

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

	)	State File Nos. M-16406; P-8562
	)	
Walter C. Webster	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Vermont Yankee Nuclear	)	Commissioner
Power Plant	)	
	)	Opinion No. 20-01WC

**APPEARANCES:**

Michael J. Hertz, Esq. for the claimant  
Andrew C. Boxer, Esq. for the employer

**EXHIBITS:**

Claimant's Exhibit 1: Training Schedule  
Claimant's Exhibit II: Medical Records

Defendant's Exhibit A: Medical Records  
Defendant's Exhibit B: Transcript of Deposition of Damaso Vidal, M.D.

**STIPULATION OF CONTESTED ISSUES:**

1. Did the claimant suffer a compensable injury arising out of and in the course of his employment with the defendant from his work-related activities on May 22, 1998 (State File No. P-8562) and/or from work-related activities ending on or about December 31, 1998, including training sessions attended by the claimant during November and December 1998 (M-16404)? If so, was the claimant rendered temporarily and totally disabled as a result of either or both alleged injuries?
2. If so, is the claimant entitled to temporary total disability benefits retroactive to December 31, 1998 as a result of either or both alleged injuries or, in the alternative, did his entitlement to temporary total disability benefits end on some date after December 31, 1998?
  - A. If the claimant was temporarily and totally disabled from employment, during what periods of time was he disabled?
  - B. Was the claimant entitled to temporary total disability benefits, despite having some work incapacity during certain periods of time, when the defendant would not allow him to return to employment while using Methadone or other narcotic pain relievers?
3. Is the defendant obligated to provide medical benefits to the claimant and to pay expenses

incurred for medical treatment of the claimant's compensable injuries since May 22, 1998, or subsequently, including treatment provided by Drs. Shapiro, Vidal and Provost, the Hitchcock Clinic and the Cheshire Medical Center?

4. Did the claimant waive any right to benefits for the alleged injury of May 22, 1998, by failing to notify the employer of the injury within the time required by the Department's regulations and decisions?
5. In the event the claimant prevails in whole or in part, should the defendant be ordered to pay interest, costs and attorney's fees?

**STIPULATION OF UNCONTESTED FACTS:**

1. As of May 22, 1998 and December 31, 1998, claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act ("Act").
2. As of May 22, 1998 and December 31, 1998 defendant was an employer within the meaning of the Act.
3. Claimant alleges that he suffered a personal injury by accident arising out of and in the course of his employment with defendant on May 22, 1998 (P-8562) and/or December 31, 1998 (M-16404).
4. Claimant has not worked for defendant since December 31, 1998.
5. As of May 22, 1998 and December 31 1998 claimant had three dependents under the age of 21 years.
6. By letter dated March 13, 1999 defendant's insurance carrier denied claimant's claim for workers' compensation benefits based on the alleged injury of December 31, 1998 (M-16404).
7. Claimant made a claim for workers' compensation benefits based on the alleged injury of May 22, 1998 (P-8562) by filing an Employee Notice and Claim for Compensation (Form 5) on or about November 13, 1999, after institution of these proceedings.
8. Claimant has received no workers' compensation benefits for either of the alleged injuries.
9. As of December 31, 1998 claimant's average weekly wage was \$1,156.46 and his compensation rate was \$770.97.
10. Claimant received short-term disability benefits from January 11, 1999 to May 14, 1999.

11. Claimant filed an application for hearing on or about July 9, 1999 and an amended application for hearing on or about July 28, 1999 (both in M-16406) seeking temporary total disability benefits, medical benefits, attorney's fees, interests and costs.
12. The parties agree to the admission of the claimant's medical records.

**FINDINGS OF FACT:**

1. Claimant, who was born on November 12, 1956, lives with his wife Sheila and three minor children in Guilford, Vermont. He obtained a GED in 1975.
2. Claimant worked part-time during high school at a cemetery and a racetrack. He also did carpentry work from time to time.
3. After high school claimant continued to work at the racetrack for a few years. Then, in 1978 he joined the carpenter's union and worked on the construction of various shopping malls in Massachusetts.
4. Claimant first worked at Vermont Yankee in 1979 when his union sent him there to work as a millwright during a power outage. He later joined the millwrights union and worked at Vermont Yankee off and on for many years, usually during power outages, for several weeks to a few months at a time. For this period of the claimant's career, he worked as an independent contractor at Vermont Yankee as well as at other nuclear plants in New England.
5. In 1997 Vermont Yankee hired the claimant as a full-time employee to work in the maintenance department. At that time he joined an electrical union. The claimant was a Vermont Yankee employee until December 31, 1999.

History

6. Claimant has a long history of back injuries and has had back pain since the 1970's when a Volkswagen fell on him while he was working underneath the car.
7. In 1978 the claimant fell 20 feet from staging at a job site, landing on his feet. In 1981 he was involved in a motorcycle accident.
8. In or around 1982 the claimant was in a rollover motor vehicle accident, after which he sought chiropractic care from Marcy Jones, D.C. for back pain in the lower and upper thoracic regions and cervical regions. Two years later he sought care from Lawrence Jenkyn, M.D. who reported that the claimant was missing four to five days of work per month because of his back problem and that he had a sleep disturbance. The claimant continued with medical and chiropractic care in 1984, in 1985 when he was working considerable overtime, and from 1986 to 1989.

9. Sometime in the 1980's the claimant started having knee problems that affected his walking.
10. In 1987 the claimant was injured on a job in Massachusetts after which he was out of work for two years. That injury hurt his thoracic-lumbar area of the back and increased the pain in his lower back. He received workers' compensation benefits for that injury.
11. In March of 1989 the claimant began treatment at the Pain Clinic at Cheshire Medical Center. He received trigger zone injections for relief of pain in his upper back and shoulder.
12. On January 25, 1990 a functional capacity evaluation placed the claimant in a sedentary to light work class. He had reported increased pain several hours after the testing.
13. On November 19, 1990 Dr. Sy placed the claimant at medical end result for his work-related injury, described as musculoskeletal. He released claimant to return work with restrictions against repetitive work or lifting more than 15 pounds.
14. Medical records indicate that the claimant injured his back again in July and September 1992.
15. In 1994 the claimant fell off a ladder while working around his house. He landed on his feet but his head came down as he landed and his chin hit his knee. He reported increase in neck pain after this incident.
16. Claimant lived with back pain. In 1994 he reported to his physician that he had episodes of low back pain and sciatica every six weeks for 4 to 5 days.
17. A January 24, 1995 MRI of the lumbosacral spine demonstrated loss of normal hydration at L2-3 and L3-4, a degenerative change. Otherwise the scan was normal with no indication of stenosis or herniated disc.
18. By 1995 the claimant still had intermittent back pain, although he was working regularly at Vermont Yankee.
19. In August 1995 a tree fell on the claimant's left shoulder, hurting his shoulder and arm and causing mid-back pain.
20. In April 1996 claimant complained of upper thoracic pain as noted in Dr. Shapiro's records.
21. In the summer of 1996 the claimant complained of left leg weakness, upper back pain and discomfort when sitting more than 5 minutes.
22. A January 3, 1997 MRI showed "multiple levels of disk desiccation." Such drying of the vertebral discs, especially with multiple levels, demonstrates a degenerative process. In a letter to the claimant dated January 9, 1997, Dr. Lawrence Jenkyn explained that the degenerative processes seen on that MRI could account for chronic back pain.

23. Throughout 1997 the claimant complained of mid-thoracic pain. In October of that year Dr. Shapiro recommended myofascial therapy for chronic thoracic pain. Also, when he was in the Brattleboro Hospital that year, it was noted that claimant was taking Oxycodone for chronic pain.

#### Work at Vermont Yankee

24. In November 1997 the claimant officially began his employment with Vermont Yankee.

25. On May 22, 1998 the claimant spent most of his day sledge hammering bolts in a dry well. He used a 6 to 8 pound sledgehammer and a 3 to 4 pound wrench. His work involved swinging the 6 to 8 pound sledgehammer from side to side with his right hand and striking a large (3 to 4 pound) wrench held with his left hand. He lost no time from work while doing that job, although he had some rib pain.

26. Claimant mentioned to his foreman a day or two later that he had difficulty working in the dry well, although he did not make a report of an injury at that time.

27. On July 10, 1998 the claimant saw his primary care physician, Dr. Shapiro, to whom he complained of right lateral rib cage pain he related to the sledgehammer work. He also complained of left sciatic pain. Dr. Shapiro noted that claimant was taking Oxycodone, MS-Contin and Imitrex at the time of that visit. He referred the claimant to Omar Damaso Vidal, M.D., an anesthesiologist with a specialty in pain management.

28. When the claimant saw Dr. Vidal in July of 1998, he reported that the sledgehammer work caused right rib pain. Although the claimant's physical examination at that time was normal, Dr. Vidal diagnosed neuropathic pain based on the claimant's complaints.

29. In August 1998, after watching a movie at Foxwoods with seats that moved backward, forward and from side to side in conjunction with the movie, the claimant asked his wife to drive home because he had upper back and neck pain. He then sought medical care from Dr. Shapiro and missed the following week from work because of the incident.

30. In September of 1998 the claimant had lower back pain that he described as "constant, burning, numbing, and sharp." Dr. Vidal continued to treat the claimant for his pain with medication and nerve root block.

31. In November and December 1998 the claimant participated in daylong classroom training sessions at Vermont Yankee. Although the sessions were long, participants had 15-minute breaks every 45 minutes and a lunch break. The claimant requested and received permission to stand up and move around so that he was not sitting for prolonged periods.

32. On December 18, 1998 the claimant underwent an annual physical examination for employment purposes. When asked for a history, the claimant reported headaches, a recent increase in back pain and left knee pain. Ten days later, on December 28, 1998, Dr. Idelkope stated that there was no medical contraindication to the claimant's performing his job, except that he was on Oxycontin and should not use heavy machinery. He also directed that the claimant not bend or lift due to his back condition.
33. In January 1999 the claimant had a sudden onset of right arm and neck pain with no obvious precipitant. He reported that his neck "froze up" for 5 days.
34. At an office visit on January 11, 1999 Dr. Vidal increased the claimant's Oxycontin.
35. On January 18, 1999 Dr. Vidal prescribed Methadone which improved the claimant's pain. Claimant was relieved. He felt his pain was under control and that he was ready to go back to work.
36. On February 9, 1999 the claimant had MRI scans of the thoracic and lumbar areas of the spine at Brattleboro Memorial Hospital. The radiologist read both as normal, although there was evidence of degenerative disease.
37. Dr. Vidal released the claimant for light duty work, with no periods of sitting or standing and frequent breaks, beginning on February 10, 1999.
38. Dr. Vidal opined that the claimant had a history of low back pain for years, aggravated from sitting for long periods of time during training.
39. Before he could return to work, claimant was required to see Dr. Idelkope, medical review officer for Vermont Yankee. Dr. Idelkope recorded that the claimant had a history of back pain that was aggravated by prolonged sitting during training. He also noted that Methadone was the only drug that helped the claimant's pain. However, because Methadone was not a medication approved for "fitness of duty requirements," Dr. Idelkope would not permit him to return to work at Vermont Yankee.
40. Dr. Vidal wrote to Dr. Idelkope expressing the opinion that the claimant could work while taking Methadone. And he expressed his disbelief about a policy that would allow an employee to work while taking MS Contin and Oxycontin, but not Methadone.
41. In April of 1999 the claimant described to Dr. Shapiro that his pain was "manageable" and that he thought he could return to work. On May 24, 1999 Dr. Shapiro determined that the claimant was able to return to work.
42. Dr. Shapiro also spoke with Dr. Idelkope at Vermont Yankee about the employer's policy not to permit a person to work while taking Methadone, but to no avail.

43. The claimant did not look for work elsewhere because he hoped that his treating physicians would have convinced Vermont Yankee to take him back on Methadone. When it became clear in May that Dr. Idelkope at Vermont Yankee would not relent, the claimant tried a series of trials on non-narcotic pain medications, none of which was effective in relieving his pain.
44. The claimant's physical examination in the spring of 1999 was the same as what it had been in July 1998. However, in June 1999 Dr. Fanciullo noted that the claimant's pain had been much more persistent in the previous six months.
45. In August 1999 Dr. Idelkope met with the Human Resource Manager and Dr. Shapiro to discuss the claimant's medications. Despite Dr. Shapiro's opinion that Methadone did not impair the claimant, Vermont Yankee would not let the claimant return while using Methadone or any other narcotic derivative. After a non-successful trial of non-narcotic medication, the claimant restarted Methadone.
46. Dr. Provost considered his September 1999 epidural steroid injection at the L4-L5 interspace unsuccessful because it provided only temporary relief of the claimant's pain.
47. In a September 30, 1999 letter to the claimant's attorney, Dr. Provost stated that it appeared from his review of notes and the claimant's medical records that the claimant had a longstanding history of chronic low back pain that was exacerbated in the spring of 1998 with his sledgehammer work. He opined that the claimant would not be able to return to work without taking Methadone for pain control.
48. On October 26, 1999 the claimant reported to Dr. Shapiro that he had been fired.
49. Dr. Kuhrt Wieneke examined the claimant for the employer. I accept as fact the findings from that examination that was thorough, logical and objective. In April 2000, claimant could bend and rotate normally with no evidence of paraspinal spasm. He had no muscle atrophy in his legs. His straight leg test was negative, sensory examination intact and reflexes symmetrical. He presented no evidence of nerve root impingement on examination or the MRI scans. These findings are remarkably similar to those by Dr. Reinert in 1989 and Dr. Jenkyn in 1984. The MRI scans of 1995 and 1999 showed no significant changes other than the natural progression of degenerative disc disease.
50. The claimant had a 5% whole person permanent impairment before and after his work at Vermont Yankee.
51. Claimant has chronic pain in his upper and lower back, left heel, foot, leg and buttock. He also has migraine headaches and shoulder pain. Over time, more and more drug is required to treat less pain. Changing to a different medication, as was done in this case when the claimant was given Methadone, is an effective ways to deal with pain. The change in his use of narcotics use was more likely due to the natural progression of long term use of narcotics than with a back injury.

## CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395 (1984); *Goodwin v. Fairbanks, Morse 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. The 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).
2. There must be created in the mind of the trier of fact something more than a mere possibility, suspicion or surmise that the alleged injury was the cause and the inference from the facts proved must be the more probable hypothesis, with reference to the possibility of other hypotheses. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. An aggravation is defined as an acceleration or exacerbation of a previous condition caused by some intervening event or events, whereas a recurrence is a return of symptoms following a temporary remission or a continuation of a problem which had not previously resolved or become stable. Workers' Compensation Rules 14 (p) (2) (D) (1) and (2); *Kerin v. Burlington Free Press*, Opinion No. 50-99 WC (Dec. 29, 1999); *Lavigne v. General Electric*, Opinion No. 12-97WC (June 17, 1997).
4. When classifying a condition as a recurrence or aggravation this Department examines several factors addressed by these questions: 1) Did a subsequent incident or work condition destabilize previously stable condition? 2) Had the claimant stopped treating medically? 3) Had the claimant successfully returned to work? 4) Had the claimant reached a medical end result? 5) Did the subsequent work contribute independently to the final disability? *Trask v. Ritchburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998).
5. If the claimant's current condition is a recurrence of a preexisting condition unrelated to his work at Vermont Yankee, the instant claim is not a compensable one. On the other hand, if it is an aggravation, Vermont Yankee is responsible for all applicable workers' compensation benefits.
6. Claimant's argument to the contrary, his condition dating back years had not stabilized at the time of the sledgehammer incident at Vermont Yankee, as is well documented in the medical records. In fact, his pain was severe enough to require narcotic pain medication even before he began his work at Vermont Yankee. He had not stopped treating medically. In 1996 he was taking Percocet, and sought care from Dr. Shapiro for headaches, neck discomfort and discomfort and aching in the left leg. When he was in the Brattleboro Hospital in 1997 it was noted that he was taking Oxycodone for chronic pain. Claimant had successfully returned to work and had reached a medical end result for his previous work related injury. However, he has not proven that his work at Vermont Yankee contributed independently to his final disability.
7. The evidence does not support the claimant's contention that the sledgehammer incident

aggravated or accelerated his preexisting pain condition. Claimant's history indicates that he was familiar with how to report a work-related injury. He had been treating for chronic pain for years and took time from work when that pain became disabling. For example, after being bounced around in the theatre seats at Foxwood, he was unable to drive home, and then missed a week from work. No suggestion is made that the theatre incident aggravated his overall condition, yet it is one that resulted in lost time from work. That incident stands in sharp contrast to the sledgehammer incident that resulted in no time from work. In fact, it was six weeks before the claimant mentioned the incident to a doctor. Finally, and most importantly, there is nothing on physical examination or on objective tests to substantiate the claimant's contention that the sledgehammer incident worsened his underlying condition.

8. Claimant contends that his sitting in class for training sessions in November and December of 1998 resulted in an aggravation or acceleration of his underlying condition. And he has produced medical opinions stating that such a causal link exists. But those opinions are based on his subjective reports. More persuasive medical opinions and the claimant's medical records indicate although the claimant had some discomfort, there was no change in his underlying condition. Months before the classroom incident, in September 1998, the claimant received a nerve root block for "constant, burning, numbing and sharp" back pain. Obviously the claimant reported that his pain condition was progressing and, as was later determined, he needed a change in medication. Such was the natural progression of his underlying condition and narcotic use, not as a result of work.
9. The claimant has a long history of back pain and back injuries. He lives in pain. The medical records are replete with references to increased pain unrelated to any event, and prior to his training program. Any increase in his report of symptoms in 1998 was more likely the result of his degenerative changes and the need for a change in medications, not work activity.
10. On balance, the inescapable conclusion is that the claimant suffers from a recurrence of a previous condition. Therefore, this claim is not compensable.
11. Because the question addressed in the first issue is answered in the negative, the other issues need not be addressed.

**ORDER**

Based on the Foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 5<sup>th</sup> day of July 2001.

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R. Tasha Wallis  
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.