

5. Joint Exhibit #5--Medical record, 1/9/90, of Dr. Rowland G. Hazard.

6. Claimant's Exhibit #1--Fee Agreement between David Drown and Michael Loignon.

FINDINGS

1. The stipulations set forth above are true and the exhibits listed above are admitted into evidence.

2. Notice is taken of the following forms filed with the Department of Labor and Industry with regard to this claim:

a. Form #1.
b. Form #6, dated 1/26/94.
c. Form #15, dated 8/16/91.
d. Form #10.
e. Form #21.
f. Form #22.
g. Form #25.
h. Form #27 (2), dated 1/17/90 and 1/19/90.
i. Form #28.

3. The claimant, while an employee of Cabot Farmers Coop Creamery, on March 12, 1989, suffered a compensable injury.

4. The claimant reached a medical end result on January 20, 1990, and received a permanency award for 58.1 weeks for loss of function of 15% of the spine and 4% of the lower extremity.

5. At the time of his end result, the claimant was not symptom free but was able to manage his pain in such a way that he could perform many of his daily activities. He testified that his work at the Spine Center was specifically aimed at allowing him to return to full use of his back, without limitation, but with the use of pain management techniques. This testimony is credible. However, Dr. Turek's evaluation limited the claimant to lifting no more than thirty pounds.

6. In August 1990, the claimant was reaching under the vanity in his bathroom for a towel after washing his face when he experienced a debilitating pain in his back, in the same area that had been injured in his original, work-related injury. He thereafter sought medical treatment from Dr. Turek, his treating chiropractor, and Dr. Brendan Buckley, his family physician. Both doctors determined that this was a recurrence of his original injury, within the meaning of the Workers' Compensation Act. He missed no work because of this incident, and it appears that all medical

bills were paid by the employer's workers' compensation insurance carrier.

7. After the 1990 recurrence, the claimant continued to fill his prescription for ibuprofen, given by Dr. Buckley to assist in pain management. There is evidence that he refilled the prescription at intervals between two and six months from the beginning of 1992 until the August, 1993, incident.

8. On August 14, 1993, the claimant picked up a box containing kindling. After initially stating that the box weighed approximately twenty pounds, he added that it could have been as much as twenty five pounds but was not more than thirty pounds. At that time, he suffered increased pain in his back in the same area as the original injury, and of an intensity sufficiently high as to require further attention from Dr. Turek. As a result of this injury, the claimant testified that he did not work for the period from August 20 to August 25, 1993.

9. Thereafter, in November of 1993, the claimant again began to experience uncontrollable pain in his back. His medication was no longer effective, and so he returned to Dr. Turek for further assistance and treatment. Dr. Turek saw him three times and then concluded that the claimant was recovered from his acute recurrence.

10. As a result of the November difficulty, the claimant stayed out of work for one week, although there was no contemporaneous doctor's order to confirm the necessity for the lost time. However, Dr. Turek testified that it was his opinion that the missed work was necessary. This testimony is credible.

11. Dr. Turek was of the opinion that both the August and the November problems were the result of the original work injury, basing his opinion on the similarity of symptoms, both subjective and objective, and the continuity of the claimant's symptoms from the date of the original injury to the incident in August.

CONCLUSIONS

1. In workers' compensation claims, the claimant has the burden of proving by credible evidence all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse & Co., 123 Vt. 161(1963). The claimant must establish by sufficient competent evidence the causal connection between the injury and

the damages claimed.

2. Where the causal connection between an accident and an injury is obscure, and a lay person would have no well grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's, Inc., 137 Vt. 393 (1979). There must be created in the trier of fact something more than a mere possibility, suspicion or surmise that the incident complained of was the cause of the injury, and the inference from the facts proved must be at least the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).

3. This is a close case. While the claimant's symptoms never resolved completely, and his use of pain management techniques is unquestioned, the issue is simply whether the lifting of a twenty to thirty pound box of kindling constitutes an aggravation or a recurrence, as the department has defined those terms by regulation and case law.

4. In prior decisions, the department has ruled that picking up a bag of groceries does not cause an aggravation (see, e.g., Verchereau v. Meals On Wheels, No. 20- 88WC) while picking up a fifty pound flower box does (see, e.g., Quilliam v. Deringer, No. 52-94WC).

5. Notwithstanding the claims of the defendant, the three year time period between the two August incidents is not so long as to attenuate completely the nexus between the original compensable injury and the new symptoms. The fact that the claimant continued to fill his prescription for ibuprofen indicates that he was self treating, with the apparent approval of his prescribing physician, for the compensable injuries he suffered.

6. Nonetheless, I find that the claimant did not suffer a compensable incident on August 14, 1993. There is no question that, if the claimant had been at work at CCV and had lifted up a box of paper of a comparable weight with similar symptoms, I would have found that there had been an aggravation and the second employer would have been liable. I can find no basis for concluding that the result should be different merely because this decision results in a loss of coverage for the claimant. Where, as here, the claimant has been stable with regard to his symptoms for a period of three years, he has the burden of producing medical evidence that not only confirms the connection with the original injury but also establishes the lack of a causal connection with any intervening event. The claimant has been compensated for his permanent injury, including the possibility that the first injury might

predispose him to further damage at the same site. The fact that a new injury has occurred does not make it compensable. See, e.g., Pellerin v. Hauenstein, Opinion #6-92WC (1992), and Jaquish v. Bechtel Construction Co.,Opinion #30-92WC (1992). See, also, Larson, 1 The Law of Workman's Compensation, §§13.10-13.14. ("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.")

7. There is no evidence with regard to the November incident from which I can determine that the symptoms experienced then by the claimant were a result of his original injury rather than the August aggravation. Accordingly, I find that the claim for compensation for the November incident is unsupported. The claimant has the burden of proof, and has failed to meet it.

ORDER:

Based on the foregoing findings and conclusions, claimant's claims for workers' compensation disability and medical benefits and attorney's fees and costs are denied.

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

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Mary S. Hooper
Commissioner