

Cote v. VT Transit & St. Johnsbury Academy (June 19, 1996)

Vermont Department of Labor and Industry

Paul Cote) File # A-15859 & H-12607
) By: John H Fitzhugh,
v.) Hearing Examiner
) For: Mary Hooper,
Vermont Transit and) Commissioner
St. Johnsbury Academy)
) Opinion # 33-96WC

APPEARANCES:

Mark L. Stephen, Esq. for the claimant
Barbara Cory, Esq. for the defendant Vermont Transit
Phyllis Severance, Esq. for defendant St. Johnsbury Academy

ISSUE:

- 1. Whether on or about August 19, 1994 the claimant suffered a recurrence of a work-related injury incurred while in the employ of Vermont Transit Company (VTC) on January 25, 1988, or a new injury or aggravation incurred while an employee of St. Johnsbury Academy (SJA) from September 10, 1992 to August 1994.*
- 2. Whether in a dispute between two carriers as to responsibility for temporary total disability compensation (TTD) from August 19, 1994 to date, the claimant is entitled to attorney's fees and costs.*

THE CLAIM:

- 1. Temporary total disability compensation from August 19, 1994 to date, calculated in reference to the claimant's employment with Vermont Transit.*
- 2. Medical and hospital benefits under 21 VSA 640.*
- 3. Attorney's fees and costs under 21 VSA 678(a).*

STIPULATIONS:

1. *On January 25, 1988,*
 - a. *the claimant, Paul Cote, was employed by defendant, Vermont Transit as a Motor Coach Operator.*
 - b. *the defendant VTC was an employer within the meaning of the Workers' Compensation Act.*
 - c. *the claimant suffered a personal injury when he was grabbed by the necktie by a deboarded passenger and assaulted.*
 - d. *the injury arose out of and in the course of the claimant's employment.*
 - e. *Continental Casualty Insurance Co. was the defendant VTC's workers' compensation carrier.*
 - f. *the claimant's average weekly wage for the twelve weeks receding the accident was \$505.24.*
 - g. *the claimant had 2 dependents at time of accident.*
 - h. *the claimant was 47 years old. His current mailing address is RR #1, Box 48A, Concord, VT 05824.*
2. *On September 10, 1992,*
 - a. *the claimant, Paul Cote, was employed by defendant, St. Johnsbury Academy.*
 - b. *the defendant SJA was an employer within the meaning of the Workers' Compensation Act.*
 - c. *TransAmerica Insurance Co. was the defendant SJA's workers' compensation carrier.*
 - d. *the claimant's average weekly wage was \$303.49.*
 - e. *the claimant had 0 dependents.*
 - f. *the claimant was 54 years old (sic).*
3. *The Commissioner takes judicial notice of the following documents:*

Form 1 - Employer's First Report of Injury dated January 28, 1988, filed by the defendant VTC

Form 10 - Certificate of Dependency (1988)

Form 25 - Wage Statement from VTC

Form 21 - Agreement for Temporary Total Disability Compensation

Form 27 - Notice of Intention to Discontinue Payments on October 31, 1990 as claimant had reached medical end result with 26% whole person PPD.

Form 22 - Agreement for Permanent Partial Disability dated January 29, 1991.

Form 14 - Settlement Agreement dated December 5, 1991.

Form 6 - Notice and Application for Hearing dated November 11, 1994.

Form 1 - Employer's First Report of Injury undated with attachment letter. (SJA)

Form 25 - Wage Statement from SJA

Form 10 - Certificate of Dependency (1994)

Form 27 - Notice of Intention to Discontinue Payments 10/31/95

Form 27 - Notice of Intention to Discontinue Payments 11/28/95

PRELIMINARY COMMENTS:

- 1. This matter was assigned to John H. Fitzhugh to serve as a contract hearing officer for the Commissioner. After several telephonic conferences with lawyers for the two carriers and the claimant, it was decided to proceed without a hearing on the basis of a paper record. The carriers withdrew their requests that a determination on medical end result be made at this time. Initial pleadings were filed February 22, 1996, with supplemental pleadings filed March 15 and March 18, 1996. The record closed March 19, 1996.*
- 2. In addition to the documents noted under Stipulation ¶ 3, the following exhibits were submitted and considered:*
 - a. Index of medical records of Paul Cote, January 26, 1988 through February 6, 1996.*
 - b. Treatment notes of Corinne Miles, pages 3-7.*
 - c. Letter of Andres Roomet, M.D., dated February 27, 1996.*
 - d. Contingent fee agreement dated February 20, 1995.*
 - e. Deposition of Paul F. Cote dated June 15, 1995.*
 - f. Rehabilitation Consultants records (Susan Flynn transmittal 1/19/96)*

3. *The following pleadings were received and reviewed:*

a. *Defendant TIG Insurance Company's Proposed Findings of Fact and Conclusions of Law (February 23, 1996).*

b. *Proposed Findings of Fact and Conclusions of Law of Vermont Transit (February 22, 1996).*

c. *Claimant's Proposed Findings of Fact and Conclusions of Law (February 23, 1996), including exhibits.*

d. *Letter of Barbara Cory dated February 26, 1996 regarding attorney's fees.*

e. *Supplemental Proposed Findings of Fact and Conclusions of Law of Vermont Transit Company dated March 14, 1996.*

f. *Defendant TIG Insurance Company's response to Vermont Transit Company's Supplemental Proposed Findings of Fact and Conclusions of Law dated March 18, 1996.*

FINDINGS OF FACT

1. *I find the stipulations 1 and 2 as set forth above are true.*

2. *This is a dispute between two insurance carriers for two different employers as to which is responsible for disability compensation due the claimant for the period beginning August 19, 1994 to the present. In addition, the claimant seeks an award of attorney's fees and costs.*

3. *The claimant, then age 47, was injured initially on January 25, 1988 while serving as a motor coach operator for VTC. While standing on a platform near the bus after discharging passengers in Boston, the claimant was assaulted by a male "passenger" who grabbed him by his necktie and struck him on the left side of his face. He received treatment for injuries to his left eye and left jaw area. Dr. William Morain, his initial treating physician, described the claimant's injuries after the initial visit as "left zygoma fracture with orbital floor disruption."*

4. *On January 28, 1988, the defendant VTC filed a First Report of Injury,*

and on May 20, 1988, the claimant and defendant VTC entered into an Agreement for Temporary Total Disability compensation (Form 21) in which the defendant agreed to pay the claimant \$356.79 a week beginning on January 29, 1988. In February 1989, the claimant underwent reconstructive surgery, with bone grafts and a metal plate inserted to repair his orbital floor. Symptoms following the initial injury and reconstructive surgery included frequent headaches, frequent stabbing pain in his left eye socket, double vision (diplopia) and persistent foul-smelling post nasal drip.

5. On November 30, 1989, Dr. Morain wrote to VTC's Insurance Company (CNA) that the claimant had reached a state of maximum medical improvement with a 25% whole person impairment.

6. On October 24, 1990, CNA notified the claimant that it was discontinuing his temporary total disability benefits October 31, 1990 on the basis that he had reached a medical end result with a PPD of 26% whole person.

7. On January 29, 1991, the claimant and defendant VTC entered into an Agreement for Permanent Partial Disability Compensation (Form 22) in which the defendant agreed to pay the claimant \$387.33 a week for 120.50 weeks.

8. From early 1990 to mid 1991, the claimant worked with Rehabilitation Consultants to find alternative employment. He was unsuccessful, partly due to the labor market, his physical limitations, and his desire to earn what he had been making at Vermont Transit. During the summer of 1991, the claimant lobbied CNA, Rehabilitation Consultants, and the Department for funds to start a logging or firewood business. The claimant told the Department that despite ongoing medical problems (including having "difficulty getting my neck comfortable" from time to time) he could operate such a business. In October of 1991, the Department determined that \$25,250.00 was adequate minimum funding for Mr. Cote to begin a logging or firewood operation. On December 5, 1991, the Department approved a settlement agreement (medical benefits open) (Form 14) in the amount of \$25,250.00 in full and final settlement for vocational rehabilitation benefits.

9. In February of 1992, the claimant underwent surgery for the purpose of removing hardware and bony decompression in his left infra-orbital nerve.

The surgery was performed by Dr. Morain at the Dartmouth Hitchcock Hospital, and was necessitated by the January 1988 incident.

10. On September 10, 1992, the claimant began working for SJA as a custodian. He said he took the job as a financial necessity. His duties involved outdoor grounds keeping and indoor janitorial work. There is no specific evidence that this job involved heavy lifting or particularly strenuous physical activity.

11. In August 1994, the claimant's physician advised him not to return to work at SJA. He was vomiting occasionally from continuous pain. The first day he did not report to work was August 22, 1994. The claimant has not returned to work since that date.

12. In January 1995, St. Johnsbury Academy submitted a First Report of Injury (Form 1) in which it is stated that the "employee never advised employer (St. Johnsbury Academy) that his absence from work was a result of injury/accident associated with his employment with St. Johnsbury Academy. In fact, he advised his supervisors that his problems were a result of an injury that occurred years ago when he worked for Vermont Transit Company."

13. Claimant's wages at SJA were approximately 3/5 his wages at VTC. Consequently, claimant has a significant economic incentive to have the disability which commenced in August 1994 attributable to VTC for the purposes of calculating his compensation rate.

14. Following the commencement of the disability in August 1994, the claimant did not receive any TTD benefits for approximately five months. On November 11, 1994, he filed a Notice and Application for Hearing (Form 6) seeking TTD benefits from VTC. VTC apparently refused the claim on the basis that SJA was responsible. On February 21, 1995 Mark Stephen, Esq., entered his appearance on behalf of the claimant replacing attorney Leo Bisson. On March 30, 1995, the Department issued a Section 662(c) order at the prodding of claimant's attorney. TIG Insurance was ordered to pay the appropriate TTD benefits from August 11, 1994 forward, together with medical expenses related to the claimant's neck injury. The claimant is currently receiving weekly TTD benefits calculated in reference to the last twelve weeks of his

employment at SJA.

15. The principal issue in this dispute is whether the claimant suffered a new injury or aggravation to his neck or spine while employed for approximately two years at SJA, or whether the disability which commenced in August 1994 was a continuation and a recurrence of the injury suffered in January 1988 while working for VTC. Testimony by the claimant and other lay witnesses, as well as medical testimony, is appropriate to this issue.

16. All parties in this dispute agree that the disability beginning in August 1992 is work-related. Although two Form 27's were filed in late 1995, there is no claim ripe for adjudication that claimant has reached a medical end result. (See Preliminary Comments ¶ 1).

17. The claimant's initial medical reports following the 1988 injury do not evidence any injury to the neck or spine. The focus was on the claimant's left eye and jaw. Thereafter, the claimant frequently complained of headaches.

18. The first mention in any report of neck or shoulder pain is found in the December 29, 1989 report of Julie Clemons, CNA's medical case manager who noted the claimant's concern about "being able to just turn his head without having it hurt" and that "his spine has been bothering him." The following February, Ms. Clemons said the claimant had been experiencing some nausea and "severe head and neck aches and it is pretty much all the time." In August 1990, Dr. Bucksbaum noted "mild paracervical spasm which may be attributing [sic] to his headaches, he recommended massage and physical therapy.

19. Prior to his 1992 surgery, the claimant himself said he suffered from tension, tightness and myofascial pain radiating down into the left side of his head and into his neck and shoulders. He had constant headaches. He told the Department in his VR request that he had difficulty getting his neck comfortable and suffered ongoing aching and discomfort in the upper neck area. At least some of these problems were to be ameliorated by the 1992 surgery to decompress the left infra-orbital nerve and remove some of the metal hardware in the claimant's face.

20. From February 1992 until August 1994, a period of more than two years, there are no medical reports of neck or shoulder pain. Neither the records

nor the claimant's deposition indicate that he engaged in any strenuous physical activity (although he must have anticipated doing some as part of his logging operation). During the two years the claimant worked at SJA, he suffered no particular aggravating incident. Nevertheless, the claimant's neck and shoulder symptoms worsened during the two years he was employed at SJA, until he decided to return to Dr. Morain in August 1994.

21. Dr. Morain said then that "Paul returns with some new symptoms. . . his new complaint is that of pain in the left side of the neck with radiation into the shoulder, aggravated by rotation at the neck." Shortly thereafter, the claimant told Dr. Swenson that "after any kind of heavy activity, or in certain positions, such as lying on his back, the neck starts to ache on the left side."

22. In September of 1994, Dr. Swenson opined that the claimant's condition was musculoskeletal and almost certainly related to aggravation of ligaments, muscles and joints of the cervical spine. In March 1995, he was referred to Dr. Carr, who reported that sometime in "September 1993" [sic] the claimant began to work as a janitor. "While he was doing that he noticed that each time he would participate in physical activities above and beyond what he normally did at home, he would have increased pain. He reports that he had increased pain from day one. Approximately seven months ago he noticed a very significant increase in the pain that I described." Since March of 1995, the claimant has been principally under the care of Dr. Carr. Initially Dr. Carr thought, as did Dr. Swenson, that there was some radiculitis to the claimant's cervical spine causing the pain. A myelogram and cat scan ruled that out, however. More recently, Dr. Carr has focused on the consequences of myofascial pain and chronic sinusitis. Massage therapy has been attempted with little positive results.

23. Numerous doctors have opined whether the claimant's current difficulties relate to his employment at SJA or at VTC. Dr. Swenson, a neurologist, said the claimant's 1988 injury had the "well known potential to result in neck injury and pain," that the claimant's post SJA symptoms "represented a continuation of the original injury," and that "the claimant's functional limitations relative to his neck which began as a result of his original injury were worsened by his duties at SJA."

24. Initially, it was Dr. Carr's opinion that the SJA employment worsened

the claimant's condition. In September of 1995, he modified that opinion by stating that while the claimant's initial treatment in 1994 related to the increased pains caused by the increased physical activities from the SJA job, by September 1995 the treatment (and the disability resulting) were more properly attributable to the injury the claimant suffered in 1988.

25. Dr. John Peterson, who did an IME for SJA, concluded in June of 1995 that the claimant's current neck and left upper extremity complaints related to his original injury in 1988, though he also stated that it was "entirely plausible that attempts to work contributed to the claimant's cervicothoracic pain syndrome."

26. Dr. Andres Roomet, who examined the claimant in August 1995 for VTC, concluded that if the medical records were to be believed, the neck trapezius and shoulder pain was a new complaint starting in August 1994, whereas if one listened to the claimant's own account, the problems predated SJA's employment.

27. Finally, in September of 1995, Dr. Allen concluded that "flare-ups of neuropathic symptoms involving his left cheek possibly from local inflammation produce discomfort and neurologic pain which in turn triggers contraction of left cervical and shoulder girdle muscles; a myofascial trigger point is palpable in his left suboccipital and left levator scapulae muscle."

28. The claimant testified by deposition that the pain in his neck which caused his disability in 1994 was a continuation of problems encountered shortly after the 1988 injury. "It wasn't any particular thing that brought it on. It just came to a head."

29. The claimant has requested reimbursement for costs associated with this claim: a copy of a deposition (\$34.00); for medical reports (\$135.50); and for mailing (\$8.09). These costs appear reasonable and necessary (but there is no specific invoice for \$120.00 in medical photocopying expenses).

30. Claimant's counsel was instrumental in obtaining a §662(c) order advancing some \$16,700.00 in TTD benefits to the claimant since August 1988 pending the resolution of this dispute. No itemization of hours was submitted by claimant's counsel. Claimant's counsel did submit in a timely fashion a copy of the contingent fee agreement between himself and claimant. Claimant seeks the award of a contingent fee up to the maximum permitted by

the Commissioner.

CONCLUSIONS OF LAW

1. *This claim poses several questions. Did the claimant suffer a new injury or an aggravation while in the employ of SJA, or was his disability in August of 1994 a recurrence of the 1988 injury? Who has the burden of proof in resolving that question? Is the claimant entitled to any attorneys fees and costs in this dispute between two insurance carriers? If TTD is appropriate, what is the appropriate compensation rate?*

Burden of Proof

2. *In a dispute between two carriers as to liability for a particular claim, the carrier for the party who employed the claimant at the onset of the most recent disability has the burden of proving that the disability was a recurrence of an old injury rather than a new injury or aggravation as those terms are defined by the Department. 21 V.S.A. 662(c); Smiel v. Okemo Realty Corporation, 10-93 WC. This rule is particularly appropriate where, as here, the claimant was employed for two years by a different employer without receiving any medical care prior to the onset of the new disability.*

Aggravation/Recurrence

3. *The Department defines "aggravation" as an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Rule 2(j). A "recurrence" is defined as the return of symptoms following a temporary remission. Rule 2(k). These terms are legal rather than purely medical terms. To determine which applies "requires close consideration of medical evidence, but ultimately the determination is a legal one." Bushor v. Mower's News Service, 75-95 WC, citing Griffin v. Blue Seal Feed, Inc., 14-94 WC.*

4. *A recurrence is a continuation of a problem which had not previously resolved or become stable, whereas an aggravation is a destabilization of a condition which had become stable, although not necessarily fully symptom free. Jaquish v. Bechtel Construction Co., 30-92 WC. If a second incident contributes even slightly to the causation of a disabling condition, the incident constitutes an aggravation of an earlier injury rather than a recurrence. Snodgrass v. E.F. Wall, 15-92 WC.*

5. Where there is no sudden aggravating incident incurred at work, the Department looks at a number of factors to determine whether there has been a recurrence or aggravation. The following factors are significant: the length of time the claimant had returned to work prior to the new disability (Jaquish, supra); whether the claimant had reached a medical end result prior to the new episode of pain (Brown v. E.B. and A.C. Whiting Co., 21-94 WC); the length of time the claimant had been symptom free or stable following the earlier injury (Parker v. Decel, 58-94 WC); whether there were any specific job related tasks (or other, non-job functions) which could have "contributed independently" to cause the most recent disability. *Id.*

6. In a gradual onset injury, the Department will hold responsible the employer at the time the disability prevents the claimant from working, unless the previous employer had accepted the claim, in which case the Department will employ the typical aggravation/recurrence analysis (Gleason v. Brattleboro Printing, 38-95 WC).

7. In this case, the claimant's condition stabilized in the spring of 1992, with a 26% whole person disability, and this stability permitted him to (1) contemplate a logging or firewood business for vocational rehabilitation, and (2) re-enter the work force in a light-duty capacity at SJA. From mid-1992 until August 1994, the claimant was not symptom free but neither did he seek medical attention. During this two year period of time, his headaches subsided but his neck and shoulder pain increased. The most probable view of the evidence is that while the employment at SJA did not cause the condition which caused the pain, it did contribute to the symptoms and disability at least until September of 1995. This is the view of the claimant's own treating physician, Dr. Carr.

8. Examining the evidence closely, I conclude that the claimant's disability beginning in August of 1994 was more of a recurrence than an aggravation of an old injury, as those terms are defined by the Department's rules. I'm persuaded that the claimant's neck and shoulder problems predated his employment at SJA and while work (any work, at home or at a place of employment) contributed to the claimant's pain, it did not cause such pain. Without some new incident, I'm reluctant to find a gradual onset injury while working for SJA when the previous injury had not become entirely stable and medical testimony provides some linkage between that prior injury and the current problem.

Compensation Rate

9. *Section 650(c) provides that when temporary disability does not occur in a continuous period but occurs in separate intervals each resulting from the original injury, compensation shall be adjusted for each recurrence of disability to reflect any increases in wages or benefits prevailing at that time. Because I find that the disability beginning in August 1994 is a recurrence, the compensation rate should be determined in reference to wages for motor coach drivers at VTC in August of 1994. The record does not contain such information. In the absence of such information being provided, the claimant's compensation rate should be his initial rate calculated in 1988, adjusted as per 21 V.S.A. §601(16) but subject to the net income limitations of §650.*

Attorneys Fees

10. *The Commissioner may award reasonable attorneys fees when the claimant prevails. §678(a). The claimant prevailed in obtaining the §662(c) order, after he had obtained legal counsel. Therefore, claimant is awarded attorney fees in the amount of 20% of all compensation paid after the §662(c) order was issued, but not to exceed \$3,000.00. Claimant did prevail on the request for reimbursement of costs.*

ORDER

Based on the findings and conclusions the Commissioner of Labor and Industry, ORDERS that:

- a. *CNA Insurance Company, or in the event of its default, Vermont Transit Company shall pay to the claimant temporary total disability compensation (TTD) commencing August 24, 1994 to the present, at a weekly compensation rate based either upon the wages of motor coach operators in August of 1994 or, if such wages are unavailable, with reference to the claimant's original compensation rate calculated in 1988, adjusted pursuant to §601(16) and §650.*
- b. *From the payments required to be made under paragraph (a) above,*

CNA, or in the event of its default VTC, shall reimburse SJA or its insurance carrier for all workers' compensation expenses (including medical benefits) paid by SJA or its carrier related to this matter from August 1994 to the present.

- c. CNA, or in the even of its default VTC, shall reimburse claimant or his attorney for their costs in the amount of \$177.59, and attorney fees in the amount of 20% of the compensation paid between the \$662(c) order and this decision, not to exceed \$3,000.00.*

Dated in Montpelier, Vermont this 19th day of June 1996.

*Mary S. Hooper, Commissioner
Department of Labor & Industry*