

Gay v. Gardner's Supply Co. (March 31, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRIES

Michael Gay) *File #: H-11608*
) *By: Barbara H. Alsop*
v.) *Hearing Officer*
) *For: Mary S. Hooper*
Gardener's Supply Company) *Commissioner*
)
) *Opinion #: 18-96WC*

Record closed on March 25, 1996.

APPEARANCES

Thomas P. Simon, Esq., for Liberty Mutual Insurance Company
Susan Flynn, Esq., for Continental Insurance Company

ISSUE

Whether the claimant's disability commencing on December 6, 1994, is an aggravation or a recurrence of the injury the claimant suffered on August 12, 1992.

THE CLAIM

Reimbursement by Continental Insurance Company of all amounts paid by Liberty Mutual Insurance Company since the claimant left work on December 6, 1994.

EXHIBITS

Joint Medical Exhibit
Deposition of David W. Leitner, M.D.
Deposition of Michael Gay

FINDINGS OF FACT

1. The claimant was first injured at Gardner s Supply Company on January 29, 1991, when a forty to sixty pound pallet swung around and wedged his hand

up against another stack. He underwent an operation by Dr. David W. Leitner in March of 1991, after which he had a successful return to work.

2. After an incident bowling, the claimant had a recurrence of his symptoms and underwent a second surgery with Dr. Leitner in April of 1992. Thereafter, he again returned to work in June of 1992.

3. Both of the surgeries were paid for by a carrier not involved in the current action. As of August 12, 1992, Liberty Mutual was the carrier for the employer.

4. On August 12, 1992, the claimant suffered a second injury to his right hand. The hand was pinched by a heavy box on a conveyor belt, and then was crushed by the box when it fell off the conveyor belt. Dr. Leitner was again the treating physician for the claimant.

5. Dr. Leitner diagnosed the claimant's condition as reflex sympathetic dystrophy (RSD), a condition with no known etiology. The claimant's diagnosis was confirmed on a referral to the Dartmouth-Hitchcock Medical Center. In January of 1993, Dr. Leitner performed an ulnar nerve release for the claimant, after which his symptoms began to improve somewhat. The claimant was placed at an end medical result after this surgery on January 5, 1994.

6. The claimant returned to work at Gardener's Supply in March of 1993, and left that employment to work with New Leaf Landscaping in April. He left for the new job because he preferred to work outside, and had substantial experience in the field. The claimant worked through the summer with New Leaf, but began to feel a recurrence of his symptoms in the fall, apparently because the cold weather in the fall mornings caused an upsurge in his RSD condition. He left work in October as the pain in his hand and arm became intolerable.

7. The claimant was out of work until October of 1994. During that period of time he noted that the pain he experienced was worse in cold weather.

8. New Leaf was insured by Continental Insurance Company. In October of 1994, Gardener's Supply was also insured by Continental.

9. The claimant was re-employed by Gardener's Supply in October of 1994. His job was an indoor job, and it involved picking orders. He would

receive an order, get the items requested, and send them to another area for packing. He would do as much lifting with his left hand as possible but would still have to use his right hand frequently.

10. The claimant indicated that he was experiencing pain throughout the spring, and that it continued when he returned to work in October, although he managed to tough it out for as long as he could. However, in December, he could no longer tolerate the pain, and he left work again. He has been out of work since, and is currently able to control his pain mainly by pacing himself and avoiding behavior that triggers an onset of acute symptoms.

11. Dr. Leitner testified that the claimant has RSD, which is a condition with no known etiology. He indicated that, once diagnosed, it is difficult to predict the course that RSD will take. Any of a number of everyday activities can trigger an increase in symptoms, although the underlying condition has not actually changed. In other words, once a person has RSD, it is unlikely to be resolved sufficiently that another occurrence could be labeled a separate and individual case of RSD. Moreover, given that the claimant's two last times out of work were in the fall or early winter, it was certainly possible that both incidents were caused by exposure to cold weather, a recognized trigger of RSD symptoms.

12. Specifically, Dr. Leitner stated that ...my way of thinking is that once you've got RSD going in one location, if you have this history that demonstrates that it keeps recurring for various reasons, it is probably the original site of injury and probably the original RSD. It was not uncommon for the claimant to have days when his hand and arm appeared almost normal and this was consistent with the condition of RSD. Moreover, it was not unlikely that mere exposure to something as minor as the wind could cause a recurrence of the symptoms. Dr. Leitner found sufficient objective findings to confirm the diagnosis, and to say that the claimant suffered recurrences of the condition at various times, without being able to state with certainty what caused the recurrences.

CONCLUSIONS

1. Where the causal connection between work 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).

2. When Liberty Mutual was on the risk, the claimant was diagnosed with RSD after the injury of August 12, 1992. Since that injury, there has been no additional specific injury, and hence this case raises the question of the gradual worsening of the claimant's condition. See, e.g., Jaquish v. Bechtel Construction Company, Opinion No. 30-92WC. However, in order to establish the necessary evidence of a worsening as opposed to a natural progression of an injury, it is incumbent upon the proponent to present some medical evidence in support of that theory. Dr. Leitner's testimony was replete with references to the unknown and unknowable causes for the various reawakenings of the claimant's symptoms. While plausible guesses could be made, there was no basis for a conclusive finding that one incident or activity rather than another caused the recurrences in this case.

3. Here, the claimant had never been symptom free in the period between his end medical result in January of 1994 and the time that he left work on December 6, 1994. The parallel characteristics of his two departures from work in 1993 and 1994, one while in the period of recovery from the 1992 injury, strongly suggest that there was no intervening cause sufficient to break the chain of compensability from the 1992 injury. A careful weighing of all of the evidence produces the conclusion that the more probable hypothesis in this case is that the claimant's inability to work in December of 1994 was caused by the RSD that arose as a result of the August 1992 injury, rather than any intervening or superseding cause or injury after January of 1994.

4. Based on the evidence, I find that the claimant's departure from work in December of 1994 was caused by a recurrence of the reflex sympathetic dystrophy that he suffered as a result of his injury of August 12, 1994.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, it is hereby ordered that Liberty Mutual provide to the claimant all benefits to which he is entitled under the Workers' Compensation Act as a result of his

inability to work on December 6, 1994.

DATED at Montpelier, Vermont, this 31st day of March 1996.

*Mary S. Hooper
Commissioner*