E. E. v. Mount Snow, Ltd. and The Silo Restaurant (February 13, 2006)

STATE OF VERMONT
DEPARTMENT OF LABOR

E. E.	)	Opinion No. 02-06WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Mount Snow, Ltd.	)	For: Patricia A. McDonald
and The Silo Restaurant	)	Commissioner
	)	
	)	State File No. P-19601; W-04582

Pretrial conference held on May 11, 2005
Hearing held on September 16, 2005, record held open
Deposition of Dr. Ketterer taken on October 12, 2005
Records closed on November 15, 2005

APPEARANCES:

Thomas Bixby, Esq., for the Claimant
John W. Valente, Esq., for the Defendant Mount Snow, Ltd.
Richard Windish, Esq., for the Defendant The Silo Restaurant

ISSUES:

1. Did the Department err in granting an interim order in this matter?

2. Did the Department err in failing to approve the Form 27 submitted with the report of Dr. Kenosh?

3. Did Claimant suffer an injury to his left extremity that arose out of his employment with Mount Snow?

4. Did Claimant suffer an injury to his left extremity that arose out of his employment with The Silo Restaurant (The Silo)?

EXHIBITS:

Joint I:	Medical Records
Mount Snow A:	Form 22
Mount Snow B:	Affidavit of Claimant

BACKGROUND:

1. On April 22, 2005, this Department ordered Maine Employers Mutual (insurer for Mount Snow) to immediately pay interim benefits, including indemnity and medical benefits, to the Claimant. Mount Snow's subsequent Motion to Reconsider was denied.

2. On May 11, 2005, Mount Snow filed a Motion for Summary Judgment. The motion was denied.

3. Form 27, Notice to Discontinue Benefits, was filed in July with a report from Dr. Kenosh. The forms were rejected because the opinion was deemed equivocal.

4. On the day of the hearing, Mount Snow's renewed Motion for Summary Judgment was denied on the record.

FINDINGS OF FACT:

1. Claimant, who is right hand dominant, injured his right wrist while working for Mount Snow as a cook on March 11, 2000.

2. Mount Snow, insured by Maine Employers Mutual, filed and accepted a claim for Claimant's injured right wrist.

3. Two weeks after the injury, Claimant had an open reduction and pinning of his right wrist. His progress afterwards was complicated and slow. He developed a mild deformity and discomfort at the mid-carpal areas of the injured right wrist. Therefore, Dr. Ketterer performed a mid-carpal fusion of the right wrist in December 2000.

4. Claimant continued to have pain and difficulty using the right wrist; he was in constant pain and often dropped items when attempting to use this wrist.

5. In October 2001, a bone graft was done to stabilize Claimant's right wrist joint.

6. In June of 2003, Claimant had a right wrist fusion. The cast from this operation was removed in early August 2003.

7. Out of functional necessity, Claimant was forced to increase the use of the left hand and wrist after the immobilization of the right wrist. Occasionally, he noted "twinges" in the left hand and wrist; also, from time to time he noted swelling in his left wrist following the increase in use.

8. Dr. Ketterer opined that Claimant reached medical end result for his right wrist injury in September 2004 with a 17% whole person impairment rating.

9. Claimant began working at The Silo in January 2005 as a prep cook; this position entailed chopping vegetables and general food preparation.

10. Claimant notified The Silo upon employment that he had problems with both of his wrists and was unable to lift anything heavy; The Silo accommodated Claimant's request.

11. One night while working at The Silo, Claimant was cleaning pots and pans when the pain in his left wrist became unbearable for him; this was the only occasion when he washed dishes for this job.

12. Claimant held this position with The Silo for approximately one month.

13. In March of 2005, Claimant returned to Dr. Ketterer complaining of burning in his left hand with numbness up to the level of the wrist and swelling at the end of a day. Carpal tunnel syndrome (CTS) testing conducted on the left hand and wrist by Dr. Ketterer's office was positive.

14. Although Claimant's first complaint to Dr. Ketterer regarding difficulty with the left hand and wrist was after he started working at The Silo, the symptoms predated his work there.

Medical Testimony

15. Dr. Ketterer, who has treated Claimant's wrist problems for years, noted that he had arthritis in both of his wrists as well as a pattern called bilateral scapho-lunate ligament disruption (preexisting condition). He also identified Claimant as having a higher than average tolerance for pain.

16. Dr. Ketterer acknowledged that Claimant would have eventually developed CTS in both wrists with any use whatsoever because of the preexisting condition. In this case, however, the CTS was accelerated in the left hand and wrist because of the increased use necessitated by the work related injury to the right wrist. Dr. Ketterer based this opinion on his professional experience treating patients with CTS, specifically his experience treating this Claimant since 2000.

17. Dr. Michael Kenosh is a physiatrist at the Rutland Regional Medical Center. He is in charge of the Occupational Health Clinic at the medical center. In his practice he treats patients with CTS. He also administers and interprets nerve conduction studies.

18. Dr. Kenosh performed an Independent Medical Records Review for Defendant Mount Snow, but did not personally examine the Claimant. Due to an allegedly poor Neurometrix study provided by Dr. Ketterer's office, he was unable to conclude with medical certainty that Claimant's CTS on the left side is work

related. He wrote, "Assuming for the moment, however, that the patient does have carpal tunnel, I cannot assign the development of this disease process to any specific occupational exposure, whether that be at The Silo Restaurant or secondary to 'forced overuse' due to his right wrist injury. There are no generally accepted dose relationship or tolerance levels for force, repetition, posture or vibration that adequately assess risk for a process such as carpal tunnel syndrome."

CONCLUSIONS OF LAW:

Interim Order

1. Mount Snow challenges the issuance of an interim order, arguing that it is in violation of V.S.A. § 643a and Workers' Compensation Rule 6.1400, which permit the issuance of such an order only if "the evidence does not reasonably support a denial." As the party attempting to relieve itself from an interim order to pay benefits, Mount Snow bears the burden of proof in this matter. *See Lewis v. Ethan Allen and Green Mountain Wood Products*, Opinion No. 41-00WC (December 20, 2000).

2. The interim order was partly based on the above stated opinion from Dr. Kenosh. In light of this opinion, the specialist who issued the order also reviewed the opinion of the treating surgeon who, unlike Dr. Kenosh, attributed the Claimant's left CTS to overuse of that extremity when the right hand and wrist were immobilized. The specialist made the determination that Mount Snow had not provided adequate expert medical evidence to reasonably support a denial.

3. Dr. Kenosh's opinion was based on dose relationships, a theoretical and partly speculative opinion that did not consider adequately the stress suffered by this Claimant's left hand and wrist as a result of years of treatment and immobilization of his right hand and wrist. Such an opinion did not reasonably support a denial of the interim order when the treating surgeon's definitive statement supported causation. This case is analogous to the recent Supreme Court case *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 41, 882 A.2d 1177. In *Gallipo*, the Supreme Court of Vermont reaffirmed the interim order standard that requires adequate expert medical evidence to reasonably support a denial. Accordingly, Mount Snow did not meet its burden of proof and the interim order was appropriate.

Form 27

4. For the same reasons explained above, the Form 27 to discontinue benefits was filed with this Department. A specialist rejected the proposed discontinuance because she found that "the evidence does not reasonably support the proposed discontinuance." 21 V.S.A. § 643a.

Causation

5. The Supreme Court of Vermont established the standard for medical causation in workers' compensation cases in *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941). The Court stated "There must be created in the mind of the trier something more than a possibility, suspicion, or surmise that such was the cause, and the inference from the facts proved must be at least the more probable hypothesis, with reference to the possibility of other hypotheses." *Id.* at 20.

6. The Claimant bears the burden of establishing medical causation by proving all facts essential to the rights asserted. *See Goodwin v. Fairbanks*, 123 Vt. 161 (1963). Further, the Claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *See Egbert v. Book Press*, 144 Vt. 367, 369 (1984). The Claimant in this case has satisfied his burden to prove that Mount Snow and Maine Employers Mutual are liable for work related injuries sustained to his left hand and wrist.

7. Although disputes between carriers typically require an aggravation-recurrence analysis, such an analysis is not the appropriate starting point in this type of case, which necessarily begins with the question whether Claimant's left hand and wrist condition is work related. Preexisting his work, Claimant had a scapho-lunate ligament disruption, which would have progressed to CTS on its own. Nevertheless, if the work related injury aggravated or accelerated that progression, Claimant's left hand and wrist condition is compensable. *See Jackson v. True Temper Corp.*, 151 Vt. 592, 593 (1989). The expert medical opinions provided as to the compensability of the left hand and wrist condition are in conflict.

8. Claimant relies on the medical opinion of Dr. Ketterer, the treating physician and surgeon who has established his professional experience, education and training, as well as extensive treatment of the Claimant's condition since his first surgery until present. Dr. Ketterer opined the accelerated CTS in the left hand and wrist to be the result of overuse necessitated by a work related injury in the right wrist. He based this opinion on his extensive treatment of the Claimant's condition and his formal training.

9. Dr. Kenosh conducted the Independent Medical Records Review for the defense. Dr. Kenosh criticized the quality of the Neurometrix study he was provided by Dr. Ketterer's office regarding Claimant's median nerve entrapment neuropathy at the wrist, ulnar nerve entrapment neuropathy at the elbow, and peripheral polyneuropathy as being a technically poor study. He further stated that appropriate, formal electrodiagnostic studies might be able to confirm or disprove Dr. Ketterer's opinion. Despite the alleged poor quality of the Neuromatrix study, Dr. Kenosh opined that Claimant's left hand and wrist injury could not be shown to have been caused by a specific occupational exposure because there are no

generally accepted dose relationship or tolerance levels for force, repetition, posture or vibration that adequately access risk for a process such as CTS.

10. In considering conflicting expert medical opinions, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional treatment and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *See Miller v. Cornwall Orchards*, Opinion No. 20-97WC (1997); *Gardner v. Grand Union*, Opinion No. 24-97WC (1997).

11. In analyzing conflicting medical opinions, we begin with the length of time the physician has provided care to the claimant. Dr. Ketterer has provided care for the Claimant's wrist injuries since he performed the first surgery until present, while Dr. Kenosh conducted an Independent Medical Records Review. Second, the experts are of a similar degree of professional training and experience. Third, based on Dr. Kenosh's admitted deficiency of all relevant and appropriate records for his Independent Medical Records Review, Dr. Ketterer's opinion is given greater deference in determining objective support for the opinion. Lastly, Dr. Ketterer's opinion is again given greater deference when examining the comprehensiveness of the respective examinations due to Dr. Kenosh's admitted deficiency of all relevant and appropriate records.

12. Moreover, Dr. Kenosh's opinion about dose relationships is far too general to be helpful in this unique case. His opinion is at least partly based on speculation due to an alleged want for a quality Neurometrix study. Lastly, Dr. Kenosh partly based his opinion on the likelihood of a prep cook/dishwasher developing CTS. This is incorrect information. Claimant's position at Mt. Snow included the duties of prep cook, but he was also required to cook and serve breakfast; he was not a dishwasher.

13. In contrast, Dr. Ketterer is more familiar with the Claimant's unique medical and employment circumstances because he has provided care for this condition since Claimant's first surgery in 2000 until present. Dr. Ketterer opined that Claimant's right wrist injury was severe, which required multiple surgeries and a fused right wrist. He further opined that Claimant was forced to compensate for his disability by overusing the left hand and wrist, thereby accelerating the preexisting condition. Dr. Ketterer's medical opinion establishes with a reasonable degree of medical certainty that Claimant's left hand and wrist injury was the result of a preexisting condition accelerated by an overuse due to the work related right wrist injury.

14. Well-established Vermont case law provides that a work related injury, which accelerates a preexisting condition is compensable. *See Jackson*, 151 Vt. at 595; *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31, 35-36 (1980); *Laird v. State*

Highway Dep't, 112 Vt. 67, 86 (1941); *Gillespie v. Vermont Hosiery & Machinery Co.,* 109 Vt. 409, 415 (1938). Both of the experts agree that Claimant had a preexisting condition of scapho-lunate ligament disruption. Dr. Ketterer's opinion overwhelmingly satisfies the *Miller* and *Gardner* criteria stated above, thereby is given greater deference. Dr. Ketterer opined the acceleration of Claimant's preexisting condition was due to a work related injury. Based on the evidence provided and the balancing of the above criterion from *Miller* and *Gardner,* Dr. Ketterer's opinion on medical causation is beyond the more probable hypothesis, with reference to the possibility of other hypothesis.

15. This case is analogous to the Supreme Court of Vermont's decision in *Ethan Allen, INC. v. Bressett-Roberge,* 174 Vt. 518 (2002), which provides that former employer and insurance carrier were liable for Claimant's work related injuries where symptoms of CTS were present during employment with former employer, and short term employment with subsequent employer did not contribute to the disability. Dr. Ketterer opined that Claimant has a high pain tolerance and though he did not seek medical care when he first had symptoms in his left hand and wrist, those symptoms began before he started working for The Silo; this condition was well on its way because of the work related right wrist injury. Nothing at The Silo caused his CTS, although he sought care after working there for a very short period of time. Mount Snow is the responsible employer. The medical evidence from both experts supports this finding.

ORDER

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law, Mt. Snow/Maine Employers' Mutual is ORDERED to adjust this claim for left carpal tunnel syndrome.

Dated at Montpelier, Vermont this _____day of February, 2006.

_____
Patricia A. McDonald
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.