

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

Brett Bowen

Opinion No. 17-04WC

v.

By: Margaret A. Mangan  
Hearing Officer

E. F. Wall

For: Michael S. Bertrand  
Commissioner

State File No. R-04586

Hearing held in Montpelier on September 18, 2003 and October 7, 2003

Record Closed on October 31, 2003

**APPEARANCES:**

David R. Bookchin, Esq. and Christine A. Murphy, Esq., for the Claimant

Eric A. Johnson, Esq., for the Defendant

**ISSUES:**

1. Does Claimant Brett Bowen have a pain syndrome that is causally related to an injury at E.F. Wall on August 29, 2000?
2. Did a work-related injury aggravate Mr. Bowen's pre-existing bipolar disorder? If so, is Liberty Mutual/E. F. Wall liable for psychiatric and other treatment for the disorder?
3. What medical care is the defendant liable for as a result of a work-related injury?
4. Is a spinal cord stimulator followed by addiction treatment and psychiatric care reasonable and causally related to a work-related injury?
5. Has claimant reached a medical end result from his work-related injury?

## **EXHIBITS**

*Joint 1: Medical Records in three volumes, totaling 1,960 pages*

*Claimant's 1: Transcript of deposition of Dr. Venger*

## **FINDINGS OF FACT:**

### History

- 1. Claimant is a 39-year-old man who had difficulty maintaining jobs throughout his adult life. In fact, he has had more than 30 jobs, most of which involved welding.*
- 2. Claimant has a significant medical history, primarily relating to a bipolar disorder that predated his work at E.F. Wall.*
- 3. In 1997 claimant's physicians reported his wish to raise poisonous snakes for their venom. Also in 1997, claimant reported to his physician at Community Health Plan that he had a approximate ten year history of problems with his arms. "He experiences some numbness, esp. in 4<sup>th</sup> and 5<sup>th</sup> fingers."*
- 4. In December of 1999, claimant sought medical care from Valley Regional Hospital for "aching all over" and tingling in his arms and legs.*
- 5. On January 19, 2000, claimant as seen at Gifford Hospital after cutting his left finger in a power sander and twisting his left hand. Extricating his hand caused a "twisting motion in shoulder, elbow and wrist." X-rays and range of motion examination were normal.*

### Work at E.F. Wall

- 6. At the time claimant was working at E. F. Wall, he was receiving social security disability benefits for his bipolar condition, benefits he has been receiving since 1997 or 1998. The benefits were based on his assertion that his bipolar condition disabled him from working. The work at E. F. Wall was considered a permissible trial. However, social security benefits have continued despite the fact that claimant has also received temporary total disability benefits because claimant never*

7. *Claimant worked for E.F. Wall from June 2000 until August of 2000.*

*Treatment for Physical Problems 2000-2001*

8. *On August 29, 2000, claimant was seen in the emergency department at Gifford Medical Center for a neck contusion, left shoulder strain and chest contusion that claimant attributes to an unwitnessed fall at work earlier that day. The notes from the visit state that he fell from a scaffold from 10 feet, struck his left chest, shoulder and neck, grabbed a pipe with his left arm, "so, therefore, he did not fall all the way." On examination, claimant had full range of motion in his shoulder. He was given a sling and prescription for Vicodin.*
9. *Over the next two months, claimant was referred to a specialist and had diagnostic tests. On September 11, 2000, he told Dr. Minsinger that his left shoulder was sore and he had numbness and tingling in his fingers. X-rays were negative. An MRI was suggestive of a partial tear of the supraspinatus tendon.*
10. *Claimant was given an elbow sleeve to protect the ulnar nerve and a strengthening program. On October 12, 2000, Dr. Minsinger recommended that he remain out of work for two additional weeks.*
11. *Claimant never followed up for physical therapy and never returned to Dr. Minsinger. He did not tell his employer that he was not returning to work or why. Nor did he determine whether a job was still available for him. He simply left, stating that he had family matters to attend to.*
12. *In late October 2000 claimant moved to Arizona and worked for one month as a welder. He was discharged for excessive absences he attributes to elbow pain, not a credible account since he did not seek medical attention at that time, given his history of freely and frequently seeking medical attention.*
13. *Claimant had no medical treatment between October of 2000 and January of 2001. I cannot accept his attempt to*

14. *Claimant began treating with Dr. Sungham Joe in January of 2001. Claimant told Dr. Joe that his shoulder was injured when scaffolding fell at work. Dr. Joe injected claimant's shoulder with lidocaine and steroids to treat his pain. A month later, he began physical therapy. But his pain complaints continued.*
15. *In March of 2001, claimant slipped in a motel bathroom. The report from the emergency medical service following the fall notes intense lower back pain. At the hospital emergency room, he was treated and released. A subsequent report, dated March 17<sup>th</sup> from "Ortho Spine," notes that claimant had soft tissue injuries to the left shoulder and lumbar-sacral spine.*
16. *Dr. Hale, another physician claimant consulted, noted that claimant hit his left shoulder on a sink when he fell.*
17. *A week after the fall, on March 22, 2001, claimant saw Dr. Ronald Joseph who noted that claimant had fallen from a 30 foot high scaffold back in 2000 and that he had electric pins and needle feelings in his left elbow, up the arm to the axilla and down to the finger tips. Claimant denied any pre-injury history of those symptoms.*
18. *Over the next three months, claimant sought medical care frequently with a variety of physicians for back and shoulder pain. He was treated with physical therapy and pain medications. During the process, Dr. Venger, shoulder specialist, reviewed with the claimant the risk of developing reflex sympathetic dystrophy (RSD).*
19. *In June of 2001, Dr. Lane, a physician hired by Liberty Mutual, determined that claimant suffered a traction injury to his brachial plexus that had resolved, that he had reached medical end result with no impairment and could return to work.*
20. *Dr. Lane diagnosed claimant with left shoulder pain with evidence of impingement tendonitis, mildly positive electrodiagnostic studies, mild carpal tunnel syndrome and bipolar illness.*

21. *Dr. Lane suggested that reasons other than claimant's shoulder were keeping him out of work and recommended psychiatric follow-up. On examination, Dr. Lane noted that "with coaxing" claimant had "normal strength and normal range of motion in all affected joints and structures."*
22. *Claimant's treating physician, Dr. Joseph, disagreed with Dr. Lane. In his July 1, 2001 report, he noted that positive electrical diagnostic tests, history and physical examination all supported his diagnosis of shoulder impingement syndrome. In Dr. Joseph's opinion, claimant was not ready to return to work because work could further exacerbate his symptoms. He concluded that claimant's work-related injury directly contributed to the problems with claimant's left elbow, carpal tunnel and shoulder problems.*
23. *Ten days later, on July 11, 2001, claimant saw still another physician, Dr. Bowen, who prescribed Valium and MS Contin and referred him to anesthesia for a nerve block.*
24. *Liberty Mutual filed a Form 27 to discontinue indemnity benefits for the claimant based on Dr. Lane's report, but in an August 2001 letter from a specialist in this department, the Form 27 was rejected and Liberty Mutual ordered to continue to pay for the claimant's upper extremity and carpal tunnel treatment.*
25. *Claimant was referred to Cascade Management for Vocational Rehabilitation services. On August 6, 2001, the entry reads, "plaintiff left at noon on 8/29/00 and stated he fell on staging 30 ft. We have not heard from or seen plaintiff since. A co-worker said his shoulder was sore."*
26. *On August 7, 2001, Dr. Joseph performed surgery on the claimant elbow and hand: left endoscopic decompression, left ulnar nerve neurolysis and transposition, medial epicondylectomy and flexor pronator tendon lengthening. Liberty never paid for that surgery.*
27. *Post operatively claimant's pain persisted. The pain in his shoulder began radiating to his jaw. His depression increased.*
28. *Further treatment and tests followed, including pain medication, cortisone injections, nerve blocks and MRI. The MRI of the cervical spine was normal.*

29. *Dr. Joseph noted that the carrier's failure to pay for the surgery delayed the surgery, which exacerbated claimant's bipolar condition and his anger at the carrier.*
30. *In December of 2001, claimant visited Dr. Joseph with the complaint of left elbow pain radiating down the palm of the hand and three middle fingers after pulling up the carpets at home.*

#### Treatment for Psychological Problems in 2001

31. *When claimant first moved to Arizona, he continued with the psychotropic medications prescribed by his psychiatrist in Vermont.*
32. *During a May 2001 hospital admission in Arizona, Dr. Joseph observed that his bipolar condition has worsened. In response, a consulting physician then altered the psychotropic medications.*
33. *In June of 2001, Dr. Lane observed that claimant's belief that his pain would go away was unrealistic. And he predicted that the combination of claimant's anger, lack of perception and bipolar illness made him a poor candidate for treatment of his upper extremity pain complaints. Dr. Lane later noted that it was his psychological problems, not his work-related injury, that kept claimant from working, an opinion with which Dr. Joseph strongly disagreed, concluding in contrast that claimant's work related injury and its sequelae were responsible for his inability to work. In his opinion, the injury aggravated the pre-existing bipolar condition.*
34. *In summer and fall of 2001, the depressive component of the bipolar condition worsened. Dr. Bennett attributed that worsening to continued pain and inactivity.*
35. *Claimant was arrested for driving while intoxicated in October of 2001 and convicted. He served a 10-day sentence in May or June of 2002.*
36. *In November 2001, claimant was hospitalized for a manic episode.*

37. On December 26, 2001, claimant first visited his current treating psychiatrist, Dr. Kaperonis, who initially diagnosed: bipolar disorder; history of alcohol and substance abuse, in remission; and chronic pain syndrome following a serious injuries to his left arm and shoulder which are work related. Dr. Kaperonis referred claimant to a pain management group, and ordered new medications, one of which causes weight gain.

#### Vocational Rehabilitation

38. At a meeting in October of 2001, claimant told a vocational rehabilitation counselor that he liked snakes and wanted to become a herpetologist. Therefore, his goal was to get a BS in Chemistry. He later told the counselor that he was putting an addition on his 2,000 square foot home to allow for an area for his home based business. He intended to do the contracting work himself.

39. Ultimately, claimant was found not entitled to vocational rehabilitation because his only interest was self-employment as a venom extractor and because Dr. Lane had determined that he could return to work as a welder.

#### Subsequent treatment: 2002

40. Dr. Kaperonis continued to treat claimant for his psychiatric problems, adjusting medication dosages and monitoring blood work. Dr. Joseph treated him for pain, which he noted was in the upper chest, neck and teeth, hand and forearm. On June 1, 2002, based on residual nerve function and decreased range of motion in the shoulder, Dr. Joseph determined that claimant left upper extremity impairment was 25%. He also determined that claimant was still incapable of working and could not return to work as a welder. Dr. Joseph then discharged claimant from his practice.

41. Records show that claimant saw his doctors at least twice each month in 2002. Complaints of upper extremity pain are reflected in many of those noted. Claimant was prescribed numerous medications including, Vicodin and Dilaudid, potent and addicting pain medications.

42. *Dr. Tadlock later noted that claimant got a minimum of 50% relief from the trial dorsal column stimulator.*
43. *By the fall of 2002, claimant's psychiatric condition worsened and he was seeking drugs from different physicians.*
44. *While claimant was awaiting the permanent dorsal column stimulator, Liberty Mutual sent him to Dr. Oliveri for an independent examination. In his October 25, 2002, Dr. Oliveri determined that with localized pain and a chronic pain syndrome with nerve involvement, it was reasonable to consider a spinal cord stimulator. However, because of claimant's psychological profile, he did not think claimant would be a good candidate. Instead, he recommended long-acting narcotics such as OxyContin, with short acting narcotics for breakthrough pain.*
45. *In November of 2002, claimant had more psychological problems, including hallucinations and anxiety. At one point he stopped taking his medications.*
46. *Dr. Oliveri placed claimant at medical end result on November 11, 2002, again recommending narcotics for the treatment of his pain.*

Continuing treatment: 2003

47. *While in Vermont for a family trip on January 2, 2003, claimant went to Gifford Medical Center with complaints of left arm pain. He left with a prescription for Vicodin.*
48. *Two days later, claimant went to an emergency room at KRMC in Arizona where he was given Dilaudid.*
49. *Throughout January of 2003 claimant went to great lengths to obtain medication from different doctors, at one point driving several hours under the pretense that his local physician was unavailable.*
50. *By April of 2003, claimant began working with an addiction specialist, Dr. Michael Levy, who noted that there was a strong possibility that narcotic medications were worsening his bipolar symptoms. He recommended implantation of the dorsal column stimulator.*



51. *Dr. Tadlock recommended that claimant be admitted to a hospital for detoxification from the addicting drugs before the permanent dorsal column stimulator is implanted. After speaking with colleagues, however, he changed that opinion in favor of one that would place detoxification only after the dorsal columns stimulator to control psychiatric symptoms.*

### Chronic pain

52. *Experts disagree on the correct diagnosis for the claimant's pain condition.*

53. *Dr. Venger, the neurosurgeon who has treated the claimant, opined that chronic pain syndrome is a constellation of symptoms and that reflex sympathetic dystrophy (RSD) is one type. He testified that the criteria for RSD listed in the AMA Guides are for the advanced stages of the condition and that the presence of each is not necessary for the diagnosis.*

54. *Defendant's expert, Dr. Leon Ensalada, rejected the diagnosis of RSD because claimant does not meet all the criteria listed in the AMA Guides for that diagnosis. Dr. Ensalad did not offer an opinion on whether claimant had a chronic pain syndrome and, if so, whether it is work-related. Nor did he comment on the reasonableness of a dorsal column stimulator.*

### Credibility

55. *Claimant and his wife both gave testimony on medical history, drug use and work capacity that contradicts objective reports and records.*

### **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*

3. *As the leading commentator has stated. "the progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause." A. Larson and L. Larson, 1 Larson's Workers' Compensation Law, at 10-1 (2003).*
4. *When exaggeration and hyperbole are stripped from this highly contested conflict we are left with a relatively straightforward case. Even assuming that claimant suffered a work-related injury at E. F. Wall, it was a minor injury, as Dr. Minsinger's notes confirm, and soon reached medical end result, as proven by Dr. Lane's opinion in June of 2001.*
5. *Significant facts undercut claimant's position that any fall at E. F. Wall in August of 2000 accounts for his myriad physical and psychiatric problems. After he saw the claimant on October 12, 2000, Dr. Minsinger estimated that he needed to be out of work for two more weeks. Claimant took a job in Arizona, albeit for a short time, and did not seek any medical care between October 2000 and January of 2001. He had an intervening fall. At most, any injury at E. F. Wall involved the claimant's shoulder, yet his complaints included tingling in his hands and fingers, symptoms that predated any work at E. F. Wall.*
6. *Furthermore, claimant's description of the incident changed over time. At first it was a ten-foot fall he broke with his left arm, later it was thirty feet, still later, he reported that the scaffolding itself fell. Physicians based opinions regarding causation on the claimant's medical history and report of the accident.*
7. *Those medical opinions are premised on inaccurate information and, therefore, lack the soundness necessary to support an award.*
8. *It is not necessary to address the question whether claimant has RSD because any causal link between claimant's pain complaints and an August 2000 incident is absent.*
9. *Defendant analogizes this claim to Howard v. Woodlan Tools, Op.No. 46-99WC (1999) where deception from the onset of a claim led to the forfeiture of benefits. However, given the heavy*

10. *Regardless, claimant is not entitled to the benefits he now seeks.*

**ORDER:**

*THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, this claim is DENIED in its entirety.*

*Dated at Montpelier, Vermont this 20<sup>th</sup> day of April 2004.*

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*Michael S. Bertrand  
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.*