

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

E. F.)	State File No. A-24343
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
)	
Bradford Veneer & Panel)	For: Steve Janson
)	Commissioner
)	
)	Opinion No. 04-00WC

Hearing held in Montpelier on May 24, 1999
Record closed on October 21, 1999

APPEARANCES:

Patrick L. Biggam, Esq. and Charles W. Collier, Esq. for the Claimant
Edward R. Kiel, Esq. for the Defendant

ISSUE:

Whether the claimant suffered a recurrence or a new injury as a result of a November 1990 concrete block incident.

FINDINGS OF FACT:

- Bradford Veneer and Panel Corporation employed claimant when he suffered an undisputed work injury on May 4, 1988. The accident occurred when claimant put a dolly under a skid loaded with wood. He jacked it up and yanked to start the load rolling. In the process, the skid got caught on a piece of concrete and when he yanked on the load, his shoulder popped and started getting numb and turning blue, cold and clammy. This was the first time claimant had suffered an injury to his shoulder.
- On May 9, 1988 claimant began treating with Lance Osadchey, M.D. a family physician in Bradford, Vermont, to whom his employer sent him. Dr. Osadchey treated him at least six times over the next ten months during which time he also sent him to physical therapy. When claimant's condition failed to improve, Dr. Osadchey referred claimant to James M. Murphy, M.D., an orthopedist at Dartmouth-Hitchcock Medical Center for a consultation. At the same time, Dr. Osadchey continued to treat the claimant.

3. In his April 11, 1989 initial note, Dr. Murphy recorded his impression that claimant suffered from a right shoulder ligament impingement phenomenon and his recommendation for conservative treatment with physical therapy and anti-inflammatory medications.
4. Dr. Osadchey saw claimant again on March 1, 1989 and June 20, 1989. At the second of these visits, the doctor's examination of claimant's shoulder revealed "good range of motion with strength decreasing." He also noted that claimant was not able to engage in physical therapy or take anti-inflammatory medications because the insurance company refused to pay for them. On July 6, 1989 claimant saw Dr. Osadchey again for his right shoulder condition.
5. The carrier sent claimant to see Dr. Kendal Frost for an independent medical examination on August 9, 1989. At that time claimant said that he could not hold a coffee cup in his right hand and his right hand and shoulder were numb. On examination, the doctor noted marked tenderness over lateral rotator cuff and the biceps tendon. Dr. Frost diagnosed chronic right biceps and supraspinatus tendonitis, possibly subsequent to a partial tear of the supraspinatus at the time of the injury. He gave claimant a sedentary work level.
6. On February 5, 1990 Dr. Murphy performed arthroscopic surgery and acromioplasty on claimant. Arthroscopically, the entire shoulder was considered normal. In his operative report, Dr. Murphy wrote, "there were absolutely no abnormalities intra-articularly noted." Next, the surgeon made an incision in the shoulder and noticed a small "osteophyte" on the anterior ridge of the acromion, which he sawed off. Direct visualization of the rotator cuff and bursa revealed no pathology. Following surgery claimant participated in 18 sessions of physical therapy at Cottage Hospital.
7. The June 12, 1990 physical therapy note to Dr. Murphy states that claimant's chief complaints remained, that with any amount of strenuous or prolonged use his shoulder became numb, cold, clammy and weak. Claimant estimated that he was in pain 50% of the day. In addition, he complained of dropping things, muscle spasms, and tremors with extension and electric sensations along the anterior aspect of the right shoulder.
8. Claimant testified that although the arm had improved, some symptoms remained. He still had the tremor, swelling and stiffness, and the arm would tire quickly if over exerted.
9. Although Dr. Murphy reported in his June 26, 1990 office note that claimant's symptoms "are significantly improved since his preoperative state and his discomfort is much less," he also noted that claimant reported limited strength in the arm prevented him from working.
10. On a referral for an evaluation of symptoms involving the right hand and arm, a neurologist, Colin Allen, M.D., saw claimant on August 18, 1990. Dr. Allen

reported that claimant was experiencing loss of strength in his right arm with use, that his arm would remain sore, and that his right hand was numb.

11. In contrast, on August 28, 1990 Dr. Murphy reported that claimant felt "significantly more comfortable than he was preoperatively." Dr. Murphy assessed good range of motion and concluded that claimant had recovered nicely. He released claimant to work without restrictions.
12. On September 20, 1990 claimant saw Dr. Osadchey and mentioned that his arm had given way and started burning in the shoulder area after he had tried to pick up stove wood and bring it into the shed. Dr. Osadchey's medical record reports this wood carrying incident, stating that claimant "tried to bring in wood. His arm would get painful." The doctor concluded with the determination that claimant could not do lifting work with his right arm.
13. In early November 1990 claimant was helping a friend with a construction project. He attempted to grab a standard concrete block with each hand, and felt his right shoulder burn and subsequently swell as it had before. He described the pain level as twice what he had experienced with the wood incident two months earlier. Claimant testified that the concrete blocks weighed between 20 and 30 pounds.
14. Claimant returned to Dr. Murphy on November 13, 1990. On examination, the doctor found that he had good range of motion in the shoulder. He also found that claimant's hand was tremulous and that he was tender in the subacromial space. Dr. Murphy suggested that claimant would be a candidate for a work hardening program, including psychological assistance and perhaps behavioral modification.
15. Dr. Osadchey wrote a report for a disability determination on December 19, 1990. In that report he stated that claimant was having problems in his shoulder, and that although he was satisfied with the results of his operation, he lost strength when he used his arm.
16. On February 11, 1991 claimant again saw Dr. Murphy who was unable to find any objective basis for his complaints, and again recommended work hardening. According to Dr. Murphy's notes, the insurance company denied that treatment.
17. On March 14, 1991 Dr. Frost again saw claimant for an IME. Dr. Frost noted that claimant continued to have difficulty with his right shoulder despite surgery and that his arm moved better, but that he swelled with pain and he was unable to use his hand for anything strenuous.
18. In his July 5, 1991 report, Dr. Murphy wrote, "I believe that his second episode, whereby he aggravated the shoulder once again, is a 'natural and probable result of the first injury' and that this is not the result of an independent intervening cause. I believe that he had an underlying condition which was aggravated by his second episode and clearly related to his first injury."

19. The carrier then sent claimant to another physician, Dr. Shoemaker of Claremont New Hampshire, who saw claimant for another IME on August 16, 1991. In the note for that visit, the doctor wrote that claimant "denies that there was any second injury or episode and that this event of November 1990 simply represented the fact that his arm was weak and it always had been. This is despite Dr. Murphy's post surgical notes that his arm had normal motion and essential[ly] no impairment." Dr. Shoemaker concluded that claimant was exaggerating, and that he had a "serious attitudinal" problem. He also noted that there is no "recent diagnosis that restricts Mr. French's use of his right shoulder."
20. Claimant saw Dr. Osadchey again on November 27, 1991 to have his right arm rechecked.
21. After more than two years, claimant visited Dr. Murphy on February 3, 1994 complaining that his hand occasionally got cold and his arm was uncomfortable. On examination, the range of motion in his arm was found to be normal. The sensory examination was normal and reflexes were symmetrical. Dr. Murphy was unable to identify a specific area of pathology. He characterized his assessment simply as occasional dysfunction of the upper extremity.
22. On June 3, 1994 claimant saw Timothy J. Wargo, M.D., in East Corinth with complaints of muscle spasms and loss of strength in his right upper extremity. On examination, claimant had tremors in the right forearm and noticeable weakness. Claimant treated with Dr. Wargo several times without relief.
23. On August 18, 1995 claimant again saw Dr. Allen for complaints in his right arm, including episodic swelling, tightness and soreness in muscles over his right upper shoulder and neck. The doctor noted a number of easily palpable trigger points in the right trapezius and supraspinatus muscles. Dr. Allen recommended a pain clinic.
24. Later in August 1995, claimant moved to Indiana.
25. An MRI scan of the right shoulder taken on October 25, 1996 revealed mild osteoarthritis in the shoulder, but no impingement and no evidence of a rotator cuff tear.
26. On October 30, 1996 claimant saw James E. Goris, M.D., an orthopedic surgeon in Indiana. At first Dr. Goris treated claimant's shoulder conservatively with physical therapy. When that treatment failed to improve claimant's symptoms, Dr. Goris recommended surgery. He determined that claimant's problem was a "continuing problem from his original injury which left the remnant of anterior acromion and failed to remove the patient's symptoms."
27. On April 3, 1997 Dr. Goris performed an impingement test by injecting a local

anesthetic into claimant's shoulder bursa. With the injection significantly improving claimant's symptoms, Dr. Boris confirmed his suspicion that claimant was suffering from impingement syndrome and that surgery was warranted.

28. On April 25, 1997 Dr. Goris performed a right shoulder arthroscopy with revision subacromial decompression and distal clavicle resection. During surgery, Dr. Goris noted a "continued spike" on the undersurface of the acromion and evidence of inflammation of the rotator cuff and bursa. Dr Goris used cautery to remove the periosteum from the undersurface of the acromion. He debrided soft tissue from the shoulder joint.
29. As of May 1999, claimant had what Dr. Goris described as a 90% improvement in his condition.
30. Claimant has worked at the Posy County Rehabilitation Services in Mount Vernon, Indiana, since September 1998.
31. Kuhrt Wieneke, M.D. performed a review of claimant's medical records and hearing transcript at the carrier's request. The parties agreed that the records' review would occur after the hearing.
32. Dr. Wieneke opined that "Since by Dr. Murphy's several reports describing this individual as fully recovered, and pain free, and with good strength in his right shoulder girdle and arm following arthroscopic surgery in 1990, I would conclude that he has made a successful recovery following that initial surgery, certainly by the late summer of 1990."
33. Based on an assumption that cement blocks weigh forty pounds each and that claimant had been lifting them with his fingertips, Dr. Wieneke concluded that "I consider the lifting incident in the fall of 1990 as an aggravation of an underlying pre-existing condition which did not however, result in any damage to the shoulder cuff mechanism per se." Dr. Wieneke did not acknowledge having reviewed Dr. Goris's opinion nor did he comment on the surgical findings from the operation Dr. Goris performed.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal relationship between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
2. 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).
3. 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, the Department has additionally explained that it is 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 v. General Electric Lockheed Martin*, Opinion No. 12-97WC (June 17, 1997); *Jaquish v. Bechtel Constr. Co.*, Opinion No. 30-92WC (Dec. 29,1992).

4. In distinguishing between the terms "recurrence" and "aggravation," the Vermont Supreme Court explained that "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*, 166 Vt. 626 (1997). (mem.).
5. Unlike situations in which one employer or another will be responsible for benefits in an aggravation-recurrence case, in this case we have an employer only for the first injury. Therefore, a determination that claimant's condition is a recurrence means that Bradford Vener is responsible for any benefits due because it is conceded that the original work related injury occurred at its work site. On the other hand, a determination that the cement block incident was an aggravation means that this is not a compensable claim because the incident did not occur in the course of employment. Therefore, the burden is on the employer to show that the concrete block incident is responsible for the benefits sought herein. See, *Sicotte v. Brattleboro Retreat*, Opinion No. 71-96WC (Nov. 25, 1996). Once it has been established that a claimant is entitled to benefits under the Workers' Compensation Act, 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).
6. 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).
7. The claimant argues that all the factors devolve in his favor. He contends that his condition did not stabilize after the first surgery, that he had not stopped treating medically, that he had not successfully returned to work, that he had not reached a medical end result before the second incident, and that the cement block lifting incident did not contribute independently to his final disability. Although he acknowledges that Dr. Murphy described a full recovery and assessment of no permanency, the claimant

relies on notes from Dr. Osadchey that document claimant's continued complaints.

8. In contrast, the employer's evaluation of the facts results in a contrary conclusion. It points to medical records in 1990 that document a complete and full recovery with no permanency associated with the surgery performed to correct his underlying condition. The employer argues further that claimant's medical treatment had concluded and that he was released to work without restrictions. The record reveals that between February 5, 1990 when Dr. Murphy performed surgery on claimant's shoulder and early November 1990 when the concrete block incident occurred, claimant continued to treat medically and demonstrated significant progress. At physical therapy at the beginning of that period, he complained of limited strength and he later complained to Dr. Allen about hand symptoms. However, by August 28, 1990 Dr. Murphy clearly documented that claimant was significantly more comfortable than he was preoperatively. He then released claimant to work without restrictions. Dr. Murphy determined that claimant's range of motion and strength were good when evaluated objectively. Assertions to the contrary are based completely on claimant's subjective, unverifiable complaints.
9. The concrete block incident in November 1990, by claimant's own description, caused significant burning and pain in his shoulder. Dr. Murphy described it as an aggravation. And although that term must be interpreted in its medical, not legal sense, it is clear that lifting the concrete block worsened claimant's shoulder condition. A specific diagnosis and medical comparison of the two surgical procedures in this case could have added greatly to an evaluation of this case, but are not available. However, with the records that have been produced, the employer has met its burden of proving that the concrete block incident was either a new injury or an aggravation of the earlier work related injury.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, because the lifting incident of November 1990 was an aggravation or new injury, this claim is DENIED.

Dated at Montpelier, Vermont, this 14th day of February 2000.

Steve Janson
Commissioner