STATE OF VERMONT
DEPARTMENT OF LABOR
WORKERS' COMPENSATION DIVISION

WILLIAM P. HERRINGTON	:	
	:	
v.	:	**State File No. DD-55913**
	:	**ARBITRATION HEARING**
TFM CONSTRUCTION COMPANY	:	

ARBITRATION HEARING HELD June 14, 2014.
Record Closed October 1, 2014.
Frank Talbott, Esq. Arbitrator.
Erin J. Gilmore, Esq. representing AmGUARD North America.
J. Justin Sluka, Esq., representing Travelers' Insurance.

ARBITRATION DECISION

EXHIBITS:

Joint 1:	**Binder of Medical Records**
Joint 2:	**Dr. Verne Backus Report dated July 20, 2012**
Joint 3:	**Dr. Verne Backus Report dated April 16, 2013**
Joint 4:	**Transcript of the Deposition of the Claimant William Herrington**
Joint 5:	**Supplemental medical records, including Operative Report of 3/5/14**
Joint 6:	**Dr. Verne Backus Addendum dated September 17, 2014**
Joint 7:	**Dr. Douglas Kirkpatrick Addendum dated September 9, 2014**

FINDINGS OF FACT:

1. The Claimant, William Herrington, worked for TFM Construction Company from 2007 through November 14, 2011 as a carpenter.

2. On April 16, 2010, the Claimant suffered an injury to his right shoulder while he was hanging a door. The Claimant tried to stop a steel door as it slid, and he felt his shoulder pop. The door was very heavy, weighing 100 lbs. or more.

3. The Travelers' Insurance was the workers' compensation carrier for the employer on that date.

4. The Claimant did not stop working altogether. Rather, he was put on light duty. The Claimant described the work as "very light duty," involving things like putting door handles

on doors. His medical provider said he could return to work on April 19, 2010 under the conditions of no lifting with the right upper extremity, no reaching above shoulders, limited use of right upper extremity, and to take ibuprofen as needed, go to physical therapy and get an MR Arthrogram of the right shoulder.

5. In April 2010 he underwent an MR Arthrogram, which did not show a full-thickness tear of the rotator cuff, but a moderate grade bursal-sided tear of the supraspinatus and extensive labral tear, as well as other findings.

6. On June 9, 2010, the Claimant underwent surgery by Dr. Slauterbeck. Dr. Slauterbeck's operative diagnosis was partial-thickness rotator cuff tear, supraspinatus; degenerative labral tear, biceps tendon rupture, subacromial bursitis and AC joint arthritis. He performed a right shoulder arthroscopy, superior and anterior labral debridement, subacromial decompression, acromioplasty and open AC joint resection.

7. Sometime in July of 2010 the Claimant fell. This has been asserted as a non-work-related incident. Claimant testified that he did not have any difficulty with his shoulder after the fall. AmGuard asserts that the medical records show that the Claimant had significant shoulder pain and loss of motion and might be developing a frozen shoulder after the fall and that he ruptured his biceps tendon in the fall.

8. The Claimant testified that after the surgery in June 2010 he felt "pretty good." The Claimant testified that he felt all of his symptoms were resolved after this surgery.

9. However, the medical records do suggest that the Claimant was still having issues after the surgery. In August of 2010 Dr. Slauterbeck noted that the Claimant was experiencing pain and clicking in the shoulder. Dr. Slauterbeck was also concerned that the Claimant was developing a frozen shoulder syndrome.

10. An MR Arthrogram was done in September 2010, and the findings again included no full-thickness rotator cuff tear, and "now complete tearing of the biceps long head tendon."

11. The Claimant returned to work in October of 2010, working full time, but on light duty. He testified that in fact, at some point shortly after his return to full time work he began working substantial overtime- up to 70 hours a week.

12. The Claimant was discharged from physical therapy on November 30, 2010. He remained on light duty restrictions, working full time.

13. On January 18, 2011, the Claimant saw Dr. Slauterbeck, who discharged him from treatment. Dr. Slauterbeck placed a 10 lb. lifting limit, no overhead lifting, and no climbing. He noted 100 degrees of abduction.

14. On February 28, 2011, the Claimant was seen for an IME with Dr. Philip Davignon, who assessed the Claimant at medical end and a 12% whole person permanent impairment. Dr. Davignon noted that the Claimant continued to have pain, and activities above the shoulder level were difficult.

15. Claimant's overtime ended in approximately May of 2011. However, he continued to work full time within his light duty restrictions.

16. Claimant testified that between January of 2011 and November of 2011 he was sent home "maybe five times" because his employer did not have work within his permanent restrictions. There was no evidence that the Claimant was unable to work within his restrictions during this time period.

17. The Claimant did not treat again for his shoulder until November 14, 2011.

18. The Travelers' risk ended on March 30, 2011. AmGuard became the workers' compensation insurer as of April 1, 2011.

19. On November 14, 2011, the Claimant was working on a job for his employer. He was kneeling and reached for a cordless drill. When he lifted it, he felt his right shoulder pop and intense pain as he raised it up to about table height. The Claimant testified that the cordless drill weighed 9.2 lbs.

20. The Claimant continued to work that day, using primarily his left arm. He used his right arm minimally because it was so painful. The following day the Claimant was out of work and he never returned to work.

21. The Claimant testified that he felt that the pain in his shoulder was more intense when the November 14, 2011 incident happened than when the April 16, 2010 incident happened, although the pain was at the same location both times.

22. On November 22, 2011, the Claimant received permission to return to work with restrictions of no lifting, pulling or pushing over 2 lbs. and to wear a sling. However, the Claimant did not return to work at that time. Claimant testified that no work was available for him within those restrictions.

23. The Claimant never did return to work. He felt that after this incident he could not do anything with his right arm. His lifting limitations eventually increased to 4 lbs. The Claimant testified that his work restrictions have not been increased over 4 lbs.

24. On January 20, 2012, the Claimant underwent an MRI. The report in comparison to the MRI of September 23, 2010 is not clear on whether there has been a worsening of the Claimant's condition. The reports suggest that there were new findings with respect to the subscapularis, but no new labral tears. The Claimant's physician, Dr. Slauterbeck, after reviewing this MRI suspected that the Claimant was developing a frozen shoulder.

25. In January 2013 he underwent a manipulation under anesthesia for frozen shoulder. Dr. Slauterbeck found that the Claimant's shoulder motion returned with simple manipulation under anesthesia. This called into question whether the pain the Claimant was experiencing in the subscapularis region was caused principally by frozen shoulder syndrome.

26. In July of 2013 the Claimant underwent another MRI of his shoulder. Dr. John Macy reviewed that MRI and concluded that it showed "very high-grade near complete supraspinatus rotator cuff tear." The radiologist of this MRI report compared the films of reports of September 2010 and January 2012, and said that the supraspinatus tear was more conspicuous than seen on the prior MRIs.

27. Between January 18, 2011 and November 14, 2011, the Claimant was able to do his household chores and continue to work as long as he limited his lifting to 10 lbs. and did little overhead work. He testified that after a long day of work his shoulder would be tired, but not painful.

28. Following the November 14, 2011 incident, the Claimant was less able to do his household chores because of chronic pain in his right shoulder.

29. Two experts, Dr. Verne Backus and Dr. Douglas Kirkpatrick, testified. Both are qualified to testify on the subject of medical diagnosis and causation in this case. Dr. Kirkpatrick has greater expertise with shoulder injuries and surgery.

30. Dr. Verne Backus performed two medical records reviews for The Travelers'. Based on the medical records, Dr. Backus concluded that the Claimant experienced an aggravation of his shoulder injury at the time of the November 14, 2011 incident, arguing that the incident destabilized a stable condition and increased the Claimant's disability and impairment.

31. Initially, Dr. Backus concluded that the incident in November 2011 was an aggravation, but it might have been only temporary – therefore only a flare-up – depending on whether the treatment were to return the Claimant to his baseline.

32. Ultimately, the Claimant did not return to his baseline and, in Dr. Backus' opinion, the incident aggravated the Claimant's pre-existing condition. Specifically, Dr. Backus opined that the action of lifting a 9.2 lb. drill with the arm extended is enough force to further tear the Claimant's rotator cuff as it was already in a weakened condition with partial tears.

33. Dr. Backus also testified that frozen shoulder, or adhesive capsulitis develops in response to the inflammatory response in the shoulder. It is his opinion that while the Claimant may have developed frozen shoulder after the November 2011 incident, it did not explain his entire problem because the surgical procedure intended to relieve the frozen shoulder did not find much to explain the pain. Dr. Backus said that given the operative report, if the Claimant had adhesions causing frozen shoulder, they were probably small and that the Claimant's shoulder pain was from other pathology in his shoulder. Dr. Backus explained that the frozen shoulder probably developed within a few months of the November 2011 injury.

34. Dr. Douglas Kirkpatrick is an orthopedic surgeon with a specialty in sports medicine, shoulder and knee complex reconstruction. In his opinion, the Claimant experienced a partial thickness rotator cuff tear, tearing of the labrum, long head of biceps tendon rupture and significant arthritis of the AC joint as a result of the April 16, 2010 work injury. He testified that in his opinion there was "no clear evidence" of additional injury due to the November 14, 2011 incident.

35. Dr. Kirkpatrick has provided numerous reports all contained in the medical records in evidence. In his first report of August 17, 2012, he noted that the Claimant was "managing well within his limitations with light duty until 11/14/11." Dr. Kirkpatrick described his understanding that the Claimant was putting a radiator cover on and was reaching out with his right arm to obtain a drill when he had a sharp pain in his shoulder. Dr. Kirkpatrick did not give an opinion on causation in his first report, but only said that the shoulder pain and diminished range of motion exceeds the findings on the MRI, and that possible diagnoses include possible progressive rotator cuff dysfunction and/or tearing. In a report of September 6, 2012, Dr. Kirkpatrick gave the opinion that the event of November 14, 2011 is not a "competent cause

for significant re-injury to his shoulder" and that the Claimant experienced only a "flare-up of his previous condition."

36. In the end, Dr. Kirkpatrick's opinion is that the Claimant has frozen shoulder, or adhesive capsulitis, which started developing prior to the November 2011 incident, and was not caused by or accelerated by that incident.

37. Dr. Kirkpatrick's testimony was somewhat contradictory and confusing. He testified that, in his opinion, the act of lifting a 9 lb. drill cannot "physically alter the structure of the shoulder in such a fashion to produce long term worsening of it"; however, he also testified that "minor changes or quick movements can alter or aggravate some underlying condition." He also testified that the act of lifting the drill may have brought the Claimant's condition "back to the forefront", but it would not have "altered his course." He testified that even if we assume lifting the drill aggravated his condition or "was the straw that broke the camel's back", there is nothing about lifting a 9 lb. drill close to his body "that would have any implication of altering his course as far as his relationship to the shoulder."

38. In Dr. Kirkpatrick's opinion, the surgery of March 2014 would have been necessary even without the November 2011 event. However, like Dr. Backus, he did not know what the surgery involved because he had not seen the Operative report, and he could not say whether the surgery came about earlier than it otherwise would have been necessary.

39. High grade partial thickness tear means it is greater than 50%, and generally requires a surgical approach. None of the medical records or operative reports indicates that the Claimant had a high grade tear before the November 2011 event. Dr. Kirkpatrick could not say from the medical records whether the Claimant had a high grade tear before the November 2011 event.

40. Dr. Kirkpatrick's opinion was based largely the premise that the medical records showed a less than full-thickness tear of the rotator cuff before the November 2011 event and did not "on an objective basis" show a full-thickness tear after the November 2011 event; that lifting 9.2 lbs. "close to the body" would not be a mechanism of further injury to the shoulder; and the Claimant was on a course of needing additional medical treatment for his shoulder given his first injury.

41. Dr. Kirkpatrick said in his prior IME reports that the Claimant was merely reaching with his right arm when he felt pain. Dr. Kirkpatrick initially stated that "the

mechanism of reaching away from his body for a drill would not be a culpable cause for a new diagnosis." He reiterated his understanding of this at the arbitration hearing when he said the claimant was "reaching away from his body to obtain a drill with some onset of pain around that time."

42. At the arbitration hearing, Dr. Kirkpatrick was asked whether his opinion would change if he learned that the Claimant experienced the pain in his shoulder when he lifted the drill, not merely when he reached out for the drill. Dr. Kirkpatrick said this would not change his opinion because picking up something "close to your body" does not stress the rotator cuff.

43. The Claimant testified that he reached out for the drill, lifted it with his arm extended, and felt a pop and intense pain in his shoulder as he lifted it up to about table height. This event permanently took him out of work. This appears contrary to the assumptions on which Dr. Kirkpatrick bases his opinions. Dr. Backus' opinion is based on the facts as testified to by the Claimant, that his arm was extended when he lifted the drill.

44. After the Arbitration Hearing, the Operative Report was produced and the Experts commented on the findings of the Operative Report.

45. At the time of the Arbitration Hearing, the Claimant had undergone surgery in March of 2014 by Dr. Macy, but no Operative Report was offered in the evidence, nor had either of the experts reviewed an operative report.

46. The Operative Report of March 5, 2014, showed the chronic long head biceps tendon rupture (which appears also on the report of the MRI of September 23, 2010); it showed "no evidence of a frozen shoulder"; and it showed a high grade retracted upper 2/3 subscapularis rotator cuff tear and a full thickness 2 centimeter supraspinatus rotator cuff tear. Both of these tears were new findings, and there is no evidence of this degree of tearing prior to the November 2011 event.

47. After reviewing the Operative Report of March 5, 2014, Dr. Kirkpatrick addressed Dr. Macy's findings with respect to the suspicion of a frozen shoulder, but did not comment on the more significant findings of two new conditions - one full thickness tear and one high grade tear. Dr. Backus provided the opinion that the tears seen at the time of the operation were likely caused by the act of lifting the drill because of the weakened state of the Claimant's shoulder. Dr. Backus also has provided the opinion that the surgery increases the Claimant's impairment and disability.

CONCLUSIONS

1. "In workers' compensation cases involving successive injuries during different employments, the first employer remains liable for the full extent of benefits if the second injury is solely a 'recurrence' of the first injury-- i.e., if the second accident did not causally contribute to the Claimant's disability (cite omitted). If, however, the second incident aggravated, accelerated, or combined with a pre-existing impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an 'aggravation,' and the second employer becomes solely responsible for the entire disability at that point. *Pacher v. Fairdale Farms & Eveready Battery Co.*, 166 Vt. 626 (1997).

2. The factors that the Department typically considers when finding an aggravation of a pre-existing condition are: 1) whether there is a subsequent incident or work condition that destabilized a previously stable condition; 2) whether the claimant had stopped treating medically; 3) whether the claimant had successfully returned to work; 4) whether the claimant had reached an end medical result; and 5) whether the subsequent work contributed independently to the final disability. *Trask v. Richburg Builders*, Op. No. 51-98WC (1998).

3. An "Aggravation" is defined as an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Rule 2.1110, Vermont Workers' Compensation and Occupational Disease Rules (2001).

4. An aggravation has been explained as "a destabilization of a condition which has become stable, although not necessarily fully symptom free." *Cote v. Vermont Transit*, Op. No. 33-96 WC (June 19, 1996).

5. The Claimant's condition was stable at the time that he lifted the cordless drill in November 2011. The Claimant had not sought treatment from a medical provider in the period between January 2011 and November 2011, approximately 11 months. There is no indication that any medical provider expected to be treating him again during that time period. The Claimant had been working full time, albeit under restrictions of lifting no more than 10 lbs., since October of 2010. He even worked substantial overtime up until May of 2011. There was no indication that the Claimant missed work because of a worsening or flare-up of his pain until the November 2011 incident.

6. Although the Claimant had a significantly weak shoulder after the first incident in April of 2010, he clearly was considered at medical end result by his doctor in January of 2011 and by the IME doctor in February of 2011, with no intention of further treatment at that time.

7. Although the Claimant was not able to return to full duty, he was able to return to working full time as well as overtime within restrictions. This is a successful return to work.

8. On November 2011, while the Claimant was working within his restrictions he reached and lifted a cordless drill and felt significant pain and injury that took him out of work. He has not returned to work since that date. His permanent restrictions have decreased to lifting no more than 4 lbs. Therefore, an event happened that clearly destabilized the Claimant.

9. Based on the medical evidence and the Expert opinions, the November 2011 incident has contributed independently to the Claimant's disability, which is greater now than before that incident.

10. AmGuard argues that Dr. Kirkpatrick's opinions should be considered more credible than Dr. Backus' opinions because Dr. Kirkpatrick is a board certified orthopedic surgeon who performs the same surgical procedures that the Claimant in this matter underwent, citing *Brodeur v. Energizer Battery Manufacturing, Inc.*, Op. No. 06-14WC (2014). However, several factors undermine Dr. Kirkpatrick's opinion. Most significantly, Dr. Kirkpatrick relies on an erroneous fact pattern. His opinion was first based on his belief that the Claimant experienced pain in his shoulder when he reached for the drill. Even after being corrected, however, his opinion was based on the position that lifting a 9 lb. drill close to his body is not sufficient mechanism to cause further tears. The evidence indicates the Claimant was reaching out when he lifted the drill. Secondly, as noted before, Dr. Kirkpatrick's opinions were internally contradictory. On the one hand he said the act of lifting a 9 lb. drill cannot "physically alter the structure of the shoulder in such a fashion to produce long term worsening of it"; on the other hand he said minor changes or quick movements can alter or aggravate some underlying condition. He also testified that the act of lifting the drill may have brought the Claimant's condition "back to the forefront", but it would not have "altered his course." He testified that even if we assume lifting the drill aggravated his condition or "was the straw that broke the camel's back", there is nothing about lifting a 9 lb. drill that would have any implication of altering his course. From a medical-legal perspective, an event that is "the straw

that breaks the camel's back" is an event that alters the course of a person's medical treatment and is, therefore, an "aggravation" as a matter of law.

11. Quoting from S.B. v. Homebound Mortgage, Opinion No. 29-07WC (Nov. 2007):

> An employer takes each employee as is and is responsible under the Vermont Workers' Compensation Act for an injury which disables one person and not another. See *Paton v. State of Vermont, Department of Corrections*, Opinion No. 4-04WC (2004). The Claimant had a degenerative condition in her knee for many years prior to her employment with Homebound Mortgage. However, in Vermont a medical condition is compensable if the employment aggravated, accelerated or combined with an existing weakness or disease to produce the final disability. *Marsigli 's Estate v. Granite City Auto Sales, 124 Vt. 95 (1964).* This is true even if the disease left to itself would in time produce the same result independent of the injury received on the job. *Id. at 104.*

> Thus, under Vermont Workers' Compensation statutes, the aggravation or acceleration of a pre-existing condition by an employment accident is compensable. See *Jackson v. True Temper Corporation, 151 Vt. 592, 595 (1989).* In other words, if a work injury accelerates the progression of a pre-existing condition, or disrupts its stability such that an individual's ability to work and function is disabled, then the injury is a compensable one. Furthermore, it is well established under the Vermont's Worker's Compensation Act that any aggravation or acceleration of a preexisting condition which produces a final disability sooner than it would have otherwise occurred is compensable. See *Marsigli Estate v. Granite City Auto Sales, 124 Vt. 95, 104 (1964).*

12. The facts in this case more likely than not establish that the Claimant experienced a new injury on November 14, 2011. It does not matter that the Claimant's shoulder condition would likely have progressed to the point of needing the surgery that he ultimately underwent.

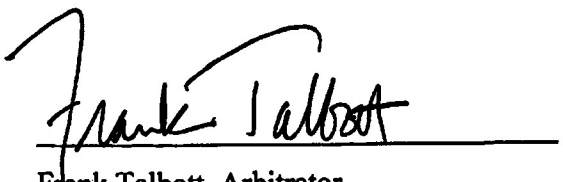
13. What is missing in Dr. Kirkpatrick's testimony is an understanding of what he means when he says "altered the Claimant's course." It was not clear whether he meant that the Claimant would have needed the particular surgery that he underwent at the time he did undergo it; or whether he meant that the Claimant ultimately would have needed the surgery, though maybe not as soon. At no time did Dr. Kirkpatrick say that in his opinion the Claimant's full thickness supraspinatus rotator cuff tear and high grade 2/3 subscapularis tear developed as a natural and direct consequence of the April 2010 injury with no intervening acceleration of that progression by the November 2011 incident. Dr. Kirkpatrick did say in his initial report that the Claimant was managing well within his restrictions until the November 14, 2011 incident.

14. In the end, it is clear that the Claimant had more than frozen shoulder after the November 2011 event, and Dr. Backus' testimony, because he bases it on the accurate facts that the Claimant was lifting a 9.2 lb. drill with an extended arm when he felt onset of debilitating pain, is the more credible medical testimony.

15. I conclude that the incident of November 14, 2011 aggravated the Claimant's pre-existing shoulder pathology and caused new injury and greater disability, and that AmGUARD is responsible for the Claimant's benefits since that date.

16. The two insurance carriers will share the arbitrator's fees equally.

Dated this 8th day of October, 2014.



Frank Talbott, Arbitrator