

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

	)	State File No. K-11334
Douglas Coombs	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
	)	For: Steve Janson
The Vermont Natural Company	)	Commissioner
	)	
	)	Opinion No. 19-99WC

Hearing held in Rutland, Vermont on January 14, 1999  
Record closed on February 17, 1999

**APPEARANCES:**

Michael C. Conroy, Esq. for the claimant  
Joshua L. Simonds, Esq. for the defendant

**ISSUES:**

1. Did claimant suffer a work-related injury on or about December 10, 1996?
2. If so, was it a new injury, aggravation of pre-existing injuries, or a recurrence of prior injuries?

**CLAIMANT SEEKS:**

Temporary Total Disability Benefits, Permanent Partial Disability Benefits, Vocational Rehabilitation Services, Attorney's fees and Costs in amounts to be determined if this claim is found to be compensable.

**EXHIBITS:**

Joint Exhibit I: Claimant's Medical Records  
Claimant's Exhibit 1: Miscellaneous correspondence and medical records (38 pgs)  
Defendant's Exhibits -  
A: Videotaped deposition of Dr. Mark J. Bucksbaum (2 tapes)  
B: Transcript of deposition of Dr. Mark J. Bucksbaum  
C: Time sheet 11/25 to 12/14  
D: Time sheet 12/16 to 12/27

**STIPULATION OF UNCONTESTED FACTS:**

1. On December 10, 1996 Douglas Coombs was an employee of the Vermont Natural Company.

2. Claimant has treated for back problems since at least 1985.
3. The Veterans' Administration rated claimant at 40% whole person disability due to his back injuries. Although this rating continued unchanged after the December 10, 1996 injuries, it should be noted that the VA does not rate disability according to AMA guidelines.

## **FINDINGS OF FACT:**

### **Service-related injury**

1. Claimant was in the Army at Fort Rucker, Alabama, in March of 1982 when he injured his low back moving wall lockers. An examination on March 11, 1982 concluded that he had sustained an L2 lumbar sprain with mild radiculopathy in the S2 distribution. During 1982, 1983 and 1984 the claimant continued to complain of low back pain and left-sided sacroiliac pain for which he was treated by the Army.
2. On March 7, 1984, Dr. James Johns, at the Fitzsimmons Army Medical Center in Aurora, Colorado, reported that the claimant had suffered low back and left leg pain for two years and that his symptoms had persisted despite conservative therapy. Surgical intervention was ruled out and he was diagnosed with "chronic low back and lower extremity pain, etiology unclear." The claimant's disposition was "permanent profile for the back with restrictions of no running, no uninterrupted sitting or standing longer than 30 minutes [and] no lifting greater than 25 pounds."
3. According to Army physicians, on March 8, 1984 claimant was assigned permanent physical limitations for no running, no uninterrupted sitting or standing longer than 30 minutes, and no lifting greater than 25 pounds pursuant to physical profile board proceedings.
4. On October 22, 1984 a medical board reviewed claimant's medical history and conducted a physical examination. Dr. David King prepared the narrative summary of that board which stated that the claimant was not fit for retention in the Army because of his back injury.
5. Based on the medical evaluation board proceedings, claimant was honorably discharged in April 1985 with a 40 % disability rating of his spine for which he receives monthly compensation.
6. On July 2, 1985 Dr. Staples, at the VA Hospital in White River Junction, examined claimant. Dr. Staples reported that claimant was in constant back pain. On examination, he was tender from the L2, L3 to S2 regions, with the worst feeling at L4 to S1 and severe left sacroiliac tenderness. Dr. Staples concluded that the claimant had a moderate severe disability.
7. When Dr. Staples saw claimant again on June 11, 1987, he reported constant pain in his low back and both legs, worse on the left and severe pain with activity. On examination, claimant's back was tender from L2 to S2, with severe sensitivity to hand pressure from

L4 to S1. Dr. Staples concluded that claimant had a permanent partial moderately severe disability in his low back and could do light work.

8. On November 16, 1993, claimant saw a neurologist, Dr. James Bernat, to whom he complained that he could not sit for more than 30 to 60 minutes, could not stand for long periods of time, and had limited lifting ability. On examination, he was tender from L3 to the sacrum. Dr. Bernat concluded “my impression is that Mr. Coombs has a chronic L5 radiculopathy from an L4-5 chronic disc herniation which has been present for at least the last ten years. He has acute exacerbations which were treated by manipulations successfully, but because of his chronic back pain it produces impairment in his functional level as stated and he must take daily medications.”
9. In the voluminous medical records in this case, there are no records relating to claimant’s back for 1994 or 1995. However, a May 2, 1996 VA progress note references an acute increase in claimant’s chronic low back pain in October 1995.
10. Since his discharge from the Army, claimant has treated regularly and frequently with Dr. Harry Harouturian.

#### **Employment with Vermont Natural Company**

11. Claimant worked at defendant Vermont Natural Company performing physical labor including property maintenance, janitorial and custodial services, carpentry, renovation, snow removal, and shipping and receiving cases of jams, jellies and maple syrup for several years prior to 1997. Throughout the period of claimant’s employment with the defendant, his job activities and duties remained unchanged and involved the same type and amount of physical labor. In early January 1997, claimant was laid off.
12. Claimant testified that on or about December 10, 1996, he experienced extreme back pain while lifting and moving heavy boxes and jumping in and out of a truck while he was working. The pain, he said, increased in severity throughout the day. Although he had experienced back pain in the past, claimant testified that the pain from that December 1996 incident was more severe than any pain he had experienced in the past.
13. On December 11, 1996, claimant went to the office of general practitioner, Dr. Harry Harouturian, where he saw Nurse Practitioner Simone Hilton for complaints of left-sided sciatica pain after shoveling on December 9, 1996. The note for that visit reflects a long history of low back pain that had not been checked in two to three years. Examination revealed tenderness over the insertion of the sciatic nerve on the left with radiation down the back of the thigh. He was referred to an orthopedist, instructed to use ice, and was given prescriptions. Nothing in the note reflects an out of work instruction.
14. Claimant was referred to Orthopaedic and Hand Surgery where physician’s assistant Dean Measeck saw him on December 12, 1996. At that visit, claimant complained of the onset of discomfort in the back and left leg when he jumped down several times from his truck and pallet on December 10.

15. On December 16, 1996 defendant filed a first report of injury that identified an injury to the lower back from moving boxes, lifting, and jumping in and out of the truck.
16. Later that month, claimant underwent an MRI from which Dr. Daniel Robbins diagnosed an L5-S1 “disk collapse.”
17. Claimant continued to perform his usual and customary work for defendant without missing any time from work until early January 1997 when he was laid off. Scott Reed, who worked with claimant on a regular basis during December 1996, did not know that claimant had injured himself that month, nor did he observe any change in how claimant did his work
18. Claimant testified that in the past, he needed to take a few days of bed rest to relieve bouts of low back pain, testimony that his medical records confirm. For example, in an October 7, 1997 report, Dr. William Davison wrote that since his discharge from the Army, claimant developed “episodes of acute back pain with radiation down the left leg once or twice a year, which he usually has to treat with bed rest for two to three days.” He did not take such a rest period after the December 10, 1996 incident. Although claimant was paid for sick time, the only sick day he took that month was on December 26.
19. Claimant testified that since the December 1996 injury he can no longer perform physical tasks that he had been used to, including carrying heavy objects, climbing ladders, shoveling, driving for extended periods, and doing carpentry work. He also testified that he has recently been prescribed a “TENS” pain suppression unit.

### **Medical Opinions**

20. On April 15, 1997 Dr. Robbins stated that claimant suffered from new onset injuries, different from prior injuries and clearly associated with work.
21. In a Rating Decision dated October 21, 1997, the Veterans’ Administration found that claimant’s December 1996 injury was an aggravation of his earlier service-connected injuries. However, based on Dr. William Davison’s October 3, 1997 examination, the VA did not increase its 40% disability rating of the claimant’s spine. Under the VA rating system, “an evaluation of 40 per cent is assigned for recurring attacks of severe intervertebral disc syndrome with only intermittent relief.” The next higher evaluation of 60% “is not warranted unless there is pronounced intervertebral disc syndrome with persistent symptoms compatible with sciatic neuropathy, characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc and little intermittent relief.”
22. At defendant’s request, Dr. Victor Gennaro reviewed claimant’s medical records, after which he issued an initial report dated December 5, 1997. Dr. Gennaro was unable to determine from the December 1996 MRI report whether claimant’s disc herniation and sciatica were due to his occupation or to longstanding degenerative disease. In a supplemental report a month later, Dr. Gennaro concluded that it was more probable than not that the findings at the L5-S1 level were old. He based that conclusion on MRI

evidence of complete loss of water content at L5, L4-5 and nearly complete loss of water content at L5-S1. The advanced degeneration of the disc at L5-S1 suggested to him that it had been there for some time.

23. Dr. Franklin Lynch, an orthopedic surgeon who has treated claimant for his back condition at the Veterans' Administration Hospital, performed surgery on claimant to remove a disc at the L5-S1 level in March 1998.
24. In a report dated July 24, 1998, Dr. Lynch opined that in December 1996 claimant suffered an injury to the L5-S1 level that was clearly different from the injuries at the L4-5 level he had suffered in the early 1980's. Dr. Lynch concluded the new injury was clearly work related. Dr. Lynch based this opinion on a February 1998 myelogram that confirmed a disc at the L5-S1 level, the surgery he performed at that level, which relieved claimant's symptoms, and the time claimant set by history, December 1996, when he was doing repetitive, physically strenuous work.
25. Dr. Mark Bucksbaum, who is a board certified independent medical examiner and is board certified in physical medicine and rehabilitation, reviewed claimant's medical records for the defense. He did not examine the claimant. He does not do surgery in his practice. Although he was not familiar with the VA disability rating system, he was able to determine the comparable rating in the 4th edition to the AMA Guides to Permanent Impairment (Guides) by comparing the narrative explanation for the VA rating to the ratings in the Guides and claimant's objective findings. For example, he noted that claimant's disability as rated by the VA for 40 % of the spine was equivalent to a DRE Lumbosacral Category V: Radiculopathy and Loss of Motion Segment Integrity impairment rating, with a resultant 25% whole person impairment. He explained that the 40% in VA system is equivalent to a Category V in the Guides. Then he put this initial opinion in context by comparing the next higher level in the two systems.
26. Dr. Bucksbaum also testified that, because perception of pain varies from person to person, the Guides specify that "the impairment percentage shown in the chapters that consider the various organ systems make allowances for the pain that may accompany the impairing condition." *Guides*, Chapter 2 at 9.
27. Dr. Bucksbaum concluded that claimant suffers from a degenerative condition in his back with its origin in his service related injury which has gradually worsened over time. This worsening, he explained, was to be expected as evidenced by the high original rating the VA had given him.
28. Dr. Lynch's operative note found that upon visual examination, there was "no evidence of impingement of the S1 nerve root on the left." That visual observation during surgery, Dr. Bucksbaum opined, was inconsistent with Dr. Lynch's July 24, 1998 opinion letter which reported an injury at the S1 level.
29. Dr. Bucksbaum also explained that the *Guides* criteria consider the lumbosacral area of the back as a single zone. Consequently, this claimant's impairment rating for a service related injury to the left side of his back at L4-5 encompassed the S1 area on that side, even though it had not become symptomatic until years later.

## CONCLUSIONS OF LAW:

30. In a workers' compensation claim, it is the burden of the claimant to establish all facts essential to support his claim. *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).
31. Where the causal connection between an accident and an injury is obscure, and a layperson 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).
32. Given the medical history in this case, claimant can sustain his burden only if he proves that, in December 1996, he suffered a new injury or an aggravation of his service-related low back injury. Because of the location of his back injury, in the lumbosacral area, claimant's assertion that an event in December 1996 was a distinctly new injury is not convincing. Even if the area of the spine was one level lower than what he had injured in the service, i.e., L5-S1, rather than L4-L5, the distinction is not one identified in the *Guides*,<sup>1</sup> which considers the lumbosacral area as a whole, and is not one this Department can recognize on the facts presented.
33. Claimant, therefore, must prove that he suffers from an aggravation, i.e., that his work in December 1996 was an intervening event that accelerated or exacerbated a pre-existing condition. *Workers' Compensation Rule 2(i)*. On the other hand, if the December 1996 condition was a "return of symptoms following a temporary remission," it is a recurrence and not compensable. *Rule 2(j)*.
34. To aid in deciding between aggravation and recurrence, this Department has traditionally considered the following factors, with the final factor receiving greatest weight under *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997): 1) whether there is a subsequent incident or work condition which destabilized a previously stable condition; 2) whether the claimant had stopped treating medically; 3) whether the claimant had successfully returned to work; 4) whether the claimant had reached an end medical result; and 5) whether the subsequent work contributed independently to the final disability. See, *Trask*

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<sup>1</sup> "It is difficult to separate the cervical, thoracic, lumbar, and sacral spine regions functionally, because the signs related to the different regions commonly overlap. ... For instance, the brachial plexus is made up of nerve trunks from both the cervical and the upper thoracic regions, and the sciatic nerve includes components from both the lower lumbar and sacral regions. With the Injury or DRE Model, the main spine regions are termed the cervicothoracic, thoracolumbar, and lumbosacral regions." *AMA Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> edition at 3/95.

*v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998), and cases cited therein.

35. Even if we were to assume that the first condition favors claimant's position, all of the other factors devolve in favor of the employer. Claimant had not stopped treating medically. His own testimony and reports to physicians indicate that his back went out two to three times a year, that he sought medical attention often, and self treated during the time he did not see physicians. By all accounts, claimant had successfully returned to work and had reached a medical end result. The VA records are replete with references to his having reached a "substantial plateau in the medical recovery process," Rule 2 (h), a finding of medical end result that prompted his ultimate discharge from the Army.
36. The final and most important factor also supports a finding of recurrence. Claimant's final disability as measured by the VA physicians had not increased. When claimant was discharged from the Army, he had essentially the same lifting and bending restrictions he has today. That he had a period when he was more active is merely the "temporary remission" contemplated under Rule 2(j). Although Dr. Lynch at the VA used the term "aggravation" to describe claimant's current condition, the legal determination gleaned from the records as a whole supports a finding of recurrence. Claimant's period of increased activity does not alter the medical documentation of VA physicians and the conclusion of Dr. Bucksbaum that claimant suffers from a "return of symptoms following a temporary remission" and, therefore, a recurrence of his service-related injury. As such, this claim is not compensable.

**ORDER:**

Based on the foregoing Findings of Fact and Conclusions of Law, this claim in its entirety is DENIED.

Dated at Montpelier, Vermont, this 15th day of April 1999.

Steve Janson  
Commissioner