Robtoy v. Craig Armstrong, Inc. (April 5, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Patrick Robtoy	*)*	*File #: G-5690*
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	*For: Mary S. Hooper*
Craig Armstrong, Inc.	*)*	*Commissioner*
	)	
	)	*Opinion #: 17-96WC*

Hearing held at Montpelier, Vermont, on February 22, 1996, and March 14, 1996.
Record closed on March 28, 1996.

APPEARANCES

Martin Maley, Esq., for the claimant
John W. Valente, Esq., for the defendant

ISSUE

Whether the claimant suffered a compensable injury on September 14, 1993,
while in the employ of Craig Armstrong, Inc.

THE CLAIM

1. Temporary total disability compensation pursuant to 21 V.S.A. §642 from
September 15, 1993, to the present.

2. Permanent partial disability compensation pursuant to 21 V.S.A. §648 to be determined.

3. Medical and hospital benefits pursuant to 21 V.S.A. §640.

4. Attorneys fees and costs pursuant to 21 V.S.A. §678(a).

STIPULATIONS

1. On September 14, 1993, the claimant was an employee within the meaning
of the Workers Compensation Act.

2. On September 14, 1993, Craig Armstrong Construction was an employer within the meaning of the Workers Compensation Act.

3. The medical treatment received by the claimant since September 14, 1993,
is reasonable and necessary, and the bills for those treatments are reasonable.

EXHIBITS

Joint Exhibit 1 Medical records
Joint Exhibit 2 Handwritten time sheet
Joint Exhibit 3 Telephone record for Murray Robtoy
Defendant's Exhibit A Copy of two checks from defendant to claimant

PROCEDURAL NOTE

The hearing commenced on February 22, 1996, with the testimony of the claimant's brother, Murray Robtoy. Thereafter, the claimant began to testify. However, after a period of time, it became clear to claimant's counsel that claimant's responses to questions were not typical nor was claimant's behavior normal. After a brief recess, claimant's attorney notified the hearing officer and opposing counsel that the claimant was taking certain prescribed medication for his injury that inhibited his ability to think clearly and to respond properly to the questions being asked. After discussion of the options available to the parties, the testimony of the claimant given on that day was stricken, and the matter was
continued to March 14, 1996. The claimant, on doctor's advice, did not take the medication for three days prior to March 14, and appeared to be free of the influence of the medication at the time of the second hearing. Although uncomfortable, the claimant managed to testify appropriately on March 14.

FINDINGS OF FACT

1. The claimant is a 32 year old single male, with a seventh grade education and minimal ability to read and write. He is a recovering alcoholic, and virtually all of his work experience has been at heavy labor. He has worked as a mason tender for almost fifteen years, a job that entails lifting and carrying material for masons, setting up and stocking staging, mixing mortar, and cleaning up job sites, among other duties.

2. The nature of the trade of mason tender is that it is job specific. When construction is being performed, the claimant would go to the site and

try to get work. Over the years the claimant has worked for between eight and fourteen contractors at a number of different construction sites.

3. In the spring of 1993, the claimant was working on a site for Ben & Jerry's, and was laid off after the construction was complete. He went looking for work, and in the latter part of May went to New York, as he had heard that there was construction work available. In Plattsburg, he encountered an old employer named Frank Gaboury, who was working for Champlain Masonry, building a store for Sam's Place. The claimant was hired,
and worked until the Sam's Place was complete. He was told to return in a few weeks for more work on a new Grand Union store.

4. The claimant returned, and was rehired for the job. After he had been working several weeks, Mr. Gaboury asked him and the other tenders to come in
on a Saturday to help clean up the area for a site inspection scheduled for the following Monday. Only the claimant and one other worker appeared on Saturday morning. Mr. Gaboury was not pleased at the lack of attendance.

5. Mr. Gaboury was attempting to move a large cement mixer from the front
of the building to the back. He pried it free and placed it on one of the arms of a forklift. Because of its awkward shape, it was counterweighted, and he ordered the claimant to stand on the other fork to balance the mixer. The claimant did as ordered, and they proceeded at an apparently excessive rate of speed over uneven ground. The mixer started to tip, and the claimant
was half- thrown and he half-jumped off of the forklift in an attempt to avoid an injury. He landed on his feet, and felt immediate pain in his back.

6. The co-worker noted the claimant's pain and went to assist Mr. Gaboury. The claimant attempted to walk off the injury, and continued to work for another two hours or so, trying to do light work and protect his back.

7. The claimant's back continued to hurt him over the rest of the weekend. He self-treated with Advil and hot baths. He returned to work on Monday, and
was fired by Mr. Gaboury. The claimant believed he was fired because his boss knew of the injury and did not want to be responsible for it.

8. The claimant took it easy for a few weeks, and his back got somewhat better. Because he needed the money, he started to look for work again in the early part of September. He was not free of symptoms from the injury, but felt that he could work with care.

9. The claimant approached Craig Armstrong at his work site at a water treatment plant to see if there was work available for a mason tender. Mr. Armstrong spoke with the claimant for about twenty minutes to half an hour, and then hired him. Mr. Armstrong spoke with the claimant generally about safety issues, and inquired whether the claimant would have any difficulty doing the job. The claimant denied any problem.

10. The claimant started work for the defendant on September 7, 1993. He was performing his work satisfactorily, and even worked some overtime over the weekend. Because of the uneven terrain around the building site, the lifting of the blocks was all performed manually, with no assistance as from a forklift.

11. On Tuesday, September 14, the claimant testified that he reinjured his back. He indicated that this occurred as he lifted a block to about chest height to pass it on to another worker on the scaffold. He said that the pain he experienced was the worst pain yet, and the pain went down into his legs. However, the pain was in the same area as that injured at Champlain Masonry, and was not in any qualitative way different. He did not tell anyone that he had hurt himself, but he did not lift anymore blocks that day. He indicated that the incident occurred fairly late in the day.

12. The following morning, the claimant was seized up and could not get out of bed. He stayed around the house all day, and went to the doctor on the following day. At the hospital, the claimant made no reference to an injury at the defendant, and instead reported that he had had an injury two weeks earlier. The notes indicate that the reference was to the forklift injury at Champlain Masonry. The claimant testified that he did not have a phone, and could not notify his employer that he would not be at work on those two days.

13. After going to the hospital on September 16, the claimant spoke with his brother Murray Robtoy. Murray testified by telephone at the first hearing. He indicated that he tended to look out for his younger borther. He stated that, after the claimant told him about the injury, he called the employer and left a message on the answering machine, leaving his phone number for the employer to call. He confirmed that the claimant did not have a phone.

14. The claimant himself never reported the injury to Craig Armstrong, and never returned to work. He treated with a number of care providers, and is currently being followed by Dr. Rowland G. Hazard at the Spine Institute.

15. The claimant's back problems currently are seen to be mechanical, consistent with degenerative changes in the spine, including a bulging of the

rim of the disc at L5-S1. He also has limitations in his range of motion and trunk flexion. There is no surgically correctable lesion. The degenerative changes he has experienced are not uncommon in people who have performed heavy labor over a number of years.

16. Dr. Hazard testified that the claimant's injury at the defendant, by history, was more probably the cause of his current problems than the injury at Champlain Masonry. Specifically, he considered it significant that the claimant did not treat with any physician between the two incidents and that he was able to work for a period of time before the injury at the defendant. On the other hand, he also testified that the claimant was a difficult historian, and it was hard to establish exactly how disabling the claimant's condition actually is. Finally, he stated that it would be reasonable to pursue intensive rehabilitation if the claimant wished to, but that it was important for the claimant to have firm goals.

17. There was further contested evidence with regard to the manner of the claimant's payment. The claimant received his first check directly from Mr. Armstrong while at work. The second check was mailed to the claimant by Mr. Armstrong approximately ten days after the claimant last worked for him. On the check, Mr. Armstrong had written in the words left my employ under his own accord. The claimant denied seeing the words before he cashed the check.

18. Mr. Armstrong testified that he received a telephone message on his machine from an unidentified individual who indicated that Pat would not be coming to work, and leaving a telephone number. He testified that he tried to call the number a few times, and never received an answer. He also said that he had two men named Pat working for him at that time, but he assumed that the message was about the claimant. He indicated that he was afraid that the claimant would make a claim for unemployment, and put the language on the check to protect against such a claim. He stated that, when he wrote the words, he was unaware that the claimant was alleging that he had been hurt while in his employ.

19. A number of Mr. Armstrong's other employees testified to the lack of knowledge of the claimant's injury. Specifically, they all confirmed the claimant's testimony that he did not cry out or otherwise indicate that he was injured, and that he never stopped doing the work to which he was assigned. This testimony was of limited probative value, especially in light

of the decision reached below.

20. The claimant has produced evidence of his contingency agreement with his attorney for fees in the amount of 25% of the amount recovered and costs in the amount of $1,07810. Subject to the regulatory limit of attorney's fees to 20% of the amount recovered, these amounts are reasonable.

CONCLUSIONS

1. In workers compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse Co., 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. Egbert v. The Book Press, 144 Vt. 367 (1984).

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 mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).

3. The question presented by the evidence is whether the claimant's current symptoms were caused by an incident at the defendant, or were a result of the prior injury at Champlain Masonry, in other words, was this an aggravation or a recurrence. We have defined an aggravation as an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events, while we have defined a recurrence as the return of symptoms following a temporary remission. See Workers Compensation and Occupational Disease Rules, Rule 2(i) and (j).

4. The area of aggravation/recurrence has been frequently addressed in decisions of this Department, and the factors to be considered have been discussed as frequently. Among those factors are whether there has been a successful return to work, whether there has been active treatment of the

injury prior to the second injury, whether the two injuries are in proximity in time, whether the claimant has reached an end medical result for the first injury prior to the second injury, and whether there was a specific new injury as opposed to a gradual worsening of the claimant's condition. See, e.g., Jaquish v. Bechtel Construction Company, Opinion No. 30- 92WC, and the myriad cases referring to it.

5. In this case, the two injuries were very close in time, the claimant was still suffering from the effects of the first injury, and the only injury reported to the first medical providers immediately after the second injury was the first injury. These factors, when coupled with the claimant's failure to make an immediate report or outcry at the water treatment plant job, strongly suggest that the primary injury occurred at Champlain Masonry, and that the inability to continue to work at the defendant was simply the result of a too speedy return to work after the original injury, or, in other words, an unsuccessful return to work.

6. Dr. Hazard's testimony, while credible, does not assist the claimant. First, the finding that the claimant did not suffer a specific injury but rather only degenerative changes in his spine makes it difficult to lay the blame on any particular incident. Secondly, the testimony that the claimant was a poor historian and that the correlation between his current symptoms and his employment with the defendant was founded on the history produced by the claimant means that the medical opinion in this case is no stronger than the claimant's own testimony.

7. As the claimant has the burden of proof of all elements of his claim, I cannot find that he has sustained that burden on the evidence before me. As he has not prevailed, the claimant is not entitled to an award of costs or attorney's fees.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, the claimant's claim for benefits under the Workers Compensation Act against Craig Armstrong is denied.

DATED at Montpelier, Vermont, this 5th day of April 1996.

_____

Mary S. Hooper
Commissioner