

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

Travis St. Arnault)	State File No. D-17737
)	
v.)	By: Margaret Mangan
)	Hearing Officer
)	
Canusa Corp.)	For: Steve Janson
and)	Commissioner
Maurice's Service Center)	Opinion No. 23-99WC

Heard in Montpelier, Vermont, on October 15, 1998.
Record Closed: February 26, 1999.

APPEARANCES:

Christopher J. McVeigh, Esquire for Claimant
John Davis Buckley, Esquire for Canusa Corp.
John W. Valente, Esquire for Maurice's Service Center

ISSUE:

Whether claimant suffered an aggravation or recurrence of his pre-existing compensable leg injury.

CLAIM:

1. Pursuant to 21 V.S.A. § 662(c), defendant Canusa Corp. seeks reimbursement from defendant Maurice's Service Center.
2. Pursuant to 21 V.S.A. § 678, claimant seeks attorney fees and expenses.

EXHIBITS:

Joint Exhibit I:	Medical records notebook
Joint Exhibit II:	Deposition transcript of Audrey E. Von Lepel, M.D.
Claimant's Exhibit 1:	Deposition transcript of Laurie Spaulding, M.D.

STIPULATION:

All parties stipulate that the gastric bypass surgery, which claimant underwent as treatment for his leg injury, constituted compensable and reasonable medical treatment, as required under 21 V.S.A. §640.

PRELIMINARY PROCEDURAL COMMENT:

In February 1991, claimant was severely injured while in the employ of defendant Canusa Corp. As a result of this injury, Hartford Insurance Company, workers' compensation carrier for defendant Canusa, paid claimant his workers' compensation benefits. Included within these payments was an award for permanent partial disability benefits based upon an approved Form 22 Agreement dated June 15, 1993. Subsequently, in September 1997, Dorothy Ford, M.D., assessed claimant with an increased permanency rating. Via another approved Form 22 Agreement, the carrier accepted this claim, without prejudice, and forwarded claimant additional benefits. However, pursuant to 21 V.S.A. §662(c), defendant Canusa presently seeks reimbursement from defendant Maurice's Service Center for this second payment, as well as any and all outstanding and future medical and indemnity benefits, maintaining that claimant's condition was aggravated by his subsequent employment.

FINDINGS OF FACT:

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

CLAIMANT'S PRIOR 1991 WORK RELATED INJURY:

2. In February 1991, claimant, a seventeen year old part time worker for defendant Canusa Corp. ("Canusa"), was severely injured when multiple bales of waste paper, weighing 1,200 pounds each, crushed his lower extremities. As a result of this incident, claimant sustained bilateral tibia/fibula fractures, as well as left sided compartment syndrome.
3. As treatment for these injuries, claimant underwent numerous surgical procedures, including irrigation and debridement of his lower extremities, an external fixation with a Delta frame on the left tibia/fibula and a skin graft of his left lower extremity.
4. Following the incident, claimant gained a significant amount of weight due to his inability to participate in physical activities. At his greatest weight, claimant was approximately 355 pounds. In addition, as a result of his injuries, claimant endured an open wound on his left lower extremity, which did not heal for several years.
5. Furthermore, due to the 1991 injuries to his lower extremities, claimant sustained significant damage to his lymphatic and venous systems.

CLAIMANT'S EMPLOYMENT HISTORY:

6. After his 1991 injury, claimant did not return to the work force for several years.
7. Subsequently, in January 1994, claimant began working, on a part time status, for defendant Maurice's Service Center ("Maurice"), which progressed into a full time position in the ensuing months. In this capacity, claimant worked an estimated fifty hours per week. His work responsibilities included locating and providing parts for serviced automobiles, assisting customers and, on occasion, pumping gasoline and

performing oil changes. While performing these duties, claimant remained in a standing position for a large portion of the work day.

8. Throughout his tenure of employment with defendant Maurice, claimant would occasionally miss work for a period of time due to his medical condition. Specifically, between 1994 and 1996, claimant was hospitalized on several occasions in order to receive treatment for an episode of cellulitis.
9. In May of 1996, claimant went on vacation for one and a half weeks. While on vacation, claimant “relaxed,” “lounged around,” and really “did not do a lot.” Claimant testified that, during this time, his condition improved. His legs stopped aching and the swelling in his lower extremities reduced.
10. When he returned to his employment with defendant Maurice following his vacation, claimant noted a deterioration in his condition. Claimant’s pain symptoms worsened to such a degree that he ceased his employment with defendant Maurice.
11. Claimant did not return to work with defendant Maurice, nor any other employer, from June 1996 through 8 weeks following his gastric bypass surgery, which was performed on April 18, 1997.

CLAIMANT’S RELEVANT MEDICAL CONDITION AND TREATMENT:

12. Following his 1991 injury, claimant continued to treat for his injuries and associated conditions for the next several years. Specifically, for his follow-up care, claimant received treatment from the University Health Center (“UHC”). Claimant also treated with the Medical Center Hospital of Vermont (“MCHV”).
13. Prior to his 1994 employment with defendant Maurice, claimant’s last documented visit with a medical provider from UHC was in October 1993. In addition, his last treatment with MCHV in 1993 was in the month of June.
14. Following his 1991 injury, claimant continued to suffer from an open wound on his left lower extremity. Although a June 1993 NWMC record related that claimant’s left lower extremity wound was healed, numerous other records, as well as the testimony of Audrey Von Lepel, M.D. and Anthony Pisanelli, M.D., revealed otherwise. As documented by the UHC medical records, up until April 1993, claimant still had 3-5 mm lesions on his left lower extremity. In addition, the later notes from UHC also revealed a .5 cm crusted erosion in August 1993 and a “poorly healed wound” and “vulnerable extremity” in October 1993.
15. Moreover, claimant testified that, when he initiated his employment with defendant Maurice in January 1994, his left lower extremity still had open wounds and he described his condition as “still pretty poor” and he explained that he was still in “pretty nasty shape.” Finally, both Dr. Von Lepel and Dr. Pisanelli testified that a review of the medical records indicated that claimant’s open wound on his left lower extremity remained open until 1998.

16. Also prior to his employment with defendant Maurice, claimant had three incidents of cellulitis, or infection, of his left lower extremity. Claimant treated at the Medical Center Hospital of Vermont ("MCHV") in March 1993 and in June 1993 for cellulitis in his left lower extremity. In addition, claimant received medical attention from UHC in October 1993 for yet another episode of cellulitis.
17. Aside from his cellulitis treatments, the medical records from 1992 through 1993, just prior to claimant's employment with defendant Maurice, also document claimant's continued discomfort, pain and edema, or swelling, in his lower extremities. Moreover, when claimant testified, he verified that, prior to his employment with defendant Maurice, he experienced swelling and pain in his lower extremities.
18. In March 1994, Dorothy Ford, M.D., examined claimant and determined a permanent partial impairment rating for his condition. Dr. Ford opined that claimant's condition constituted a Class III peripheral vascular/lymphatic problem and, utilizing the A.M.A. Guidelines, the doctor then concluded that claimant sustained a 45% right lower extremity and a 69% left lower extremity permanent partial impairment. Finally, Dr. Ford stated that claimant was at a medical/surgical end result for the purposes of permanency.
19. Following his employment with defendant Maurice, claimant continued to suffer from cellulitis in 1994. Specifically, the records from UHC revealed that claimant was treated for cellulitis in June 1994, as well as September 1994 through October 1994.
20. In addition, the medical documentation also recounts that claimant's wounds on his left lower extremities remained open during 1994. A September 1994 record from UHC partially describes claimant's medical condition as a history, since 1991, of nonhealed draining ulcers. Furthermore, in October 1994, after Michael J. Guerra, D.P.M., examined claimant, he noted two open ulcers on claimant's left leg.
21. In a December 1994 correspondence, Dr. Ford again commented on claimant's medical status. Of particular importance, she explained that since claimant's condition causes a natural progression of lymphatic blockage, he will continue to deteriorate, rather than improve.
22. Claimant also combated several episodes of cellulitis in 1995. The records from NWMC document treatment for cellulitis in January, March, and May.
23. In 1995, claimant also initiated treatment with Audrey Von Lepel, M.D., of Fairfax Associates in Medicine. In a May 1995 correspondence, Dr. Von Lepel explained claimant's unrelenting cellulitis condition. Specifically, she stated that the original 1991 injury compromised claimant's venous system of the left lower leg. This compromised system caused claimant's chronic ulceration, which then leads to the recurrent episodes of cellulitis. In conclusion, she opined that this condition would recur over and over again.
24. In a September 1995 Case Development Sheet, Dr. Von Lepel's opinion as to claimant's

medical status was summarized. The record refers to Dr. Von Lepel's opinion that claimant's laceration, which places claimant with a life long risk of infection, does not heal because of the location and direction of the wound, as well as claimant's obesity.

25. In 1996, claimant continued to suffer from cellulitis of the left lower extremity. A March 1996 note of Dr. Von Lepel explains that claimant once again developed cellulitis in his left leg. In addition, claimant still endured a non-healing, draining wound on his left tibia, as documented in an April 1996 record of David Groening, D.P.M., of the NWMC.
26. In June 1996, after claimant returned to work following a ten day vacation, he sought medical attention from Dr. Von Lepel. In the applicable medical record, the doctor noted an improvement in claimant's pain tolerance during his vacation. However, upon his return to employment with defendant Maurice, claimant's symptoms worsened. Specifically, claimant experienced an increase in pain and he felt he could no longer stand on his legs. As such, it was at this time that claimant decided to cease his employment.
27. In order to relieve claimant of his pain complaints and his recurring episodes of cellulitis, Dr. Von Lepel presented the possibility of a gastric bypass surgery. In the fall of 1996, the doctor explained the necessity behind the surgical procedure. Initially, she related that claimant, whose ideal weight is 180 pounds, weighed 347 pounds, and this increased weight compromised claimant's blood supply to the lower extremities and caused recurrent episodes of cellulitis. Therefore, since claimant's chronic cellulitis would improve if he lost the excess weight and because claimant's condition prevented him from reducing his weight by physical exercise, Dr. Von Lepel opined that the surgical procedure was necessary.
28. In a January 1997 correspondence, Dr. Von Lepel clarified her explanation for claimant's condition. She explained that claimant suffered from recurrent cellulitis because his obesity compromised his circulation and, therefore, he sustained recurrent infections of his semi-open, chronic wound.
29. In April 1997, claimant, in fact, underwent the gastric bypass surgery in an effort to control his morbid obesity. This procedure was performed by Laurie Spaulding, M.D., at the referral of Dr. Von Lepel. When discussing her understanding of claimant's condition and the necessity for the surgery, Dr. Spaulding testified that the surgery would help claimant lose his excess weight and subsequently, his pain, persistent ulcers, and chronic infections should be alleviated.
30. However, a few months following the surgical procedure in June 1997, claimant once again was admitted to the hospital for treatment of cellulitis in the left lower extremity.
31. Also in June 1997, Dr. Ford examined claimant again and updated her opinion on his condition. After conducting her evaluation, Dr. Ford opined that the continuing infections over the past years, which serve to plug up the lymphatic system, increased claimant's permanency. As such, she re-diagnosed him with a Class IV peripheral vascular/lymphatic problem and she assigned an 80% permanent partial impairment to claimant's left lower extremity. Finally, she determined that claimant was at a

medical/surgical end result.

32. Claimant testified that, since the surgery, he has lost approximately 160 pounds. Furthermore, he explained that his condition has improved. His wound has closed, the swelling in his lower extremities has decreased and he generally feels better.

EXPERT MEDICAL OPINIONS:

33. Both defendants in the instant matter presented expert opinions to support and bolster their respective positions. Defendant Canusa, in asserting that claimant suffered an aggravation, relied upon the testimony of Dr. Von Lepel. Defendant Maurice, on the other hand, in advancing its recurrence theory, proffered the expert opinion of Dr. Pisanelli.
34. In Dr. Von Lepel's assessment, claimant's prolonged standing, while working for defendant Maurice, contributed to the pattern of claimant's recurrent infections. By way of explanation, Dr. Von Lepel stated that when claimant was in a standing position, gravity pulled his bodily fluids down to his lower extremities. This fluid, which is a good medium for culturing bacteria, accumulated and became stagnant in claimant's lower extremities because, as a result of the prior 1991 injury, claimant's venous and lymphatic system were compromised. Subsequently, as the fluid amassed in his lower extremities, claimant sustained dependent edema, or swelling, which set claimant up for an infection in his open wound.
35. Although Dr. Von Lepel linked claimant's prolonged standing with his recurrent episodes of cellulitis, she further opined that claimant's severe obesity, which also created venous compromise and, therefore, dependent edema, also placed claimant at a risk for infection. Moreover, the doctor also explained that claimant's compromised venous and lymphatic systems, which occurred as a result of the 1991 injury, in and of themselves, also increased claimant's risk of infection. Finally, Dr. Von Lepel unequivocally correlated claimant's open lesion on his left lower extremity with the mechanism of the recurrent infections, since the bacteria entered claimant's body through the open wound.
36. At the request of defendant Maurice, Victor J. Pisanelli, Jr., M.D., also proffered his own opinion on the cause of claimant's recurrent infections. In his estimation, claimant's employment with defendant Maurice neither worsened his condition nor produced any permanent damage. Rather, Dr. Pisanelli concluded that claimant's obesity, as well as his chronic open ulceration on the left lower extremity, led to the recurrent episodes of cellulitis.
37. Although Dr. Pisanelli concedes that claimant's symptoms of pain and swelling increased because of his employment with defendant Maurice, he further explained that anytime claimant's leg was in a dependent position, extending downward, he would experience pain and swelling.

MEDICAL EXPENSES, COSTS AND ATTORNEY FEES:

38. As a result of his gastric bypass surgery and due to his necessary follow-up care,

including his 1997 cellulitis treatment, claimant incurred an additional \$11,134.13 in medical expenses.

39. The claimant has presented evidence specifically delineating his attorney's 84.9 hours of representation. Furthermore, he has submitted as evidence an itemized list of expenses totaling \$1,516.99.

CONCLUSIONS OF LAW:

1. At issue in the present case is whether the claimant's recurrent infections, increased disability, and gastric bypass surgery resulted from an aggravation of the previous 1991 injury, for which defendant Maurice must assume liability, or a recurrence, for which defendant Canusa would remain liable.
2. The burden of proving which carrier is on the risk is determined by the facts and circumstances of each case. *Brown v. E. B. and A. C. Whiting and University of Vermont*, Opinion No. 07-97WC (June 13, 1997); *Smiel v. Okema Realty Development Corp.*, Opinion No. 10-93WC (Aug. 23, 1993). However, the Department will primarily assign the burden of proof to the party attempting to relieve itself of liability. *Brewer v. Town of Springfield and Overhead Door Co. of Rutland, Inc.*, Opinion No. 27-97WC (Oct. 3, 1997); *Frederick v. Metromail Corp.*, Opinion No. 25-97WC (Sept. 23, 1997). Accordingly, in this case, since defendant Canusa is seeking reimbursement from defendant Maurice for benefits paid to or on behalf of claimant, it carries the burden of proving that claimant sustained an aggravation of his pre-existing 1991 lower extremities injury.
3. 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 Lumber Co.*, 112 Vt. 17 (1941).
4. 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). 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).
5. In order to conduct a proper aggravation/recurrence analysis, it is essential that the definitions of these terms are clearly understood. The Department defines a recurrence as the return of symptoms following a temporary remission, or a continuation of a problem which had not previously resolved or become stable. Whereas, an aggravation means an acceleration or exacerbation of a previous condition caused by some intervening event or events. In further clarifying the meaning of the term aggravation, it has been additionally explained as a destabilization of a condition which had become stable, although not necessarily fully symptom free. Rule 2(i) and (j) of the Vermont Workers' Compensation and Occupational Disease Rules (April 1, 1995) ("Rules"); *Lavigne, supra*; *Jaquish,*

supra.

6. In distinguishing between the terms “recurrence” and “aggravation,” the Vermont Supreme Court articulated the following:

In workers’ compensation cases involving successive injuries during different employments, the first employer remains liable for the full extent of benefits if the second injury is solely a “recurrence” of the first injury -- i.e., if the second accident did not causally contribute to the claimant’s disability (cite omitted). If, however, the second incident aggravated, accelerated, or combined with a pre-existing impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an “aggravation,” and the second employer becomes solely responsible for the entire disability at that point. (cite omitted).

Pacher v. Fairdale Farms & Eveready Battery Company, Vermont Supreme Court Docket No. 96-434 (June 2, 1997).

7. Several factors are utilized by the Department to assist in the classification of a condition as a “recurrence” or an “aggravation of a pre-existing injury.” The factors include (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 claimant had successfully returned to work; (4) whether claimant had reached a medical end result; and (5) whether the subsequent work contributed independently to the final disability. *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998).
8. When evaluating the initial factor of the aggravation/recurrence analysis, it is apparent that claimant suffered a recurrence of his 1991 injury. As evidenced by the medical records in this matter, claimant’s condition was never stabilized. From the date of the first injury in February 1991 until claimant commenced his employment with defendant Maurice, claimant suffered from continuous edema and pain. Moreover, prior to his employment with defendant Maurice, claimant had already endured multiple bouts of cellulitis in his left lower extremity. Finally, as evidenced by the medical records, claimant’s testimony and the opinions of Dr. Von Lepel and Dr. Pisanelli, when claimant initiated his employment with defendant Maurice, he still had a chronic open wound on his left lower extremity. Accordingly, this factor clearly advances a conclusion in favor of a recurrence.
9. The second element of the analysis, whether claimant had stopped treating medically, also dictates a recurrence finding. As indicated by the records in this matter, claimant received medical care and attention on a persistent basis from the time of his original 1991 injury until January 1994, when claimant started his employment with defendant Maurice. In fact, in October 1993, just prior to his employment with defendant Maurice, claimant underwent medical treatment for his condition. Therefore, since claimant was still receiving continued medical treatment, this factor supports a recurrence determination.

10. After applying the present factual scenario to the third factor of the analysis, it is apparent that claimant did not “successfully” return to work following his 1991 injury. Despite his approximate two year tenure with defendant Maurice, from January 1994 through June 1996, claimant’s employment cannot be described as a productive and accomplished re-entry into the work force. During that time, claimant missed an ample amount of work on numerous occasions due to his lower extremities injury. Furthermore, as claimant explained, while he was employed by defendant Maurice, his symptoms of pain and swelling never subsided. As such, it is evident that claimant did not “successfully” return to his employment.
11. Although Dr. Ford determined in March 1994 that claimant was at a surgical/medical end result for purposes of permanency, as required by the fourth element of the inquiry, this finding is clearly questionable, in light of Dr. Ford’s subsequent commentary. Specifically, Dr. Ford explained, in a December 1994 correspondence, that since claimant’s condition results in a natural progression of lymphatic blockage, he will continue to deteriorate rather than improve. Since the doctor’s theory of deterioration did in fact occur, as evidenced by her 1997 increased impairment rating of claimant, her prior conclusion of medical end result is suspect, at best. Therefore, Dr. Ford’s medical end result determination cannot be relied upon to sustain a finding of aggravation in this matter.
12. An extensive and complete appraisal of the final factor, whether the claimant’s subsequent work contributed independently to the final disability, unequivocally requires a finding in favor of recurrence. Both experts in this case, Dr. Von Lepel and Dr. Pisanelli, concur that claimant’s obesity, his compromised venous and lymphatic systems, and his open wounds, all of which resulted from his prior 1991 injury, caused claimant’s recurrent episodes of cellulitis. As such, it is apparent that claimant’s 1991 injury caused claimant to suffer from chronic infections, which created a greater impairment in claimant’s left lower extremity.
13. The experts differ, however, when assessing the effect of claimant’s prolonged standing while in the employ of defendant Maurice. Although Dr. Von Lepel concluded that the standing was a contributing factor in causing claimant’s cellulitis episodes, this conclusion cannot be accepted. Initially, it is essential to note that prior to, as well as after his employment with defendant Maurice, claimant suffered from multiple bouts of cellulitis. Similarly, claimant has exhibited constant symptoms of pain, discomfort, and swelling from the time of his initial 1991 injury. Although these symptoms may have increased during his employment with defendant Maurice, this does not necessarily equate with an increase in his disability. Rather, the more probable hypothesis, as advanced by Dr. Pisanelli, is that claimant’s prolonged standing neither worsened his condition nor produced any permanent damage. Furthermore, the fact that claimant’s wound has closed and his swelling decreased since the 1997 gastric bypass surgery, which resulted in a significant reduction in claimant’s weight, lends a substantial amount of credence to Dr. Pisanelli’s overall causation theory. Consequently, consistent with the medical evidence, the final factor also mandates a recurrence conclusion.
14. In summation, as illustrated by the preceding conclusions of law, a complete and thorough analysis of the aggravation/recurrence inquiry definitely establishes, as the

more probable hypothesis, that claimant's condition was a continuation of a problem which neither previously resolved nor became stable. Rather, since his 1991 injury, claimant's condition progressively and continuously deteriorated. As such, a finding in favor of recurrence is required.

15. As to claimant's request for attorney fees and costs, the claimant has presented evidence of his attorney's services for 84.9 hours spent on his representation. Furthermore, claimant has submitted as evidence an itemized list of expenses totaling \$1,516.99.
16. Pursuant to 21 V.S.A. §678(a), which discusses awards for costs and attorney fees, provides that an award for reasonable costs is mandatory, as a matter of law, if the claimant prevails in a workers' compensation proceeding. *Pederzani v. The Putney School*, Opinion No. 57-98WC (Oct. 6, 1998); *Fredriksen v. Georgia-Pacific Corp.*, Opinion No. 28-97WC (Oct. 17, 1997). Therefore, since claimant has prevailed in this matter, he is awarded his expenses.
17. An award of attorney fees is a matter of the Commissioner's discretion. *Aker v. ALIIC*, Opinion No. 53A-98WC (Nov. 5, 1998); *Pederzani, supra*; *Fredriksen, supra*. In this matter, claimant submitted a detailed itemization of his attorney's involvement and representation, which delineated services provided from June 24, 1996 through February 26, 1999. After a review of this submission, it is apparent that claimant is only entitled to attorney fees up until, and including, the date of the formal hearing, October 15, 1998. Since the parties stipulated to the compensability of the gastric bypass surgery at the time of the hearing, claimant's attorney's representation was not necessary or required thereafter. As such, attorney fees, being calculated at a rate of \$35 per hour for 72.9 hours of representation, for services provided from June 24, 1996 through October 15, 1998, in the amount of \$2551.50 is awarded to claimant.

ORDER:

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law:

1. Canusa Corp. remains liable for claimant's workers' compensation benefits as a result of his 1991 injury;
2. Canusa Corp. must pay claimant \$1,516.99 in costs and \$2,551.50 in attorney fees

DATED in Montpelier, Vermont, this 19th day of May 1999.

Steve Janson
Commissioner