STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Joyce (cook) Thayer Plaintiff	)	
vs.	)	State File Nos. M-09384 L-14576
Jolley Associates and Ben AND Jerry's Homemade Inc., Defendants	)	Harold E. Eaton, Esq. Arbitrator

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES:

Frank E. Talbott, Esq. for Jolley Associates/Great American Insurance
Jason Ferreira, Esq. for Ben and Jerry's Homemade Inc./Royal Insurance

ISSUE:

Are the compensation benefits for Ms. Thayer's back claim the result of an aggravation or recurrence?

FINDINGS OF FACT:

The above matter came on for hearing on October 21, 2002 in St. Albans, Vermont. Jolley Associates was represented by its attorney, Frank Talbott, Esq. Ben and Jerry's was represented by its attorney, Jason Ferreira, Esq.. Based upon the testimony at the hearing and the submitted exhibits the arbitrator finds as follows:

1. Jolley Associates operates convenience stores in the St. Albans, Vermont area. It is an employer as defined under Vermont's Workers Compensation Act.

2. Ben and Jerry's Homemade, Inc. is an ice cream producer, operating a manufacturing plant in the St. Albans, Vermont area. It is an employer as defined under Vermont's Workers Compensation Act.

3. Joyce Thayer began working for Ben and Jerry's in 1995. Initially her job was a rotating one where she was responsible for a variety of tasks in the ice cream manufacturing process. Her tasks involved a great deal of bending and lifting, although the lifting was not particularly heavy in nature.

4. In 1997, Joyce Thayer developed a wrist problem while working for Ben and Jerry's. This problem, ultimately diagnosed as tendonitis, was asserted to be work related and a claim for compensation benefits was made. This claim was accepted and benefits paid by Ben and Jerry's compensation insurer, Royal Insurance Company.

5. Ms. Thayer was out of work due to her wrist injury for about eight months, returning to work at Ben and Jerry's in December 1997.

6. Ms. Thayer's return to work at Ben and Jerry's was in association with a work hardening program as she attempted to recover from her wrist injury. Her duties at Ben and Jerry's from December 1997 forward involved performing lighter tasks than she had done before her wrist injury.

7. Ms. Thayer ultimately left work at Ben and Jerry's on March 28, 1998 due to difficulties with her wrist.

8. In December 1997, while on light duty at Ben and Jerry's, Ms. Thayer bent over to pick up some ice cream container lids. At that time she felt pain going into her right leg. She had not experienced this problem previously.

9. Ms. Thayer told a coworker about this problem and went home early from work that day. Within a day or two, Ms. Thayer reported the problem to her supervisor, Deb McKenzie.

10. Ms. Thayer believes she missed a day or two of work in December 1997 as a result of the pain into her right leg.

11. Ms. Thayer was receiving treatment for her wrist tendonitis with Dr. Maureen (Molly) Keefe, a chiropractor during the fall of 1997 and the spring of 1998. Dr. Keefe's records of December 18, 1997, January 6, 1998 and January 21, 1998 indicate a report of low back pain from Joyce Thayer.

12. On February 25, 1998, Dr. Keefe cleared Joyce Thayer to return to full duty employment at Ben and Jerry's.

13. There is minimal documentation of any reported lower back problem in Dr. Keefe's records prior to July 1998. The vast majority of Dr. Keefe's treatment related to Ms. Thayer's wrist complaints.

14. On January 12, 1998, Ms. Thayer reported a pulling pain in her right hip, which had existed for approximately two weeks, to Dr. Susan Saferstein. No specific injurious event is noted in Dr. Saferstein's medical record and no work connection to the symptoms was documented at that time.

15. Ms. Thayer was approved for a full duty return to work by Dr. Saferstein's office (Anne Standish) on February 25, 1998, although she was taking ibuprofen for sciatica at that time. Ms. Thayer reported that her work, which at that time was at Ben and Jerry's, seemed to aggravate her sciatica.

16. Ms. Thayer was experiencing pains in both her legs and her back when she left Ben and Jerry's employment due to wrist problems in late March 1998. Her pain was intermittent during this time.

17. Ms. Thayer remained out of work from late March 1998 until July 13, 1998. At that time she began her employment with Jolley Associates working in a convenience store. She claims to have taken that job due to the anticipated expiration of compensation benefits related to her wrist injury. She claims to have been fairly inactive during the time she was out of work.

18. During the time Ms. Thayer was out of work her back pain continued to be intermittent. She was having trouble with her activities of daily living during this time but did not seek medical care for her back or leg pain. There are no records of any treatment for back problems between February and July 1998. The absence of medical evidence is not necessarily evidence of absence of ongoing pain complaints.

19. When Ms. Thayer started work for Jolley Associates in July 1998, she told her supervisor, Deb Whitney, of her back problem and of pain into her legs.

20. Ms. Thayer's job at Jolley Associates involved general convenience store duties, including running the cash register, making coffee, and occasionally working in the bottle redemption center. No specific task at Jolley Associates seemed to cause an increase in her pain complaints except for mopping the floor, which she did occasionally. Long periods of standing at work also caused an increase in her symptoms.

21. On July 27, 1998, Ms. Thayer saw Dr. Carol Thayer as a result of increased back pain. Ms. Thayer claims that she experienced a significant increase in back pain the evening prior to the office visit with Dr. Thayer. Dr. Thayer's record, however, does not report any significant increase in back pain immediately prior to the visit, but gives a subjective history of sciatic pain for about a week.

22. Ms. Thayer is unable to associate her claimed significant increase in back pain in July 1998 to any specific task at Jolley Associates, although mopping and standing bothered her in particular.

23. When Ms. Thayer started at Jolley Associates, they did not require her to unload trucks due to her reported back problems. Her job, in that respect, was somewhat lighter duty than other clerks without a prior history of injury.

24. Ms. Thayer missed four days of work for Jolley Associates in late July 1998 due to her back problems.

25. Ms. Thayer denies any prior back problems before December or January 1998. However, Dr. Saferstein's record of January 12, 1998, indicates Ms. Thayer had chronic back pain and previous sciatica. The basis for the report of chronic back pain at that time has not been established.

26. There are no medical records evidencing treatment for prior chronic low back pain or sciatica before Dr. Saferstein's office record of January 12, 1998.

27. Ms. Thayer received no workers compensation benefits for her back problems while she was employed with Ben and Jerry's.

28. Although Ms. Thayer's original pain complaints in her leg were focused on the right side, later she experience bilateral leg pain.

29. After missing a few days of work, Ms. Thayer continued working at Jolley Associates until she had her surgery.

30. Dr. Martin Krag performed surgery on April 20, 1999. Dr. Krag's operative diagnosis was L4-5 degenerative spondylolisthesis and stenosis. Dr. Krag did not draw a connection between Ms. Thayer's back condition and work either at Ben and Jerry's or Jolley Associates.

31. Dr. Thayer believes Ms. Thayer's back injury occurred prior to January 12, 1998. Dr. Thayer does not provide a cause for Ms. Thayer's injury, nor does she indicate the role, if any, that work may have played in Ms. Thayer's back complaints. Dr. Thayer further states Ms. Thayer's complaints in July 1998 were a recurrence of her earlier complaints.

32. Dr. George White examined Ms. Thayer in August 2000. Dr. White felt Ms. Thayer's spinal stenosis was work related, apparently based upon his interpretation of Department of Labor and Industry precedent. Dr. White felt Ms. Thayer's complaints in July 1998 were a recurrence of her symptoms produced by the underlying degenerative spinal condition. The Department decision referenced by Dr. White involved an accepted claim for spinal stenosis and is not germane to the current issues.

33. Dr. Jacques Archambault, who examined Ms. Thayer in November 2000, felt the relationship of Ms. Thayer's discogenic complaints and surgery to work was "fuzzy". Dr. Archambault is an orthopedic surgeon.

CONCLUSIONS OF LAW:

1. The issues for determination in an arbitration proceeding under Department of Labor and Industry Rule 8 are insurance or employer disputes pursuant to 21 V.S.A. §662(c) and (d). Rule 8.1110.

2. An arbitrator appointed pursuant to Department of Labor and Industry Rule 8 is without authority to decide other disputes, which may arise in a claim, which would necessarily include compensability issues. Rule 8.1110.

3. The party seeking to relieve itself from an interim order awarding benefits bears the burden of proof. *Lewis v. Ethan Allen,* Opinion No. 41-00 WC (Dec 20, 2000).

4. In this claim, the evidence of any connection between Ms. Thayer's degenerative back condition and her work endeavors is sparse, or in the words of one of the orthopedic surgeons, "fuzzy".

5. Employers should not be required to provide lifetime medical and other compensation benefits to workers with degenerative back conditions merely because that worker experienced the onset of the symptoms, or an increase in them, during the time the worker was employed. Some cause or contribution of the work to the condition is required beyond simply experiencing more pain while attempting to work. *Sherman v. Johnson Controls Inc.*, Opinion No. 58-95 WC (September 1, 1995).

6. Here, the Claimant suffered from a degenerative back condition, which unquestionably pre-dated her symptom complaints. There is no suggestion in the medical records that Ms. Thayer's work activities caused her back condition, no evidence that her work accelerated an underlying or pre-existing condition and minimal evidence that work activities were responsible for an increase in symptoms beyond those caused by activities of daily living.

7. It has long been recognized that an increase in symptoms, standing along, does not constitute an aggravation or new injury for compensation purposes. *Liberty v. Lebel and Raines Sprinkler, Inc.*, Opinion No. 34-92 WC (April 9, 1993); *Smeil v. Okemo Realty Corp.*, Opinion No. 10-93 WC (August 24, 1993).

8. Those doctors who have been able to establish any connection between Ms. Thayer's symptom complaints and her work characterize the July 1998 return of symptoms, while Ms. Thayer worked for Jolley Associates, as a recurrence of earlier symptoms. These terms are, however, to be given their legal, not medical, meaning. *Cote v. Vermont Transit,* Opinion No. 33-96 WC (June 19, 1996).

9. There is no medical evidence that the work performed by Ms. Thayer for Jolley Associates accelerated any underlying back condition or contributed independently to her disability. There is no evidence any underlying pathology was at all affected by the work at Jolley Associates.

10. While the Department of Labor and Industry has not conclusively established a test for analyzing the aggravation/recurrence issue, the generally accepted test stems from the Department's decisions in cases such as *Jaquish v. Bechtel Construction Co.*, Opinion No. 30-92 WC (December 29, 1992). These factors were further enunciated in subsequent decisions including *Lavigne v. General Electric,* Opinion No. 12-97 WC (July 17, 1997) and *Trask v. Richburg Builders,* Opinion No. 51-98 (August 25, 1998).

11. The so-called factors, which are often more easily stated than applied, are:
    a) Whether there has been a subsequent incident or work condition which destabilized a previously stable condition
    b) Whether the claimant had stopped treating medically
    c) Whether the claimant had successfully returned to work
    d) Whether the claimant had reached and end medical result and
    e) Whether the subsequent work contributed to the final disability

12. The greatest weight is given to the fifth factor, the contribution of work to the final disability. *Brewer v. Town of Springfield,* Opinion No. 27-97 (October 3, 1997).

13. The medical records show that Ms. Thayer's back complaints apparently became symptomatic in December 1997 or January 1998, although the records also note the Ms. Thayer's back pain to be chronic at that time.

14. Ms. Thayer's back complaints apparently did not stabilize at any time from their apparent onset in December 1997 or January 1998. There are no medical findings that her condition had stabilized and she describes her pain as intermittent. This factor weighs in favor of a recurrence.

15. There is no indication that Ms. Thayer had stopped treating medically for her back during Ben and Jerry's employment. The medical record from February 25, 1998 indicates the continued presence of severe symptoms on occasion and a recommended continued home exercise program. This factor, at best, is neutral.

16. Ms. Thayer sought out employment with Jolley Associates knowing of her back complaints. She disclosed these to Jolley Associates and they attempted to modify Ms. Thayer's job duties to accommodate her needs. She had been working there only two weeks when she experienced more severe symptoms. This brief employment cannot be considered a successful return to work and weighs in favor of a recurrence.

17. There was no declaration of end medical result for Ms. Thayer's back complaints prior to employment with Jolley Associates. This factor also favors a recurrence.

18. The policy behind Vermont's Workers' Compensation Act is and should be to encourage workers to seek out employment as soon as medically possible and to encourage employers to hire workers despite earlier injuries or ongoing pain complaints. See e.g. 21 V.S.A. §710.

19. To find an aggravation under the circumstances of this case, without any evidence of an independent contribution of the Jolley Associates work to Ms. Thayer's medical condition would be contrary to this policy. The final factor also favors a recurrence.

20. As between these two employers, Ben and Jerry's is responsible for whatever compensation benefits have been or may be found to be due related to the back complaints. The complaints during the Jolley Associates employment constitute a recurrence of her earlier condition, given only the choice between an aggravation and a recurrence.

21. The ability to allocate benefits between the carriers on an apportionment basis has been raised. It appears that such an allocation is permissible in the arbitrator's discretion, and may be proper in certain circumstances, such as where the Trask factors prove unworkable. In this instance benefits will not be apportioned, especially given that reimbursement to Great American does not compensate them for the loss of use of their funds.

22. This was a case, which involved a legitimate dispute between carriers, entirely proper for determination under Rule 8. The issue of whether this injury was an aggravation or a recurrence was one upon which reasonable minds might differ. Accordingly, it would be inequitable to allocate costs of the arbitration on anything other than an equal basis in these circumstances. See, e.g. *Longley v. Town of Jericho,* Opinion No. 89-81 WC (June 30, 1981).

Based upon the foregoing, it is hereby ORDERED as follows:

1) Jolley Associates, and its insurer Great American Insurance Company, are relieved form further payments pursuant to the interim order issued January 19, 2001 insofar as they relate to Ms. Thayer's back claim;

2) Great American is entitled to reimbursement from Royal Insurance for payments made pursuant to the interim order, or otherwise, pertaining to the claimed back injury;

3) The arbitrator's fee, which will be separately submitted, and other costs of this arbitration, shall be split evenly between the insurers, Great American Insurance Company and Royal Insurance.

Dated at Woodstock, Vermont this 25th day of November 2002.

Harold E. Eaton, Jr., Esq.
Arbitrator