

Almodovar v. Munson Earth Moving Co. and J.B. Stone Co. (July 15, 2004)

**STATE OF VERMONT
DEPARTMENT OF LABOR & INDUSTRY**

Dennis Almodovar)	
)	State File No. S-21344
v.)	
)	
Munson Earth Moving Co. and J.B. Stone Co.)	Phyllis Severance, Esq. Arbitrator

ARBITRATION DECISION AND ORDER

APPEARANCES:

John Valente, Esq. for Munson Earth Moving Co.
Keith Kasper, Esq. for J.B. Stone Co.

ISSUE PRESENTED:

Whether the claimant's bilateral upper extremity injury was causally related to a chemical burn he received while employed by Munson Earth Moving Co. in August 2001 or to overuse resulting from his employment by J.B. Stone Co. in October 2001 and thereafter.

JOINT EXHIBITS:

1. Joint Medical Record
2. Deposition of Dennis Almodovar taken January 15, 2004
3. Deposition of Todd Lefkoe, M.D. taken February 9, 2004
4. Deposition of Mark Bucksbaum, M.D. taken February 19, 2004
5. Deposition of John Johansson, D.O. taken April 28, 2004

FINDINGS OF FACT:

1. On August 1, 2001 Dennis Almodovar was employed as a mason for Munson Earth Moving Co. ("Munson"). He was working on the "Renaissance Project" at Fletcher Allen Health Care when he suffered chemical burns to the upper part of both forearms.
2. The burns occurred while Mr. Almodovar was working in a manhole, using hydraulic concrete. He was wearing gloves at the time. He noticed that the concrete was splashing above the gloves and onto his upper forearms. At first he felt a slight burning sensation, which progressed to stinging and then more intense pain.

3. Mr. Almodovar went immediately to the Fletcher Allen Health Care Emergency Room. He was treated for chemical burns on both forearms and released.
4. On August 3, 2001 Mr. Almodovar presented to his family medical practice and was treated by Wende Morgan, F.N.P. Ms. Morgan noted multiple wound areas on his forearms and some evidence of infection.
5. On August 8, 2001 Mr. Almodovar returned to the Emergency Room for a recheck of his burns. The note from that visit reflects that he had continuing pain, especially near his left elbow. He also complained of diminished strength in his arms.
6. On August 17, 2001 Mr. Almodovar returned to Ms. Morgan for a recheck. His burns were healing well, but he was continuing to experience forearm pain throughout the muscle.
7. Mr. Almodovar did not lose any time from work as a result of the injury, although his arms felt very sore. From the time of the injury until he left Munson's employment in October 2001, he performed only light-duty tasks such as flagging and running equipment. His arms continued to feel painful and tender throughout this time. The more physical work he did, the more his arms hurt.
8. In October 2001 Mr. Almodovar terminated his employment with Munson and began working for J.B. Stone. His job involved laying split-face granite blocks weighing 35 to 110 pounds each. Mr. Almodovar testified that he laid 40 to 60 blocks per day, a task that required lifting them from a pallet and placing them on a wall.
9. Mr. Almodovar's arms were still painful and sore when he began working at J.B. Stone. They got progressively worse and increasingly weak as he continued to work there.
10. On November 15, 2001 Mr. Almodovar began treating with Ann Stein, M.D. Dr. Stein noted his complaints of forearm soreness and also noted that he felt his arms were not as strong as they used to be. Dr. Stein diagnosed discomfort secondary to chemical burn, underlying biceps tendinitis and perhaps some adhesions secondary to the burns themselves. She prescribed physical therapy modalities.
11. On December 4, 2001 Mr. Almodovar presented to Vermont Sports Medicine Center for physical therapy. The initial summary noted that his wounds were healed but that he reported continued fatigue and difficulty lifting stones at work.
12. On December 20, 2001 Dr. Stein referred Mr. Almodovar to a physiatrist for further evaluation and treatment.

13. On January 16, 2002 Mr. Almodovar began treating with Todd Lefkoe, M.D., a physiatrist. Dr. Lefkoe noted that Mr. Almodovar's symptoms had remained unchanged since the August 1, 2001 injury, and included aching, pain, numbness and decreased strength throughout the forearms. Suspecting the possibility of a burn neuropathy, Dr. Lefkoe ordered electrodiagnostic studies. These were completed on January 25, 2002, and were normal.
14. Dr. Lefkoe saw Mr. Almodovar again on February 25, 2002. Dr. Lefkoe reported that Mr. Almodovar had just returned from a two-week vacation, during which time his symptoms had decreased. Dr. Lefkoe felt that Mr. Almodovar's reported symptoms were more specific and localized than they had been at the January 16th office visit. With this in mind, he concluded that Mr. Almodovar's ongoing symptoms were musculoskeletal in nature and therefore unrelated to the August 1, 2001 burn injury. Dr. Lefkoe diagnosed left lateral epicondylitis and extensor tendinitis, causally related to Mr. Almodovar's ongoing employment with J.B. Stone. He prescribed a left elbow brace and physical therapy.
15. Dr. Lefkoe reported in his March 22, 2002 office note that Mr. Almodovar was no longer working.
16. On April 29, 2002 Mr. Almodovar underwent an independent medical evaluation with John Johansson, D.O. Dr. Johansson diagnosed left lateral epicondylitis, causally related to Mr. Almodovar's ongoing masonry work for J.B. Stone. Dr. Johansson agreed with Dr. Lefkoe that Mr. Almodovar's problem was musculoskeletal in nature, and therefore unrelated to his August 1, 2001 burn injury.
17. Neither Munson nor J.B. Stone would pay voluntarily for the physical therapy Dr. Lefkoe prescribed. As a result, Mr. Almodovar did not undergo it until September 2002, many months later. He realized only slight improvement with this therapy. At his October 8, 2002 recheck with Dr. Lefkoe, he continued to report aching pain in his left forearm.
18. On November 19, 2002 Mr. Almodovar presented to Mark Bucksbaum, M.D., for evaluation and treatment. Dr. Bucksbaum diagnosed tenosynovitis, which he believed to have been caused by the August 1, 2001 burn injury. He prescribed both physical therapy, including ultrasound, and connective tissue massage therapy.
19. Dr. Bucksbaum's medical background includes specialized training in the rehabilitation management of burn victims.
20. Mr. Almodovar made slow, steady progress with Dr. Bucksbaum's treatment program. He still is left with residual tenderness in his forearms and reports being somewhat restricted in terms of strength and activity as well.

21. In Dr. Bucksbaum's opinion, Mr. Almodovar's work at J.B. Stone did not cause, aggravate or accelerate his condition. Dr. Bucksbaum described the mechanism of injury as emanating entirely from the August 1, 2001 chemical burn accident. The healing fluids generated by Mr. Almodovar's body in response to the burns caused the tendons and surrounding tissues to become sticky and restricted in motion. Deep release massage strips the sticky material away from the tendons and allows a restriction-free gliding surface to be re-established.
22. Dr. Bucksbaum was able to palpate the thickness of the tissues in Mr. Almodovar's extensor tendons on examination. He noted that Mr. Almodovar's complaints were not localized to his elbow joint specifically, but extended into the extensor compartment as well. He also found Mr. Almodovar's complaints of loss of strength and range of motion to be more consistent with a diagnosis of tenosynovitis than with lateral epicondylitis. Last, Dr. Bucksbaum noted that there had been some indication of inflammation around the wound sites within a very short time after the August 1, 2001 injury. Consideration of all of these factors led to his ultimate diagnosis.
23. Mr. Almodovar underwent an independent medical evaluation with Daniel Wing, M.D., on April 29, 2003. Dr. Wing agreed with Dr. Bucksbaum's diagnosis of tenosynovitis causally related to the August 1, 2001 burn injury. He determined Mr. Almodovar to be at end medical result, with a 4% whole person permanent impairment referable entirely to the burn injury.
24. Dr. Bucksbaum declared Mr. Almodovar to be at end medical result on August 25, 2003, with a 7% whole person permanent impairment referable to the August 1, 2001 burn injury.
25. Mr. Almodovar has been a mason for many years. He has worked in the construction industry for his entire life. He has no prior medical history involving injuries to his upper extremities prior to the August 1, 2001 burn incident.
26. As the workers' compensation insurance carrier for J.B. Stone, Acadia Insurance Co. has paid a total of \$40,927.28 in workers' compensation benefits to Mr. Almodovar and/or on his behalf. Apparently, some portion of this amount was paid to Mr. Almodovar in conjunction with a Form 15 Settlement Agreement, to which Munson's workers' compensation insurance carrier also contributed. The record does not reflect each carrier's relative contribution to that settlement. The record also does not reflect to what extent the amounts paid represented compensation for Mr. Almodovar's permanent partial impairment, either in accordance with Dr. Bucksbaum's 7% rating or with Dr. Wing's 4% rating.

CONCLUSIONS OF LAW:

1. The issue in this claim is more factual than legal. It revolves around the most likely diagnosis of the symptoms the claimant experienced in his forearms in the months following his August 1, 2001 chemical burn injury. If those symptoms represent lateral epicondylitis caused by overuse, as Drs. Lefkoe and Johansson believe, then legal responsibility rests with J.B. Stone. If the symptoms are indicative of tenosynovitis causally related to the August 1, 2001 burn injury, as Drs. Bucksbaum and Wing believe, then legal responsibility rests with Munson.
2. All four doctors are well trained and highly respected practitioners in the workers' compensation arena. To decide which of the four is to be believed, the following factors should be considered:
 - (a) the treating relationship, if any, that each physician had with the claimant;
 - (b) each physician's professional education and experience;
 - (c) the comprehensiveness of the evaluation each physician performed, including whether he or she had all medical records in making his or her assessment; and
 - (d) the objective bases underlying each physician's opinion.

DeGraff v. Pizzagalli Construction, Opinion No. 14-04WC (March 9, 2004).

3. As to the first factor, both Drs. Lefkoe and Bucksbaum were treating physicians, although their treatment periods did not overlap, and neither was involved in the claimant's care until many months after his initial injury. Both Dr. Johansson and Dr. Wing were independent medical evaluators, and as such neither had any ongoing treatment relationship with the claimant.
4. As to the second factor, only Dr. Bucksbaum appears to have specialized professional training, involving the rehabilitation management of burn victims, that is relevant to his ultimate conclusion as to both diagnosis and causal relationship.
5. As to the third factor, all four physicians conducted comprehensive evaluations of the claimant's history, presentation, and symptom complex.
6. The fourth factor is the most difficult to analyze. Both of the treating physicians can point to objective support for their opinions. Dr. Bucksbaum's opinion is the only one, however, that takes into account all of the relevant facts and harmonizes them into one logical conclusion.

7. Specifically, Dr. Lefkoe's conclusion seems to discount the fact that the claimant had been complaining consistently of decreased strength in his forearms as early as August 8, 2001, only days after the burn incident occurred. Dr. Bucksbaum's conclusion is consistent with this finding.
8. Dr. Lefkoe's conclusion also seems to ignore the fact that the claimant had been employed for more than 25 years as a mason and yet had never experienced any pain or weakness in his forearms until after the August 1, 2001 burn injury. Though clearly strenuous, there is no evidence that the claimant's work at J.B. Stone involved any lifting or repetitive upper extremity use that was unusual given this employment history. This is particularly true for the time period between Dr. Lefkoe's first and second evaluations, from January 16, 2001 until February 25, 2002. This is the period that Dr. Lefkoe found most significant in making his diagnosis of epicondylitis, yet there is no factual basis for concluding that the claimant's work during this time was any more strenuous than it had been previously. Indeed, the claimant was on vacation and did not work at all for two weeks during this period.
9. In Dr. Lefkoe's opinion, the claimant's report of ongoing symptoms in and around his left elbow, the exact area of the most severe burns caused by the August 1, 2001 injury, is a coincidence. In contrast, Dr. Bucksbaum's diagnosis incorporates the claimant's history and the development of his symptoms in a manner that is consistent both with his examination findings and with his underlying understanding of how burn injuries impact the body's anatomical structures.
10. The weight of the evidence favors Dr. Bucksbaum's conclusion that the claimant suffers from tenosynovitis causally related to the August 1, 2001 burn injury.
11. While the record is somewhat unclear, it appears that at least a portion of the \$40,927.28 paid by J.B. Stone's workers' compensation insurance carrier to and/or on Mr. Almodovar's behalf represented compensation for Dr. Bucksbaum's 7% permanent impairment rating. Munson has not raised the issue whether compensation in that amount was reasonable given Dr. Wing's 4% rating. Certainly Dr. Bucksbaum's rating was well supported by the evidence, and therefore there is no basis for concluding that it was unreasonable for J.B. Stone to make payment as it did.
12. This claim involved a legitimate dispute between two employers as to which one should bear responsibility for the claimant's workers' compensation benefits. The dispute was one upon which reasonable minds clearly could differ. There is no reason, therefore, to allocate arbitration costs on anything other than an equal basis.

Based on the foregoing, it is hereby **ORDERED**:

1. Munson Earth Moving Co., or its workers' compensation insurance carrier, shall bear responsibility for all of the workers' compensation benefits paid to and/or on the claimant's behalf by J.B. Stone, or its workers' compensation insurance carrier, and therefore shall reimburse the latter in the amount of \$40,927.28.
2. The arbitrator's fee, which will be submitted separately, shall be split evenly between the employers.

DATED at Williston, Vermont this 15th day of July 2004.

Phyllis Severance, Esq.
Arbitrator