N. B. v. Paquin Motors (June 12, 2006)

STATE OF VERMONT
DEPARTMENT OF LABOR

N. B. Opinion No. 26-06WC

By: Margaret A. Mangan
v. Hearing Officer

Paquin Motors For: Thomas W. Douse
Acting Commissioner

State File No. U-12362

Hearing held in Montpelier on March 28, 2006
Record Closed April 24, 2006

APPEARANCES:

William B. Skiff, II, Esq., for Claimant;
Davis Buckley, Esq., for Defendant ACE Insurance Company; William Blake, Esq., for Defendant Vermont Guaranty Fund; Richard Windish, Esq., for Defendant Eastern Casualty Insurance; John W. Valente, Esq., for Defendant Cardinal Compensation

ISSUES:

1. Whether Claimant's right shoulder injury and subsequent shoulder surgeries arose out of and in the course of Claimant's employment with Paquin Motors.

2. If so, which insurer(s) is responsible for payment of medical and indemnity benefits?

3. Whether Claimant is entitled to attorney fees and costs in connection with this claim.

EXHIBITS:

Claimant's Exhibits:

1. Medical Records
2. All State Forms and Department of Labor correspondence
3. Claimant's Employment File from Paquin Motors
4. Deposition of Dr. Robert Beattie, M.D.

Defendants' Exhibits

A. Deposition of Verne Backus, M.D.
B. Deposition of Burt Paquin
C. Deposition of Robert Beattie, M.D.

FINDINGS OF FACT:

1. At all relevant times in this case, Claimant was an employee and Paquin Motors his employer, within the meaning of the Vermont Workers' Compensation Act.

2. Paquin Motors had different workers' compensation insurance carriers throughout the time Claimant was employed. The relevant carriers include: One Beacon Insurance (May 1, 1997 - May 1, 1999); ACE (January 1, 1999 - January 1, 2000); Reliance Insurance Company (January 1, 2000 - January 1, 2001); Eastern Casualty (January 1, 2001-January 1, 2002); Cardinal Comp/Clarendon (January 1, 2002 - January 1, 2005).

3. Reliance Insurance Company's risk has been assigned to Guaranty Fund Management Services.

4. Claimant is fifty-two years old and has worked various jobs throughout his life. These jobs include general laborer, equipment operator, shift supervisor, auto body repairman, and shop manager.

5. Claimant was an auto body repairman during the first two years of work for Paquin Motors beginning in October of 1993. This position required Claimant to perform labor-intensive work such as lifting heavy objects, running a vibrating sander, swinging a hammer, tugging on auto parts, and other manual labor.

6. In 1995, Claimant was promoted to the position of body shop manager and was paid a flat rate for the next four years. Throughout this period, he still performed auto body repair in addition to his managerial duties. Claimant alleges that on an average day he spent approximately ninety percent of his time engaged in manual labor and ten percent of his time engaged in administrative duties. The defense argues that he worked ten percent of his time performing manual labor. While both extremes seem exaggerated, the nature of the work place supports a finding that Claimant, even as a manager, spent more than half of his day in manual labor.

7. Throughout his employment at Paquin Motors, Claimant operated his own auto body repair shop, K & N Collision.

8. Claimant began to experience pain in his right shoulder in 1999. Claimant was having problems sleeping at night and difficulty performing at work. He sought treatment, on October 28, 1999, with Robert Beattie, M.D. He was not aware of a specific event that caused the injury. Dr. Beattie assessed an element of impingement syndrome as well as a possible SLAP lesion and then he referred Claimant for physical therapy.

9. An Initial Assessment of Claimant was taken by a physical therapist on November 5, 1999. A note indicated that Claimant was not aware of a specific incident that caused the injury, but the injury may have occurred from throwing a tennis ball.

10. After participating in physical therapy, Claimant returned to Dr. Beattie on December 1, 1999. Claimant still complained of right shoulder pain, popping, and limited motion. Dr. Beattie administered a diagnostic anesthesia injection to temporary relieve the pain and then ordered a MRI. The MRI revealed "articular surface, partial thickness rotator cuff tear versus tendonitis. There is the suggestion of a superior labral tear." [See 01.27.00 Note Dr. Beattie Medical Index Exhibit 1].

11. Claimant continued to work full-time until he underwent surgery on June 8, 2000 to repair the SLAP lesion and rotator cuff tear. He was released for light work duty on August 17, 2000. He continued his usual work, but still had pain in his right shoulder.

12. In 2000, before Claimant's surgery, he was steered from filing a workers' compensation claim upon the suggestion of the employer. Human resources advised Claimant that he should not file for workers' compensation since he could not identify a specific date of injury. Instead, he filed a claim for short-term disability insurance and received those benefits thereafter. Accordingly, the Defendant had actual knowledge of the Claimant's injury in 2000, even though no official forms were filed with the Department until 2004.

13. In 2001, the auto body shop moved to the North Country Nissan location where Claimant worked as the auto body manager and the Nissan Service and Parts Manager. He performed very little bodywork during the next two years. Claimant was offered a sales position in March of 2003. He refused the offer by his employer and then resigned from his job.

14. Two months later, Claimant continued to have difficulty with his shoulder. In addition to the pain, he developed numbness, weakness, and tingling in his right shoulder. Claimant began treatment with Adam Shafritz, M.D., in May 2003.

15. Claimant was diagnosed with cubital tunnel syndrome and impingement of the shoulder with partial tearing of the rotator cuff. In a letter dated March 14, 2004, Dr. Shafritz attributed Claimant's diagnosis to a failed rotator cuff surgery.

16. A second shoulder surgery was performed on February 20, 2004. The surgical evaluation revealed that the biceps tendon was 99% ruptured.

Medical Opinions

17. Robert N. Beattie, M.D., a Board Certified Orthopedic Surgeon and Claimant's initial treating physician, testified that it is more likely than not that Claimant's shoulder injury was related to his work at Paquin Motors. He opined that the SLAP injury may have produced the tear of the rotator cuff or they both could have occurred at the same time. He conceded that Claimant is predisposed to this shoulder condition by arthrosis and a nerve dysfunction, but an additional force or a repetitive motion is necessary to cause the injury. According to Dr. Beattie, it is most likely that the injury occurred over time and then an incident occurred during Claimant's work that was the "straw that broke the camel's back." [See Deposition of Dr. Beattie at pp.45; 47]. Dr. Beattie concluded that this type of injury was consistent with his occupation as an auto body mechanic.

18. Verne Backus, M.D., a Board Certified Occupational Medicine Specialist, conducted the independent medical examination of Claimant on June 16, 2004. Dr. Backus opined that Claimant's shoulder condition is causally related to his employment at Paquin Motors. Dr. Backus lacked the specific details of Claimant's job description, but he based his findings on a general understanding of what a mechanic's job entails, such as heavy lifting, tugging, and sanding. He recalled that Claimant had spoken of a laborious job where he removed stripes from several recalled trucks. He also stated Claimant's job required him to multi-task and that the SLAP injury could have been caused by repetitive motion, i.e., operating a vibrating sander over time, or it could have been caused by a specific event. Dr. Backus opined that Claimant's work, when looked at as a whole, more likely than not caused his injury, even if he was predisposed to the shoulder condition by arthritis.

19. Michael Kenosh, M.D., provided a record review and testified on behalf of Paquin Motors. Dr. Kenosh is a Board Certified Occupational Medicine Specialist employed by the Rutland Regional Medical Center. Dr. Kenosh opined that Claimant's injury did not occur after January 2002. In addition, he stated that Claimant's injury was probably not related to his previous occupation at Paquin Motors. He bases his opinion on the lack of medical literature to support the link between Claimant's injury and his work. Dr. Kenosh testified that Claimant was predisposed to this injury by other factors that include age, gender, and genetics. Given his medical history it is least likely that there is a causal link between his injury and his employment. Instead, it would be more likely for Dr. Kenosh to find causation if Claimant were a twenty year old. Claimant had complained of numbness in his arms prior to his work at Paquin Motors. Thus, Dr. Kenosh concludes that Claimant's injury was not within a reasonable degree of medical certainty to be related to his employment.

CONCLUSIONS OF LAW:

1. The Claimant has the burden of establishing all facts essential to the rights asserted in this workers' compensation case. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962).

2. The Claimant must establish by sufficient credible evidence the character and the extent of the injury and disability as well as the causal connection between the injury and the employment. See *Egbert v. The Book Press*, 144 Vt. 367 (1984).

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 & Martin Lumber Co.,* 112 Vt. 17 (1941).

4. Vermont recognizes that some work place injuries come about gradually from frequent stress on the body. See *Campbell v. Savelberg*, 139 Vt.31 (1980). Therefore, to be compensable, an injury need not be instantaneous.

5. 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). While a reasonable degree of medical certainty might connote some marginally higher standard of proof than a mere preponderance, the modifier "reasonable" returns the standard to the level of preponderance; [more likely than not]. *Wheeler v Central Vermont Medical Center*, 155 Vt. 85, 94 (1990).

6. To address divergent opposing medical opinions, the Department considers the following criteria: 1) The nature of treatment and length of time there has been a patient-provider relationship; 2) whether all accident, medical, and treatment records were made available to and considered by the examining physician; 3) whether the report or evaluation at issue is clear and thorough and includes objective support for the opinions expressed; 4) the comprehensiveness of the examination; and 5) the qualifications of the experts, including professional training and experience. *Wallace v. Velan Valve Corp.*, Opinion No. 51-02WC (2002); *Yee v. IBM*, Opinion No. 38-00WC (2000); *Miller v. Cornwall Orchards,* Opinion No. 20-97WC (1997); *Martin v. Bennington Potters*, Opinion No. 42-97WC (1997); *see also, Morrow v. VT Financial Services,* Opinion No. 50-98WC (1998).

Causation

7. Claimant relies on the testimony of his prior orthopedic surgeon, Dr. Beattie, and an occupational physician, Dr. Backus, to establish a causal connection. Defendants rely for the most part, on the testimony of Dr. Kenosh, also an occupational medicine expert.

8. Claimant argues that a causal connection exists between his right shoulder injury and his work place routine with respect to 1999-2000 and 2003 treatments. He argues that the injury resulted from repetitive use of his arms at work, causing the rotator cuff to become torn, and creating the pain associated with the impingement. With regard to the second surgery, Claimant argues that he never properly healed from the first surgery.

9. Defendants assert that the shoulder injury did not occur in the workplace. Through Dr. Kenosh's opinion**,** Defendants argue that the pain felt by Claimant has been brought about by other factors, such as age, his predisposition to arthritis, and even a nerve dysfunction, which brings about an increasingly sensitive rotator cuff. The impingement was caused by Claimant's aging sensitive rotator cuff. In addition, the event that caused the injury was not at Claimant's workplace, but at Claimant's home while working on his own automobiles, or throwing a ball with his dog, or sleeping on his shoulder.

10. Despite the lack of a present treating relationship with Claimant, Dr. Beattie has an advantage as a prior treating physician and surgeon for Claimant. All three experts reviewed the relevant records. All provided clear, objective opinions and comprehensive evaluations. All are well qualified, Dr. Beattie in orthopedic surgery, Dr. Backus in occupational medicine and Dr. Kenosh in occupational medicine. The balance, however, tips in favor of Dr. Beattie as prior treating physician and in Dr. Backus as a supporting opinion. Furthermore, an early opinion by Dr. Shafritz supports causation in this case.

11. Even if I deferred to the opinion of Dr. Kenosh, it does not seem logical. Dr. Kenosh opined that if the shoulder injury were present in a twenty year old, it would be causally related given the individual's medical history. This would mean that the event must be the *sole* cause in order for the Department to find causation. Dr. Kenosh's deduction goes against previous rulings by the Department. For example, a prior condition that has been made symptomatic by work is compensable. *Clark v U.S. Quarried Slate Products*, Op. No. 8-95WC (1995). Accordingly, a work related event does not have to be the sole cause, but there can be other underlying factors, i.e., age.

12. Defendants' argument that throwing a tennis ball caused the impingement is unlikely in this situation. There is simply no medical evidence to support such an assertion. Although such a shoulder impingement could spontaneously occur, the weight granted to the expert opinion coupled with the underlying facts regarding Claimant's work routine of sanding, heavy lifting, and tugging would make Claimant's work duties the more probable and logical cause of the shoulder impingement.

13. Defendants also contend that Claimant's shoulder injury transpired from his sleeping position. This argument does not hold weight. A daily activity, such as sleeping, is not an intervening cause. *Verchereau v. Meals on Wheels,* Op. No. 20-88 (1988). In *Verchereau,* Claimant injured her back in work that required repetitive lifting. Five months after the surgery necessitated by that work related injury, she reinjured her back while lifting a bag of groceries, an activity that was within restrictions established by her surgeon. The Department held that the incident was not an aggravation because "the act of lifting a bag of groceries is a routine activity that it is customary for people, even injured people, to customarily perform. Thus the reinjury in February is a normal consequence of the original work injury....". *Id*. Similarly, in this case, I do not accept that Claimant's sleeping routine, an ordinary activity for everyone, was an intervening cause of his shoulder injury.

14. Moreover, if the pain is associated with Claimant's arthritis, a pre-existing condition, it is compensable. *Clark,* Op. No. 8-95WC (1995). Because none of the experts could find any other activity undertaken by Claimant that would cause an aggravation of the arthritis, the more probable hypothesis would be that the constant motion of Claimant's arms at work caused the arthritis to become symptomatic. Furthermore, Defendants contend that it is possible that Claimant incurred the injury while at his own body shop. Given the ratio of time spent working at Paquin versus the time spent at his hobby shop, it is more probable than not that he was injured at work than at his own body shop.

15. Finally, Defendants argue that the employer was not aware that Claimant's injury was work related. Claimant did attempt to apply for workers' compensation benefits from human resources. However, his employer steered him from filing a workers' compensation claim based, albeit incorrectly, on the fact that Claimant was not aware of a specific event that caused his shoulder injury. The employer then directed him to apply for temporary disability benefits. Accordingly, Claimant's initial request to file a worker's compensation claim was sufficient to put the employer on notice that Claimant had suffered a work related injury.

16. It is more likely than not that Claimant's shoulder injury is related to his employment at Paquin Motors. His type of injury seems to logically flow from his occupational duties. Activities such as operating a vibrating sander, lifting frames, and tugging on auto parts have most likely resulted in his condition. In this case, tossing a ball, aging, and sleeping are activities that are least likely to have caused his injury. Thus, given the facts underlying this case and the expert medical opinions, I conclude that Claimant's right shoulder problems are the result of a work injury at Paquin Motors.

Aggravation-Recurrence

17. In cases such as this, the insurer on the risk when the first injury occurred remains liable "if the second accident did not causally contribute to the claimant's disability." *Pacher v. Fairdale Farms* 166 Vt. 626, 629 (1997). However, if the second incident "combined with a preexisting 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." Id.

18. "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. WC Rule 2.1110. "Recurrence" means the return of symptoms following a temporary remission. WC Rule 14.9242.

19. Facts this Department examines to determine if an aggravation or recurrence has occurred, with the greatest weight being given the final factor, are whether: 1) a subsequent incident or work condition destabilized a previously stable condition; 2) the claimant had stopped treating medically; 3) claimant had successfully returned to work; 4) claimant had reached an end medical result; and 5) the subsequent work contributed independently to the final disability. *Trask v. Richburg Builders,* Opinion No. 51-98WC (1998).

20. After application of the pertinent factors to the factual scenario of this case, it is clear that in May 2003 Claimant sustained a recurrence of his prior shoulder injury or a continuation of his shoulder problem that had not become stable or previously resolved. Therefore, ACE, the insurance carrier at risk from January 1999 through January 2000, is responsible for medical and indemnity benefits to Claimant.

21. With regard to the initial factor of this inquiry, it is apparent, as revealed by the evidence submitted at the Hearing, that Claimant's condition prior to his return to work in August 2000 had not been stabilized. A few months after the June 2000 surgery, Claimant complained that weakness, tingling, and pain had returned to his shoulder. Dr. Shafritz diagnosis revealed that Claimant needed a second shoulder surgery because the first surgery was unsuccessful. Accordingly, this factor advances a recurrence conclusion.

22. An evaluation of the second and fourth factors also support a recurrence determination. Claimant had not stopped treating medically and he had clearly not achieved a medical end result. He sought further consultation and underwent a second surgery in an attempt to remedy the same injury from 1999. Claimant fails to satisfy the third factor since he had successfully returned to work and was eventually offered a sales position that was not physically demanding.

23. Although, Claimant fails to satisfy the third factor, he does meet four of the five factors. After analyzing the evidence in this case, it is obvious that the final factor mandates a recurrence finding. First, the proffered medical experts, Dr. Beattie and Dr. Backus opine that Claimant's injury was work related. Even Dr. Kenosh testified that Claimant's injury occurred before 2002. In fact, Dr. Shafritz equated Claimant's second surgery with incomplete repair of the first surgery. In light of the submitted evidence, it is apparent that Defendant ACE has failed to satisfy its burden beyond mere speculation and surmise that Claimant's work activities in 2003 aggravated his pre-existing medical condition. Thus, consistent with the final factor of the analysis, the evidence supports, as the more probable hypothesis, a recurrence conclusion.

24. As demonstrated by the conclusions discussed above, a thorough analysis of the relevant factors clearly shows that in May 2003 Claimant sustained a recurrence of his prior shoulder injury. As such, Defendant ACE remains liable for compensating Claimant for his 1999 shoulder injury.

Attorney Fees

25. As a prevailing Claimant, Neil Barrette is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678(a). Claimant's litigation costs were necessary for the success of the complex issues presented. However, the award will be made only if the claimant submits a copy of the attorney-client fee agreement required by WC Rule 10.7000.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law,

1. Defendant ACE is ORDERED to adjust this claim.

2. The claim for attorney fees and costs is GRANTED, contingent on this Department's receipt of a signed fee agreement within 30 days of this order.

Dated at Montpelier, Vermont this 12th day of June 2006.

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Thomas W. Douse
Acting Commissioner

N. B. v. Paquin Motors (July 21, 2006)

STATE OF VERMONT
DEPARTMENT OF LABOR

N. B.

v.

Paquin Motors

Opinion No. 26A-06WC

By: Margaret A. Mangan
Hearing Officer

For: Thomas W. Douse
Acting Commissioner

State File No. U-12362

RULING ON CLAIMANT'S REQUEST FOR ATTORNEY'S FEES AND COSTS

Claimant, by and through his attorney, William B. Skiff, II, Esq., requests attorney's fees and costs associated with his claim.

A prevailing claimant is entitled to reasonable attorney's fees as a matter of discretion and necessary costs as a matter of law when the claim is supported by a fee agreement and details of costs incurred and work performed. 21. V.S.A. §678(a); WC Rule 10.000.

Claimant prevailed on his claim after a March 8, 2006 hearing. He incurred litigation fees and costs that were reasonable and necessary for his success. However, Claimant had not submitted a copy of the attorney-client fee agreement required by WC Rule 10.7000. The Department postponed the award upon receipt of the fee agreement.

On July 11, 2006, Claimant submitted the attorney-client fee agreement, as well as detailed time and cost reports. Therefore, Claimant is awarded fees of $6,012.00 (66.8 hours x $90.00 per hour) and costs of $3,199.34.

Accordingly, the request for attorney's fees and costs are hereby GRANTED.

Dated at Montpelier, Vermont this 21st day of July 2006.

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Thomas W. Douse
Acting Commissioner