

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Gregory Lewis

Opinion No. 12-15WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

Town of Stowe

For: Anne M. Noonan
Commissioner

State File No. Z-61161

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Gregory Lewis, *pro se*
Wesley Lawrence, Esq., for Defendant

ISSUE PRESENTED:

Are Claimant's migraine headaches causally related to his February 21, 2008 compensable work injury?

EXHIBITS:

Defendant's Exhibit A: Memorandum and referral to formal hearing docket, March 18, 2014
Defendant's Exhibit B: August 27, 2014 office notes from Ms. Finley-Bruno, APRN
Defendant's Exhibit C: Dr. Backus independent medical evaluation report, July 18, 2013 with addendum, January 29, 2014

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Claimant as the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer 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 file relative to this claim.
3. Claimant has worked at Defendant's sewage treatment plant since 1979. On February 21, 2008 he was exposed to toxic fumes while working and required admission to Copley Hospital. He was diagnosed with severe reaction to inhaled chemicals causing

bronchospasm and hypoxia. Defendant accepted this injury as compensable and paid workers' compensation benefits accordingly.

4. Effective August 31, 2008 the Department approved termination of Claimant's temporary total disability benefits on the grounds that he had reached an end medical result for his work injury.
5. At Defendant's request, Claimant underwent an independent medical evaluation with Dr. Backus, a board certified specialist in occupational medicine, on July 18, 2013. Defendant requested a general case evaluation, and also an opinion whether Claimant had suffered any permanent impairment from the 2008 injury. Dr. Backus provided an addendum to his report on January 29, 2014.
6. In Dr. Backus' opinion, Claimant remained at end medical result and had not suffered any permanent impairment as a consequence of his 2008 work injury. He further concluded that Claimant's migraine headaches, for which he now sought treatment at Defendant's expense, were not causally related. Rather, according to Dr. Backus, these resulted from his excessive use of analgesics, which were not necessitated in any way by the 2008 toxic exposure.
7. On September 25, 2013 Defendant filed a Notice of Intention to Discontinue Payments (Form 27) as to any medical treatment related to Claimant's migraines, on the grounds that these were not causally related to his accepted 2008 work injury. In accordance with Dr. Backus' opinion, Defendant also asserted that Claimant was at end medical result. On October 1, 2013 Defendant filed a Denial of Workers' Compensation Benefits (Form 2), in which it again denied coverage for medical benefits causally related to Claimant's migraine headaches.
8. Claimant appealed Defendant's denial by letter to the Department in January 2014. Following an informal telephone conference, the Department's workers' compensation specialist concluded that both the Form 27 and the Form 2 remained reasonably supported. At that point, Claimant requested that his case be forwarded to the formal hearing docket.
9. The Department's hearing officer convened a telephone pre-trial conference on May 28, 2014. A formal hearing was scheduled for August 18, 2014, but was converted to a status conference because the parties had not yet mediated the case. At that status conference Claimant indicated that he needed a week to get his calendar for scheduling and also to collect and disclose his medical records.
10. One week later, on August 26, 2014 the hearing officer convened a second status conference. At this point, Claimant indicated that he was scheduled to be evaluated by an expert, Joyletta Finley-Bruno, APRN, at Dartmouth-Hitchcock Medical Center on the following day. To allow time for a report from that evaluation to be generated, the formal hearing was scheduled for December 23, 2014.

11. Ms. Finley-Bruno's August 27, 2014 office note reports that Claimant was complaining of migraines that he alleged were caused by his work, and for which he was seeking workers' compensation coverage. She advised him as follows:

I can provide office notes, advised that it's probably best to get his original treating physician to write a supportive letter. Explained that he had a preexisting migraine [history] before this work related incident and that the sludge exposure is a trigger, but not the cause of his migraines.

12. Upon reviewing Ms. Finley-Bruno's office note, which Defendant's attorney had provided, the hearing officer e-mailed the parties as follows:

It does not appear that the medical professional rendered an opinion that the fumes from the plant caused Mr. Lewis' migraines. She did say that the fumes were a trigger, but because the migraine condition pre-existed the work injury, the fumes were not the cause. Mr. Lewis, you will need to have a medical expert give an opinion in your case that the fumes from the plant cause your migraines. Your testimony and your belief that the fumes cause your headaches will not be enough to carry your burden. If you have questions, I can set up a short telephone status conference for either tomorrow or Monday.

13. At a status conference held the next day the hearing officer informed Claimant that he was entitled to pursue his claim and have the hearing on December 23, 2014. However, she also informed him that without expert medical evidence he would not be able to carry his burden of proof and could not prevail on his claim. Claimant indicated he did not want to proceed with the hearing on December 23, 2014. This motion for summary judgment followed.

DISCUSSION:

1. Summary judgment is proper when "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, after giving the benefit of all reasonable doubts and inferences to the opposing party." *State v. Delaney*, 157 Vt. 247, 252 (1991). To prevail on a motion for summary judgment, the facts must be "clear, undisputed or unrefuted." *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979); *A.M. v. Laraway Youth and Family Services*, Opinion No. 43-08WC (October 30, 2008).

2. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
3. Defendant asserts here that because Claimant has no expert medical evidence causally relating his migraine headaches to his 2008 work injury, as a matter of law he cannot prevail on his claim for workers' compensation benefits. I agree. In cases such as this one, where the causal connection between an injury and an incident is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
4. Even considering the evidence in the light most favorable to Claimant, I conclude that he has failed to establish a general issue of material fact, such that Defendant is entitled to judgment in its favor as a matter of law. Summary judgment is therefore appropriate.

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's claim for workers' compensation benefits associated with his treatment for migraine headaches is hereby **DENIED**.

DATED at Montpelier, Vermont this 3rd day of June 2015.

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.