Blanchard v. Vicon Recover Systems and VT AOT (May 9, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

John Blanchard	*)*	*File #: A-3303*
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	*For: Mary S. Hooper*
Vicon Recovery Systems and State of Vermont, Dept. of Transportation	*)*	*Commissioner*
	)	*Opinion #: 31-96WC*

Record closed on April 24, 1996.

APPEARANCES

John W. Valente, Esq., for Vicon Recovery Systems
Keith J. Kasper, Esq., for State of Vermont Department of Transportation

ISSUE

Whether the claimant's current symptoms are as a result of an aggravation or a recurrence of his injury at Vicon Recovery Systems

THE CLAIM

National Union Fire Insurance Company seeks reimbursement from the State of Vermont for an uncertain and unspecified sum which paid on the claim of John Blanchard against Vicon.

EXHIBITS

Joint Exhibit 1 Medical record folder
Joint Exhibit 2 Deposition of John Blanchard, dated October 4, 1995.
Joint Exhibit 3 Deposition of Daniel C. Wing, M. D., dated March 8, 1996.

FINDINGS OF FACT

1. John Blanchard dislocated his right shoulder while working at Vicon on July 22, 1987. As a result of that injury, he developed, among other problems, a reflex sympathetic dystrophy ("RSD"). He has treated with a number of medical providers between 1987 and 1993. On October 28, 1993, the

claimant and the insurer for Vicon entered into a Form 15, Settlement Agreement, for $38,000.00, unallocated between his various claims for benefits, that was intended to be a full and final settlement of Mr. Blanchard's claims as a result of his injury of July 22, 1987, specifically reserving to Vicon the right to bring a claim under 21 V.S.A. §662(c) against the State of Vermont or any other employer.

2. The evidence in this case is made up of two depositions and some medical records that postdate the claimant's departure from Vicon. The lack of earlier medical records or more complete employment records hampers the decision making process.

3. The claimant was returned to work at Vicon after his injury, and worked for a few months. The reasons for his leaving Vicon involved a perceived discrepancy about the availability of light duty work. While the claimant's physician had released him to light duty work, the only work Vicon offered was painting, which entailed some work above his head. The claimant was not able to work above his head, and was not able to paint for eight hours a day. He was unsuccessful in gaining further assistance from his doctors, and so he left the job. He was placed at an end medical result in February of 1989.

4. After some period out of work, the claimant obtained a job with the state Department of Transportation, shortly before he was placed at an end medical result. He claims he did so because he was told by a vocational rehabilitation counselor that he would get more benefits if he could return to work. Instead, once he got the new job, he claims he was "dropped like a hot tomato." He claims to have been pressured into accepting the new job. He further said that "[t]o be point blank, I had the same amount of pain, the same problems from the date of the injury till almost now."

5. The work the claimant performed for the state of Vermont involved physical labor. He started as a flagman on construction projects, and also worked in the winter as a night patrolman where his job was to check roads for icy or unsafe conditions. Although there were more strenuous tasks, the claimant did only what he could consistent with his condition, and stopped when it became too painful. Among the tasks that gave him difficulty were working with a chainsaw, shoveling snow and clearing brush. The claimant testified that he did not do any of these tasks for an appreciable length of time. He also testified that his supervisor accommodated his difficulties, and his coworkers assisted him.

6. According to records produced at the deposition of Dr. Wing, the

claimant worked for the Department of Transportation from February 1, 1989,
to March 23, 1990, took a leave of absence until October 22, 1990, and then worked through until June 8, 1991. Documentary evidence supplied in Joint Exhibit 1 tends to confirm this information. The claimant testified that he took such other time as he needed to improve his symptoms. The claimant was
released from work for the state under the terms of his employment contract for medical causes with RIF (reduction in force) rights.

7. The claimant treated with Dr. Maurice Cyr, a chiropractor, during the period of his employment with the state. He also treated with Dr. Mark J. Bucksbaum, M.D., the medical director of the Department of Physical Medicine
and Rehabilitation at the Rutland Regional Medical Center. On April 4, 1991, the claimant went to Dr. Daniel C. Wing, M.D., at the Dartmouth-Hitchcock Medical Center. While both Dr. Cyr and Dr. Bucksbaum noted an increase in the claimant's symptoms from his work activities with the state, neither indicated that the claimant's underlying condition was altered by the work.

8. Dr. Wing testified that the claimant denied ever being pain free from the time of the 1987 injury to 1991, when the doctor first saw the claimant. It was his opinion, based on the reports of the claimant, that his wintertime work was within his work restrictions, but that his summertime work was probably not. Dr. Wing indicated that the claimant's symptoms alone did not justify the claimant's stopping employment. Dr. Wing ordered, after his first appointment with the claimant, a functional capacity evaluation. He also recommended that the claimant stop smoking.

9. The functional capacity evaluation showed that the claimant had a light work capacity because of the limitations in his right arm. The claimant reported a significant increase in his symptoms as a result of the examination, and thereafter stopped working.

10. Dr. Wing testified that the claimant's position at the Department of Transportation was not appropriate for him in 1989 when he started the job. Nonetheless, he did not find any increase in the claimant's permanent impairment, and no appreciable alteration in his baseline condition as a result of that employment. His concerns were prospective, in that he opined that continuance in that line of work would ultimately result in physical deterioration and the inability to return to the baseline established in 1989. His opinion was confirmed by other treating physicians, including Dr. David J. Keller, his treating orthopedic surgeon, and Dr. Cyr. It should be noted that Dr. Keller made his reservations about the position with the Department of Transportation within weeks after the claimant began to work there.

CONCLUSIONS

1. "As between the insurance carriers, the burden of proving which carrier is on the risk is determined by the facts and circumstances of each case. More often than not the department will place the burden of proof on the insurance carrier which is attempting to relieve itself of the burden of paying compensation pursuant to a Department order or preliminary determination." Bushor v. Mower's News Service, Opinion No. 75-95WC, citing to Smiel v. Okemo Realty Development Corp., Opinion No. 10-93WC. Accordingly, the burden of proof is on Vicon.

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. This case has significant parallels with Gay v. Gardener's Supply Company, Opinion No. 18-96WC. In Gay, a claimant diagnosed with RSD had a return to work marked by periodic absences due to resurgence of his symptoms. In that case, citing to Jaquish v. Bechtel Construction Company, Opinion No. 30-92WC, the carrier on the risk at the time of the diagnosis of RSD was found to be responsible for the ongoing condition. The issue in that case, as in this, is whether there was a gradual worsening of the claimant's condition sufficient to constitute a new injury with a subsequent employer.

4. As was stated in Gay, "...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." The medical evidence in this case, while replete with concern for the impropriety of the position at the Department of Transportation, is silent as to any additional damage, other than symptomatic, to the claimant's condition. In fact, Dr. Wing was clear that the claimant's condition was not actually worse than it was at the time that he was found to be at an end medical result in 1989.

5. It is also significant that the claimant never stopped treating for his injury from its occurrence in 1987 until at least 1991, when he left the employ of the state of Vermont. In order to find that the claimant suffered a new injury, at least one factor to be considered would be whether the claimant was actively treating prior to the second injury. See Jaquish, supra. Combining this factor with the amount of time the claimant missed from his position with the Department of Transportation, I cannot find that the claimant suffered from a new injury while in the employ of the state.

6. If, as all of the physicians suggest, the claimant was improperly placed at the Department of Transportation, then it should be noted that that placement occurred before he reached an end medical result from his injury at
Vicon. He was apparently receiving vocational rehabilitation benefits at that time, and it is unfortunate at best that a more timely response to the problems at the Department of Transportation was not forthcoming from Vicon's
insurer.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, Vicon's claim for reimbursement against the State of Vermont is denied.

DATED at Montpelier, Vermont, this ____ day of May 1996.

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Mary S. Hooper
Commissioner