

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

| | | |
|----------------------------------|---|--------------------------|
| Harold Osmer |) | State File No. S-50331 |
| |) | |
| |) | By: Margaret A. Mangan |
| v. |) | Hearing Officer |
| |) | |
| International Stone Products and |) | For: Michael S. Bertrand |
| Rouleau Granite |) | Commissioner |
| |) | |
| |) | Opinion No. 25-03WC |

Hearing held in Montpelier on January 23, 2003
Record closed on January 31, 2003

APPEARANCES:

Robert Halpert, Esq. , for the Claimant
Christopher J. McVeigh, Esq. for Rouleau Granite/CNA
Jason R. Ferriera, Esq. for International Stone/Liberty Mutual

ISSUES:

1. Are Claimant's work-related problems due to an aggravation or a recurrence?
2. Is this claim barred by the applicable statute of limitations?

EXHIBITS:

Joint Exhibit I: Transcript of deposition of Jim Massie
Joint Exhibit II: Transcript of deposition of Christopher M. Meriam, M.D.
Joint Exhibit III: Medical Records
Joint Exhibit IV: Records from Christopher M. Meriam, M.D.

Claimant's Exhibit 1: Undated handwritten First Report of Injury

Defendant CNA Exhibit A: Statement of Carol Livendale

BACKGROUND:

This matter was the subject of a CNA motion for summary judgment on the statute of limitations issue that was denied in an order from the hearing officer dated January 14, 2003.

STIPULATION:

International Stone bought Rouleau Granite on January 10, 2001.

FINDINGS OF FACT:

1. Claimant Harold Osmer worked in the granite industry from 1967 until 2002, primarily as a surface plate technician. His work involved moving a grinding stone over the surface of another stone to level its surface. It was strenuous work on the shoulders and arms.
2. Claimant started working at Rock of Ages then went to Rouleau in 1982. With the exception of a short return to Rock of Ages in the early 1990's, he remained an employee of Rouleau up through January 10, 2001 when the company was sold to International Stone Products. Then he continued to work for International Stone Products until approximately July 2002.
3. As a result of his work in the granite industry, Claimant developed bilateral rotator cuff tears.
4. Liberty Mutual is the workers' compensation carrier for International Stone Products. To date, Liberty Mutual has paid all benefits associated with the Claimant's upper extremity injuries. CNA Insurance is the carrier for Rouleau Granite.
5. Jim Massie worked for Rouleau Granite/International Stone for 25 years, first as a foreman, then in 1986 as plant manager. He supervised 35 to 40 employees, including the Claimant. Among other duties, Massie was responsible for investigating and reporting workers' compensation claims while at Rouleau/International.
6. Mr. Massie took great pride in his control of workers' compensation claims. If an injured worker missed only a few days from work, he saw to it that the worker was paid by marking the time card as if the employee had worked those days. But, in an effort to keep insurance rates down, he would not have filed an official claim. If one had a serious injury or was expected to be out of work for more than a few days, he would have the worker fill out a report that he would then send to Carol Livendale, the bookkeeper at Rouleau and International Stone. Ms. Livendale retained the forms in her office, even those not sent to the carrier. However, Mr. Massie did not give her all notes he took about a worker's complaints.

7. Jim Massie remembers Claimant's mentioning in passing that his shoulders bothered him in the early 1990's. However he did not seek medical treatment nor miss time from work at that time. At the time Claimant had an active life outside of work, including gardening, lawn mowing and woodworking.
8. In 1996 or 1997, Claimant complained to Mr. Massie about his shoulder and in doing so followed company policy of reporting an injury to his supervisor. Mr. Massie believed the shoulder symptoms were work related, kept notes about the complaints and when the Claimant began to lose short periods of time from work, marked Claimant's time card as having worked. Mr. Massie made a distinction between an "accident" such as cutting fingers off or "something like this" where he would let the process go on. He would have kept his own notes about the shoulder complaints, but destroyed the records when he left management in 2001.
9. Mr. Massie considered himself "strict" about the filing of workers' compensation claims, at times getting involved with investigations. However, he would not have kept a worker from filing a claim.
10. Beginning in 1999, Claimant was experiencing throbbing pain in both shoulders. That pain was sharp and burning. He turned his attention to less physically strenuous sales work and took Advil and Tylenol, medications that did little to alleviate his symptoms. The pain was constant.
11. Claimant first sought medical treatment for his shoulder pain on December 13, 1999 when he saw Dr. Bram Starr who diagnosed left rotator cuff tendonitis. Dr. Starr documented the Claimant's history of intense physical work, "but in the last several weeks especially, he has been complaining of left shoulder pain radiating to his arm." Dr. Starr administered an injection and prescribed Vioxx.
12. Later Dr. Starr diagnosed probable ulnar compressive neuropathy, recommended an EMG and referred Claimant to physical therapy.
13. Claimant's complaints of shoulder pain and Dr. Starr's treatment continued after International Stone became the owner of the plant on January 10, 2001.
14. No mention is made of any shoulder complaints in Dr. Starr's notes for a March 14, 2001 visit, although there is such a complaint noted on May 30, 2001. At that May visit pain was elicited in both shoulders on range of motion. Claimant noticed that he had more difficulty reaching to the side, front and overhead. He also noticed loss of strength and difficulty sleeping in 2001.
15. A July 2001 MRI of the shoulders revealed full thickness tears of the rotator cuff tendons bilaterally and retraction of the tendon on the right.

16. When conservative measures failed, Claimant had left rotator cuff surgery on August 31, 2001 and right rotator cuff surgery on September 21, 2001, both by Dr. Meriam.
17. This office received a First Report of Injury on September 4, 2001 from International Stone Products for a strain of the shoulders from hard work over thirty-four years.
18. In Claimant's handwriting is a First Report of Injury from 2001, which states that shoulder problems, due to hard work, started eight years before.
19. No official report of injury was filed before 2001.
20. Dr. Meriam opined that the full bilateral rotator cuff tears were due to Claimant's work as a surface plate technician in the granite industry and that the tears had been present for some time when he performed the surgery in August and September of 2001. Claimant had clear rotator cuff pathology in 1999 and could have developed the tears had he stopped working, although it is not possible to determine when the tears occurred. Further, Dr. Meriam explained that Claimant's heavy work contributed to the progressive nature of the rotator cuff problem.
21. Dr. Meriam placed the Claimant at medical end result on May 10, 2002 with a 10% whole person impairment for both shoulders combined.
22. Claimant submitted a copy of his fee agreement with his attorney and evidence of 47.3 hours worked on this claim and necessary costs incurred totaling \$307.73.

CONCLUSIONS OF LAW:

Aggravation or recurrence

1. In those cases involving successive and gradual onset injuries the familiar aggravation or recurrence analysis is employed to determine which employer or insurer is liable. Recurrence means the return of symptoms following a temporary remission. WC Rule 2.1312. Aggravation means an acceleration or exacerbation of a previous condition caused by some intervening event or events. Rule 2.1110.

2. “[T]he 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 ... 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.” *Pacher v. Fairdale Farms & Eveready Battery Company*, 166 Vt. 626 (1997) (mem.) (internal cites omitted).
3. As the party attempting to relieve itself of liability, International Stone has the burden of proof. See, *Smith v. Chittenden Bank*, Op.No.17-01WC (2001), *aff'd* Supreme Court Docket No. 2001-333, Feb. 2002 (three justice panel entry order). Because the issue requires expertise beyond the ken of a layperson, expert testimony is necessary. See *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
4. As a progressive condition, Claimant’s shoulder problem had not stabilized prior to International Stone’s ownership in 2001. He continued with constant pain for which he continued to treat medically, although he also continued to work without interruption. Most importantly, it is clear that the subsequent work, even though it was only for a few months, contributed to the Claimant’s final disability. Claimant’s worsening symptoms after International Stone bought the plant and Dr. Meriam’s opinion that the continued work worsened the Claimant’s shoulder condition, although he could not say when the rotator cuffs tore, support the conclusion that this is an aggravation. As such, International Stone is the responsible employer.

Statute of Limitations

5. Vermont workers’ compensation proceedings are governed by two statutes of limitations, 21 V.S.A. §§ 656 and 660. *Longe v. Boise Cascade Corp.*, 171 Vt. 214, 218 (2000). First, an injured worker must provide notice of his injury to the employer “as soon as practicable after the injury occurred,” and “within six months after the date of injury.” § 656. However, the six month requirement is not a bar to a claim “if it is shown that the employer, the employer’s agent or representative, had knowledge of the accident or that the employer has not been prejudiced by the delay of want of notice,” in which case the claim must be filed within six years of the date of injury. § 660; *Fitch v. Parks & Woolson Mach. Co.*, 109 Vt. 92, 98 (1937). The “date of injury” is the “point in time when an injury becomes reasonably discoverable and apparent.” *Hartman v. Ouellette Plumbing & Heating*, 146 Vt. 443, 447 (1985); *Longe*, 171 Vt. at 219.
6. With the above conclusion that Claimant suffered an aggravation in 2001, and with the employer’s clear knowledge of the claim, there was a timely filing.

Attorney Fees and Costs

7. Pursuant to 678(a) a prevailing Claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. Mr. Osmer has prevailed due to the efforts of his attorney who is entitled to fees of \$4,257.00, based on the 47.3 hours at \$90.00 per hour, and his necessary costs of \$307.73.

ORDER:

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, International Stone/Liberty Mutual is ORDERED to:

1. Adjust this claim;
2. Pay Claimant \$4,257.00 in attorney fees and \$307.73 in costs.

Dated at Montpelier, Vermont this 14th day of May 2003.

Michael S. Bertrand
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 court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.