A. B. v. Smith Buick Pontiac GMC (February 13, 2006)

**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

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| A. B. | ) | Opinion No. 03-06WC |
| | ) | |
| | ) | By: Margaret A. Mangan |
| v. | ) | Hearing Officer |
| | ) | |
| Smith Buick Pontiac GMC | ) | For: Patricia A. McDonald |
| | ) | Commissioner |
| | ) | |
| | ) | State File No. U-10916 |

Pretrial conference held on June 23, 2005
Hearing held in Rutland on December 14, 2005
Record Closed on January 9, 2006

**APPEARANCES:**

Erin H. Gallivan, Esq., for the Claimant
John W. Valente, Esq., for the Defendant

**ISSUE:**

Are Claimant's symptoms, which began on January 12, 2004 a flare-up, recurrence or a new injury attributable to Cardinal Comp Insurance?

**EXHIBITS:**

Joint I: Medical Records

Claimant's 1: Statements from Donald Anderson and John Davis
Claimant's 2: Claimed lost wages

**FINDINGS OF FACT:**

1. Claimant was an employee and Smith Buick Pontiac (SBP) his employer within the meaning of the Workers' Compensation Act at all relevant times. Cardinal Comp Insurance provided workers' compensation insurance for SBP.

2. Claimant has worked for SBP for almost 12 years, typically 9.5 hours per day five days a week. He works in the Parts Department.

3. In 1984 claimant injured his back. Within a year he was placed at medical end result with a 7.5% impairment.

4. Since 1986 Claimant has treated with Chiropractor Dr. Diekel for back pain. After an acute injury in 2003 the treatment with Dr. Diekel became regular and ongoing rather than episodic.

5. Claimant injured his back in December 2002 and April 2003 in non work-related incidents. He was out of work after the 2003 accident from April until September when he returned full time, full duty.

6. In November of 2003, Claimant's primary care physician, Dr. Peter Diercksen, noted that he was still having problems with the disc herniation. The doctor noted that although Claimant's straight leg raise test was negative and he was able to work full 9 to 10 hour days, Claimant felt restricted. When he tried going out hunting he had to stop because of the pain.

7. According to Dr. Diekel, Claimant's back pain symptoms were "minimized and stable prior to January 12, 2004."

8. On January 12, 2004, the crucial date for consideration in this matter, Claimant was at work, scooping salt from the back of a pick-up truck, a task he did not typically perform, but a necessary one that day because of freezing rain. In the process, Claimant felt back pain. He immediately told his co-workers and asked for help completing the job. Claimant tried but was unable to finish his shift that day. He left work and went to Dr. Diekel for treatment. Notes from Dr. Diekel's office from January 12, 2004 confirm the history of emptying salt from a spreader at work that day, with the onset of back pain.

9. After the January 12, 2004 incident, Claimant was unable to work for 7 to 8 days. He then returned to work 4 hours a day, worked up to 8 hours a day then to 9 hours a day. By September, he was back to his 9.5-hour workdays.

10. On examination, Dr. Diekel found moderate tenderness and muscle spasms in Claimant's lower back, guarded range of motion and positive straight leg raise test. He diagnosed acute lumbar discopathy with associated myospasms and lumbar sprain/strain.

11. Claimant continued to treat with Dr. Diekel and Dr. Dierksen for back pain, with visits more frequent than those immediately before the work related incident.

12. Dr. Diekel opined that the January 12, 2004 incident caused a flare-up of his chronic back pain condition.

13. At the defense request, Dr. Todd Lefkoe performed an independent medical examination of the Claimant. He opined that claimant's back pain is due to

longstanding degenerative joint disease, that he did not sustain a new injury in January 2004. Dr. Lefkoe also stated that the back symptoms Claimant experienced beginning on January 12, 2004 reflected a pain flare and recurrence of chronic pain. He agreed that the salt shoveling incident increased Claimant's back pain.

14. Dr. Diekel and Dr. Lefkoe agree that the January 12, 2004 incident did not alter Claimant's underlying chronic pain condition.

15. As a result of the January 12, 2004 incident, Claimant was unable to work for a week and a half. After that he returned to work with a gradual increase in hours. By September 2004 he was back to his regular 9.5 hour days.

16. Claimant produced a copy of his fee agreement with his attorney, and evidence of attorney time and secretarial time worked on this case as well as costs of $84.33.

**CONCLUSIONS OF LAW:**

1. Defendant urges this Department to deny this claim by finding that the work-related incident of January 2004 was a mere recurrence of a long standing problem under the traditional aggravation recurrence analysis. "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. WC Rule 2.1110. "Recurrence" means the return of symptoms following a temporary remission. Rule 2.1312. Claimant argues that this claim is one for a flare-up.

2. This case has similarities to *Cehic v. Mack Molding, Inc*. 2006 VT 12 in which this Department's finding of a recurrence, holding Mack Molding liable, was affirmed. The second employer, Pike Industries, was only responsible for indemnity and medical benefits until Mr. Cehic reached his pre Pike injury baseline. After Claimant reached that baseline, responsibility fell back on Mack Molding, the first employer. The Vermont Supreme Court explained: " 'Flare-up' most appropriately connotes a temporary worsening of a preexisting disability caused by a new trauma for which the new employer is responsible for paying compensation benefits until the worker's condition returns to the baseline, and not thereafter. *Wood v. Fletcher Allen Health Care*, 169 Vt. 419, 424, 739 A.2d 1201, 1206 (1999) (summarizing the Commissioner's use of the temporary flare-up doctrine, but finding it inapplicable to the facts of the case)." Id. ¶ 9

3. Defendant's role in this case is analogous to that of Pike in *Cehic.* As the Court noted, "Mack Molding was not responsible for lost work or medical treatment associated with the 2001 back strain suffered at Pike, but was responsible for claimant's underlying condition…" The employer here, like Pike Industries in *Cehic*, is responsible for the temporary flare of the condition caused by a specific incident, one that disabled Claimant from working and necessitated medical treatment.

4. Accordingly, defendant is responsible for the indemnity benefits and medical benefits from January 12, 2004 until Claimant reached his preinjury baseline.

5. Because he prevailed, Claimant is entitled to attorney fees and costs as well as interest. 21 V.S.A. § 678(a); § 644. However, secretarial time must be subtracted from the total number of hours.

6. Interest is due from the date each benefit was due until paid.

**ORDER:**

Defendant is ORDERED to adjust this claim for the temporary flare of symptoms until Claimant reached baseline in January 2005.

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.