Jeffrey Wimble v. Green Mountain Coffee Roasters/MEMIC; State File X-60513; and
Jeffrey Wimble v. Green Mountain Coffee Roasters/Liberty Mutual; State File DD-61994

STATE OF VERMONT
DEPARTMENT OF LABOR & INDUSTRY

JEFFREY WIMBLE, Claimant	)	
v.	)	STATE FILES: X-60513 DD-61994
GREEN MOUNTAIN COFFEE ROASTERS	)	
Defendant	)	William B. Skiff, Esq. Arbitrator

ARBITRATION DECISION AND ORDER

I. APPEARANCES

1. Keith Kasper, Esq., for Liberty Mutual and;
2. Jeffrey Spencer, Esq., for MEMIC

II. ISSUE PRESENTED

1. Whether Claimant's current left upper extremity condition represents a "recurrence" from his original April 3, 2006 work injury or a new injury or "aggravation"?

III. JOINT EXHIBITS

1: Claimant's Medical Records;
2: Deposition of Doctor Stephanie Landvater taken August 31, 2012;
3: Curriculum Vitae of Doctor Stephanie Landvater;
4: Deposition of Jeffrey Wimble taken July 31, 2012;
5: Claimant's Personnel Materials from Green Mountain Coffee;
6: Department of Labor Forms, Orders, and Correspondence.

Posture of Case

1. On June 15, 2012, Vermont Department of Labor Specialist II Mary Levin Sarazin, ordered Green Mountain Coffee Roasters and its most recent insurer, Liberty Mutual Insurance, to pay all related and medically reasonable and necessary treatment pursuant to 21 V.S.A. §640(a) in connection with Mr. Wimble's February 28, 2012 left upper extremity injury.

2. Specialist Sarazin further ordered that Liberty Mutual and MEMIC, through their respective counsel, arbitrate the insurer liability dispute pursuant to 21 V.S.A. §662(e).

IV. FINDINGS OF FACT

Testimony of Jeffrey Wimble

1. Jeffrey Wimble is a 42 year old right handed man. Prior to 2006, Mr. Wimble had never experienced any problems with his left elbow.

2. Mr. Wimble began working for Green Mountain Coffee Roasters (hereinafter GMCR) in December of 1998. When he first started with GMCR, Mr. Wimble was employed as a customer service representative in the mail order department. His job consisted of taking phone orders and processing those orders forward to the distribution center. Mr. Wimble worked in a cubicle, utilizing a headset and a computer as part of his work station. Mr. Wimble worked in this customer service position for several years and then moved into wholesale telemarketing.

3. The wholesale telemarking job involved making outbound calls, contacting people to see if they were interested in having a GMCR salesman contact them for a potential sale. Mr. Wimble utilized a headset and computer to assist him with this wholesale telemarketing job.

4. In 2003, Mr. Wimble was working for GMCR as a service technician. This job involved going on service calls, fixing coffee machines on location, and repairing machines when they came back in to the company. Mr. Wimble traveled approximately 25 percent of the time on this job, with the remaining balance at GMCR in Waterbury, Vermont. While working as a service technician, Mr. Wimble did not use a computer for the first year or two of the job.

5. In 2006, Mr. Wimble first started noticing problems with his left upper extremity. At that time, Mr. Wimble testified he was using a shared computer with seven or eight co-workers. Then, additional computers were brought in for use, but the keyboards were up high, to keep them clean. Mr. Wimble testified that this high keyboard set up was not "*very ergonomically correct*" and that he would have to elevate his arms to reach the

keyboard. It was within approximately six months of the new keyboards that Mr. Wimble noticed that his elbow started hurting.

6. Approximately three months passed before Mr. Wimble sought medical treatment for his elbow pain. Mr. Wimble testified that the discomfort in his elbow made sleeping difficult and this was when he decided to seek medical attention.

7. Around this time, Mr. Wimble told his supervisor that he was having problems with his arm. Mr. Wimble was sent to Concentra Medical Center for evaluation and was first treated there on April 5, 2006.

8. Mr. Wimble was eventually seen by Dr. Stephanie Landvater for the upper extremity problem and underwent surgery on October 10, 2006. The surgical procedure consisted of a left endoscopic carpal tunnel release and a left ulnar nerve transposition subcutaneously at the elbow.

9. After surgery, Mr. Wimble missed some time from work and engaged in physical therapy.

10. After approximately six weeks out of work, Mr. Wimble returned to work part time on light duty in a new position with GMCR. The new position was purchasing. This new position consisted of managing the returns for a particular type of equipment used in dispensing coffee. Mr. Wimble would receive the malfunctioning piece of equipment, hand write down the serial number, enter this information into a spread sheet and send this information to the manufacturer. During his initial return to work, Mr. Wimble would take breaks to rest and ice his elbow.

11. Mr. Wimble's new work space was out in the shop. He testified that when he started with the new job in purchasing, an ergonomic analysis was arranged for him by the employer. As part of this analysis, his chair was given arm rests. Later, Mr. Wimble's job expanded when a co-worker went on leave and he began doing all of the purchasing for the service department.

12. In approximately late 2008 or early 2009, Mr. Wimble changed job roles. He moved to the multi-site purchasing department with GMCR Waterbury. In his new job role, Mr. Wimble was ordering anything the Vermont distribution centers required. Mr. Wimble testified the new job was more in-depth; where he might have been 80 percent busy in his previous job role, he was now 100 percent busy all day long. He had many more meetings and the new job was a more stressful position.

13. With his new job role, Mr. Wimble was not at a desk nearly as much as he had been in his previous job role. Mr. Wimble testified that with his new job role his desk work was approximately 65 percent with the remaining 35 percent at meetings and or traveling. The desk work primarily involved computer work, research and purchasing with electronic communication, although some handset phone work was also utilized.

14. When Mr. Wimble moved to the new job role his chair, computer, risers, and other office equipment were moved to his new location for his use. The set up at the new location was very similar to the set up at his previous office location.

15. When Mr. Wimble moved to the new job location no ergonomic test was performed as he set up in his new work location. Later, in September, when he started having pain again, he asked for ergonomic testing and he testified that someone would come in every so often to assess.

16. When he was placed at medical end result by Dr. Landvater in May of 2007, Mr. Wimble did not recall any long-term or permanent restrictions placed on his employment or activities.

17. On September 12, 2007, Mr. Wimble returned to Dr. Landvater for treatment, which included an injection. Mr. Wimble did not have a clear memory of what activities or symptoms occasioned the return to Dr. Landvater at that time. Although Mr. Wimble does recall that his job at that time did involve moving boxes, packing boxes, and lifting coffee brewing equipment.

18. As of the date of his deposition, July 31, 2012, Mr. Wimble did not have an in-depth recall or memory of his symptoms, limitations, or function of his left upper extremity from back in 2007 or 2008. Mr. Wimble did recall that uncomfortable sleep was a memorable symptom. Mr. Wimble was prescribed an arm brace which he wore after the elbow surgery in 2006, but he could not recall if he was regularly wearing the brace in 2007 or 2008.

19. Mr. Wimble was seen by Dr. Landvater on May, 19, 2008 for left upper extremity symptoms. Mr. Wimble was not seen again by a health care professional, for left upper extremity symptoms, until October 17, 2011 when he returned to see Dr. Landvater.

20. Mr. Wimble testified that from May of 2008 through September of 2011 he was not pain free in his left upper extremity. The pain was something he learned to live with and he made adjustments in his lifestyle to accommodate his symptoms. Mr. Wimble did not have a specific recall regarding the intensity of his pain levels from 2008 through 2011. However, he testified the pain scale range was likely between a 5 and a 7 out of 10.

21. Mr. Wimble testified that between 2006 and 2011 he would take two or three Advil per day to manage symptoms associated with his left upper extremity.

22. In September of 2011, Mr. Wimble was having pain in his left upper extremity and felt that he had "just aggravated it at some point" so he decided to return to Dr. Landvater to have the arm checked out. Mr. Wimble testified the problems with his arm had been developing over the months previous to his visit with Dr. Landvater. Mr. Wimble did not recall any specific sudden onset of pain, but felt his condition was interfering with his rest and he decided to seek medical attention.

23. Mr. Wimble testified that in the months preceding 2011, if he moved his arm just right, he could feel discomfort in his elbow and it was very uncomfortable to sleep.

24. Mr. Wimble testified that around September 2011, he was doing more typing at his job and his work place had been transitioned several times. He used several different desks and chairs and he was without a chair with arm rests for a period of time; a problem he fixed by having a co-worker send over some arm rests. Mr. Wimble made several other work place adjustments, including putting a computer monitor tray under his desk and using a laptop more often.

25. Mr. Wimble testified that between 2008 and 2012, he had essentially the same job. However, his responsibilities and tasks increased as he moved his way up to the top tier of his job and he considered his contribution to the company to have increased from 2008 to 2012. As part of the increased responsibilities Mr. Wimble attended more meetings and his work on a laptop computer increased. However, Mr. Wimble testified the physical aspects of his job remained essentially the same during this period of time.

Medical Records

26. On April 5, 2006 Mr. Wimble was examined by Concentra Medical Center for symptoms described as "*Mild swelling, with tenderness to palpation volar right hand and wrist.*" He was diagnosed with a sprain/strain of the hand. Physical therapy was suggested as well as ibuprofen. He was cleared to perform all job duties and return to work.

27. Physical therapy records from Family Physical Therapy from April 6, 2006 through October 2, 2006 document treatment modalities, symptom severity, stretching, the use of a brace and subjective perceptions of progress.

28. On May 16, 2006, Mr. Wimble was examined by Dr. Stephanie Landvater. Based on the chief complaint and physical exam, Mr. Wimble was diagnosed with "*left ulnar nerve subluxation with possible ulnar neuropathy and right wrist over use.*" Physical therapy was to continue, a nerve conduction test was to be performed, and Mr. Wimble was given instructions regarding splinting and sleep positions.

29. The nerve conduction test results of June 12, 2006, revealed mild left carpal tunnel syndrome and mild left entrapment of the left ulnar nerve at the elbow.

30. On June 20, 2006 Mr. Wimble was seen by Dr. Landvater. The assessment was a "*left ulnar nerve subluxation with neuropathy in the mild category.*" The recommendation was for an ulnar nerve transposition.

31. On October 10, 2006, Mr. Wimble underwent surgical procedures consisting of a "*left endoscopic carpal tunnel release and a left ulnar transposition subcutaneously at elbow.*"

59. When asked if there was any evidence of subluxation during the 2007 and 2008 examinations, Dr. Landvater responded "*I am going to call this ulnar instability because the ulnar nerve, I believe, moved more out towards the medial epocondyle.*"

60. Dr. Lanvater next examined Mr. Wimble on October 17, 2011. Dr. Landvater testified that the condition she examined Mr. Wimble for on that date was related to the condition she treated him for in 2006. She testified that it was related because it was the same side and the same area of surgery. The only difference she detected was the nerve was now up and onto the prominence of the medial epicondyle.

61. In response to the deposition question, "*So same condition, same problem, it's just moved further than what it had been originally?*", Dr. Landvater responded "*I believe so, yes.*"

62. When asked to clarify her March 26, 2012 note regarding her statement that the current symptoms represented a continuation of the prior injury, Dr. Landvater responded "*I believe that one of the underlying problems with a subcutaneous transposition is ulnar nerve instability. That means it's unstable. It moves around a little bit more than it would in, let's say, a transmuscular, where you cut the muscle in the tendon, lay it underneath. It has more of an opportunity subcutaneous to move over.*"

63. Dr. Landvater attributed the ability of the ulnar nerve to move over to both Mr. Wimble's genetic laxity predisposition and the original 2006 work injury.

64. When asked if there was any information she was aware of that would help identify when the second subluxation occurred, Dr. Landvater responded "*I believe this is a situation that also happened of gradual onset. I believe, again, this is time. I believe over time, it became more sensitive to him because it was moving out from underneath more tissue from the surface down to where the nerve is located, to an area where it's more—we call it subcutaneous, even more so than in the deeper areas. It became more superficial.*"

65. When comparing the two different surgical methods of ulnar nerve transposition, subcutaneous v. submuscular, Dr. Landvater specifically noted that one of the known disadvantages of the subcutaneous surgical method was the risk of nerve instability. Dr. Landvater also testified that she had not seen a nerve slip like this in her 25 years of practice and she could not specifically attribute Mr. Wimble's nerve movement to any single factor.

66. Dr. Landvater testified that she believed that "*all along he had some ulnar nerve instability*" and that "*the position of the ulnar nerve was more and more symptomatic based upon where it as located and what the activities were that he was continuing to do.*"

67. Dr. Landvater testified that Mr. Wimble was put through a long course of post-operative physical therapy to prevent something like nerve instability from happening.

68. Dr. Landvater testified that the physical exam of March 26, 2012 was not significantly different than the October 17, 2011 exam; with the exception of her inability to perform

the thumb-to-forearm test due to irritation in the joint at the base of the thumb, a symptom unrelated to the original ulnar nerve surgery.

69. Dr. Landvater did not expect there to be a future permanent impairment associated with her renewed treatment, however she could not promise that would be the case.

Employment Records

70. Mr. Wimble was hired by GMCR on December 16, 1996, to fill the position of *Mail Order Customer Service Rep, Dept: Mail Order Customer*. On August 16, 1999, Mr. Wimble changed jobs and moved into a position titled *Telemarketing Rep, Dept: Wholesale Customer Service*. On April 2, 2001, Mr. Wimble changed jobs and moved into a position titled *Service Parts Coordinator, Dept: Service*.

71. On November 21, 2007, Mr. Wimble's status changed and he became a "*Service Parts Coordinator, Dept: Service*. On August 22, 2010, Mr. Wimble was moved to a position titled *Operations Buyer, Dept: Operations Support*. On January 2, 2012, Mr. Wimble's position changed and he became *a Buyer II, Dept: Operations Support*.

72. Several ergonomic assessments were performed during Mr. Wimble's employment with GMCR. In October and November of 2011, workstation changes were made secondary to Mr. Wimble treating for his worker's compensation claim. According to notes related to the ergonomic assessment, these changes helped and the new set up no longer provoked Mr. Wimble's left elbow symptoms.

V. CONCLUSIONS OF LAW

1. As the party attempting to relieve itself of liability, Liberty Mutual has the burden of proof. See, *Smith v. Chittenden Bank,* Op.No.17-01WC (2001), *aff'd* Supreme Court Docket No. 2001-333, Feb. 2002 (three justice panel entry order).

2. Any payments made pursuant to 21 V.S.A. §662 shall not be deemed an admission or conclusive finding of an employer's or insurer's liability. 21 V.S.A. §662(c).

3. The Vermont Supreme Court has explained, "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 Company*, 166 VT. 626 (1997) "Mere continuation or even exacerbation of symptoms, without a worsening of the underlying disability, does not meet the causation requirement." *Stannard v. Stannard Company, Inc., et al.*, 2003 VT 52 ¶11.

4. Medical practitioners, unschooled in the nuances of workers' compensation law, frequently use these terms interchangeably, however, the terms `aggravation' and `recurrence' in the workers' compensation context are legal rather than purely medical terms. *Griffin v. Blue Seal Feed, Inc.*, Opinion No. 14-94WC (4/25/94).

5. The Regulatory definitions provided by the Commissioner follows: "Aggravation" means 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). This has been explained as "a destabilization of a condition which has become stable, although not necessarily fully symptom free." *Cote v. Vermont Transit*, Opinion No. 33-96 WC (June 19, 1996).

6. Five factors are generally considered by the Commissioner in distinguishing whether a specific case constitutes an aggravation versus a recurrence: (1) whether claimant had reached a medical end result, (2) whether claimant had a successful return to work, (3) whether claimant had stopped treating for the injury, (4) whether claimant's condition was destabilized by a work-related incident and (5) whether the alleged aggravating incident contributed to the final disability. See *Trask v. Richburg Builders*, Op. No. 51-98WC (1998). The greatest weight is to be given to the final factor. *F.N. Montpelier School District*, Opinion No. 52-06WC.

7. Important to the distinction between an aggravation and a recurrence is that a mere increase in symptoms, standing alone, does not constitute an aggravation for workers' compensation purposes. *Badger v. Cabot Hosiery Mills*, Opinion No. 21B-97WC (July 9, 1998); *Pelkey v. Rock of Ages*, Opinion No. 74-96WC (January 3, 1997). There must be evidence of a change in the underlying condition. *Id.* Recurrence means the return of symptoms following a temporary remission. WC Rule 2.1110.

VI. DECISION

1. Based on the factual and medical evidence in the record, and applying the pertinent legal principles, I find that Mr. Wimble's current upper extremity treatment is a **RECURRENCE** of his compensable 2006 condition. As such, Liberty Mutual Insurance is relieved of responsibility and MEMIC Insurance shall assume responsibility for Mr. Wimble's upper extremity worker's compensation claim.

2. Mr. Wimble was placed at medical end result on May 7, 2007, by his treating orthopedic physician, Dr. Landvater, and although he was not symptom free on that date, a zero permanent impairment rating was given. As of the date of medical end result, Mr. Wimble had successfully returned to work.

3. Although Mr. Wimble did not treat with a medical provider for left elbow pain from May 19, 2008 through October 17, 2011, he was not symptom free. Mr. Wimble described learning to live with his symptoms, which he rated at a five to seven pain level, and using Advil on a daily basis to manage his pain.

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February 6, 2014

Mary Sarazin, Esq.
Department of Labor
Workers' Compensation Division
P.O. Box 488
Montpelier, Vermont 05601-0488

Re: Jeffrey Wimble v. Green Mountain Coffee Roasters
State File No: X-60513 and DD-61994

Dear Mary:

Enclosed please find the arbitration decision in the above-reference case.

Thank you for your attention to this letter.

Sincerely,

William B. Skiff, Esq.

cc: Keith Kasper, Esq.
Jeffrey Spencer, Esq.

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