

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

)	State File No. J-00312
)	
Dennis Lafountain)	By: George K. Belcher
)	Hearing Officer
v.)	
)	
Champlain Construction)	For: R. Tasha Wallis
)	Commissioner
)	
)	Opinion No. 13-01WC

Hearing held in Burlington on March 12, 2001
The record closed on March 27, 2001

APPEARANCES:

Beth Robinson, Esq. for the claimant
Stephen Fegard, Esq. for the defendant

ISSUE:

Are the claimant's current symptoms of back and leg pain, and his recent need for surgery, caused by a work related injury, which occurred on June 13,1995 during his employment with Champlain Construction? The issue was framed by the parties in their joint stipulation – neither party alleges that another employer is liable for this claim.

EXHIBITS ADMITTED:

Joint Exhibit 1:	Medical Records/Report by Dr. Russell P. Davignon
Claimant's Exhibit A:	Curriculum Vitae, Dr. Bruce I. Tranmer
Defendant's Exhibit 1:	Form 25 dated June 10, 1996
Defendant's Exhibit 2:	Curriculum Vitae, Dr. Russell P. Davignon

Joint Stipulation of the Parties

FINDINGS OF FACT:

1. The claimant was born on July 8, 1949. He left school after approximately ten years of education. He has done physical labor for his adult working life. He has worked a variety of jobs including farming, carpentry, wood cutting, and lawn care. Until December of 1994 he had never had any back problems

which were significant.

2. In May of 1994 the claimant began working for Champlain Construction. In December of 1994 he was laid off for the winter season. Approximately one week later, he sneezed and felt severe pain in his back. He was seen for this problem on January 24, 1995 at the Hudson Headwaters Health Network by Physician's Assistant Rob Berrick. At this time his symptoms were pain radiating from his back into his left buttock, down his left thigh, and down the back of his calf to his heel. He had some numbness in his foot. He was prescribed pain medication.
3. His back pain improved over the next three months. The claimant returned to work at Champlain Construction in late May or early June 1995. While at work, he was in the process of lifting a heavy manhole cover when he felt searing pain in his back.
4. About one week later on June 15, 1995, he was seen at the Hudson Headwaters Health clinic again. The back pain had not resolved. The pain was in his back, his left leg, and his left foot had numbness. According to Chris Wolfe, RPA-C, who saw him on June 15, 1995, Mr. Lafountain was complaining of some back pain and pain that radiated down his legs. Examination of the patient at that time revealed some paraspinal muscle tenderness in the lumbosacral region that was worse on the left than on the right. Palpation of the sciatic notch elicited an intense shooting pain that radiated down the left leg. (See letter of Chris Wolfe dated August 7, 1995. Joint Exhibit 1). According to Chris Wolfe the presentation on the visit on June 15, 1995 was "strikingly similar" to the presentation on January 24, 1995.
5. Mr. Lafountain was seen again on June 22, 1995 and his pain was worse. He could hardly walk and had to enter the doctor's office in a wheelchair. Mr. Lafountain was referred to Dr. George P. White at the Spine Institute in Williston, Vermont, who examined him on July 17, 1995. Dr. White diagnosed Mr. Lafountain as having a "disc herniation". This was confirmed by a CT scan. The herniation was of the L5-S1 disc with left sciatica. Mr. Lafountain was prescribed an epidural steroid injection, which was given on August 17, 1995. He did not have surgery or other procedure to correct the herniated disc. The epidural injection caused significant improvement although it was not 100%.
6. In the fall of 1995 Mr. Lafountain went to work at Stella Foods. He worked there for 9 months. During his time there he had another back incident where he saw Chris Wolfe again on May 3, 1996 for lower back pain which started two days after he was loading hay with a friend. He was diagnosed as having a lower back strain and he was given medication. This problem was "almost completely resolved per patient" on June 17, 1996. (See chart note dated June

17, 1996 by C. Wolfe, Joint Exhibit 1). In June of 1996 while at Stella Foods, Mr. Lafountain was lifting a block of cheese and felt pain in his left leg. (See chart note of Dr. White, January 6, 1997, Joint Exhibit 1).

7. In December of 1996 Mr. Lafountain suffered back pain following a sneeze. The pain was severe in his back and his left leg. He was given another epidural injection on January 17, 1997. He had continuing pain in October of 1997 and he was seen at the Hudson Headwaters clinic. This pain appeared to be without a specific cause. In December of 1997 he was given another epidural injection.
8. In September of 1999 Mr. Lafountain woke up in the morning with pain. A CT scan was done on September 14, 1999 which showed a moderate disc bulge at L4-L5 and slight disc bulging at L5-S1 and L3-L4. An epidural injection was given on September 15, 1999. (See chartnote of James P. Rathmell, M.D. dated September 15, 1999, Joint Exhibit 1.)
9. In December of 1999 Mr. Lafountain saw Dr. Karen Lawes for recurring back and leg pain. She noted that the September, 1999 CT scan showed moderate bulging disc at L4-L5 and mild bulging disc at L3-L4 and L5-S1. She referred him to neurosurgeon for evaluation. On January 12, 2000 Dr. Bruce Tranmer saw Mr. Lafountain. He ordered a CT myelogram, which was done on January 17, 2000. This test showed that the claimant had a disc herniation at L4-L5 with an extradural defect which “may be causing an L5 radiculopathy”. (See Dr. Ratkovits radiology report, Joint Exhibit 1). There were no noted abnormalities in the L5-S1 area of the spine according to this report, although disc degeneration was noted in the L3-L4, and the L4-L5 spaces. It was decided that the claimant should have surgery to correct the herniated disc at L4-L5 and he underwent a microdiscectomy at L4-L5 on April 25, 2000 with Dr. Tranmer performing the surgery. Disc fragments were removed.
10. Following the surgery, Mr. Lafountain felt some temporary relief from the pain but the basic symptoms continued. (See. chartnote of Dr. Tranmer, October 23, 2000, Joint Exhibit 1). Dr. Tranmer noted that the MRI scan of October 16, 2000 showed mild left L5-S1 protrusion.
11. Since the surgery in April of 2000 he has had two epidural injections with no lasting effect. At the time of the hearing, Mr. Lafountain was still having pain in his back and his leg, with numbness in his foot. The pain is significant, with the base level of pain increasing over time.
12. Dr. Bruce Tranmer is a medical doctor who is the Chairman of the Division of Neurosurgery at the University of Vermont, Fletcher Allen Health Care Hospital. He is a Fellow of the American College of Surgeons and a Fellow in Neurosurgery of the Royal College of Physicians and Surgeons of Canada.

He is the surgeon who performed the microdiscectomy in April of 2000 on Mr. Lafountain.

13. Dr. Tranmer testified that the current back and leg pain of the claimant is substantially related to the June 1995 injury, which arose from the manhole-lifting incident. The basis for his opinion is his experience and his review of the medical records. According to Dr. Tranmer, the sneezing injury of December 1994 probably caused a bulging or slight tear in the tissue of the back at the L5-S1. The injury incurred in the manhole-lifting incident aggravated the situation into a herniated disc at the L5-S1 area. This was the principal cause of the pain and numbness which was severe and which continued with some ups and downs until the present. As stated by Dr. Tranmer, the manhole-lifting incident was the most significant event concerning the claimant's back in his life. While the sneezing incident may have "gotten the ball rolling", the manhole lifting injury was given greater emphasis in the medical records.
14. Although the manhole lifting injury resulted in a herniation of the L5-S1 disc, the surgery at issue in this case, and the current pain source, is the nerve root at the L4-L5 space. Dr. Tranmer believes that the injury at the L5-S1 in June of 1995 caused the spine to be altered in such a way that it became degenerative. This put added stress on the next level above (L4-L5). (See also Letter of Dr. Tranmer dated August 22, 2000, Joint Exhibit 1). According to Dr. Tranmer, once the biomechanics at one level of the back are thrown off, the other disc spaces of the back can be affected. When asked whether the June 1995 injury was the substantial cause of the current condition and the need for surgery in April of 2000, his answer was that it was. When asked why the sneezing incident of December of 1994 was not the basic cause of the problem, he indicated that the severity of the injury, the severity of the pain, the duration of the problems following the injury, and the continuity of problems following that injury make it more significant in terms of cause than the sneezing incident.
15. When asked why the degeneration in the L5-S1 space did not appear on the CT scan as reported on January 17, 2000, Dr. Tranmer indicated that the radiologists often focus on the area, which is suspected as a source of pain, and they often do not comment on other areas.
16. When Dr. Tranmer was asked about the injuries, which the claimant suffered after the manhole injury (hay-lifting incident, cheese-lifting incident, 1997 sneezing incident, etc.) Dr. Tranmer indicated that he had evaluated each of these and concluded that based upon the history, the symptoms and the degree of pain suffered after each one, they were less likely to be the primary cause than the manhole incident.
17. The claimant was examined by Dr. Russell P. Davignon on January 22, 2001.

Dr. Davignon performed a physical exam and he conducted a review of the medical records, although neither he nor Dr. Tranmer had access to some of the original CT scans.

18. Dr. Davignon is a medical doctor and an orthopedic surgeon. He is a Fellow of the American Academy of Orthopedic Surgeons and a Diplomat of the American Board of Orthopedic Surgery. He has been in the private practice of orthopedic surgery from 1978 to the present and he has held various positions at the Central Vermont Hospital, including Chief of Surgery from 1986 to 1990. Dr. Davignon did not appear to question the veracity of the claimant's symptoms. He did not, however, agree with the conclusions of Dr. Tranmer concerning causation.
19. Dr. Davignon is of the opinion that it is impossible to rationally identify the manhole-lifting incident as the primary cause given the similarity of the symptoms to the 1994 sneezing incident. As Dr. Davignon puts it, "what is good for the goose, is good for the gander". This is understood to mean that the initial sneezing incident cannot be ignored. He makes the same point concerning the subsequent injuries and exacerbation's (hay-lifting, cheese-lifting, etc.). Dr. Davignon saw no reason that these injuries were not just as causally responsible as the manhole incident. Finally, Dr. Davignon noted that the most recent CT scan appeared to show that the L5-S1 injury had healed or resolved and, thus, the argument that the L5-S1 injury was weakening the spine and causing a migration of the problem to the next upper level was not justified. He also indicated that studies, which have shown the relationship of lower disc problems to subsequent disc problems, have been based on cases where surgery was performed and, thus, cannot relate to the facts of this case. In summary, Dr. Davignon is of the opinion that it is impossible to logically relate the April 2000 discectomy at L4-L5 to the manhole incident. (See generally report of Dr. Davignon of January 22, 2001, Joint Exhibit 1).
20. It is not contested that the June 13, 1995 manhole incident was an accident arising out of and in the course of the claimant's employment at Champlain Construction.
21. The claimant was paid Temporary Total Disability from June 13, 1995 to October 2, 1995 as a result of the June 13, 1995 injury. He was also awarded a permanent partial disability award of 10% whole person impairment directly related to the June 13, 1995 injury.
22. The attorney for the claimant incurred compensable costs in the amount of \$218.49 and attorneys fees at the allowed rate in the amount of \$3,495.00.

CONCLUSIONS OF LAW:

1. In workers' compensation cases the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1963). 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. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
2. 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). Where the causal connection between an accident and an injury is obscure, and a lay person would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979).
3. In this case the chain of causation is the real legal and factual issue requiring resolution. The first link in the chain is the relationship of the sneezing incident in December of 1994 to the disc herniation found (after the manhole incident) in August of 1995. An injury that exacerbates a pre-existing condition is a compensable injury. *Bedini v. Frost*, 165 Vt. 167 (1995). In this case the claimant was awarded 10% whole person impairment to the spine arising from the manhole incident with full consideration of the prior sneezing incident. See Workers' Compensation Forms 21 and 22, approved by Department on February 25, 1997. In addition to this legal determination, both Doctors Tranmer and Davignon testified that concerning pain, the sneezing incident had essentially resolved by the time the claimant returned to work in June 1995.
4. The next causation factor has to do with the multiple incidents of back strain and pain suffered by the claimant in the ensuing years. The hay-lifting incident, the cheese lifting incident, another sneezing incident, and his general pattern of heavy work, all raise an issue as to whether the current L4-L5 disc herniation relates back to the manhole incident. An injury subsequent to a work-related injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable work-related injury. *Correl v. Burlington Office Equipment*, Opinion 64-94, citing 1 Larson, WORKERS COMPENSATION Sec. 13.11. (The *Correl* case dealt with subsequent incident of shoveling following back problem, which was work-related.) All of the incidents subsequent to the manhole incident appear to be less-intense than the manhole incident or clearly related back to it. As such, they are either related to it, or they are of lesser significance in making the determination of the cause of the most recent back problem of the claimant.

5. The final causation factor has to do with the relationship of the June 1995 injury to the L5-S1 disc space and nerve root, to the eventual L4-L5 disc space problem, which was diagnosed and treated in 1999-2000. "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an intervening cause attributable to the claimant's own intentional conduct." LARSON'S WORKERS' COMPENSATION, Desk Edition, Chapter 10, p. 10-1(2000). Dr. Tranmer was of the opinion that the change of the biomechanics of the claimant's back at L5-S1 was a significant cause of the L4-L5 problem. The fact that a chain of causation is complex does not mean that causation is broken (See *Liscinsky v. Temporary Payroll Incentives, Inc.*, Opinion No. 09-01 WC (March 22, 2001, in which the Commissioner found that vascular surgery, arising from a blister, arising from poor fitting footbrace, arising from back injury, was compensable.) If the work related injury accelerates or exacerbates an underlying condition, the claim is compensable, even if the condition would inevitably lead to the same result. *Id.*, citing *Marsigli Estate v. Granite City Sales*, 124 Vt. 95, 103 (1964).
6. Dr. Davignon and Dr. Tranmer were in conflict whether the most recent medical problem of the claimant could be related to the manhole incident. When choosing between conflicting medical experts the Department has traditionally considered several factors: (1) whether the expert has a treating relationship with the claimant; (2) the professional's qualification, including the education and experience of the expert; (3) the evaluation performed, including whether the expert had all medical records in making the assessment; and (4) the objective bases underlying the opinion. *Yee v. International Business Machines*, Opinion No. 39-00 WC (Nov. 9, 2000). Both doctors are well qualified and had ample opportunity to examine the claimant and the medical records prior to the hearing.
7. On the whole, Dr. Tranmer's opinion is more cogent. Dr. Davignon was of the view that the current back problem should be related back to the "index injury" (meaning the first injury or the 1994 sneezing incident). Dr. Tranmer explained, however, that the sneezing incident appeared to be resolved in terms of symptoms, and that the manhole incident was much more pronounced in terms of pain, continuous problems, and subsequent exacerbations. Dr. Davignon was of the opinion that the L5-S1 injury shown on the CT scan of August, 1995 should not be said to be the cause of the L4-L5 disc problem because the CT scan of January, 2000 did not show any abnormality to the L5-S1 space. In addition, he doubted that Dr. White's diagnosis of a "herniated" disc really meant a herniated/ruptured disc, but rather, it meant a "bulging" disc. Dr. Tranmer, on the other hand understood Dr. White's description of a herniated disc to be a herniated/ruptured disc and, that, whatever disc material had escaped in 1995, caused a change to the

claimant's back. He thought that the disc fragments might have been resorbed, but that the disc was no longer there as a cushion. Thus, the biomechanics of the claimant's back had changed. Dr. Tranmer's view on this point appears to be the more persuasive opinion since it takes Dr. White's diagnosis at face value. Finally, Dr. Davignon often addressed questions as to whether the manhole injury was "the" cause of the current problem, or whether it was 51% of the cause, or the most important cause. It appeared that his opinion was colored by his own view of the legal degree of proof. Our law allows recovery as long as the given cause is not trivial or inconsequential. It need not be the "only" cause, nor 51% of the cause.. Cf. *Chater v. Central Vt. Hospital*, 155 Vt. 230 (1990).

8. The claimant's current symptoms of back pain and leg pain, and his recent need for surgery, are a direct and natural consequence of the work related injury which occurred on June 13, 1995 during his employment with Champlain Construction.
9. Having prevailed in this case, the claimant is entitled to an award of costs as a matter of law and attorney's fees as a matter of discretion. 21 VSA Sec. 678(a); Workers' Compensation Rule 10(a). Costs are allowed in the amount of \$218.49 and attorney's fees are approved claimant's counsel in the amount of \$3,495.00.
10. Since the only issue presented was the issue of the relationship between the current medical problems and the employment, it is anticipated that further determinations of compensation will be resolved either by stipulation or by further proceedings.

SO ORDERED

Dated at Montpelier this 16th day of July 2001.

R. Tasha Wallis
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.