J. H. v. State of Vermont, Agency of Transportation (April 11, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

J. H.	Opinion No. 14-08WC
v.	Phyllis Phillips, Esq. Contract Hearing Officer
State of Vermont, Agency of Transportation	Patricia Moulton Powden Commissioner
	State File No. T-15331

OPINION AND ORDER

Hearing held in Montpelier on January 16, 2008.

APPEARANCES:

Heidi Groff, Esq. for Claimant
Wesley Lawrence, Esq. for Defendant

ISSUE PRESENTED:

Whether Claimant's ongoing symptoms are causally related to his compensable injury or whether they are the result of an intervening aggravation or flare-up caused by non-work-related activities.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records

Claimant's Exhibits:

Claimant's Exhibit 1: *Curriculum Vitae* of Richard H. Dooley, PA-C

CLAIM:

Medical benefits under 21 V.S.A. §640(a)
Attorney's fees, costs and interest under 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. Claimant began working for Defendant as a transportation maintenance worker in December 2002. His job responsibilities include snow plowing in the winter and general highway maintenance in the spring, summer and fall.

2. On March 10, 2003 Claimant and a co-employee were removing an arrow board from the back of a truck. The board fell suddenly from the back of the truck, pulling Claimant with it. Claimant fractured two fingers on his left hand and also suffered a back strain. Defendant accepted these injuries as compensable and paid benefits accordingly.

3. Claimant treated conservatively for his back strain, first with Susan Anderson, a physician's assistant selected by Defendant, and later with Richard Dooley, Claimant's own primary care provider, also a physician's assistant. His symptoms included tenderness in the upper lumbar muscles, thoracic pain, occasional lumbar spasms and reduced range of motion. For treatment, Claimant underwent chiropractic manipulation, massage and physical therapy. He also took Celebrex, an anti-inflammatory.

4. Claimant's symptoms improved somewhat with conservative treatment, and then plateaued. He was released to full-duty work in August 2003, but continued to experience pain with many work activities.

5. In November 2003 Physician's Assistant Dooley referred Claimant to the Dartmouth Hitchcock spine center for further evaluation and treatment of his ongoing back pain. An MRI revealed a small disc herniation at T11-12 and a small extruded disc fragment at T12-L1. Lumbar epidural steroid injections were recommended as treatment. Claimant had two such injections, the first in November 2003 and the second in mid-December 2003. The injections were markedly effective in reducing Claimant's mid-thoracic and low back pain.

6. After the second epidural steroid injection Claimant was advised to follow up for a third injection on an as-needed basis. Because the injections were sufficiently effective at alleviating Claimant's symptoms, he was deemed not to be a surgical candidate.

7. At Defendant's request, Dr. Verne Backus performed a medical records review in December 2003. Dr. Backus is board-certified in occupational and environmental medicine. He regularly treats patients with low back pain and also routinely performs independent medical evaluations. Dr. Backus also works as a consultant for Defendant on workers' compensation claims.

8. Dr. Backus concluded that Claimant suffered a thoracal-lumbar strain in the March 10, 2003 accident and that all of his complaints were causally related to that injury. Dr. Backus further concluded that Claimant had not yet reached an end medical result and that epidural steroid injection therapy was a reasonable treatment option "as long as there is an adequate response."

9. Dr. Backus performed another medical records review in March 2004. Given that Claimant had been determined not to be a surgical candidate, and that only pain management treatment was being advised, Dr. Backus concluded that Claimant had reached an end medical result.

10. At Defendant's request, Dr. John Johansson performed an independent medical evaluation in May 2004 for the purposes of determining the extent of Claimant's permanent impairment. Dr. Johansson agreed with Dr. Backus' end medical result determination and rated Claimant with a 5% whole person impairment referable to his spine injury. In addition, Dr. Johansson determined that Claimant was permanently restricted from heavy lifting, but that with proper body mechanics he could lift at a medium level.

11. Claimant testified that for the next two years following his course of epidural steroid injections in 2004 he experienced occasional episodes of increased back pain, perhaps four or five times per year. Claimant testified that these flare-ups were not related to any specific activity, but rather just came on gradually. During these episodes Claimant's pain would increase to a 6 or 7 on a 10-point pain scale. Claimant treated these flare-ups with Celebrex. Taken over a period of two to four weeks, this medication effectively reduced Claimant's pain back to a "normal" level, about a 3 on his pain scale, which he found tolerable.

12. At Defendant's request, Claimant underwent an independent medical evaluation with Dr. Backus in June 2005. Dr. Backus reiterated his end medical result determination as of his March 2004 medical records review. As for Claimant's continued use of Celebrex to treat his occasional flare-ups, Dr. Backus concluded that if over-the-counter analgesics were unsuccessful in providing sufficient pain management then Celebrex was a reasonable option.

13. In November 2006 Claimant experienced another episode of increased back pain, similar to the occasional flare-ups he had suffered in the past. This time, however, his symptoms were more intense and did not respond to Celebrex. Claimant sought treatment for his symptoms with his primary care provider, Physician's Assistant Dooley, on November 30, 2006. Mr. Dooley reported a recurrence of back pain "over the last 2 weeks." He noted that Claimant was requesting a referral to the Dartmouth Hitchcock spine center for another epidural steroid injection, as he had found this treatment so effective in 2004.

14. Claimant testified that, like the flare-ups he had suffered in the past, the episode of increased pain he experienced in November 2006 arose gradually and was not triggered by any specific event or activity. Notably, however, during the month of October 2006 Claimant had spent a considerable amount of time helping his father-in-law to finish building a garage. Claimant worked with three other people to construct the garage roof. This involved moving, repositioning and climbing up and down a ladder, using a hammer to attach the trusses to the frame, and then positioning and securing plywood panels to the trusses. Claimant also did some electrical work in the garage, installing outlets and running the wire for three overhead lights and some overhead doors. Claimant estimated that he spent approximately 56 hours working on the garage over the course of the month. Claimant testified that the garage was finished by the end of October 2006.

15. As treatment for the November 2006 increase in symptoms Claimant underwent two epidural steroid injections, the first in January 2007 and the second on March 22, 2007. Claimant testified that, as had happened in 2004, the injections were successful in reducing his pain back down to its "normal" level. Since that time, Claimant testified that he continues to suffer occasional flare-ups, but that, as was the case before November 2006, he treats these successfully with Celebrex.

16. At Defendant's request, in January 2007 Claimant underwent a second independent medical evaluation with Dr. Backus. Dr. Backus noted Claimant's work on the garage construction project in October 2006. In his opinion, those activities caused the exacerbation of symptoms Claimant had been experiencing since November 2006. Significantly, however, Dr. Backus noted that once Claimant's chronic pain was "back to baseline," intermittent use of Celebrex "can still be related to his 3/10/03 injury."

17. As noted in Dr. Backus' January 2007 IME, Claimant reported that activities such as lifting, carrying, pushing, pulling, reaching, bending, kneeling, standing and sitting made his pain worse. Based on Claimant's testimony at the formal hearing, I find that his work on the garage construction project in October 2006 involved many of these activities.

18. Dr. Backus testified that there was no way to know whether Claimant's work on the garage construction project in October 2006 resulted merely in a temporary increase in symptoms or whether it caused his underlying condition to worsen as well. Dr. Backus admitted that if Claimant was able to return to his baseline at some point after his symptoms increased, then presumably the underlying condition was not aggravated.

19. In February 2007 Defendant filed both a Denial of Workers' Compensation Benefits (Form 2) and a Notice of Intention to Discontinue Payments (Form 27). In its Form 2, Defendant asserted that the treatment Claimant had received for back pain from October 2006 forward was not "reasonable, necessary or causally related" to his March 2003 work injury. In its Form 27, Defendant sought to terminate its responsibility for Claimant's "Celebrex treatment." Defendant pointed to Dr. Backus' January 2007 IME in support of both the denial and the discontinuance.

20. The Department approved Defendant's discontinuance on February 24, 2007. As a result, since that time Defendant has refused to pay for Claimant's Celebrex prescriptions, and Claimant has had to assume responsibility himself for these costs.[1]

21. In contrast to Dr. Backus' opinion, Physician's Assistant Dooley believes that Claimant's November 2006 flare-up was causally related to his original work injury rather than to any intervening event or activity. Mr. Dooley's November 30, 2006 office note does not reflect Claimant's work on the garage construction project during the preceding month, and he testified that Claimant had not reported any other specific triggering event to him. Mr. Dooley concluded, therefore, that there had been no particular event or activity that caused Claimant's symptoms to recur when they did.

22. In Mr. Dooley's opinion, Claimant's back injury is of a type that is likely to cause recurrent, intermittent symptoms regardless of activity. According to him, therefore, it would be incorrect to assume that Claimant would not have had an increase in symptoms in November 2006 had he not engaged in the garage-building activities in October 2006.

CONCLUSIONS OF LAW:

1. In this claim, Defendant posits that the back pain Claimant has experienced since November 2006 was not caused by his compensable 2003 work injury but rather resulted from working on his father-in-law's garage construction project in October 2006. Defendant argues that these non-work-related activities aggravated Claimant's condition, thus severing the causal link back to the original work injury. As a result, Defendant asserts that it is no longer responsible for any ongoing medical treatment relating to Claimant's back.

2. When an employer seeks to terminate coverage for medical benefits, it has the burden of proving that the treatment at issue is not reasonable. *Richard v. Mack Molding*, Opinion No. 34-07WC (December 11, 2007). A treatment may be unreasonable either because it is not medically necessary or because, as Defendant alleges here, it is not related to the compensable condition or injury. *Id.*

3. It is not unusual for conditions such as Claimant's to produce symptoms that wax and wane over time, and the medical evidence documents that in fact this is the pattern of symptomatology Claimant has experienced since his original 2003 work injury. As the Vermont Supreme Court has established, the temporary flare-up doctrine works to rationally apportion workers' compensation responsibility in situations where a specific event or activity triggers the increased symptoms. *Cehic v. Mack Molding, Inc.*, 2006 Vt. 12, ¶10. As defined by the Court, a flare-up "connotes a temporary worsening of a preexisting disability caused by a new trauma." *Id*.

[1] Although it is unclear from the record, presumably Defendant also has refused to pay for the epidural steroid injections Claimant underwent in January and March 2007.

4. A flare-up is distinguishable from an aggravation in that there is evidence only of temporarily increased or worsened *symptoms*, without any indication that the underlying *condition* has been worsened as well. *Id.* For that reason, when a specific new trauma or activity causes a flare-up to occur, the employer on the risk at the time of the earlier injury is excused from workers' compensation responsibility only until such time as the symptoms return to their previous baseline. *Id.; see Wood v. Fletcher Allen Health Care*, 169 Vt. 419, 424 (1999). In contrast, were the new trauma to cause an aggravation, the earlier employer would be absolved permanently from responsibility. *Id.*; *see also Pacher v. Fairdale Farms*, 166 Vt. 626 (1997).

5. There is no evidence in the current claim that Claimant's work on the garage construction project in October 2006 caused a worsening of his underlying condition. Defendant's own medical expert, Dr. Backus, declined to reach such a conclusion. In fact, Dr. Backus opined that if Claimant's symptoms returned to baseline at some point after worsening in November 2006, as in fact they did, then presumably the underlying condition was not affected in any way by his activities. Without any medical evidence or expert medical testimony to substantiate that the underlying condition was worsened as a consequence of the garage construction project, there can be no finding of aggravation. Defendant's argument on this point fails, therefore.

6. Did Claimant's work on his father-in-law's garage cause a temporary flare-up? Dr. Backus says yes, because the activities were of a type that likely would cause Claimant's symptoms to worsen temporarily, and because in fact this is what occurred. Physician's Assistant Dooley says no, because Claimant's symptoms might have worsened in November 2006 even if he had not been engaged in the garage construction project during the prior month.

7. Mr. Dooley's argument misses the mark. Focusing on what "might have been" is as pointless in workers' compensation claims as it is in life; what matters is what in fact happened. Certainly it is true that Claimant might suffer a temporary flare-up of symptoms with no specific triggering event or activity at all, in which case Defendant might remain responsible for all resulting medical treatment. But it is equally possible – and in this case, probable – that specific activities caused Claimant's symptoms to flare at a time when they otherwise might not have, in which case Defendant has earned a temporary respite from liability for the treatment that ensued.

8. I conclude, therefore, that Defendant has sustained its burden of proving that, more probably than not, Claimant's work on the garage construction project in October 2006 caused his symptoms to flare in November 2006. Defendant is not responsible, therefore, for the medical costs incurred by Claimant to treat this flare-up.

9. The medical evidence establishes that Claimant returned to his previous baseline shortly after the March 22, 2007 epidural steroid injection. Defendant properly should resume responsibility as of that date for ongoing treatment of any recurrent symptoms, unless and until another new trauma occurs to break the causal link back to the original 2003 work injury. This includes assuming ongoing responsibility for payment of Claimant's Celebrex prescriptions.

10. Claimant has submitted evidence of costs totaling $255.68 and attorney's fees totaling $3,258.00. An award of costs to a prevailing claimant is mandatory under 21 V.S.A. §678, and therefore these costs are awarded. As for attorney's fees, these lie within the Commissioner's discretion. Although Claimant was unsuccessful in establishing his right to medical benefits for the November 2006 flare-up, he did succeed in proving his entitlement to ongoing medical benefits from March 2007 forward, which I find to be of greater import in the long run. I conclude, therefore, that Claimant substantially prevailed and that an award of attorney's fees is appropriate.

11. As for interest, under 21 V.S.A. §664 an award of interest is mandatory from the date on which the employer's obligation to pay compensation began. The evidence does not reflect specifically the amount or due date of the medical bills Defendant has refused to pay since March 22, 2007, nor does it establish what amounts subsequently were paid, either by Claimant or by his group health insurer. Under the statute, I conclude that Defendant is obligated to reimburse Claimant for any amounts he paid, along with interest at the statutory rate from the date of payment forward. Defendant is obligated to reimburse any third-party payors as well, including any interest charges or other late-payment penalties assessed by them.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to pay:

1. Reasonably necessary medical benefits causally related to the ongoing treatment of Claimant's March 10, 2003 work injury after March 22, 2007;

2. Interest on any medical expenses paid by Claimant and/or third-party payors in accordance with Conclusion of Law #11 above;

3. Costs of $255.68 and attorney's fees of $3,258.00.

DATED at Montpelier, Vermont this 11th day of April 2008.

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Patricia Moulton Powden
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.