STATE OF VERMONT
DEPARTMENT OF LABOR

Brad Bowen	)	State File Nos. J-4270 & P-2005
	)	
v.	)	
	)	Phyllis G. Phillips, Esq.
Ethan Allen/Ace Insurance and	)	Arbitrator
McDermott's, Inc./Cardinal Comp.	)	

ARBITRATION DECISION AND ORDER

Hearing held in Montpelier on January 16, 2008.

APPEARANCES:

Marion Ferguson, Esq. for Ethan Allen/Ace Insurance
Christopher McVeigh, Esq. for McDermott's, Inc./Cardinal Comp.

ISSUE PRESENTED:

Whether Claimant's low back symptomatology since January 2003 represents either the natural progression or a recurrence of his June 29, 1995 injury, for which Ethan Allen bears responsibility, or whether it is an aggravation or new injury causally related to his work for McDermott's.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records

FINDINGS OF FACT:

1. Brad Bowen began working at Ethan Allen's Orleans, Vermont furniture manufacturing plant in October 1994. Mr. Bowen worked as a ripsaw operator. His job entailed lifting boards of rough lumber from a pallet, manipulating them through the saw and then depositing them onto another pallet. The job was fast-paced and required him to bend forward, twist side to side and lift constantly throughout an eight-hour day.

2. Over the course of time Mr. Bowen began to develop low back pain, for which ultimately he sought treatment in July 1995 and reported to his employer in August 1995. Although the date of injury recorded in Ethan Allen's First Report of Injury was June 29, 1995 Mr. Bowen testified that no specific incident or injury occurred on that day.

3. Aside from an episode of mid-back pain in 1992 causally related to farm work, Mr. Bowen had no prior history of low back pain.

4. Initially Mr. Bowen treated with his primary care providers, Drs. Covington and Birge, who diagnosed a low back sprain and prescribed physical therapy and anti-inflammatory medications as treatment. According to an August 1995 CT scan, there was no evidence of disc herniation.

5. Mr. Bowen's symptoms failed to improve. Neither his primary care physicians nor the neurologists to whom he was referred (Drs. Savoy and Stommel) could determine conclusively the etiology of his symptoms. Dr. Birge questioned whether there might be a depressive, psychological or other non-organic component to Mr. Bowen's symptoms. The symptoms persisted both when Mr. Bowen was taken out of work for a time in December 1995 and after he returned to work in a modified-duty position.

6. Mr. Bowen underwent an MRI study in December 1995 which showed a mild left paracentral disc herniation at L5-S1, but no significant disc herniation or evidence of neural compromise.

7. In January 1996 Mr. Bowen returned to Dr. Savoy, the neurosurgeon to whom he had been referred previously. Dr. Savoy noted that Mr. Bowen's low back pain now radiated into his left leg, a new finding indicative of mild S1 radiculopathy. Dr. Savoy referred Mr. Bowen to Dr. Phillips for a second neurosurgical opinion.

8. Dr. Phillips examined Mr. Bowen on February 7, 1996. Dr. Phillips questioned the extent to which Mr. Bowen's symptoms were muscular rather than neurological, but concluded that there were sufficient objective findings to warrant surgery nonetheless.

9. Mr. Bowen underwent a left L5-S1 microsurgical discectomy on April 11, 1996. The operative findings were of a herniated nucleus pulposus, with good decompression of the S1 nerve root obtained. Following the surgery, Mr. Bowen reported that his leg pain had resolved, and that his low back pain had abated as well, though not entirely.

10. Mr. Bowen returned to work at Ethan Allen in July 1996, first modified-duty and then, towards the end of the year, back to his position as ripsaw operator. Although his symptoms had improved initially following the April 1996 surgery, by December 1996 he was again reporting increasing low back pain and symptoms in his left leg, including occasional numbness in his feet. A repeat MRI in January 1997 revealed no evidence of a recurrent disc. The left S1 nerve root was swollen as compared with the right, and there also was evidence of left paracentral scar tissue at L5-S1. Upon reviewing the MRI, Dr. Phillips concluded that the scar was not compressing on the nerve root, and that any ongoing problems Mr. Bowen was suffering were more likely to be of an inflammatory nature than a mechanical one.

11. In February 1997 Mr. Bowen was referred to Dr. Banarjee for an end medical result determination and permanency rating. Dr. Banarjee noted that since returning to work as a ripsaw operator Mr. Bowen had been experiencing increasing low back and left leg pain. Dr. Banarjee concluded that Mr. Bowen had reached an end medical result for his June 1995 injury and had incurred a 14% whole person permanent impairment.

12. Mr. Bowen returned to Dr. Birge in November 1997, again complaining of ongoing low back and left leg pain. As he had done in the past, Dr. Birge noted that Mr. Bowen was depressed, and questioned whether this was playing a role in perpetuating his symptoms. Dr. Birge observed that Mr. Bowen was very unhappy at work, that he was angry with Ethan Allen for causing his injury and that he felt the people there were "out to get him." By January 1998 Mr. Bowen informed Dr. Birge that he was actively seeking employment elsewhere. Mr. Bowen asked whether truck driving might be a good option. Dr. Birge responded that based on Mr. Bowen's history of low back pain he did not think that it was.

13. Mr. Bowen returned to see Dr. Phillips in February 1998, complaining of increased low back and left leg pain. Dr. Phillips recommended a lumbar myelogram, which was normal, and a lumbar CT scan, which revealed only mild bulging of the L5-S1 disc. Dr. Phillips did note, however, that the CT scan revealed some findings consistent with a "sick root," or internal fibrosis, on the left side, which correlated with Mr. Bowen's left-sided symptomatology. As there was no surgical remedy for this problem, Dr. Phillips recommended a pain clinic. Mr. Bowen reported that he was willing to put up with the pain and therefore declined this treatment.

14. In the spring of 1998 Mr. Bowen left Ethan Allen and began working as a commercial truck driver. Initially Mr. Bowen worked for Northern Gas Transport, driving a flatbed truck. In December 1998 he left that job and began working for McDermott's as a milk hauler.

15. Mr. Bowen drove an 18-wheel tractor-trailer for McDermott's. He began his day by driving to various farms, where he loaded milk by attaching a hose from the back of the trailer to each farmer's bulk tank. While the trailer was filling Mr. Bowen sat in his truck, read, chatted with the farmer or walked around. Two or three times during the milk loading process, Mr. Bowen had to climb a stationary ladder attached to the side of the trailer, then crawl along a catwalk atop the trailer and remove a cap so that he could check the milk level inside. Mr. Bowen testified that this work was not physically taxing and that to his mind, it did not cause any increased pain or symptoms in either his low back or left leg.

16. Once the trailer was completely loaded with milk, Mr. Bowen would drive to one of several dairies in the Boston area, where the milk would be unloaded. After that, Mr. Bowen would drive home to Vermont. In all, Mr. Bowen estimated that he spent eight to nine hours daily driving to and from Boston, more if traffic or weather conditions were bad.

17. Mr. Bowen testified that when he first began working for McDermott's he drove three different trucks. Two of the trucks were equipped with air-ride suspension systems, while one of the trucks had a spring suspension. This latter truck, which Mr. Bowen drove about twice weekly, gave a stiffer ride, one that was not as "cushy" as the trucks with air-ride suspension systems gave. After 2001 Mr. Bowen drove only air-ride suspension trucks.

18. All of the trucks, including the spring suspension one, were equipped with air-ride seats that moved up and down and rocked back and forth to absorb shocks and bumps. Mr. Bowen testified that the McDermott's trucks were more comfortable to drive than his own truck or car was. In his mind, seat vibration was not an issue.

19. Mr. Bowen worked for McDermott's from December 1998 until March 2006. He testified that he left McDermott's because he was "burned out" from the long work weeks. From March 2006 until November 2007 Mr. Bowen worked for the Department of Corrections. He left that job because he did not enjoy it. Recently he returned to his old job as a milk hauler at McDermott's.

20. After seeing Dr. Phillips for ongoing low back and leg pain in February and March 1998, Mr. Bowen did not treat again until July 1999, some sixteen months later. Despite this and other subsequent gaps in treatment as well, Mr. Bowen testified that he has never been pain-free since the original injury in June 1995. His low back pain has always been present to some degree, sometimes radiating into his left leg, sometimes not.

21. In July 1999 Mr. Bowen experienced the sudden onset of severe low back pain radiating down his left leg upon getting out of bed one morning. An August 1999 MRI revealed some enhancing scar tissue at the margin of the L5-S1 disc towards the left, but no new disc herniations and no significant interval changes from prior post-surgical MRI studies. Mr. Bowen was prescribed steroids and pain medications. He was disabled from working for two weeks, after which his symptoms abated and he returned to work.

22. Mr. Bowen testified that he suffered similar episodes of increased low back pain once or twice a year from 1999 until 2003. To his mind, they were not related to any specific activity. Mr. Bowen testified that the symptoms he experienced during these episodes were always of the same type and in the same location – lower back, radiating down the left leg – and although they differed in severity they always responded to the same treatment – steroids and pain medications.

23. In only one of those intermittent episodes of back pain did either Mr. Bowen or his treatment provider relate the cause to truck driving. On March 21, 2001 Mr. Bowen reported the following to Dr. Bouchard, a primary care provider: "Truck driver (bad truck) – pain in renal area x 6 months – all time – increased if drives truck." Dr. Bouchard diagnosed "myositis secondary to poor seating in truck," and recommended that Mr. Bowen "try and correct sitting position in truck." This description does seem to belie Mr. Bowen's testimony that the seats in McDermott's trucks were more comfortable than the ones in his own personal vehicles and that they were never an instigating cause of his back pain. Nevertheless, aside from this one episode, which appeared to center on Mr. Bowen's mid- to low back rather than on his low back and into his left leg, no other medical records reference truck driving as a possible causal factor in Mr. Bowen's symptomatology.

24. In January 2003 Mr. Bowen experienced another episode of increased low back and left leg pain. As with previous episodes, Mr. Bowen could not identify any particular triggering mechanism or specific activity that precipitated his increased symptoms. Unlike prior episodes, however, this time his symptoms did not respond to steroids and pain medications.

25. An April 2003 MRI again revealed some scar tissue surrounding the left S1 nerve roots, but according to the radiologist's report, no evidence of recurrent disc herniation and overall, no significant interval change from earlier studies.

26. From February through October 2003 Mr. Bowen underwent a variety of conservative therapies to address his symptoms, including epidural steroid injections and radiofrequency ablation. None of these provided any sustained relief.

27. Mr. Bowen underwent a fifth MRI in October 2003. For the first time since his 1996 surgery, this MRI revealed more left paracentral disc material at L5-S1 as compared with previous MRI studies, suggestive of a recurrent disc herniation at this level. There also was evidence of more enhancing scar tissue, again more conspicuous than what was present on previous studies. Last, the left S1 nerve root was asymmetrically enlarged and swollen, as had been documented on prior studies as well.

28. In September 2004 Mr. Bowen underwent yet one more MRI. He was treating at this point with Dr. Abdu, a neurosurgeon. This MRI showed an improved appearance as compared with the October 2003 MRI, with the left paracentral disc at L5-S1 no longer evident. Some scarring was still apparent, however, as well as some thickening of the nerve roots at the L5-S1 level.

29. Upon reviewing this MRI with a neuroradiologist, Dr. Abdu determined that there still appeared to be disc material present at L5-S1 on the left side, consistent with Mr. Bowen's S1 symptoms. Thus, Dr. Abdu concluded that surgery was the appropriate treatment option. Mr. Bowen underwent this surgery in January 2005. The surgical findings noted that there was in fact a recurrent disc herniation at L5-S1 and that the extruded disc on the left side was impinging on the S1 nerve root.

30. Dr. Abdu noted that Mr. Bowen did "reasonably well" following his surgery, but by May 2005 he was reporting increasing numbness in his leg once again. A September 2005 MRI showed enhancing scar tissue around the left L5-S1 nerve roots, but no evidence of residual or recurrent disc herniation.

31. Mr. Bowen testified that currently he continues to experience both low back pain and nerve pain radiating down his left leg. The intensity of his symptoms may have diminished since January 2003, but there appears to have been little change in the constancy of his symptoms since that time.

32. At McDermott's request, Dr. Robert McLellan evaluated Mr. Bowen in November 2005 for an end medical result and permanency determination. Dr. McLellan found Mr. Bowen to be at end medical result with a 17% whole person permanent impairment, that is, 3% more than what had been rated following Mr. Bowen's 1996 surgery.

33. At Ethan Allen's request, Dr. Nelson Haas performed an independent medical evaluation of Mr. Bowen on November 18 and November 26, 2003. Dr. Haas is a physiatrist who is board certified in occupational medicine. Dr. Haas issued his initial report on December 23, 2003 and an addendum on December 29, 2004. He also testified at the arbitration hearing.

34. In Dr. Haas' opinion, the episode of low back and left leg pain that Mr. Bowen experienced in January 2003 most likely was due to a recurrent disc herniation at L5-S1 caused by the prolonged sitting and exposure to vibration that he experienced while truck driving for McDermott's. To arrive at this conclusion Dr. Haas relied in large part on epidemiologic studies. An epidemiologic study uses observations of particular populations – manual laborers, for example, or truck drivers – to establish an association between the physical activities or exposures to which they are subjected and the incidence of a particular injury or disease.

35. After studying the medical literature relevant to Mr. Bowen's employment history, Dr. Haas reported that the epidemiologic studies did not establish any association between the type of work he did for Ethan Allen and the incidence of lumbar disc herniations. The studies Dr. Haas reviewed did show, however, a higher risk of disc herniation among truck drivers, because of the prolonged sitting and seat vibration to which they are exposed. Thus, Dr. Haas concluded, because (a) Mr. Bowen was diagnosed with a recurrent lumbar disc herniation in 2003[1]; and (b) his job as a truck driver exposed him to prolonged sitting and vibration, then according to the relevant epidemiologic studies Mr. Bowen's truck driving activities were a more likely cause of his injury than his work at Ethan Allen.

36. Dr. Haas admitted on cross-examination that because the epidemiologic studies did not support any increased risk of lumbar disc herniations associated with the type of work Mr. Bowen did at Ethan Allen, he did not know what might have caused Mr. Bowen's original injury in June 1995. Similarly, he had no opinion as to what might have caused the episode of low back pain Mr. Bowen experienced in August 1999, as there had been no evidence of a recurrent disc herniation at that point. Last, Dr. Haas admitted that he had no detailed knowledge as to the type of truck Mr. Bowen drove for McDermott's and the extent of any seat vibration it generated.

37. At McDermott's request, Dr. William Boucher performed an independent medical evaluation of Mr. Bowen in October 2004. Like Dr. Haas, Dr. Boucher is board certified in occupational medicine. Dr. Boucher issued a written report and also testified at the arbitration hearing.

[1] In Dr. Haas' opinion, the recurrent lumbar disc herniation was apparent on both the April 2003 MRI and the October 2003 MRI scans. As to the April 2003 MRI, his opinion conflicts with the radiologist's report, which stated that there was no recurrent disc herniation and no significant interval changes from earlier studies.

38. In Dr. Boucher's opinion, there was no causal relationship between Mr. Bowen's truck driving activities and the low back and left leg pain he experienced in January 2003. Dr. Boucher believed that Mr. Bowen's symptoms at that time were not due to a recurrent disc herniation but rather resulted from post-laminectomy syndrome. Post-laminectomy syndrome is a condition that can develop after disc surgery, where the presence of scar tissue leads to chronic irritation of a nerve root.

39. In support of his diagnosis, Dr. Boucher pointed to the fact that Mr. Bowen did not exhibit any signs of acute radiculopathy in January 2003, which one would expect in the event of a new disc herniation. Rather, Mr. Bowen's symptoms were indicative of only chronic, mild radiculopathy, which is more consistent with chronic nerve root irritation.

40. Dr. Boucher disputed Dr. Haas' assertions as to the epidemiologic association between disc herniations and truck driving. In Dr. Boucher's opinion, the studies to which Dr. Haas referred were outdated given recent advances in truck suspensions and the consequent reduction in vibration levels. Dr. Boucher could not point to any more recent studies establishing either of these facts, however.

41. Dr. Boucher concluded that the episodes of low back pain Mr. Bowen experienced after his 1996 surgery, including the one that began in January 2003, resulted from chronic nerve root irritation caused by post-surgical scar tissue. Because the 1996 surgery was necessitated by the original June 1995 injury, for which Ethan Allen was responsible, in Dr. Boucher's opinion Ethan Allen remained responsible for the subsequent episodes as well.

42. Mr. Bowen testified that he found Ethan Allen to be a "hostile" place to work, one in which the workers were "a dime a dozen." He admitted that he was very angry at Ethan Allen, that Ethan Allen "threw me to the curb" and "ruined my life." Mr. Bowen voiced similar anger at the "whole [workers' compensation] system" for holding McDermott's, whom he considered to be "the wrong employer," responsible for his ongoing treatment. Notwithstanding these vocalizations, I find that Mr. Bowen was a credible witness who testified truthfully as to his work at Ethan Allen, the timing and progression of his symptoms and his job activities as a McDermott's truck driver.

CONCLUSIONS OF LAW:

1. Defendants Ethan Allen and McDermott's dispute responsibility for Mr. Bowen's low back and left leg symptoms since January 2003. Ethan Allen argues that Mr. Bowen suffered an aggravation or new injury causally related to his employment for McDermott's. McDermott's argues that Mr. Bowen's symptoms were caused by the natural progression of his original June 1995 injury, a recurrence for which Ethan Allen bears responsibility.

2. As the party seeking to shift responsibility for this claim to another employer, McDermott's bears the burden of proof. 21 V.S.A. §662(c); *Trask v. Richburg Builders*, Opinion No. 51-98WC (August 26, 1998). It must show that the episode of increased low back and left leg symptoms Mr. Bowen experienced in January 2003 was not caused or aggravated by his work at McDermott's.

3. Vermont's Workers' Compensation Rules define the terms "aggravation" and "recurrence" as follows:

> Rule 2.1110. "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events.
>
> Rule 2.1312. "Recurrence" means the return of symptoms following a temporary remission.

4. The Vermont Supreme Court has described the process for attributing responsibility in claims such as this as follows: "In workers' compensation cases involving successive injuries, the employer/carrier at the time of the first injury remains liable unless the medical evidence establishes that the second injury 'causally contribute[d] to the claimant's disability.'" *Stannard v. Stannard*, 175 Vt. 549, ¶11, quoting *Pacher v. Fairdale Farms*, 166 Vt. 626, 627 (1997).

5. Both Workers' Compensation Rule 2.1110 and the *Stannard* court require, therefore, that in order for an aggravation to be found, there must be some causal link between the exacerbated condition and the subsequent employment. As in all workers' compensation claims, this causal link must be based on something more than mere possibility, suspicion or surmise; rather, it must be the more probable hypothesis. *Burton v. Holden and Martin Lumber Co.*, 112 Vt. 17 (1941); *see Pearson v. Grimes*, Opinion No. 04-01WC (January 31, 2001)(claim failed where claimant proved only a possible connection between prior injury and current symptoms).

6. In determining which employer should bear responsibility in an aggravation/recurrence claim, the Department typically considers five factors:

   (a) Whether the subsequent incident or work condition 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 an end medical result; and

   (e) Whether the subsequent work contributed to the final disability.

   Trask, supra. While each of these factors may shed light on whether the injury should be characterized as an aggravation or a recurrence, no one question is an established litmus test. *Smith v. Chittenden Bank*, Opinion No. 17-01WC (June 27, 2001).

7. The crux of the dispute here centers on the first and fifth factors. According to Dr. Haas, Ethan Allen's expert medical witness, Mr. Bowen's condition stabilized at some point after his 1996 surgery, and became destabilized in January 2003. Dr. Haas pointed to the April 2003 MRI, which he read as showing a recurrent disc herniation at L5-S1, as the earliest objective evidence of this destabilization. With reference to epidemiologic studies establishing an association between disc herniations and truck driving, Dr. Haas concluded that Mr. Bowen's subsequent work contributed to his final disability, thus establishing the causal link necessary for an aggravation to be found.

8. McDermott's expert medical witness, Dr. Boucher, viewed the first and fifth factors differently. In Dr. Boucher's opinion, the natural progression of Mr. Bowen's June 1995 injury necessitated the 1996 surgery, which caused scar tissue to develop around the S1 nerve root, which led to chronic nerve root irritation, which resulted in Mr. Bowen's ongoing low back and left leg symptomatology. According to Dr. Boucher, neither Mr. Bowen's truck driving activities nor the recurrent disc herniation that became evident in 2003 were responsible for his symptoms. Therefore, there was no aggravation.

9. When faced with conflicting expert medical opinions the Department traditionally uses a five-part test to determine which 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 (Sept. 17, 2003).

10. With those factors in mind, I find that Dr. Boucher's opinion is the most persuasive here. Dr. Boucher's theory of causation incorporated both the objective findings – scar tissue and nerve root irritation evident on virtually every post-1996 MRI – and the nature and timing of Mr. Bowen's subjective complaints – recurrent low back and left leg pain that did not correlate to any specific incident or activity. Dr. Boucher provided an explanation that left no gaps.

11. In contrast, I find that Dr. Haas' opinion as to causation suffers from too great a reliance on global associations, and not enough focus on Mr. Bowen's specific circumstances. With due respect to the role of epidemiologic studies in determining the association between exposure and injury, the process of identifying the cause of a particular worker's injury must center primarily on that particular worker, not simply the population to which he or she belongs. Certainly there must be some degree of variation as to the extent of prolonged sitting and/or vibration to which truck drivers are exposed to account for the fact that while many of them develop disc herniations, at least some of them do not. Had Dr. Haas incorporated into his opinion specific information as to how much prolonged sitting Mr. Bowen did while driving or the extent to which he was exposed to excessive vibration in the trucks that he drove, and how those facts correlated with the epidemiologic data, I might have found his conclusion to be more persuasive. Without that link from the population to the individual, I am unconvinced.

12. I conclude, therefore, that McDermott's has sustained its burden of proving that Mr. Bowen's low back and left leg symptoms in January 2003 were not the result of any aggravation or new injury caused by his work there. Rather, I conclude that they resulted from the natural progression of his original June 1995 injury, for which Ethan Allen bears responsibility.

13. McDermott's seeks an award of attorney's fees under Workers' Compensation Rule 8.3119, as well as apportionment of all arbitration fees to Ethan Allen, under Rule 8.5111. It is true that the Department typically exercises its statutory discretion to award attorney's fees to a prevailing claimant, *see* 21 V.S.A. §678. I decline to exercise that discretion here. There is a qualitative difference between an injured worker-litigant and an insurance carrier-litigant. An injured work may have limited financial resources from which to pay his or her own attorney's fees. An insurance carrier is more likely to have made allowance for attorney's fees as a cost of doing business. It is more appropriate in that context for each party to bear its own expenses of litigation, in accordance with the American rule. *See Perez v. Travelers Insurance*, 2006 Vt. 123.

14. As for arbitration fees, this claim involved a legitimate dispute upon which reasonable minds clearly may differ. Neither party's defense was frivolous or so unsustainable as to fail a straight face test. I find it appropriate for the arbitration fees to be split equally between the parties.

15. I also decline to award interest. The statute mandates that interest be awarded to a prevailing claimant, 21 V.S.A. §664, but imposes no such requirement in the context of an arbitration between employers and insurers. *See* 21 V.S.A. §662(e)(2)(A).

ORDER:

Based on the foregoing findings of fact and conclusions of law, Ethan Allen/Ace Insurance is ORDERED to reimburse McDermott's, Inc./Cardinal Comp. for all workers' compensation benefits paid and/or payable to Mr. Bowen as a consequence of his January 2003 injury.

The parties shall bear equal responsibility for the arbitrator's fees.

DATED at Williston, Vermont this 14th day of March, 2008

Phyllis G. Phillips, Esq.
Arbitrator