

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

)	State File No. M-18438
)	
Leon Galli)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
Stanley Tools)	For: R. Tasha Wallis
)	Commissioner
)	Opinion No.06-02WC

Hearing Held in Manchester, Vermont on June 25, 2001
Record Closed on October 17, 2001

APPEARANCES:

John M. Whalen, Esq. and Peter V. Holden, Esq. for the claimant
Andrew C. Boxer, Esq. for the defendant

ISSUES:

1. What traumatic incident induced the claimant's initial symptoms?
2. Are the claimant's continuing symptoms causally related to the initial injury?

EXHIBITS:

Joint Exhibit I:	Stipulation
Joint Exhibit II:	Transcript of deposition of Daniel S. Robbins, M.D.
Claimant's Exhibit A:	Medical Records
Claimant's Exhibit B:	Summary of medical expenses with supporting documents
Claimant's Exhibit C:	Paycheck stubs
Claimant's Exhibit D:	Department Forms and denial letters
Claimant's Exhibit E:	Attorney fee agreement and statement

STIPULATION:

1. At all relevant times, The Stanley Tools Works was an employer within the meaning of the Vermont Workers' Compensation Act.
2. At all relevant times, Leon Galli was an employee of The Stanley Tool Works within the meaning of the Vermont Workers' Compensation Act.

3. At all relevant times, Constitution State Service Company was the workers' compensation carrier/servicer for the Stanley Tool Works.
4. Mr. Galli was absent from work for the period of March 8, 1999 to June 2, 1999 and received temporary total disability benefits for this time period.
5. Mr. Galli worked part-time from April 5, 1999 to June 2, 1999 and received temporary partial disability for this time period.
6. Mr. Galli was absent from work from August 31, 1999 to October 15, 1999 and received no benefits under the Vermont Workers' Compensation Act for this time period.
7. Mr. Galli worked part-time from December 11, 2000 to January 5, 2001 and received no benefits under the Vermont Workers' Compensation Act for this time period.
8. Mr. Galli has been absent from work from January 8, 2001 to the present [at least to the time the record closed] and received no benefits under the Vermont Workers' Compensation Act during this time.
9. The parties stipulated to the admissibility of the exhibits listed above.
10. The parties stipulated to the qualifications of the claimant's expert witnesses Dr. Alexander S. Kloman and Dr. Daniel S. Robbins.
11. The parties stipulate to the qualifications of the defendant's expert witness Dr. Kuhrt Wieneke, Jr.
12. The parties stipulate that the Department may take judicial notice of all records in its files on this claim, including all Department forms properly filed, and the absence of all Department forms which should have been filed but were not filed.

FINDINGS OF FACT:

1. The stipulated facts are accepted as true and the exhibits are admitted into evidence. Judicial notice is taken of all Department forms.
2. Claimant Leon Galli has worked for Stanley Tool Works as a laborer for 28 years.
3. On February 15, 1999 the claimant stumbled while hanging shelves at work. He fell from a platform approximately 40 inches above the ground and to break his fall, grabbed an upright 2 x 4.

4. After the fall the claimant's leg was bruised and bleeding. When asked if he wanted to fill out an accident report, claimant said he was okay. He continued to work although he had discomfort and stiffness in his neck and shoulders.
5. About three weeks after the work incident the claimant was bowling when he felt a sharp twinge beneath his right shoulder blade.
6. The claimant did not seek medical care or file an accident report until March 8, 1999 when he saw Dr. Brian Cunningham, his family doctor. Dr. Cunningham's notes reflect that the claimant had been experiencing pain and stiffness for the previous three weeks, dating the onset of the pain at about the time of the work incident.
7. Dr. Cunningham referred the claimant to Dr. Alex Kloman, a neurologist.
8. On Dr. Cunningham's order, the claimant was out of work from March 8, 1999 to April 2, 1999 during which time he received temporary total disability benefits (first absence).
9. When Dr. Kloman saw the claimant on March 9, 1999, he recorded the claimant's history of a fall at work and a three-week history of neck shoulder stiffness. Dr. Kloman diagnosed a subacute radiculopathy, or a "pinched nerve" based on the claimant's history, paresthesia into his thumb, weakness in his right arm and asymmetric reflexes.
10. A March 11, 1999 MRI revealed disc narrowing at C3-C4 that occurred over time, not within a month. It also revealed a central disc bulge at C4-C5 and a central disk protrusion at C5 and C6. In a September 10, 1999 report that included a review of objective tests, Dr. Kloman concluded that this MRI, as well as x-rays and EMG "revealed a primary musculoskeletal syndrome."
11. On March 22, 1999 claimant underwent nerve conduction studies (NCS) and electromyography (EMG) of the right upper extremity. Dr. Klom concluded that the NCS/EMG study was normal. Specifically there was no electrophysiologic evidence for a focal neuropathy such as carpal tunnel syndrome, nor evidence of cervical radiculopathy.
12. Nevertheless, Dr. Kloman noted that although the claimant had improved, he was still "40% less than his pre-injured self." He recommended continued physical therapy followed by a gradual return to work.
13. Claimant participated in physical therapy then returned to work on a part-time basis on April 5, 1999 and worked part-time until June 2, 1999. During that interval, he received temporary partial disability benefits.

14. In April 1999 the claimant expressed to Dr. Kloman that he was 80 to 85% better following the physical therapy and gradual return to work status. He was working six hours a day and no longer needed analgesics for pain. His examination was normal.
15. The parties entered into a Form 21 Agreement for Temporary Total Disability Compensation for a strained neck and right shoulder injury of February 15, 1999 resulting in disability beginning on March 8, 1999.
16. By June of 1999 the claimant was engaged in volunteer carpentry work at a public park. That work involved hammering and cutting boards with a power saw. At a visit to Dr. Manindra Ghosh on June 3, 1999, the claimant reported that he had no pain or discomfort as a result of these activities. On examination, Dr. Ghosh noted that the claimant's neck was normal. Range of motion of the neck, shoulder, elbow and wrist was essentially normal. Sensory function was normal. Muscle strength on both sides was equal and normal. And reflexes were equal and normal. Dr. Ghosh concluded that the claimant's radiculopathy was stable, that he had reached medical end result and that he should return to work. He also cautioned that the claimant "continue to maintain appropriate precautions related to neck rotation, particularly hyperextension and prolonged extension should be avoided sudden push-pull should also be avoided." He noted that follow-up care was as needed.
17. From June to the end of August 1999 the claimant worked full-time.
18. On August 31, 1999 the claimant visited Dr. Cunningham with a complaint of neck pain that had been increasing over the previous 2 months and a roaring sensation in his ears. Dr. Cunningham consulted with Dr. Kloman and ordered an MR angiogram, which was normal. In addition, he prescribed prednisone, deep heat ultrasound and cervical traction.
19. On September 2, 1999 Dr. Cunningham wrote a note stating that the claimant was under his care and had been unable to work since August 31, 1999.
20. Over Labor Day weekend (September 5), the claimant picked up a truck and he and his wife helped their son move to Dartmouth. His pain worsened.
21. On September 10, 1999 Dr. Kloman again saw the claimant and recorded a history of headaches dating back to late June and neck pain that "was returning and increasing with each passing day." Dr. Kloman noted that claimant remained active as property manager of rental properties, but that he denied new trauma or injury. The examination was normal. The doctor's impression was "recurrent neck strain and tension/muscle contraction headaches that are most likely a recurrence/exacerbation of his previous injury." He recommended that the claimant continue physical therapy and remain out of work until he saw Dr. Cunningham at a September 21 appointment.

22. Claimant remained out of work from August 31, 1999 to October 15, 1999 when he claimed, but was denied, worker's compensation benefits (second absence).
23. Dr. Robbins noted no evidence of focal nerve pressure, that is no tension of the nerves from direct pressure when he examined the claimant in October of 1999 and reviewed the MRI scan taken the previous March. Nevertheless, he noted that claimant had significant neck pain that in his opinion was magnified by anxiety and stress.
24. From October 18, to October 31, 1999 the claimant worked part-time, a period during which he was denied temporary partial benefits.
25. In November 1999 claimant returned to work full-time. He was also involved in maintenance of several properties he owned with projects including installing new washers, fixing toilets and mowing lawns.
26. In February 2000 the claimant again experienced pain and stiffness in his neck and shoulder while he was making a two-day drive home after a vacation in Florida.
27. Claimant worked until March 6, 2000 when Dr. Cunningham excused him from work. He was then out of work until December 8, 2000 (third absence).
28. When Dr. Robbins saw the claimant in March of 2000 he noted significant changes from his examination the previous October.
29. Dr. Robbins recommended physical therapy, epidural injections and exercise to treat the claimant's pain. A repeat MRI in July of 2000 revealed more significant pressure, particularly at C4-5, therefore surgery was recommended.
30. On August 7, 2000 Dr. Robbins performed fusion surgery on the claimant's neck at C4-5, C5-6 and C6-7 with plate fixation. Postoperatively, Dr. Robbins noted that the claimant was doing much better, but by October 10, 2000 the claimant again complained of shoulder pain. Dr. Robbins recommended physical therapy, more aggressive exercises and increase in function. He advised the claimant to return to work.
31. From December 11, 2000 until January 5, 2001 the claimant worked part-time, but was denied temporary partial benefits.
32. Claimant has not worked since January of 2000.

33. Dr. Kloman saw the claimant in January 2001 and again in April 2001 noting that the claimant complained of pain, stiffness and headaches. Dr. Kloman concluded that the claimant's symptoms were the result of a residual strain/sprain syndrome caused by the claimant's fall at work.
34. Dr. Kloman referred the claimant to Dr. James Bernat at Dartmouth whose findings were in accord with Dr. Kloman's.
35. Claimant has submitted evidence that his attorney worked 108.35 hours on this case and incurred costs totaling \$1010.61.

Medical Opinions

36. Dr. Kloman, the claimant's treating neurologist; and Dr. Robbins, his treating orthopedist, testified in support of this claim. Dr. Kuhrt Wieneke, an orthopedic surgeon, testified for the defense in this matter. All are well qualified in terms of education, training and experience to render expert opinions in this matter.
37. Dr. Kloman expects the claimant to suffer symptoms of a continuing, if fluctuating, basis because his condition is chronic. Further, Dr. Kloman opined that the claimant's injury is akin to a whiplash and that his symptoms have been consistent with such trauma.
38. Based on the claimant's complaints of symptoms dating back to the day of the fall, corroborated by his wife's testimony and Dr. Cunningham's office note, Dr. Kloman concluded that the claimant's fall in 1999 caused his current problems. He dismissed the notion that the claimant's bowling could account for his symptoms because in his opinion bowling does not cause enough force to injure the spine.
39. Dr. Kloman opined that the fall at work caused nerve root impingement when the neck flexed or extended enough to have caused heavy pressure on the disc space. Degenerative changes predisposed him to the injury, but it was the injury that caused the pain. He further opined that fluctuations in pain levels as demonstrated by the sporadic absences from work are normal for this type of injury because the spine has become the claimant's "Achilles heel." At the same time, he conceded that the March 1999 EMG study was normal.

40. Dr. Robbins noted a change in the claimant's symptoms between March of 1999 and March of 2000. In 2000 the claimant had more arm symptoms and true dural tension signs in the C6-C5 nerve root irritation—indicated by abduction, extension and palmer flexion of the wrist. He also had other positive objective signs, which indicated impingement on the nerves, signs that were different from what they had been earlier. Whatever protrusion of disc material seen on the 1999 MRI clearly worsened to create the signs and symptoms he had a year later. Additionally, a fragment of disc had broken off by the time Dr. Robbins did surgery in July of 2000.
41. At the time of his deposition in October of 2000, Dr. Robbins opined that the claimant would be able to return to work on light duty in about 6 weeks.
42. Dr. Robbins and Dr. Kloman both testified that they have never seen a disc herniation from bowling, nor have read any reports of such an injury, although such a possibility exists.
43. The physicians agree that trauma caused the claimant's current pain condition. Dr. Kloman attributes the trauma to the incident at work in February of 1999; Dr. Wieneke attributes it to bowling.
44. Dr. Wieneke also opined that whatever nerve damage the claimant suffered in February or March of 1999 was acute and had resolved by June of 1999. In his opinion, the symptoms claimant had in late August and September of 1999 were related to chronic, multi-level degenerative disk disease.

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*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. 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).
3. However, once an employee has adequately established the original injury and a subsequent disability, the burden is on the employer to justify the termination of temporary total disability compensation. *Merrill v. U. V.M.*, 133 Vt. 101 (1974).

4. The case presents two issues. The first asks whether the initial injury was work or bowling related. The second questions the cause of the claimant's current condition.
5. Two divergent theories have been presented to explain the initial injury. The first, advanced by the claimant, posits that the claimant suffered a deceleration type of injury at work in 1999 when he fell and caught himself by grabbing a 2 x 4 to break the fall. Dr. Kloman, the claimant's treating neurologist supports that theory.
6. The second theory is that it was bowling, not an incident at work, that accounts for the claimant's symptoms. Dr. Wieneke for the defense supports that theory.
7. The onset of the claimant's pain immediately after the work-related injury, the mechanism of that injury and the lack of reported or observed cases of such injuries related to bowling, convince me that the trauma in this case was from the work-related incident, not from bowling. Furthermore, the parties entered into a Form 21 agreement in which the carrier accepted the claim for a February 1999 fall followed by disability in March. It cannot now disavow that agreement. 21 V.S.A. § 662(a) (agreements enforceable if approved by the Commissioner).
8. Whether the claimant's current symptoms and episodic periods of disability are a result of that trauma is less clear. Given the symptoms claimant had after the fall in 1999 and the greater likelihood that the fall than bowling would account for them, I accept the claimant's theory that he pinched a nerve when he fell at work in February of 1999.
9. However, the objective evidence demonstrates that any injury caused by that fall resolved by June of that year. The EMG was negative. Claimant had returned to usual activities such as carpentry and the management of his investment properties. He was released to work with no restrictions.
10. Claimant has chronic disc disease that predated the 1999 fall at work. It was to that condition that Dr. Cunningham attributed the symptoms claimant had in August of 1999.
11. When the claimant fell, he suffered an exacerbation of that chronic condition, and then returned to baseline, as evidenced by negative objective tests and a finding of medical end result.
12. Subsequent periods of disability are either due to the natural progression of the underlying condition or to an exacerbation of that condition after June of 1999. It is not likely that they are due to the fall in March of 1999.

13. Therefore, claimant is not entitled to temporary total and temporary partial benefits for the periods claimed because the condition causing any disability during those times was not caused by the March 1999 work-related fall.

ORDER:

THEREFORE, based on the Foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 11th day of February 2002.

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 court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.