STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. Z-12945
Hugh Raymond	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Grand Union Stores of Vermont	)	For: Steve Janson
	)	Commissioner
	)	
	)	Opinion No. 13-99WC

Hearing held in Montpelier, Vermont on December 9, 1998
Record closed on January 18, 1999

APPEARANCES:

James J. Dunn, Esq. for the claimant
John Davis Buckley, Esq. for the employer

ISSUES:

1. Whether claimant's permanent lower spine condition is causally connected to his work-related injuries.

2. Whether claimant's chiropractic care is necessary and reasonable.

EXHIBITS:

Joint Exhibit I: Medical Records
Claimant's Exhibit A: Transcript of deposition of Dr. Richard Marko, Oct. 8, 1998

STIPULATION:

1. The parties stipulated to the admission of the medical records which include those from the Medical Center Hospital of Vermont, the New England Back Center, Richard Marko, D.C., University Health Center, P. Nuzzolo, D.C., Bradley J. Weiss, D.C., Kenneth D. Polivy, M.D., Paul F. Hayes, D.C., Bradford R. Towle, D.C., Vermont Radiologists, and Comprehensive Rehabilitation Associates.

2. The parties also stipulated that the claimant has reached maximal medical improvement and has suffered 33.4% permanent impairment of his spine.

FINDINGS OF FACT:

1. The exhibits are admitted into evidence. Notice is taken of all forms filed with the Department.

2. Scott Wetzel Services and Gallagher Bassett Services administered this workers' compensation claim for the employer at different times.

3. Since 1968, except for an interruption from 1978 to 1981, claimant has worked as a produce manager for Grand Union. His work has taken him to different Grand Union stores, including one in Swanton and another in Essex Center.

4. At all times relevant to this action, claimant's job was that of a working manager. On a daily basis he needed to lift produce boxes, which weighed up to 50 pounds, from the floor to shelves, which were located approximately at waist level. He also unloaded produce from trucks and participated in all cleaning and maintenance work in his department.

5 Claimant had no back problems until December 22, 1986 when he was using a lift to unload a double pallet of produce from a truck at the store. A support on the lift broke and the produce started to fall. Claimant tried unsuccessfully to control the load that was falling in his direction. Ultimately, he twisted his body sharply to avoid being crushed.

6. Claimant immediately felt a searing pain in his lower back which forced him to the floor. He was unable to move his legs and he could not stand up. His co-workers laid him across a pallet and called the ambulance.

7. He was then taken to the Medical Center Hospital of Vermont where x-rays of his lower back showed no fractures. The examination revealed no numbness or tingling. His neurological examination, including reflexes, was normal. The examining physician diagnosed low back strain and prescribed Dolobid, Percocet, and bed rest. Because claimant did not have a personal physician at that time, he was referred to University Orthopaedics for follow-up evaluation.

8. On December 29, 1986 Dr. Freymoyer at University Orthopaedics, a division of the University Health Center (UHC), examined claimant and documented a history which included complaints of achiness in his thighs and pain in his back. Dr. Freymoyer diagnosed muscular strain, ordered a fit for a lumbar corset, prescribed Motrin, and gave claimant a note to stay out of work for two weeks, when he would be evaluated again. At the next visit on January 12, 1987, the doctor noted complaints of stiffness and soreness, as well as his impression that the muscular strain was resolving. He started claimant on exercises and asked him to return again in two weeks. Ten days later, an associate working with Dr. Freymoyer gave claimant a note to return to work on February 2. However, because he had a lifting restriction, Grand Union did not want claimant to return to work. Three days later, claimant received the note that allowed him to return to work full time without restrictions. Notwithstanding this work release, claimant was to continue with prescribed exercises and return to University Orthopaedics in six weeks.

9. Until January of 1998, claimant's total time out of work due to the December 22, 1986

injury was seven weeks.

10. At a March 17, 1987 visit to University Orthopaedics, Marlene Booth, the clinical associate working with Dr. Freymoyer, determined that claimant's muscular strain had resolved. However, claimant returned in July with a complaint of back pain at the end of his workday. He was sent to the New England Back Center for an increase in his exercise program.

11. On September 2, 1987 claimant returned to University Orthopaedics with a complaint of backache and right leg numbness related to another work incident when claimant became "stuck" after he bent over to pick up trash. He could neither go down nor come up.

12. The examiner suspected a vertebral disc and ordered a CT scan which was performed on September 16, 1987. The scan of L3 to S1 showed a small herniated disc at L5-S1, which the radiologist interpreted as "consistent with the clinical statement regarding right leg discomfort." The radiologist determined that the disc at L3-4 was within normal limits.

13. Dr. Dorothy Ford, who was at University Orthopaedics at the time, saw claimant twice in September of 1987. She determined that his CT scan was compatible with his physical examination and complaints, which included findings of lumbar lordosis and splinting of the low back, as well as complaints of stiffness and low back pain which existed since the incident earlier that month.

14. An October 8, 1987 note from University Orthopaedics reflects a visit with Dr. Grobler who documented claimant's symptoms of low back pain that worsened with rotation of his body. His physical examination was essentially negative. Dr. Grobler noted that claimant needed further support in terms of physical therapy, but that he and the claimant agreed that surgery was not an option. The doctor advised claimant to take care when lifting.

15. On May 5, 1989 Dr. Ford saw claimant again, this time for complaints of back and right leg pain after working on "sparkle day" at Grand Union. On this occasion, he spent all day in the forward bending position cleaning shelves. By the end of the day, his back ached. By the next morning, his upper right leg also hurt. Dr. Ford recommended anti-inflammatory medications before any future "sparkle days" and a back care program at the New England Back Center.

16. On December 13, 1989 Dr. Ford wrote a letter to the workers' compensation claims manager in which she stated that she "would not recommend chiropractic manipulation for anyone with a known nucleus pulposa which is the case with Mr. Raymond."

17. Claimant continued to work and live in pain. In November 1989 he decided to see Dr. Marko, a chiropractor, in the hope that he could get some relief. For the first time since his injury, claimant found some relief from his back pain after that chiropractic treatment. While the relief does not last, treatment breaks the buildup of pain enabling claimant to continue to work and to function.

18. Dr. Marko has provided supportive care to claimant since November of 1989. At first his chiropractic treatments were weekly, then tapered to once or twice a month. However, his sessions returned to a weekly basis in January 1998 when claimant experienced a worsening of back pain.

19. On May 7, 1990 Dr. P. Nuzzolo, at the Burlington Chiropractic Clinic, saw claimant at the request of the employer's insurance carrier for "an independent chiropractic examination and evaluation." Dr. Nuzzolo documented claimant's history and his complaints. The doctor also examined claimant and reviewed x-ray films. Dr. Nuzzolo diagnosed "chronic constant traumatic radiculopathy L4-S1 with a lumbar subluxation complex." The doctor opined that continued chiropractic care was necessary as it was the only relief he could secure. Finally, Dr. Nuzzolo recommended that a second opinion be obtained, that claimant have another CT scan, and that he engage in "no lifting of any kind" at work.

20. On July 26, 1990 claimant had a second CT scan, from L3 through the sacral promontory, at Vermont Radiologists in South Burlington. Dr. Richard Morse read that scan as showing a symmetric L3-4 disc bulge causing a moderate amount of compression and a minimal symmetric disc bulge at L4-5. The L5-S1 level was considered unremarkable.

21. Also at the request of the insurance carrier, Dr. Bradley Weiss, at the Tafts Corners Back and Neck Care Center, saw claimant on October 5, 1994 and on January 19, 1996. At the 1994 visit, Dr. Weiss took a history and examined claimant. He documented blood pressure, lumbar range of motion, pain on percussion, positive straight leg test, and "joint dysfunction at the sacroiliac, L4, L5, T1 and C1 spinal levels." Dr. Weiss opined that claimant's condition was solely related to the injury of December 1986 and that the chiropractic treatment was reasonable to manage pain and allow claimant to work. In addition, he determined that, unless there was a surgical option, claimant had reached a medical end result.

22. On March 22, 1995 Dr. Kenneth Polivy, who is Board Certified in Orthopedics and practices with the Newton-Wellesley Orthopedic Associates, reviewed claimant's medical records at the request of the insurance carrier. He did not examine the claimant or the actual x-ray films. Dr. Polivy concluded that claimant had reached a medical end result, that any disc protrusion that occurred from the 1986 injury had resolved by 1990, that a new protrusion was not related to the 1986 injury, and that the chiropractic treatment claimant had been receiving from Dr. Marko was not reasonable or necessary. Dr. Polivy further concluded that claimant had no permanent impairment from the 1986 injury.

23. On January 19, 1996 after another thorough history and physical examination for the employer, Dr. Weiss again stated that claimant's chiropractic treatment was medically necessary and causally related to his injury. At that time, claimant's job still included "unloading trucks and a lot of manual lifting," according to Dr. Weiss's note.

24. On July 8, 1997 Dr. Paul Hayes of Champlain Chiropractic Services performed the third carrier-requested history and physical examination of this claimant. In his comments

after that visit, Dr. Hayes opined that claimant's healing was longer than usual "due to the repetitive stress from his employment. . . . His occupation as a produce manager obviously involves much physical stress and his necessary positions are not conducive to healing." Dr. Hayes acknowledged that the benefits of chiropractic treatment were short term, but were necessary to relieve his low back pain and keep him working. Finally, he determined that claimant had suffered a permanent partial disability of his lumbar region that might be relieved, but not cured.

25. On March 26, 1998 the carrier obtained its fourth "independent" chiropractor examination, this time from Dr. Bradford Towle, a chiropractor in Montpelier. After taking a history from claimant, examining him, and reviewing x-ray films, Dr. Towle answered specific questions the employer's representative asked him. He concluded that: 1) based on change in symptoms and CT scan results, claimant's current chiropractic treatment did not seem to be related to the 1986 disc injury; 2) the chiropractic treatment was psychologically necessary, but was not reasonable, beneficial or supportive; and 3) that the task of gaining control of his own back would be a difficult step that could involve work recovery, a health club, and family and physician support.

26. At the hearing, Dr. Polivy, the orthopedist hired by the employer, testified that his review of the medical records focused on claimant's report of symptoms, as well as reports from examining physicians and radiologists who interpreted the CT scans. He noted that claimant had full motor function after the 1986 injury. He found no evidence in the 1986 records of radiculopathy or a disc injury. In Dr. Polivy's opinion, the diagnosis of muscle sprain at that time was appropriate. Not until 1987, when a CT scan confirmed a herniation, do the records include any reference to sensory dysfunction in the leg. Dr. Polivy interpreted the 1990 CT scan, which showed herniation at a different level from that identified in 1987, as proof that the 1987 herniation had resolved. The new one the claimant developed, he explained, was not related to the 1986 injury. Dr. Polivy conceded that different radiologists may get different results when they read a CT scan, especially when a disc is minor. The later appearance of a disc herniation, he said, was due to the 1987 bending incident or to degeneration.

27. Dr. Marko testified that the 1986 injury resulted in the claimant suffering from a motion instability of the lower spine from L-1 to the sacrum. He supported his theory of lower spine motion instability with findings from flexion-extension x-rays. Motion instability, Dr. Marko explained, causes nerve root irritation which in turn results in back and leg pain.

28. With chiropractic treatments, Dr. Marko opined, he is able to move the claimant's spinal structures into a more normal position which reduces the irritation of the nerve roots. However, the treatment produces only temporary relief due to instability of the supporting structures combined with claimant's physically stressful work.

29. Dr. Marko concluded that claimant's spinal injuries are a direct result of the 1986 accident. He based that opinion on the degree of instability of the spine he found in the L3-4 to S1 range, claimant's complaints, and the lack of any other traumatic incidents which could have resulted in such spinal damage.

30. Since 1986 claimant has tried physical therapy and exercise at different times, but pain has kept him from pursuing those avenues. In his own opinion, only chiropractic care keeps his back pain at bay long enough to allow him to work. However, by January of 1998 claimant missed some time from work due to worsening of his back pain. When he returned to work, it was on less than a full time basis.

31. Claimant submitted evidence of his contingency agreement with his attorney and evidence of reasonable and necessary costs which total $131.22.

CONCLUSIONS OF LAW:

CAUSATION

1. Medical end result "means the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." Rule 2 (h), Workers' Compensation and Occupational Disease Rules; *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (Aug. 4, 1997). The parties have stipulated to the fact that this claimant has reached a medical end result with a 33.4% permanent partial impairment of his spine.

2. In deciding whether that permanent partial disability is causally related to claimant's work-related injury, we consider dueling expert opinions using the factors traditionally considered by this Department: (1) What is the nature of treatment and how long has there been a patient-provider relationship? (2) Were accident, medical and treatment records made available to and considered by the examining physician? (3) Is the report or evaluation at issue clear and thorough and does it include objective support for the opinions expressed? (4) How comprehensive was the examination? (5) What are the qualifications of the experts, including professional training and experience? *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (Aug. 4, 1997); *Martin v. Bennington Potters*, Opinion No. 42-97WC (Dec. 30, 1997).

3. Dr. Marko, as claimant's treating chiropractor, has had an on-going relationship with this claimant as his treating doctor. He has examined the claimant over time, performed physical examinations and evaluated x-rays, but he did not review UHC records. Although Dr. Towle saw claimant only once, he was the only chiropractor who had all medical records. The other chiropractors, Dr. Nuzzolo, Dr. Weiss and Dr. Hayes, lacked a complete set of the records in all probability because the adjuster who retained them for an "independent" review for the employer never sent them. They, too, did not review the UHC notes that reveal the absence of leg pain, a sign of radiculopathy, until 1987. Dr. Nuzzolo took a history, examined the claimant, and reviewed x-rays before rendering an opinion. Dr. Weiss and Dr. Hayes also took a clinical history, examined the claimant, and performed lumbar range of motion examinations before they offered their opinions. Dr. Weiss saw claimant twice at visits two years apart. The orthopedic surgeon, Dr. Polivy, had a complete set of records, but he did not examine this claimant or review the x-ray films. Crucial to his conclusion that the causal link between the 1986 injury and claimant's current condition had been broken were records that reflected the absence of leg pain in 1986 and its presence in 1987.

4. Dr. Marko, Dr. Weiss, Dr. Nuzzolo and Dr. Hayes evaluated the lumbar section of the spine as a whole. They observed limited range of motion, lumbar spasm, and joint dysfunction at different spinal levels. All four chiropractors concluded that claimant's condition is related to the 1986 injury. For the defense, Dr. Polivy opined that the 1986 injury was merely a muscle strain. By 1987, when claimant bent over to pick up trash, he had a disc protrusion at L5-S1, confirmed by CT scan. A second CT performed in 1990 at a different facility, read by different radiologists, revealed a L3-4 disc bulge, but no evidence of a protrusion at L5-S1. Dr. Polivy's review of the medical records, together with written interpretations of the CT scans, led him to the conclusion that the disc protrusion from the 1986 injury resolved, a conclusion the employer argues undercuts any finding of causation.

5. However, at the hearing Dr. Polivy acknowledged that the later appearance of disc herniation could have been from the 1997 bending over incident, which occurred at work, although it also could have been due to degeneration. Although Dr. Polivy reviewed the reports of claimant's CT scans, he did not examine the actual films. He conceded that different CT scan readers can get different results, especially when a disc is minor.

6. After all the testimony and medical records are considered, we are left with a choice of three theories of causation: 1) as Dr. Marko opined, that a direct unbroken link exists between claimant's 1996 injury and his current condition; 2) with support from claimant's testimony, the medical records and opinions of Dr. Nuzzolo, Dr. Weiss and Dr. Hayes, that claimant suffered a work-related injury in 1996 which was aggravated by specific work-related events in 1987 and 1989 and by the daily strain of his job; and 3) from the opinions of Dr. Polivy and Dr. Towle, that unexplained events and possibly degeneration, but not the 1996 injury, account for claimant's current impairment.

7. It is a well established principle that an injury is compensable if it is the direct and natural result of a compensable work-related injury. *Verchereau v. Meals on Wheels*, Opinion No. 20-88WC (Jan. 25, 1991); 1 Larson's Workers' Compensation §13.11; *Cady v. Vermont Tap & Die*, Opinion No. 2-97WC (Feb. 22, 1997). And it is uncontested that this claimant suffered a work-related injury in 1996 after which he continued his usual physically taxing work at Grand Union. While performing that work, claimant experienced at least two documented incidents of back pain that prompted the need for medical care. The medical records are replete with reference to the strain of claimant's work. The employer was well aware that claimant sought medical care for several work-related injuries, including the incident in 1986 and the sparkle day incident in 1989.

8. Doctors Nuzzolo, Weiss and Hayes support Dr. Marko's opinion that claimant's current condition relates back to the 1986 injury based on the claimant's history and chiropractic principles that consider the entire lumbar region of the back as a whole. Although defendant argues that their opinions should be rejected because the chiropractors did not have all the medical records, nothing in those records takes claimant's lumbar complaints out of the realm of his work. And they confirm claimant's theory that his original injury was in the lumbar region, that his complaints in 1987 and 1989 were also related to pain in the lumbar region, and that his ongoing complaints are of pain to the lumbar area.

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9. Even if we were to accept Dr. Polivy's opinion that the injury from 1986 had resolved, ample evidence has been produced to prove that subsequent work-related injuries combined with the daily physical assault to his back from his work account for claimant's current condition. Claimant, therefore, has proven that it is more probable than not that his work at Grand Union caused his current permanent partial disability of the spine.

REASONABLENESS OF CHIROPRACTIC CARE

10. Under our Workers' Compensation Act, an employer is obligated to provide reasonable surgical, medical and nursing services when an injury arises out of and in the course of employment. 21 V.S.A. § 640(a). It is well established that the claimant has the initial burden of proving that the treatment he is seeking is reasonable and that it is causally connected to his work-related injury.

11. Once claimant has established that he is entitled to benefits under the Workers' Compensation Act, including medical treatment, the burden shifts to the employer to establish the propriety of either ceasing or denying further compensation. *Merrill v. University of Vermont*, 133 Vt.101 (1974).

12. The employer's expert, Dr. Towle, agreed that the treatment is psychologically necessary, although he did not agree that it was linked to the 1986 injury or reasonable in light of the continued pain and perceived change in the location of the pain. Doctors Nuzzolo, Weiss and Hayes opined that Dr. Marko's treatments are reasonable and that they were necessitated by the work claimant has done at Grand Union. Dr. Weiss suggested adding a program to strengthen claimant's back to the chiropractic care he is now receiving. Dr. Hayes acknowledged in his 1997 note that claimant's healing was longer than usual. But he also acknowledged that the physical stress of this claimant's job was not conducive to healing. Their reports are clear and well reasoned. The inescapable conclusion is that this claimant has continued to work because of the chiropractic treatment.

13. Even though three years elapsed between the work-related injury in 1996 and his first chiropractic treatment, claimant has met his burden of proving that Dr. Marko's treatment has been reasonable and has been related to his work-related injury through his own credible testimony, the testimony of his treating chiropractor, and the records from three of the five opinions obtained by the employer. Claimant testified credibly that he had been in pain since 1986. Records from Dr. Marko, Dr. Nuzzolo, Dr. Weiss and Dr. Hayes all agree that the only treatment that has kept that pain under control has been the chiropractic treatment. Surgery was not an option, physical therapy was not successful, and the only activities that arguably could have exacerbated the condition created by the 1986 injury were themselves work-related. Claimant has continued to work because of the chiropractic treatment. Because claimant has proven reasonableness and causation, the burden of proof shifts to Grand Union to establishing that claimant's continued chiropractic treatment is not reasonable or is not casually connected to his employment related injury.

14. Whether the employer has met its burden depends on the strength of its expert opinions.

Again, we are asked to choose between the opinions of Dr. Towle and Dr. Polivy, which the employer argues should be accepted because of their logic and thoroughness, and the opinions of Dr. Nuzzolo, Dr. Weiss, Dr. Hayes and Dr. Marko who agree that the chiropractic treatment is reasonable in this case and causally connected to the 1986 injury.

15. On balance, the collective opinions of Doctors Nuzzolo, Weiss and Hayes are more convincing than the opinions of Doctors Towle and Polivy. This claimant, like the claimant in *Grenier*, has been able to work "because of his strong work ethic and the temporary pain relief he derived from the chiropractic treatments." *Grenier v. Hill Martin Corp.*, Opinion No. 23-86WC (March 16, 1987). The employer has not met his burden of proving that the treatments are unreasonable and unrelated to the original injury. But this is not to say that the treatments should continue indefinitely or that claimant should be discouraged from again pursing a rehabilitation program.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Grand Union is ORDERED to pay claimant:

1. Permanent Partial Disability Benefits based on a 33.4% impairment to the spine;

2. Attorney's fees of 20% of the permanency award, not to exceed $3,000 and costs in the amount of $131.22.

Dated at Montpelier, Vermont, on this 24th day of March 1999.

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Steve Janson
Commissioner