David Auclair v. GW Savage Corp., Revera Inc. (April 29, 2011)

STATE OF VERMONT
DEPARTMENT OF LABOR

David Auclair	Opinion No.	09-11WC
v.	By:	Phyllis Phillips, Esq. Hearing Officer
G.W. Savage Corporation, Revera, Inc. (Liberty Mutual Insurance Co.) and Revera, Inc. (ESIS, Inc.)	For:	Anne M. Noonan Commissioner
	State File Nos. P-16967/CC-209/BB-60688	

OPINION AND ORDER

Hearing held in Montpelier, Vermont on January 26, 2011
Record closed on February 25, 2011

APPEARANCES:

Michael Green, Esq., for Claimant
John Valente, Esq., for Defendant G.W. Savage Corporation
James O'Sullivan, Esq., for Defendant Revera, Inc. (Liberty Mutual Insurance Co.)
Jason Ferreira, Esq., for Defendant Revera, Inc. (ESIS, Inc.)

ISSUES PRESENTED:

1. Are Claimant's current right ankle symptoms and condition causally related to his February 2000 compensable work injury, such that Defendant G.W. Savage Corporation remains responsible for benefits?

2. Alternatively, if Claimant's current right ankle symptoms and condition are causally related to his employment for Revera, Inc., which of the two insurers for that employer are responsible for benefits?

3. If Claimant's current right ankle symptoms and condition are causally related to his employment for Revera, Inc., is his claim time barred pursuant to 21 V.S.A. §§656(a) and/or 660(a)?

EXHIBITS:

Joint Exhibit I: Medical records

Defendant Cincinnati Exhibit 1: *Curriculum vitae*, John Johansson, D.O.

Defendant ESIS Exhibit 1: *Curriculum vitae*, Leon Ensalada, M.D.
Defendant ESIS Exhibit 2: Letter from Michael Green, Esq., March 22, 2010

Defendant ESIS Exhibit 3: Letter from Marnie Marrier, April 7, 2010

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640
Costs and attorney fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendants were his employers as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Department's files relating to this claim.

Claimant's February 2000 Injury and Initial Medical Course

3. On February 1, 2000 Claimant was employed as a roofer for Defendant G.W. Savage Corporation ("Savage"). On that date, Claimant was sweeping off an icy roof when he fell 8 to 10 feet to the ground, landing on his right ankle and leg. Claimant suffered a severe ankle injury, which included three fractured bones.

4. Defendant Savage accepted Claimant's injury as compensable and began paying workers' compensation benefits accordingly.

5. Claimant underwent surgery to repair his ankle fractures on the date of the injury. Thereafter he was followed by Dr. Kaplan, his treating orthopedic surgeon.

6. Following the surgery Claimant experienced ongoing pain, stiffness and decreased range of motion in his ankle. For support, he wore a lace-up ankle corset. Even with that, because he lacked dorsiflexion (the movement by which the toes are brought closer to the shin), he walked with his right foot pointed out so that his ankle would clear the ground. Extended standing or walking more than a block or two caused both pain and swelling. Stair climbing also exacerbated his symptoms.

7. In November 2000 Dr. Kaplan performed a second surgery. The goal was to decrease Claimant's pain and increase his range of motion by extracting the screws that previously had been placed, removing inflamed tissue and manipulating the joint under anesthesia.

8. Unfortunately, even after the second surgery Claimant continued to experience pain, stiffness, swelling, decreased range of motion and occasional episodes of giving way in his ankle. Dr. Kaplan determined that it was fruitless to pursue further attempts to increase mobility, and decided instead to focus on maximizing Claimant's ability to function. To that end, in January 2001 he prescribed a rigid AFO (ankle-foot orthosis) brace. The brace is permanently affixed to the sole of Claimant's shoe, with metal rods extending up both sides of his lower leg and held in place mid-calf with a leather strap.

Its purpose is to support the ankle and position the foot in such a way as to allow a more normal gait.

9. At Defendant Savage's request, in March 2001 Claimant underwent an independent medical evaluation with Dr. White, an occupational medicine specialist. Dr. White reported that Claimant continued to experience constant pain in his right ankle and foot, that his ankle sometimes gave way, that he walked with a limp and that he wore an ankle brace.

10. Dr. White determined that Claimant had reached an end medical result, and rated him with a 15% whole person permanent impairment on the basis of his gait disturbance. In addition, given the severity of his ankle fractures Dr. White noted the "substantial possibility" that as time went on Claimant might develop post-traumatic arthritis.

11. Also in March 2001 Claimant completed a work hardening program and was determined to have a medium duty work capacity. His primary functional limitations were in the areas of walking, carrying and stair climbing. These limitations effectively precluded him from returning to work as a roofer.

12. With Dr. White's end medical result determination as support, in April 2001 Defendant Savage terminated temporary disability benefits. Thereafter it paid permanency benefits in accordance with Dr. White's 15% impairment rating.

Claimant's Post-Injury Work and Subsequent Medical Course

13. From 2001 until 2004 Claimant worked as a truck driver for Merriam Graves, delivering oxygen tanks. He routinely worked more than 40 hours weekly. Driving the truck caused the pain in his ankle to increase, however, as the positioning required to depress the accelerator was problematic. Loading and pushing dollies also was difficult. Claimant left the job because of these issues.

14. From 2004 until 2006 Claimant worked as a Licensed Nursing Assistant (LNA) at Starr Farm Nursing Home, having studied for his certificate while still at Merriam Graves. The career change proved to be a much better fit for him. Not having to drive a truck eased the stress on his ankle. In addition, because he routinely worked evening and/or night shifts he found the work to be far less strenuous. Such shifts involve significantly more sitting than walking, in contrast to what typically is required during a day shift. Indeed, once the residents are fed, bathed and safely in bed, usually by 8 or 9 PM, the remainder of the night is spent completing chart notes, responding to calls and conducting quick rounds. Claimant estimated that he spent no more than 50 percent of an 8-hour evening shift on his feet, and only 2 to 2-1/2 hours on his feet during a night shift. As he described it, his primary responsibility on the latter shift was merely to sit at the nurse's station and stay awake.

15. Claimant routinely worked overtime at Starr Farm, sometimes as much as 72 hours weekly. This was in keeping with his custom through the years. Growing up, he worked long hours on his family's farm, and as noted above, he typically worked overtime while at Merriam Graves as well.

16. In May 2006 Claimant left Starr Farm to take a similar job at Burlington Health & Rehabilitation Center ("BH&R"), owned by Defendant Revera, Inc. As he had at Starr Farm, Claimant worked either evening (3 to 11 PM) or night (11 PM to 6 AM) shifts, performing essentially the same functions. Also as he had previously, Claimant often worked overtime, sometimes combining evening and night shifts consecutively. Even though he logged many hours, Claimant credibly described the work as "pretty easy duty." Most of his time was spent sitting down rather than standing or walking.

17. In addition to his LNA shifts, beginning in 2009 Claimant occasionally took on minor maintenance projects at BH&R as well, such as painting rooms and fixing wheelchairs. Claimant credibly described this work as not strenuous. Larger maintenance jobs were contracted out.

18. Claimant left BH&R in May 2010, for reasons unrelated to the current litigation. He continues to work as an LNA, but at another facility whose residents are somewhat more independent.

19. Between March 2001 and June 2007 Claimant treated for ankle pain only once. This was in April 2004, when he returned to Dr. Kaplan complaining of aching pain. X-rays documented only mild degenerative changes. As treatment, Dr. Kaplan prescribed Vioxx for pain relief. He also suggested that Claimant either lock up his AFO brace more stiffly so as to further decrease his ankle motion, or consider an ankle fusion "in the future." Dr. Kaplan reported that Claimant did not yet feel ready for the latter option.

20. Claimant next sought treatment for ankle pain in June 2007. By this time he had been working as an LNA for approximately 3 years – the first two at Starr Farm and the most recent one at BH&R. Claimant reported to his physician's assistant that while his ankle had always ached since the original injury, in the past month the pain had increased. There had been no new inciting event or injury.

21. Claimant was referred back to Dr. Kaplan for treatment. An MRI study showed evidence of degenerative changes, with irregular, thinned and depressed cartilage at the site of his prior fractures. Such findings are consistent with post-traumatic arthritis. Damaged cartilage rarely heals back to its pre-injury condition, which often results in a joint that is slightly misaligned. Even a minute misalignment will cause abnormal wear and tear on the joint.

22. Dr. Kaplan attempted to treat Claimant's worsening symptoms with steroid injections, but these proved unsuccessful. The only remaining treatment options are arthroscopic surgery (to remove dense scar tissue) and if that fails, then surgical fusion.

23. At the hearing, Claimant described his current symptoms and corresponding limitations. Although not specifically reflected in the medical records, his account of chronic ankle pain, restricted motion and occasional swelling, all gradually worsening since the original injury, was consistent and credible. Claimant has continued to wear his metal AFO brace throughout. At some point during his Starr Farm employment, he began wrapping his ankle with an Ace bandage at night, to reduce swelling. Within the past two years or so, he also has taken to wearing his lace-up ankle corset under his AFO brace, for added support. Claimant continues to refrain from many of the recreational activities he enjoyed prior to the February 2000 injury, including hiking, swimming, skiing and soccer coaching.

24. Claimant was adamant that his decision to seek renewed treatment in 2007 was not precipitated by any new incident or change in work conditions at his BH&R job. He testified that the reason he had not sought treatment earlier was because he understood that the only remaining option was fusion surgery, and that until he was ready to take this step, there was no point in returning to Dr. Kaplan. I find this testimony to be credible.

Medical Opinions as to Causation of Claimant's Current Condition

(a) Dr. Kaplan

25. Although Dr. Kaplan did not testify at the hearing, his medical records reflect his very strong opinion that Claimant's current condition, which is marked by significant scar tissue, damaged cartilage and degenerative changes in his ankle, is directly attributable to his original injury.

(b) Dr. Johansson

26. Defendant Savage's medical expert, Dr. Johansson, stated a different opinion. Dr. Johansson is an osteopathic physician who is well experienced in treating occupational injuries involving the lower extremities. Dr. Johansson conducted an independent medical examination of Claimant in May 2008.

27. Dr. Johansson concluded that Claimant's work activities at BH&R during the weeks leading up to his decision to seek treatment in June 2007 aggravated and accelerated the progression of osteoarthritis in his right ankle. As support for his opinion, Dr. Johansson relied on his experience regarding the pace at which arthritis typically develops, which he felt was much slower than what Claimant exhibited. To a reasonable degree of medical certainty, Dr. Johansson identified Claimant's work at BH&R as the most likely cause for this acceleration.

28. Dr. Johansson made a number of assumptions in reaching this conclusion. Most notably, he assumed that the overtime hours Claimant routinely worked involved significant time on his feet, which as Claimant credibly testified was not the case at all. Dr. Johansson identified these extra shifts as "the key" to his opinion, yet mistakenly assumed that at least some of them were more strenuous day shifts. When questioned on cross-examination, he acknowledged that his opinion was based primarily on what he understood to be "standard LNA work," and that actually he knew none of the specifics of Claimant's job duties. I find that these assumptions appreciably weaken Dr. Johansson's causation opinion.

29. There were other gaps in Dr. Johansson's knowledge as well. At the time he rendered his opinion, for example, Dr. Johansson was unaware that Claimant had been in the habit of working substantial overtime hours at least since 2001, long before he began working at BH&R. What he identified as a recent increase in work hours, therefore, actually had been Claimant's norm for more than 6 years. I find that this gap as well significantly undermines the persuasiveness of Dr. Johansson's opinion.

30. Dr. Johansson expressed no opinion as to whether Claimant's work at BH&R after 2007 also might have contributed to his current condition and need for treatment. His conclusions as to causation, therefore, do not implicate Defendant ESIS, Inc. ("ESIS") in any way, as it did not begin providing workers' compensation insurance coverage for BH&R until March 1, 2008. Prior to that time, Defendant Liberty Mutual Insurance Co. ("Liberty") provided coverage.

(c) *<u>Dr. Ensalada</u>*

31. Defendant ESIS' medical expert, Dr. Ensalada, strenuously disagreed with Dr. Johansson's analysis. Dr. Ensalada is board certified in both pain management and occupational medicine. He conducted an independent medical examination of Claimant in September 2010.

32. As Dr. Kaplan had, Dr. Ensalada concluded that Claimant's current condition and need for treatment are directly attributable to his original injury, and have not been aggravated or accelerated in any way by his employment at BH&R.

33. Dr. Ensalada used a relatively simple analysis to reach this conclusion. As the medical records well document, Claimant suffered a severe right ankle injury when he fell from the roof in February 2000. With such a significant injury, it was entirely predictable that subsequently he would develop post-traumatic arthritis; indeed, Dr. White anticipated this as early as 2001. Claimant described a credible history of ongoing pain, range of motion deficits and functional limitations in the years since then. Over time, the natural progression of his post-traumatic arthritis led to worsening symptoms and now, the need for more invasive treatment, either arthroscopy or fusion.

34. Dr. Ensalada disputed Dr. Johansson's conclusion that Claimant's arthritis progressed at a faster rate than would be expected had he not worked at BH&R. In Dr. Ensalada's experience, 6 years is a not an unusual period of time for the condition to have worsened, even absent any external factors such as work.

Procedural Posture of Current Claim

35. Consistent with its statutory obligation, Defendant Savage continued to pay medical benefits for Claimant's ongoing treatment even after Dr. White's end medical result determination in 2001. It paid for Claimant's return visit to Dr. Kaplan in 2004, and also for the various replacement braces Claimant required from time to time as his old ones wore out.

36. When Claimant resumed treatment in June 2007, however, Defendant Savage denied responsibility for the charges. It asserted that there was no medical evidence to connect the treatment back to the February 2000 injury.

37. Claimant appealed the denial in April 2008, through his attorney at the time. In response, in May 2008 Defendant Savage scheduled Dr. Johansson's independent medical evaluation. As noted in Finding of Fact No. 27 *supra*, Dr. Johansson concluded that Claimant's current symptoms were causally related to his employment for BH&R, and not to his February 2000 injury. With that opinion in mind, on July 18, 2008 the Department's workers' compensation specialist upheld Defendant Savage's denial and directed Claimant's attorney to file a Notice of Injury and Claim for Compensation (Form 5) against BH&R instead.

38. Believing that his condition was in no way related to his job duties at BH&R, Claimant declined to file a claim against it until March 22, 2010. On that date, Claimant's current attorney notified BH&R's human resources coordinator, Marnie Marrier, of Claimant's claim for benefits.

39. Ms. Marrier testified that she was confused by the situation, as she was not aware that Claimant had suffered any injury while at BH&R. Her confusion was compounded by the fact that Claimant as well asserted that his condition was not causally related to his work there. Nevertheless, Ms. Marrier completed a First Report of Injury and forwarded it to Defendant ESIS for review. As noted above, *see* Finding of Fact No. 30 *supra*, Defendant ESIS has provided coverage for BH&R since March 1, 2008.

40. Defendant ESIS denied Claimant's claim for benefits on the grounds that (a) Claimant's symptoms were causally related to his original injury in 2000; (b) there had been no aggravation causally related to his BH&R employment in 2007; (c) even if an aggravation had occurred, Defendant ESIS was not on the risk at that time; and (d) any aggravation claim was barred by the applicable notice requirement and/or statute of limitations. Claimant appealed this denial in June 2010.

41. In July 2010 Defendant Liberty was put on notice of Claimant's claim. Defendant Liberty provided workers' compensation insurance coverage for BH&R from the time of Claimant's hiring in May 2006 through February 29, 2008. It thus was on the risk at the time of Claimant's alleged 2007 aggravation.

42. Defendant Liberty denied Claimant's claim in August 2010, on the grounds that there was insufficient evidence to establish that his LNA duties at BH&R had aggravated his previous injury. Claimant seasonably appealed this denial as well.

CONCLUSIONS OF LAW:

1. This is an aggravation-versus-recurrence dispute. Defendant Savage asserts that Claimant's work at BH&R in the weeks prior to June 2007 aggravated and accelerated the post-traumatic arthritis in his right ankle, such that the disease progressed at a faster rate than it would have otherwise. On those grounds, it argues, the responsibility for treating Claimant's current condition now rests with one or the other of BH&R's workers' compensation insurers.

2. Defendants Liberty and ESIS disagree with this analysis. They argue that Claimant's current condition is directly attributable to his original injury, and has not been aggravated or accelerated in any way by his subsequent employment.

3. Vermont's workers' compensation rules define an aggravation as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." Workers' Compensation Rule 2.1110. A recurrence is defined as "the return of symptoms following a temporary remission." Workers' Compensation Rule 2.1312.

4. In *Trask v. Richburg Builders*, Opinion No. 51-98WC (August 25, 1998), the Commissioner identified five factors that typically will support a finding of aggravation, thus severing the causal connection back to an earlier injury:

   (1) Whether there has been a subsequent incident or work condition which destabilized a previously stable condition;

   (2) Whether the claimant had stopped treating medically;

   (3) Whether the claimant had successfully returned to work;

   (4) Whether the claimant had reached an end medical result; and

   (5) Whether the subsequent incident or work condition contributed independently to the final disability.

   In accordance with the Vermont Supreme Court's holding in *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997), the fifth factor – whether the subsequent incident or work condition contributed independently to cause the final disability – is accorded the greatest weight. *Id.*

5. Applying these factors here, there is no question that (a) Claimant had stopped treating medically for some years after his original injury and prior to June 2007; (b) he had long since successfully returned to work; and (c) he previously had reached an end medical result.

6. That Claimant did not suffer any specific new injury, incident or inciting event while working at BH&R also is undisputed. The disputed question, therefore, is whether Claimant's work conditions at BH&R, particularly the extent of his overtime hours, either (a) destabilized a previously stable condition; and/or (b) contributed independently to his current disability and need for treatment.

7. Both employers presented expert medical testimony on this question, Dr. Johansson on behalf of Defendant Savage and Dr. Ensalada on behalf of Defendants Liberty and ESIS. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

8. Dr. Johansson identified extra work shifts and overtime hours as the "key" to his conclusion that Claimant's employment at BH&R had aggravated and accelerated the arthritis in his ankle. At the same time, however, he failed to consider the specifics of Claimant's shift work – how much time he spent standing and walking as opposed to sitting, or how strenuous the work was, for example. Instead he made assumptions as to what "standard LNA work" entailed and then used those as the basis for his opinion. Dr. Johansson demonstrated a similar lack of familiarity with Claimant's work history, particularly the extent to which his overtime hours in the weeks leading up to June 2007 differed – or not – from the amount of overtime he had worked for the many years previous to that time period.

9. When considering a progressively degenerative disease in the context of an aggravation-versus-recurrence dispute, one "where 'the disease, if left to itself, and apart from any injury, would, in time, have inevitably caused a complete disability,' the causation test becomes whether, due to a work injury or the work environment, 'the disability came upon the claimant earlier than otherwise would have occurred.'" *Stannard v. Stannard Co, Inc.*, 175 Vt. 549, 552 (2003), quoting *Jackson v. True Temper Corp.*, 151 Vt. 592, 596 (1989).

10. Given the deficiencies in Dr. Johansson's understanding of the specific facts relative to Claimant's work for BH&R during the time period in question, I cannot conclude that his post-traumatic arthritis progressed any faster than it would have had he not been employed there. The fact that Claimant's symptoms worsened during his tenure at that job establishes nothing more than a temporal relationship, not a causative one. *S.D. v. State of Vermont, Economic Services Division*, Opinion No. 35-09WC (September 2, 2009). Dr. Johansson's aggravation opinion is based on speculation alone, with no objective corroboration. For that reason, I find it to be unpersuasive.

11. In contrast, Dr. Ensalada's causation analysis was based not only on Claimant's credible history of how his symptoms had progressed through the years, but also on a comprehensive understanding of Claimant's specific job duties at BH&R. His opinion was clear, thorough, straightforward and convincing. For these reasons, I accept it as the most persuasive.

12. I conclude that Claimant's current condition is the result of progressively worsening post-traumatic arthritis, directly attributable to his original February 2000 work injury, and not aggravated or accelerated in any way by his employment at BH&R. Defendant Savage remains responsible for whatever medical treatment is determined to be reasonable and necessary as a consequence of that injury.

13. Having determined that Claimant's employment at BH&R has played no role in his worsened condition, there is no need to consider Defendant ESIS' notice and/or statute of limitations defense.

14. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $1,124.98 and attorney fees totaling $7,011.00.[1] An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded. As for attorney fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded as well.

---

[1] Of the hourly charges submitted, 2.5 were incurred prior to June 15, 2010, the effective date of amended Workers' Compensation Rule 10.1210. Those charges are limited to the maximum rate in effect at the time they were incurred, or $90.00 per hour. Charges incurred after June 15, 2010 are subject to the amended rate, $145.00 per hour. *Erickson v. Kennedy Brothers, Inc.*, Opinion No. 36A-10WC (March 25, 2011).

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Defendant Savage is hereby **ORDERED** to pay:

1. All workers' compensation benefits to which Claimant proves his entitlement as causally related to his right ankle condition since June 2007; and

2. Costs totaling $1,124.98 and attorney fees totaling $7,011.00.

DATED at Montpelier, Vermont this 29th day of April 2011.

____
Anne M. Noonan
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.