STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-08041
Wayne Pecor	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Pepin Granite Company	)	For: Steve Janson
and CNA	)	Commissioner
	)	
	)	Opinion No. 16AA–99WC

APPEARANCES:

Kimberly B. Cheney, Esquire for the Claimant
Christopher J. McVeigh, Esquire for the for Defendant

RULING ON CLAIMANT MOTION TO RECONSIDER DECISION AND CERTIFIED QUESTION

This is in response to Attorney Cheney's request that the Department reconsider Opinion No. 16-99WC, the Amended Order No. 16A-99WC and the question certified to the Vermont Supreme Court for its review.

DECISION:

On April 29, 1999, the Commissioner denied Mr. Pecor's claim for workers' compensation or occupational disease benefits. That opinion followed a two-day hearing during which the hearing officer heard testimony from several fact witnesses and the defense expert, Dr. White. She also reviewed claimant's medical records and deposition transcript of claimant's expert, Dr. Williams. Claimant argued that his claim should be compensable either as an aggravation of a preexisting injury on October 13, 1997 when he pushed a heavy piece of granite to its side, or as a gradual onset occupational disease from the heavy nature of his work.

The thrust of claimant's current argument is that the hearing officer misinterpreted Dr. White's testimony that he maintains sufficiently established the necessary causal connection between claimant's back condition and his work. The essence of Dr. White's testimony was that the heavy work Mr. Pecor said he did might exacerbate or temporarily make worse the preexisting disc disease. After a careful review of the hearing transcript and the arguments of counsel, I conclude that the original decision was correct for three reasons. First, the hearing officer did not find the claimant's testimony to be credible. Second, Dr. White testified to possibilities, not the required standard of probability. Third, even if Dr. White's testimony could be interpreted to mean that he found a probable connection between claimant's work and his pain, he failed to establish that work worsened the underlying condition.

The hearing office rejected the claimant's testimony that he was injured on October 13, 1997 in the way he described. She explained that claimant had familiarity with the process for

filing a claim from prior experience, yet failed to report an injury to his employer. Furthermore, he failed to mention anything about a work injury to coworkers or to the physician's assistant whom he consulted that day. The decision was based on a judgment of credibility that fell within the province of the hearing officer who determined that claimant's version of events was not credible. Yet, that version formed the basis for the hypothetical question[1] that asked Dr. White if he could hypothesize that claimant aggravated his preexisting disk disease. An opinion based on a premise that has not been accepted cannot be accepted either.

Furthermore, Dr. White's opinion is only in the realm of the possible, which does not rise to the necessary level of probability. 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 hypotheses. *Burton v. Martin Lumber Co.*, 112 Vt. 17 (1941).

On the issue whether claimant suffered a gradual onset work-related injury, the commissioner accepted medical testimony that Mr. Pecor suffered from chronic degenerative disc disease, a non-work related condition. Dr. White conceded that claimant's work may have increased claimant's subjective perception of pain, but was firm in his opinion that the underlying condition was not getting worse. It is this distinction, worsening of symptoms versus worsening of the underlying condition, which seems to be the basis for claimant's request for reconsideration. He relies on cases, e.g. *Clark v. U.S. Quarried Slate Products,* Opinion No. 8-95WC (April 21, 1995), in which a worker's claim was found compensable when the work increased back instability and pain radiating down his leg, necessitating spinal fusion surgery. In sharp contrast to *Clark,* however, the evidence in this case supports only that Mr. Pecor's work increased his symptomatology, not the underlying condition. Consequently claimant's proof was an insufficient basis for an award. *Munroe v. Raylar Limited Partnership*, Opinion No. 54-96WC ("The only evidence before me is that the work may have caused an increase in symptoms. There is no evidence of an actual worsening of the underlying condition.")

Next, in an argument related to the gradual onset theory, claimant contends his claim is compensable as an occupational disease under 21 V.S.A. § 1001 et. seq. Under that Act, in effect at the time of the alleged injury, claimant's condition would have to be "a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment, and to which the employee is not ordinarily subjected or exposed outside of or away from his employment, and which arises out of and in the course of such employment." Furthermore, "the disease must be so distinctively associated with the employee's occupation that there is a direct connection between the employee's occupation and the disease contracted." *Perkins v. Community Health Plan*, Opinion No. 39-98WC (July 17, 1998).

Claimant maintains that he suffers from an occupational disease known as degenerative disc disease and posttraumatic fibromyalgia. However, because he has not presented any

[1] Mr. Cheney's question was: "I want you to assume that Mr. Pecor had a large slab of granite about three feet four inches long by eighteen inches wide and ten inches thick that weighed four to five hundred pounds, and the slab is brought to him on a roller. In order to work on it he has to manually flop it on its side, and he uses his own muscles and body to do that. And that when he's flopping it over on his side, he feels a pain in his back. … Assuming that that's what occurred, could you hypothesize that he's aggravated a preexisting disk disease in doing that?"

evidence that either condition is characteristic of and peculiar to the granite industry, the claim based on the occupational disease theory must also fail.

Certified Question

On May 28, 1999, claimant filed a Notice of Appeal to the Supreme Court. Thereafter, on June 24, 1999, the commissioner certified for review by the Vermont Supreme Court the following question: "Did claimant's back problem arise out of and in the course of his work for the defendant, Pepin Granite Company?" That question, to which both parties have taken exception, was the same question framed and decided in the April 1999 opinion.

In the interest of clarity the certified question is amended as follows:

> Whether sufficient evidence exists in the record to support the Commissioner's conclusion that Mr. Pecor's employment did not aggravate his preexisting low back condition.

ORDER:

1. Claimant's Motion to Amend the findings is hereby DENIED.

2. The motion to amend the question certified for review by the Vermont Supreme Court is GRANTED.

Dated at Montpelier, Vermont, this 14th day of September 1999.

_____
Steve Janson
Commissioner