Read v. W. E. Aubuchon Company, Inc. *(July 13, 2004)*

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Valerie Read *Opinion No. 24-04WC*

By: Margaret A. Mangan
v. *Hearing Officer*

W.E. Aubuchon Company, Inc. *For: Michael S. Bertrand*
Commissioner

State File No. K-09387

Hearing held in Rutland on February 25, 2004
Record Closed on March 11, 2004

APPEARANCES:

Mary E. Grady, Esq., for the Claimant
Bonnie B. Shappy, Esq., for the Defendant

ISSUES:

Is claimant's current back condition causally related to her work-related injury of June 14, 1996?

If so, is continuing chiropractic and massage reasonable medical treatment under 21 V.S.A. § 640(a)?

EXHIBITS:

Joint Exhibit I: *Medical Records*
Joint Exhibit II: *Deposition of Michael Garcia, M.D.*

Defendant Exhibit A: *Curriculum vitae of Jonathan Fenton, D.O.*

FINDINGS OF FACT:

1. *In June of 1996 Valerie Read (claimant) was an employee and W.E. Aubuchon (defendant) her employer within the Vermont Workers' Compensation Act.*

2. *Hanover Insurance Company was the workers' compensation claim for defendant at all times relevant to this claim.*

3. *While lifting a heavy object at work on June 14, 1996, claimant incurred a low back injury. On CT scan, a mild disc bulge was revealed at L4-5 and L5-S1 and small central rupture at L5-S1.*

4. *Claimant was treated conservatively and participated in work hardening.*

5. *In August of 1997, claimant was placed at medical end result and, in July of 1998, received permanent partial disability benefits based on a 5% whole person rating.*

6. *There are no records of treatment of claimant's back pain between December of 1996 and October of 1998, except for independent medical examinations.*

7. *Because she could not return to her previous job, claimant received vocational rehabilitation services and training as a medical transcriptionist. She received her certification as a transcriptionist in 1999.*

8. *At a January 1999 visit to her primary care physician, Michael Garcia, M.D., claimant reported that she was walking up to ½ hour a day and was taking three Ultram tablets a day for her back pain. At the time, she had mild low back muscle tenderness. Ultram is a non-narcotic pain medication.*

9. *Between January of 1999 and September of 1999 claimant visited Dr. Garcia three times. None of those visits was for back pain.*

10. *In August of 1999 claimant began working for a chiropractor, Dr. Cyr, as a medical transcriptionist. As a benefit, he provided her with free chiropractic adjustments, which she started in September 1999. Claimant identified "low back pain," "left knee pain," shoulder blade," and "jaw dysfunction" as the conditions she was most interested in having corrected. In addition to the chiropractic treatment, claimant had massage therapy in Dr. Cyr's office.*

11. At the time she began treating with Dr. Cyr, claimant was taking two Ultram tablets a day.

12. On July 24, 2000, claimant reported to Dr. Garcia that she threw her back out building a rock garden. She had diffuse paralumbar tenderness and was prescribed narcotic pain medication, Vicodin, then Percocet. Claimant described her pain as "debilitating."

13. Claimant's attempt at hearing to minimize the work she was doing in her garden while building the rock garden was not convincing.

14. Claimant's visits to Dr. Cyr after the rock garden incident increased.

15. Claimant returned to Dr. Garcia on September 28, 2000 to be rechecked for back pain.

16. On November 30, 2000 claimant saw Dr. Garcia with a complaint of upper back pain after using a new pillow. Dr. Garcia prescribed Flexeril and Percocet.

17. In response to a request from claimant, Dr. Garcia recommended that the carrier pay for the chiropractic treatments claimant was receiving from Dr. Cyr.

18. Claimant returned to Dr. Garcia in January of 2002 with continued complaints of upper back pain that was not responding to chiropractic, massage or acupuncture.

19. In February of 2002 claimant again treated with Dr. Garcia, this time for "excruciating" low back pain after doing some painting over the weekend.

20. After the painting incident, claimant treated with Dr. Cyr for crisis care.

21. On April 27, 2002, claimant had an independent examination with Dr. Fenton.

22. In May of 2002, the carrier discontinued payment for chiropractic care and massage treatments based on Dr. Fenton's

23. At a visit to Dr. Garcia on May 2, 2002, claimant complained of low back pain that disabled her from doing minimal painting and gardening. The doctor noted that she had back pain with radiculopathy that required daily narcotics. This is the first reference to radiculopathy in the records.

24. In October of 2002, Dr. Fenton opined that the pain resulting from claimant's building a rock garden was not related to her 1996 work related injury.

25. Claimant's treatment with Dr. Cyr included treatments for her back, neck, ankles, hip and elbow.

26. Sitting, such as what she had to do while working for Dr. Cyr, bothered claimant's back. She also has bouts of back pain when grocery shopping, doing laundry or feeding the dog.

27. A December 2002 MRI revealed a small left paracentral L4-5 disc herniation and a question of L5 radiculopathy.

28. Claimant worked for Dr. Cyr until November 2003.

29. Claimant's current work is with crafts, including painting, knitting, sewing, and other projects.

Expert Medical Opinions

30. *Dr. Fenton, board certified in osteopathy and independent medical examinations, opined that the rock wall incident was a new injury unrelated to the 1996 work related incident. He based the opinion on the claimant's subjective reports and the medical records indicating the greater complaints, more frequent visits and the need for stronger medication.*

31. *Claimant's treating physician, Dr. Garcia, is a board certified family physician. He opined that the chiropractic treatment claimant received did not decrease her medication needs, but improved her sense of well-being and allowed her to work.*

32. *Dr. Garcia also opined that after the rock wall incident, claimant had a flare-up of her back pain, and then returned to her baseline. However, after the painting incident, she required treatment with Percocet and did not return to baseline. Over time he has noted that claimant's back pain has gradually worsened, she had several flare-ups and she has required more medications.*

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. *This is a compensable claim only if claimant's current condition is a result of her 1996 injury, and not an intervening event.*

> *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 independent intervening cause attributable to the claimant's own intentional conduct. More specifically, 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.*

1 Larson's Workers' Compensation Law, § 10 at 10-1 (2000).

4. *The medical records and opinions demonstrate that any causal link between the claimant's 1996 injury and her current condition was broken by at least two nonindustrial events. After the rock garden incident, her visits to doctors with complaints of back pain increased. After the painting incident, she presented for the first time with radicular complaints and started on a course of narcotic pain relief that has continued unabated.*

5. *Before the rock garden incident, claimant had only routine visits with Dr. Garcia. Afterwards, she reported acute pain. After the painting incident, she experienced excruciating pain, as noted in contemporaneous medical records.*

6. *Although this Department has held that normal activities of daily living do not sever the causal connection from a work related injury, see e.g. Verchereau v. Meals on Wheels, No. 20-88WC (1991) (picking up a bag of groceries), building a rock garden and painting do not fall into that category.*

7. *Claimant's back condition was stable for three years after her injury. It worsened only after the incidents described above, which are unrelated to the 1996 incident.*

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 13th day of July 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.