

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Michael Taub

Opinion No. 12-23WC

v.

By: Stephen W. Brown
Administrative Law Judge

Shippee Family Eye Care, PC

For: Michael A. Harrington
Commissioner

State File No. JJ-53287

OPINION AND ORDER

Hearing held via Microsoft Teams on August 18, 2022
Record closed on January 13, 2023

APPEARANCES:

Thomas C. Nuovo, Esq., for Claimant
William J. Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant sustain a cervical injury arising out of and in the course of his employment with Defendant?
2. If so, to what benefits is he entitled?
3. Is Defendant responsible for the cost Claimant incurred in procuring an independent medical examination (“IME”) from Mark J. Bucksbaum, MD, and/or for the cost of Dr. Bucksbaum’s testimony at the formal hearing?

EXHIBITS:

Joint Exhibit	Joint Medical Exhibit (“JME”)
Claimant’s Exhibit 1:	[Excluded]
Claimant’s Exhibit 2:	Letter from Samuel Shippee, O.D. dated November 5, 2018, relating to Claimant’s retirement from employment
Claimant’s Exhibit 3:	Physician’s Statement for Disability Insurance Claim
Claimant’s Exhibit 4:	Curriculum Vitae of Mark Bucksbaum, MD
Claimant’s Exhibit 5:	Preservation Deposition of Mark Bucksbaum, MD

- Claimant's Exhibit 6: Letter from Richard Eschholz, DC, dated November 16, 2016
- Defendant's Exhibit 1: Preservation Deposition of Philip Davignon, MD (two volumes)
- Defendant's Exhibit 2: Curriculum Vitae of Philip Davignon, MD

FINDINGS OF FACT:

1. I take judicial notice of all relevant forms and correspondence in the Department's file for this claim.
2. Defendant owns and operates a general optometry practice with multiple office locations in Vermont and New Hampshire, including Saint Johnsbury, Vermont.
3. Claimant is a 69-year-old man licensed to practice optometry in the State of Vermont. He currently resides in Malone, New York.
4. Over the course of Claimant's optometry career, he has worked in several locations in Vermont, including Springfield, Woodstock, Waterbury, Colchester, Waitsfield, and Middlebury. He worked as an optometrist in Defendant's Saint Johnsbury office from approximately January 2015¹ until he voluntarily retired from that position, and from the practice of optometry, in September 2018. When he first began working for Defendant, he generally worked four days per week, although he later reduced his schedule to three days per week.
5. During his employment with Defendant, Claimant's job duties focused on patient care and diagnostics, including the use of a manual phoropter,² with which he performed refractions to determine the correct lenses for each patient. Operating this device involved sitting in front of the patient and often turning his body at sharp angles while tightly gripping a lever to manipulate the device. He credibly testified that the knobs and discs were quite firm, requiring some force to move. At his immediately previous job in Middlebury, Claimant did not perform refractions with a phoropter himself, as staff technicians performed this work.
6. Prior to his work for Defendant, Claimant had experienced mild shoulder pain on and off for years, but it never significantly interfered with his work or leisure activities, which included skiing, hiking, cycling, and playing the guitar. His symptoms usually resolved after a day or two of rest, and he never sought medical treatment for his symptoms before 2016.
7. Beginning in 2016, however, his shoulder pain began to worsen. This pain involved his neck and radiated down his arm to his hand, and he experienced numbness in his

¹ Claimant began working in 2014 for a corporate predecessor of Defendant; Defendant acquired that practice in January 2015.

² A phoropter is a medical device used during eye examinations containing a variety of lenses to determine a patient's appropriate eyeglass lens strength.

thumb and forefinger. These symptoms increased with exercise, which had not been the case previously. In August 2016, Claimant took one week off from work, hoping that rest would resolve these symptoms. However, his pain again worsened when he returned from vacation.

8. In early September 2016, Claimant presented to chiropractor Rick Eschholz, DC, of Hardwick Chiropractic in Hardwick, Vermont. (JME 1). On his intake form, he indicated that he believed he had a repetitive motion injury to his right shoulder and forearm and that it had been bothering him for several years but worsened in the last six months. (JME 3). Dr. Eschholz noted that Claimant's most painful areas were in his right shoulder, but that his neck was "hard to move." He diagnosed Claimant with right shoulder and cervical spine radiculopathy. (JME 2).
9. Approximately one week later, Claimant saw orthopedic surgeon Richard Gagnon, MD at Northeastern Vermont Regional Hospital, with complaints of intermittent right shoulder pain throughout his optometry career but having worsened in the previous six weeks. Dr. Gagnon performed a physical examination, which revealed a mostly normal range of motion and strength but with pain to palpitation over his biceps tendon and the long head of the biceps. He assessed Claimant with biceps tendonitis of the right shoulder and recommended a shoulder MRI. (JME 4).
10. In October 2016, Claimant underwent the MRI that Dr. Gagnon recommended. It showed no evidence of a rotator cuff tear, but it did show a suspected labral tear and multiple degenerative changes. (JME 7). Dr. Gagnon assessed Claimant with rotator cuff tendinosis, prescribed an injection, and referred him to physical therapy. (JME 11-14).
11. Claimant's symptoms initially improved with physical therapy. Treatment notes from November 2016, for instance, reflect reports that Claimant had "no pain with work" and was making "great improvements" with "no mobility deficits." (JME 28). By early January 2017, he transitioned from physical therapy to a minimally supervised exercise program at a gym facility without a set schedule. (JME 30).
12. However, on January 9, 2017, he returned to Dr. Eschholz with complaints that his neck pain had recently worsened, especially when he turned to the side.
13. On January 31, 2017, Claimant saw occupational medicine physician Philip Davignon, MD, for an independent medical examination (IME) at Defendant's request. During this examination, Dr. Davignon noted that Claimant demonstrated a full range of motion in his cervical spine and upper extremities including his shoulder, and full motor strength. Dr. Davignon assessed Claimant with biceps tendonitis for which he found him at end medical result with no permanent impairment. Dr. Davignon also found that Claimant could return to work at his then-current schedule of three days per week. (JME 35 *et seq.*).
14. In an Agreement for Temporary Compensation (Form 32) that the Department approved on March 2, 2017, Defendant accepted Claimant's workers' compensation

claim as compensable for right shoulder tendonitis only. However, Defendant has never accepted liability for any cervical spinal condition.

15. Claimant did not challenge the opinions that Dr. Davignon expressed in his January 2017 IME report and did not seek additional benefits at that time; he continued working for Defendant three days per week. Further, he did not seek any treatment for his neck or shoulder pain complaints for approximately one year following Dr. Davignon's 2017 IME, except for occasional massage therapy. He was discharged from physical therapy in March 2017.
16. In January 2018, however, Claimant again returned to Hardwick Chiropractic with complaints that his right shoulder and neck pain had recently worsened. He did not report any new trauma but stated that his previous symptoms had never fully resolved; they had simply been "manageable." (JME 44-45).
17. Later in January 2018, he returned to Dr. Gagnon, who again assessed right rotator cuff tendonitis and recommended an injection, which Claimant received. Although Claimant inquired about partial disability, Dr. Gagnon provided him a full work release. (JME 53-55).
18. On March 23, 2018, Claimant presented to Jessica Miller, PA, at the University of Vermont Medical Center, who assessed him with upper extremity pain and tingling consistent with a C6 radiculopathy.
19. Claimant credibly testified that at some point in 2018, his pain was becoming so severe that it negatively affected his sleep. However, around this same time, Defendant renovated its office space and obtained more updated, electronic phoropecters that allowed him to run the device from a keypad at a desk. He did as much as he could with his left hand and tried to protect his right hand and arm as much as possible. However, he still struggled to work through his entire day with his pain, and he found it increasingly difficult to be fully present for his patients.
20. Claimant retired from his employment with Defendant at the end of September 2018, citing his ongoing pain. He has not sought alternative employment since that time. Before retiring, he discussed the possibility of reducing his work schedule from three to two days per week instead of retiring, but Defendant did not find that solution to be workable. Claimant credibly acknowledged that none of his treating physicians have opined that he is completely disabled from employment.
21. In April 2019, Claimant underwent X-ray and MRI imaging studies, both of which showed degenerative changes at multiple levels of his spine. In particular, the MRI showed advanced multilevel lower cervical spinal disc and facet disease including foraminal narrowing at the C5-C6 and C6-C7 levels. (JME 82-83). He subsequently received epidural steroid injections and in June 2019 and underwent EMG testing, which found mild neuropathies in multiple locations and suggested C6 radiculopathy. (JME 85-88).

22. Claimant underwent another series of injections in July 2019, which resulted in only temporary relief. (*See* JME 95). Although his treating nurse practitioner Sarah Britton, NP, suggested a surgical consultation, Claimant was not interested in surgery; while his symptoms were uncomfortable, they were manageable. (JME 100). Since August 2019, he has not undergone any significant medical treatment for the complaints at issue in this case except for occasional follow-ups with Ms. Britton. (*E.g.*, JME 105 *et seq.*).
23. Claimant credibly testified that his symptoms have improved since his retirement, though he is still protective of his right arm. He has limited or modified some of his recreational activities to accommodate his pain. For instance, he previously played the guitar in a band called the New Economistas, but now finds it difficult to practice his guitar for more than forty minutes, leading him to sell his high-quality vintage guitar. He still cycles but uses an electronic assist bicycle. He was also once a highly skilled skier but no longer skis as often or as aggressively as he used to, although he moved to Malone, New York after his retirement to be near a ski resort where he holds a season pass.
24. Defendant filed a Denial of Workers' Compensation Benefits (Form 2) for medical bills related to cervical radiculopathy on August 17, 2021, which the Department upheld as reasonably supported at the informal resolution level. Claimant's appeal of that denial ultimately resulted in the formal hearing giving rise to this opinion.

Medical Expert Testimony

25. Both parties presented medical expert testimony on the issues of whether Claimant's cervical spinal condition is related to his employment with Defendant and, if so, the extent of his permanent impairment. Claimant presented Mark Bucksbaum, MD, and Defendant presented Philip Davignon, MD, both of whom performed IMEs on Claimant and reviewed at least the vast majority of his pertinent medical records.

Mark Bucksbaum, MD

26. Dr. Bucksbaum is a physician board certified in the fields of physical medicine and rehabilitation, pain management, and as an independent medical examiner. He performed an IME at Claimant's request on December 10, 2020.
27. Dr. Bucksbaum credibly testified that Claimant's cervical MRI and EMG findings showed degenerative changes in his cervical spine that would have taken at least ten years to develop and noted that these images did not show any acute fractures or conditions that would be "emergent." In his opinion, these conditions had been asymptomatic despite these degenerative processes until he began seeking treatment for them in 2016. Dr. Bucksbaum believes that the repetitive movements associated with Claimant's work activities—such as constantly working with his head, neck, and right upper extremity—aggravated his degenerative cervical spine changes and caused them to become symptomatic.

28. Dr. Bucksbaum did not find Claimant's recreational activities such as skiing and guitar playing to be significant causal factors, based on his understanding that Claimant only engaged in these activities for brief periods each day. In his view, this level of activity would not likely be sufficient to cause cervical radiculopathy.
29. Dr. Bucksbaum also noted that after Claimant stopped working for Defendant, his symptoms appeared to improve, even if he did not return to his previous baseline. Therefore, he concluded that Claimant's cervical complaints were related to his employment with Defendant.
30. Additionally, Dr. Bucksbaum found that Claimant had reached end medical result for these conditions and assessed permanent impairment under the American Medical Association's Guides for the Evaluation of Permanent Impairment, Fifth Edition (the "AMA Guides"). He relied on Diagnosis Related Estimate ("DRE") Category III, based on Claimant's diagnosis of cervical radiculopathy, and assessed a whole person impairment of 17 percent.

Philip Davignon, MD

31. Dr. Davignon is a physician board certified in the area of occupational and environmental medicine. In addition to the IME that Dr. Davignon performed on Claimant in January 2017 for his shoulder condition, *see* Finding of Fact No. 13, *supra*, Defendant subsequently scheduled a second IME with Dr. Davignon, which he performed on March 30, 2022, to address Claimant's cervical spinal conditions.
32. In Dr. Davignon's opinion, Claimant suffered from preexisting degenerative cervical disease. He credibly testified that although he could not rule out the possibility of Claimant's occupational activities contributing to his cervical spinal condition, he did not see enough evidence within a reasonable degree of medical certainty that Claimant's work played a causal role.
33. Dr. Davignon credibly testified that he did not see any cervical radiculopathy at the time of his 2017 IME, and that Claimant's primary complaints at that time related to his right upper extremity. He diagnosed Claimant at that time with biceps tendonitis and found that he was at end medical result for that condition, with no permanent impairment attributable to that condition. He confirmed at the formal hearing that he stood by those opinions.
34. Dr. Davignon noted that Claimant's complaints of radiating pain and numbness into his right hand were new complaints at the time of his 2022 IME and represented a change from his 2017 IME.
35. On physical examination in 2022, Dr. Davignon did not find any spasm or atrophy along Claimant's cervical spine, although he did note a diminished range of motion. He found Claimant's reflexes, upper extremity range of motion, grip strength, and motor strength to be normal. He testified that Claimant's MRI study showed chronic degenerative changes in his cervical spine, including osteophyte and facet changes as

well as spinal canal narrowing. However, in his opinion, these findings most likely reflected changes that resulted from the aging process. I find this opinion credible and persuasive.

36. With respect to Claimant's EMG studies that had suggested cervical radiculopathy in 2019, Dr. Davignon credibly testified that his physical examination in 2022 did not reveal any evidence of cervical radiculopathy. He explained that he had no reason to dispute Claimant's treating physician's EMG findings at the time of his examination but noted that patients' conditions can change over the course of three years. Based on his physical examination of Claimant in 2022, Dr. Davignon could not diagnose him with cervical radiculopathy.
37. Irrespective of his diagnosis and causation opinion, Dr. Davignon found that Claimant had reached end medical result for his cervical spine condition, but he disagreed with Dr. Bucksbaum's opinion that Claimant's appropriate impairment rating for that condition was 17 percent. In his opinion, the appropriate rating was 7 percent under DRE Category II, based on a lack of findings supporting cervical radiculopathy at the time of his evaluation. (JME 131 *et seq.*).
38. He explained that the primary difference between his permanent impairment assessment and that of Dr. Bucksbaum was in whether to rate him under DRE Category 2 or 3 under the AMA Guides. Category III, which Dr. Bucksbaum had relied upon, requires significant signs of radiculopathy such as sensory loss, motor deficit, reflex asymmetry, or atrophy. Dr. Davignon noted that Dr. Bucksbaum had found some evidence of motor sensory loss at the time of his examination, but credibly testified that he could not make the same finding. Based on his own findings, Dr. Davignon assessed Claimant under DRE Category II, which permits a permanency rating based on radicular complaints without objective findings. However, because Dr. Davignon did not find that Claimant's cervical complaints were related to his employment, this 7 percent impairment was not attributable to work.

CONCLUSIONS OF LAW:

1. Claimant has the burden of proof to establish all facts essential to the rights he asserts. *Goodwin v. Fairbanks Morse & Co.*, 123 Vt. 161, 166 (1962); *King v. Snide*, 144 Vt. 395, 399 (1984). He must establish by sufficient credible evidence the character and extent of the injury, *see Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (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, supra*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

Medical Causation

2. Under Vermont's Workers' Compensation Act, a workplace injury is compensable if it "accelerates the progression of a pre-existing condition, or disrupts its stability such that an individual's ability to work and function is disabled[.]" *S. B. v. Homebound Mortgage*, Opinion No. 29-07WC (November 6, 2007). Thus, in the context of progressively degenerative conditions, the standard for causation is "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.*, 2003 VT 52, ¶ 11 (cits. & punct. omitted). Importantly, the "[m]ere continuation or ***even exacerbation of symptoms***, without a worsening of the underlying disability, does not meet the causation requirement." *Id.* (emphasis added); see also *Goodwin-Abare v. State of Vermont*, Opinion No. 41-11WC (December 14, 2011) ("Nor is it enough that Claimant's job aggravated her symptoms. To be compensable, there must be proof that her work either caused or accelerated the underlying condition itself.").
3. The parties presented conflicting expert medical testimony regarding the causal relationship between Claimant's cervical spinal condition and his employment with Defendant. In such cases, 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). However, because a claimant bears the burden of proof on issues of causation, "in the final analysis it is his expert's credibility that matters most." *Kibbie v. Killington, Ltd.*, Opinion No. 04-19WC (March 1, 2019) (punct. omitted; quoting *Meau v. The Howard Center*, Opinion No. 01-14WC (January 24, 2014)).
4. In this case, I find that all of the factors except the third weigh substantially evenly as between Drs. Bucksbaum and Davignon. Both are well-credentialed physicians who performed thorough examinations and examined at least most of Claimant's relevant medical records and demonstrated a thorough familiarity with Claimant's medical history. Both were hired solely as forensic experts. Neither has any treating relationship with Claimant. While Dr. Davignon performed two IMEs and Dr. Bucksbaum only performed one, I do not find this to be a significant difference as it relates to the opinions these physicians articulated in this case.
5. The third factor, however, favors Dr. Davignon's causation opinion over Dr. Bucksbaum's, for the reasons that follow.
6. Distilled to its essence, Dr. Bucksbaum's causation opinion rests on inferences from temporal sequence relating to the severity of Claimant's symptoms: Claimant had degenerative spinal changes that Dr. Bucksbaum characterized as asymptomatic; they became symptomatic at a time that coincided with a change in employment; and those symptoms improved somewhat, if not fully, after Claimant stopped working.

7. Importantly, Claimant had experienced some pain in the affected regions before his work with Defendant. It was just not severe enough for him to seek treatment until 2016. *See* Finding of Fact No. 6, *supra*. It would thus be more accurate to characterize Claimant's symptoms as progressing or worsening over a number of years rather than having an onset date in 2016. As such, for Dr. Bucksbaum's analysis to sustain Claimant's burden of proof on causation, it would need to persuade me that Claimant's work worsened his underlying condition rather than simply worsening his symptoms. *See Stannard, supra*, 2003 VT 52; *Goodwin-Abare, supra*, Opinion No. 41-11WC.
8. Two details present significant challenges to Dr. Bucksbaum's causation analysis under that standard: first, Dr. Bucksbaum credibly acknowledged that Claimant's degenerative changes as shown in his MRI would have taken at least ten years to develop; second, Claimant only worked for Defendant for approximately four years, during almost all of which he was over sixty years old. These facts make it difficult to ignore the possibility that Claimant's symptoms simply resulted from natural aging that continued to progress while Claimant was still working. The fact that Claimant's symptoms improved after his retirement but did not improve to any previous baseline does not convince me that Claimant's occupational activities accelerated or objectively worsened his underlying degenerative processes. At most, this suggests that his workplace activities increased the severity of cervical spinal symptoms that he would most likely have experienced anyway as a result of natural degeneration in his cervical spine. That inference, even if credited, would not be sufficient to satisfy the *Stannard* causation standard.
9. I find Dr. Davignon's testimony that he could not rule out the possibility Claimant's workplace activities contributed to his symptoms, but that he could not so find within a reasonable degree of medical certainty, to be better supported by the Claimant's occupational and medical chronology, for essentially the same reasons that I find Dr. Bucksbaum's analysis insufficient to convince me otherwise. Thus, the third *Geiger* factor, which is often the most important, weighs in favor of Dr. Davignon's opinion.
10. I conclude that Claimant has not sustained his burden of proof on the issue of whether his employment caused or contributed to his cervical spinal condition. As such, I need not assess his entitlement to any specific workers' compensation benefits, including permanent partial impairment, that might be related to that condition.

Expert Witness and IME Fees

11. Finally, Claimant seeks to recoup his cost for Dr. Bucksbaum's IME and appearance as an expert witness. Had Claimant prevailed on the disputed issues in this case, his costs including expert witness fees would have been recoverable under 21 V.S.A. § 678(a). However, since Claimant has not prevailed, these costs are not recoverable under that subsection.
12. In addition to supplying a causation analysis, Dr. Bucksbaum's IME included a permanent impairment rating. The Department's Workers' Compensation Rules

provide in relevant part as follows regarding an employer's obligation to pay for a permanent impairment rating:

Payment for permanent partial impairment evaluation. Within 45 days after receiving notice or knowledge that the injured worker has reached an end medical result, the employer or insurance carrier shall take action necessary to determine whether he or she has suffered a permanent impairment *as a result of the compensable injury*.

The employer or insurance carrier shall promptly notify the injured worker in writing of his or her right to seek a permanent impairment rating, either from the treating physician or from another physician of his or her choosing. The employer or insurance carrier shall be responsible for paying for at least one such permanent impairment rating, notwithstanding its decision to obtain a rating from another medical examiner as well if it so chooses. At the Commissioner's discretion, the employer or insurance carrier may be ordered to pay for additional permanent impairment evaluations.

Workers' Compensation Rules 10.1100-1210 (emphasis added).

13. Although these rules do require Defendant to pay for at least one permanency evaluation with a physician of Claimant's choosing when the Claimant has a *compensable* injury, they do not contemplate the employer paying for Claimant's development of evidence on the front end to establish the compensability of a disputed condition.
14. Defendant denied liability for Claimant's claim for benefits related to his cervical spinal condition, the Department upheld that denial at the informal resolution level, and Claimant ultimately did not sustain his burden of proof to establish the compensability of that condition at a formal hearing. *See generally* Finding of Fact Nos. 24, 35; Conclusions of Law Nos. 2-10, *supra*.
15. A condition only becomes compensable if a defendant accepts it or the Department orders a defendant to pay benefits for it. Here, Dr. Bucksbaum's assessment of permanent impairment was based entirely upon a cervical spinal condition that is not compensable. As such, Defendant is not responsible for any portion of Dr. Bucksbaum's fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for benefits related to his cervical spine condition and his request to recoup the costs associated with his retention of Dr. Bucksbaum as an IME provider and expert witness are **DISMISSED WITH PREJUDICE**.

DATED at Montpelier, Vermont this 15th day of May 2023.

Michael A. Harrington
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.