

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

)	State File No. L-08041
Wayne Pecor)	
)	By: Jill Broderick
v.)	Hearing Officer
)	
Pepin Granite)	For: Steve Janson
)	Commissioner
)	
)	Opinion No. 16-99WC

Heard in Montpelier, Vermont, on July 21, 1998 and November 23, 1998
Record closed: December 14, 1998

APPEARANCES:

Attorney for Claimant - Kimberly B. Cheney
Attorney for Defendant and CNA Insurance Company - Christopher J. McVeigh

THE CLAIMANT SEEKS:

1. Temporary total disability benefits for the period beginning on October 13, 1997 and continuing.
2. Medical treatment.
3. Attorney's fees.

ISSUE:

Did the claimant's back problem arise out of and in the course of his work for the defendant?

STIPULATIONS:

The parties have stipulated to the following:

1. The claimant was an employee of the defendant, Pepin Granite, on October 13, 1997.
2. The defendant is an employer within the meaning of the Workers' Compensation Act.
3. CNA Insurance Company was the workers' compensation insurance carrier for the defendant on October 13, 1997.
4. There is no objection to the admission of the following exhibits:

Joint Medical Exhibit 1:	Indexed records
Claimant's Exhibit 1:	Handwritten production record for October 13
Claimant's Exhibit 2:	Transcript of deposition of Dr. Stuart Williams on March 27, 1998
Claimant's Exhibit 3:	Transcript of deposition of Dr. Stuart Williams on November 16, 1998
Defendant's Exhibit 2:	Office notes of Mr. Davison for October 13, 1997
Defendant's Exhibit 3:	"Encounter Form" of Associates in Family Health for claimant's October 13, 1997 office visit

FINDINGS:

Based on the evidence and testimony presented at the hearing, I find:

1. The stipulations set forth above are true and the exhibits are admitted into evidence.
2. The claimant has worked in the granite industry as a stonecutter since he was 17 years old. He began working for Pepin Granite about 1995.
3. The claimant testified that he was moving a block of granite at work on the morning of October 13, 1997 when he felt a "snap" on the lower right side of his back. He noted a "pulling sensation" and a "sharp pain."
4. The claimant did not tell anyone about the incident at that time, although two other stonecutters were working within 15 feet of the claimant at the time of the alleged incident. Neither of those stonecutters observed any "incident" in which the claimant appeared to have been injured that morning.
5. The claimant continued to work for approximately two and one half-hours and then told the foreman, Scott Pepin, that he was "sick" and was going home. Scott Pepin did not observe that the claimant looked or moved as if he had been injured.
6. Scott Pepin indicated to the claimant on Friday, October 10, 1997, at the end of the work day that the claimant's production was insufficient. Mr. Pepin had been requiring the claimant to maintain a written production record each day for several weeks prior to October 13.
7. The claimant has sustained work injuries in the past and received workers' compensation and he is familiar with accident reporting procedure.
8. The claimant saw Bob Davison, a physician's assistant, at the office of Dr. Stuart Williams on the afternoon of October 13, 1997.

9. Mr. Davison's office notes stated that the claimant complained of "worsening LBP past 3d" (worsening low back pain during the past three days). He diagnosed the claimant as having "chronic low back pain."
10. The claimant testified that he told Mr. Davison he had been injured at work that morning and that the note should say "past three hours."
11. Mr. Davison, however, testified, and I so find, that the claimant did not mention a work injury that day during his office visit. Rather he complained of longstanding back pain that had increased gradually over the three days prior to October 13, 1997, as reflected in Mr. Davison's notes.
12. Dr. Stuart Williams, a family practitioner, is the claimant's treating physician. He first saw the claimant on July 22, 1996. At that time he diagnosed the claimant as having degenerative disc disease. He noted that the claimant has had recurring low back pain since 1986. Dr. Williams testified that the claimant has been taking percocet and other low back pain medication on a fairly regular basis since July 1996.
13. Dr. Williams believes the claimant's degenerative disc disease is exacerbated by "repeated stress from lifting granite." Dr. Williams also believes the claimant has fibromyalgia.
14. Dr. Eric White, an orthopedist, conducted an independent medical exam of the claimant on September 8, 1998.
15. Dr. White agrees that the claimant has degenerative disc disease in his lumbar spine. He opined, however, that the claimant's work did not aggravate the disease; the natural history of degenerative disc disease is varying and gradually worsening pain. This progression is consistent with the claimant's history, including Mr. Davison's office note of October 13, 1997.
16. Dr. White testified if, in fact, the claimant suffered a work injury on October 13, 1997, that such an incident may have exacerbated temporarily the symptoms from the degenerative disc disease. Such an incident would not, however, worsen the underlying condition itself.
17. Dr. White testified, and I so find, that degenerative disc disease is not characteristic of and peculiar to granite workers, and that it is a disease which individuals outside the granite industry often have.
18. Dr. White testified that the claimant does not have the requisite criteria to be deemed to have fibromyalgia. I find the testimony of Dr. White to be more credible than that of Dr. Williams.

CONCLUSIONS:

Based on the foregoing Findings of Fact, I conclude the following:

1. In workers' compensation cases the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963). Sufficient competent evidence must be submitted verifying the character and extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
2. The claimant maintains that he suffered an injury on October 13, 1997 at work, which aggravated his preexisting back problem. In the alternative he claims that his back problem is compensable under the occupational disease law, 21 V.S.A. §1001 *et seq.*
3. I conclude that the claimant did not suffer an injury on October 13, 1997 which arose out of and in the course of his employment. Although familiar with the accident reporting procedures for workers' compensation, the claimant did not report to his employer on October 13 that he had been injured. In fact, he stated only that he felt "sick to his stomach" and was going home. In addition, he did not mention anything about being injured at the time of the alleged incident to either of his coworkers who were stationed within 15 feet of him, nor did he report a work injury to Mr. Davison during his office visit on that day.
4. The claimant's history is consistent with the diagnosis by Drs. White and Williams of degenerative disc disease. However, that disease is neither "characteristic of" nor "peculiar to" the granite industry and, therefore, is not an "occupational disease" within the meaning of the occupational disease law. In addition, I conclude that the record does not support such a finding; there is no evidence that fibromyalgia is an "occupational disease."

ORDER:

Therefore, based on the foregoing Conclusions and Findings, the claim for workers' compensation or occupational disease benefits is **DENIED**.

Dated at Montpelier, Vermont, on this 29th day of April 1999.

Steve Janson
Commissioner