

**STATE OF VERMONT
DEPARTMENT OF LABOR & INDUSTRY**

Alain Gaudreault

Opinion No. 22-04WC

v.

By: *Margaret A. Mangan*
Hearing Officer

Granite Industries of Vermont

For: *Michael S. Bertrand*
Commissioner

State File No. S-13028

APPEARANCES:

Gary McQuesten, Esq., for the Claimant
Stephen Soule, Esq., for the Defendant

ISSUE:

Must a claimant with an occupational disease be disabled for medical expenses to be covered under the Workers' Compensation Act?

STIPULATED FACTS:

- 1. Claimant was born in Alma, Quebec on December 28, 1939.*
- 2. Claimant worked as a stonecutter in Canada beginning in 1957. Claimant moved to Providence, RI in 1967; then to Barre, VT in 1969.*
- 3. Claimant began working in the granite industry in Barre in May 1969.*
- 4. Claimant worked for Granite Industries of Vermont as a stonecutter and finisher from May 1980 until his retirement at age 62 on December 28, 2001.*
- 5. Dr. Robert Johnson interpreted claimant's chest x-ray, performed at the Central Vermont Hospital on April 12, 2001, as normal.*
- 6. Dr. Camilla Kelly interpreted claimant's chest x-ray, performed at Central Vermont Hospital on April 12, 2002, as "suggestive of inhalational lung disease and silicosis."*
- 7. Dr. Royal Bartrum reported that a CT scan performed on claimant at Central Vermont Hospital on April 19, 2002 confirmed silicosis.*

8. *Pulmonary function testing on claimant, done at Central Vermont Hospital on July 30, 2002 by Dr. Arif Khan, showed lung function within normal limits.*
9. *Dr. Marvin Malek, claimant's personal doctor, noted on October 7, 2002 that the pulmonary function test did not even show "damage from years of tobacco smoking."*
10. *The pulmonary function testing and all physical examinations to date do not reveal any sign that claimant is disabled because of silicosis. Claimant saw Dr. William Graham, a pulmonary specialist, at the request of the employer on Jan. 31, 2003. Dr. Graham issued a report on the same date. Dr. Graham is associated with Fletcher Allen Health Care. He has been a board-certified pulmonary specialist since 1971.*

CONCLUSIONS OF LAW:

1. *The claimant has silicosis from his work in the granite industry. Though not "disabled," he has incurred costs for diagnostic tests and treatment, which the insurer has refused to pay because he is not disabled. This defense finds root in the repealed Occupational Disease Act. The defense contends that occupational diseases must cause disability before they are compensable, just as was required under the former Act. See 21 V.S.A. §§ 1002, 1004. This decision, then, considers whether a claimant with an occupational disease must be disabled by that disease to receive compensation under the Workers' Compensation Act.*
2. *Workers' compensation statutes must be interpreted to effect the purpose expressed by the legislature, which enacted them. Herbert v. Layman, 125 Vt. 481 (1966).*
3. *This is an issue of first impression since the Occupational Disease Act was repealed on July 1, 1999 and the diseases previously classified as occupational diseases under the Occupational Disease Act became subject to the Workers' Compensation Act, 21 V.S.A. § 601, et. seq.*
4. *By statute, "injury" and "personal injury" include occupational diseases. 21 V.S.A. § 601(7). An "occupational disease" is a disease that "results from causes and conditions characteristic of and peculiar to a particular trade, occupation, process or employment, and to which an employee is not ordinarily subjected or exposed outside or away from the employment and arises out of and in the course of the employment." § 601(23). "Disability" is an inability to work. It may be partial or total and temporary or permanent. See §§ 642, 644, 646, and 648.*

5. *Silicosis, the disease the claimant developed from his work in the granite industry, is one characteristic of that trade and one to which an employee is not ordinarily exposed away from employment. As such, silicosis is an occupational disease. See Comstock v. Columbo Granite, Inc., Op. No. 06-01WC (2001).*

6. *The defense contends that the repeal of the Occupational Disease Act did not change the compensability of injuries categorized as occupational diseases. That Act required the claimant to be disabled by the occupational disease to be eligible for compensation. 21 V.S.A. § 1004(a). There is no such qualification under the current Workers' Compensation Act. In fact, one injured on the job is entitled to workers' compensation medical benefits and permanency benefits, if applicable, even if that worker lost no time from work. See 21 V.S.A. § 618(a)(1); § 640(a); §648. To require a disability would run counter to the purposes of the statute and contrary to the plain meaning of the statute's language.*
7. *By definition, "injury" means any harmful work-related change in the body, whether occurring instantaneously or gradually, and includes a claimed or apparent injury or disease. WC Rule 2.1240. The presence of silicosis in the claimant's lungs and the need for additional tests and monitoring indicate that claimant is injured within the definition of "injury."*
8. *In his deposition, Dr. Graham, who performed an IME, confirmed claimant's diagnosis of silicosis. Claimant's silicosis is the result of the cumulative effect of claimant's continuous exposure over the years to quartz dust contained in the air of his employer. Silicosis is a progressive disease, which might continue to progress and adversely impact lung function. As a result of the diagnosis, Dr. Graham recommended that claimant have additional tuberculosis testing and a yearly x-ray to follow the radiographic appearance of the chest.*
9. *The date of injury; that is, the date when the disease and its relationship to claimant's employment was reasonably discoverable and apparent, was April 12, 2002, when Dr. Camilla Kelly interpreted claimant's chest x-ray, performed at Central Vermont Hospital, as "suggestive of inhalational lung disease and silicosis."*
10. *Since claimant retired on December 28, 2001, the date of injury under this discovery rule was after claimant had ceased all employment. Accordingly, under § 656(b), he is "entitled to reasonable and necessary medical treatment necessitated by the injury and permanent partial or permanent total disability compensation based on the employee's average weekly wage at the time of the last work-related exposure."*
11. *Since claimant is not disabled, he is entitled only to "reasonable and necessary medical treatment necessitated by the injury." The*

treatment covered includes the medical expenses at issue as well as yearly monitoring in the form of a chest x-ray.

12. *The Department finds that the integration of occupational diseases into the Workers Compensation Act has jettisoned the principle that an occupational disease must be disabling to be compensable. Instead, 21 V.S.A. § 656(b) states that “[t]he date of injury, or in the case of occupational disease, the date of injurious exposure shall be the point in time when the injury or disease, and its relationship to the employment is reasonably discoverable and apparent.” Both parties agree that silicosis was “discoverable and apparent” on the April 12, 2002 x-ray. Therefore, claimant was injured and entitled to “reasonable and necessary medical treatment necessitated by the injury.” Id.*

13. *Since the claimant has prevailed, he may recover his reasonable attorney fees. §678(a).*

ORDER:

Therefore, based on the stipulated facts and conclusions of law, defendant is ORDERED to pay:

- 1. Medical expenses associated with identifying, treating, and monitoring claimant's silicosis; and*
- 2. Attorney fees*

Dated at Montpelier, Vermont this 13th day of July 2004.

*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.