

Boutwell v. Hubbardton Forge (July 1, 2003)

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

Michelle Boutwell)	
)	State File No. P-07188
v.)	
)	
Hubbardton Forge)	Phyllis Severance, Esq.
)	Arbitrator

ARBITRATION DECISION AND ORDER

APPEARANCES:

Nicole Reuschel-Vincent, Esq. for Ace/Cigna
Joshua L. Simonds, Esq. for Wausau Insurance Company

ISSUE PRESENTED:

Whether the claimant's cervical injury occurred during her employment for Heritage Personnel Services, such that Wausau Insurance Company should be responsible for paying workers' compensation benefits, or whether it occurred during her employment for Hubbardton Forge, such that Ace/Cigna should be responsible.

JOINT EXHIBITS:

1. Joint Medical Record
2. Heritage Personnel Application for Employment
3. Heritage Personnel Separation Information
4. Deposition of Michelle Boutwell
5. Deposition of Dr. Richard Ashcroft
6. Deposition of Dr. David Delaney

FINDINGS OF FACT:

1. Michele Boutwell was employed by Heritage Personnel Services ("Heritage"), a temporary employment agency, from December 1, 1998 through May 31, 1999.
2. On March 9, 1999 Ms. Boutwell began a work assignment on behalf of Heritage at Hubbardton Forge. She received her paychecks and insurance coverage through Heritage, and was considered a Heritage employee.
3. Ms. Boutwell's work assignment was in the "assembly pack" department. She wired lamps, packed them into boxes and then loaded them onto carts for shipping.
4. On June 1, 1999 Ms. Boutwell was hired on by Hubbardton Forge as a permanent full-time employee. Her employment for Heritage ceased as of that date. Her job

responsibilities and work hours remained exactly the same after becoming a Hubbardton Forge employee, as they had been when she was a Heritage employee.

5. At all relevant times, Wausau Insurance Company was the workers' compensation carrier for Heritage, and Ace/Cigna was the workers' compensation carrier for Hubbardton Forge.
6. In April 1999 Ms. Boutwell began experiencing left sided neck pain. Ms. Boutwell had a long-standing history of migraine headaches that often started with a stiff neck. The neck pain she experienced in April 1999 felt completely different, however, particularly with respect to its severity. It radiated down into both shoulders and prevented her from turning her head.
7. On April 19, 1999 Ms. Boutwell sought treatment for her neck pain with Dr. Richard Ashcroft, a chiropractor with whom she had treated previously for occasional minor lumbar and cervical strain/sprains as well as for her migraine headaches.
8. Dr. Ashcroft determined that Ms. Boutwell's neck pain was not related to a migraine headache. Dr. Ashcroft noted that Ms. Boutwell's pain was severe and he had difficulty manipulating her neck on that day.
9. Ms. Boutwell also noted that Dr. Ashcroft's treatment on that day was very painful, unlike any of the treatments she had received from him for either migraine headaches or cervical strains/sprains in the past.
10. Dr. Ashcroft's diagnosis was cervical radiculitis. Dr. Ashcroft later determined that Ms. Boutwell's neck pain was causally related to her assembly pack work at Hubbardton Forge. This work involved a substantial amount of repetitive lifting and use of both shoulders.
11. Ms. Boutwell's neck pain continued unabated after Dr. Ashcroft's treatment. She was reluctant to return to him for additional treatment, however, because the initial treatment had been so painful. Instead, she sought treatment from Dr. David Delaney, an associate of her primary care physician, Dr. Diercksen.
12. Dr. Delaney examined Ms. Boutwell on April 23, 1999. His diagnosis was left trapezius tendinitis secondary to overuse related to her assembly line work at Hubbardton Forge. He prescribed both anti-inflammatory and pain medications, and also advised Ms. Boutwell to consider physical therapy if her symptoms did not improve.
13. From April until June 1999, Ms. Boutwell experienced neck pain on a daily basis, but continued to work nonetheless. She did not seek any additional medical treatment during this time, but did take the anti-inflammatory and pain medications prescribed by Dr. Delaney.
14. In early June 1999 Ms. Boutwell's mother fell ill, and Ms. Boutwell took a leave of absence from her job at Hubbardton Forge. She returned to work on July 7, 1999, following her mother's death. During the period of time when she was not working, Ms.

Boutwell's neck pain diminished. Her symptoms were minor, but did not resolve completely.

15. Ten days after returning to work, on July 17, 1999 Ms. Boutwell presented to Dr. Diercksen for treatment of a migraine headache. At that time, she also was given a refill for the anti-inflammatory and pain medication previously prescribed by Dr. Delaney for her neck pain. A second prescription refill was called in on August 12, 1999.
16. In September 1999 Ms. Boutwell's neck pain and symptoms recurred. There was no specific precipitating event or trauma. The symptoms were the same as those she had experienced in April 1999, and the pain was in the same location. This time, however, the pain was severe enough that Ms. Boutwell had to leave work early one day.
17. On September 22, 1999 Ms. Boutwell saw Dr. Delaney for a physical examination. She had multiple complaints at that time, including fatigue and persistent neck pain. Dr. Delaney noted that Ms. Boutwell worked on an assembly line and stated that there was a good probability that the neck pain was from overuse, poor conditioning and poor posture. He referred her for further testing to rule out fibromyalgia, and also physical therapy for her neck pain.
18. Upon hearing Dr. Delaney's assessment that her neck pain was work-related, Ms. Boutwell completed a First Report of Injury on October 4, 1999. Subsequently, in an injury report she completed for the workers' compensation insurance carrier, Ms. Boutwell stated that her neck symptoms "started in April and continued since that time."
19. Dr. Delaney re-evaluated Ms. Boutwell for persistent neck pain on October 12, 1999 and again on December 6, 1999. Ms. Boutwell had continued to work full-time, full-duty, but after the December office visit, Dr. Delaney recommended that she reduce her work hours and work a light duty schedule instead. Dr. Delaney made this recommendation because Ms. Boutwell was not improving with physical therapy.
20. At a re-visit on December 20, 1999 Dr. Delaney noted that Ms. Boutwell's persistent neck pain was improving since limiting her workload to light duty hours. On January 6, 2000 Dr. Delaney examined Ms. Boutwell again, and again noted gradual improvement. He recommended that her light duty hours continue, and also referred her to a chiropractor for additional treatment.
21. Ms. Boutwell returned to Dr. Ashcroft for further chiropractic treatment on January 14, 2000. Dr. Ashcroft's assessment was cervical radiculitis, the same diagnosis he had rendered when he had last seen Ms. Boutwell in April 1999.
22. Ms. Boutwell treated with Dr. Ashcroft from mid-January 2000 until mid-March 2000. Her symptoms continued to improve gradually during this time, although they did not abate entirely. At a re-check with Dr. Delaney on February 21, 2000 Ms. Boutwell continued to complain of a moderate amount of neck pain. At her request, Dr. Delaney released her to return to work full-time and full-duty.

23. In March 2000 Dr. Delaney referred Ms. Boutwell to Dr. Kenosh, a physiatrist, for further evaluation and assessment as to possible treatment regimens. Dr. Kenosh's assessment was myofascial cervical spine pain. He ordered an MRI, which was within normal limits, as well as a functional capacities evaluation.
24. Ms. Boutwell underwent an independent medical evaluation with John Pizzo, D.C., on May 30, 2000. Dr. Pizzo's assessment was cervical spine myofascial pain syndrome. He determined Ms. Boutwell to be at end medical result, but concurred with Dr. Kenosh's recommendation that she undergo an MRI prior to issuing a permanency opinion.
25. Ms. Boutwell underwent a second independent medical evaluation with Arnold Kirbach, D.C. on June 19, 2000. Dr. Kirbach's diagnosis was cervical myofasciitis secondary to chronic cervical strain/sprain, causally related to her work at Hubbardton Forge. Dr. Kirbach determined that Ms. Boutwell was at an end medical result, with an 8% whole person permanent impairment.
26. Dr. Kenosh determined that Ms. Boutwell had reached an end medical result on August 23, 2000 with a 0% permanent impairment. Based on the results of the FCE, Dr. Kenosh concluded that Ms. Boutwell had a light task duty capacity for work below the shoulders and a sedentary task duty capacity with lifting restrictions for work above the shoulders. Dr. Kenosh also recommended that Ms. Boutwell continue using Nortriptyline, as prescribed by Dr. Delaney, as a permanent medication for her neck pain.

CONCLUSIONS OF LAW:

1. The legal question presented by this claim is whether Ms. Boutwell's entitlement to workers' compensation benefits after June 1, 1999 should be characterized as a recurrence of a neck injury originally suffered in April 1999, while she was a Heritage employee, or whether it should be characterized as an aggravation or new injury suffered at some point after June 1, 1999, when she became a direct employee of Hubbardton Forge.
2. An aggravation is defined as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." Workers' Compensation Rule 2.1110. A recurrence is defined as "the return of symptoms following a temporary remission." Workers' Compensation Rule 2.1312.
3. The Vermont Supreme Court has addressed the aggravation/recurrence issue as follows:

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. If, however, the second incident aggravated, accelerated or combined with a preexisting 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, 166 Vt. 626 (1997).

4. Most recently, the Supreme Court addressed the aggravation/recurrence issue in a case involving facts similar to the current claim. In *Ethan Allen, Inc. v. Jeannette Bressett-Roberge*, Supreme Court Docket No. 2001-254 (June Term 2002), the Court affirmed a finding of recurrence on the grounds that the progression of the claimant's carpal tunnel syndrome had "clearly manifested itself" during her initial employment for a temporary employment agency.
5. The Department has identified five factors to be considered in determining whether to find an aggravation or a recurrence in a particular claim: (1) whether there has been a subsequent incident or work condition which 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 to the final disability. *Trask v. Richburg Builders*, Opinion No. 51-98WC (August 25, 1998). The greatest weight is given to the fifth factor, the causal contribution of the subsequent work to the ultimate disability. *Holland v. Okemo Mountain*, Opinion No. 65-98WC (November 5, 1998).
6. Applying these factors to the current claim, the first one weighs in favor of a recurrence. Ms. Boutwell's neck injury had not stabilized by the time she became Hubbardton Forge's direct employee in June 1999. To the contrary, she testified that she continued to experience neck pain on a daily basis from April until she took her leave of absence from work in June. And while it is true that her neck pain abated somewhat during her leave of absence from work, it did not resolve entirely. Instead, it appeared to worsen shortly after she returned to work on July 7, 1999, as is evidenced by the fact that she refilled Dr. Delaney's prescriptions for anti-inflammatory and pain medications on July 17, 1999, only ten days later. Ms. Boutwell previously had refilled her prescriptions in May 1999, and refilled them again in August 1999. Her continued use of anti-inflammatory and pain medications from May through August is a strong indication that her injury had not yet stabilized or resolved. *Mason v. Baker Distributing*, Opinion No. 79-95WC (October 30, 1995).
7. The second factor also weighs in favor of a recurrence. After one treatment with Dr. Ashcroft in April 1999, Ms. Boutwell did not stop treating, but rather sought out additional treatment with Dr. Delaney instead. Dr. Delaney did not discharge Ms. Boutwell from medical care at any time prior to June 1999; he suggested that she would need physical therapy if her symptoms did not resolve, and in fact she did ultimately pursue this recommendation. Ms. Boutwell's continued use of the anti-inflammatory and pain medications prescribed by Dr. Delaney throughout the summer of 1999 also negates a finding that she had stopped treating medically for her injury.
8. The third factor points to a recurrence as well. Ms. Boutwell did not lose any time from work initially, although she testified that her neck bothered her continuously while she worked. After taking a leave of absence, during which her pain admittedly abated, it recurred within ten days of returning to work in July 1999, as is evidenced by the fact that she sought to refill the anti-inflammatory and pain medication prescriptions at that time. A return to work for only ten days prior to the recurrence of symptoms does not constitute a successful return to work.

9. The fourth factor, whether the claimant had reached an end medical result, points to a recurrence. Ms. Boutwell was not declared to be at end medical result at any point during her employment for Heritage, and in fact did not reach this milestone until more than a year later, in June 2000.
10. The fifth factor is the only one that arguably points to an aggravation. It is true that Ms. Boutwell's neck injury appeared to resolve at least partially during her leave of absence in July 1999. Her symptoms then worsened significantly after she began working again and ultimately led to permanent light duty restrictions. Viewed in this light, it could be said that Ms. Boutwell's return to work "accelerated" a pre-existing condition that might otherwise have resolved completely had her leave of absence continued beyond July 7, 1999.
11. However, 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.*
12. The medical evidence of this is equivocal at best. Neither Dr. Delaney's nor Dr. Ashcroft's diagnoses have changed from the time they first evaluated Ms. Boutwell in April 1999. Both related her injury to overuse caused by her work at Hubbardton Forge beginning in April 1999. Neither appeared to support the notion that the underlying condition giving rise to Ms. Boutwell's symptoms changed materially in the fall of 1999 and thereafter. It simply became more extensive, as is to be expected in a chronic condition caused by overuse when the overuse continues.
13. Given the added weight accorded to the fifth factor in the Department's aggravation/recurrence analysis, however, the contribution of Ms. Boutwell's work in the summer and fall of 1999 to her ultimate disability cannot be overlooked entirely. But for the continued overuse of her neck caused by her continued work, it is reasonable to assume that her symptoms may have continued to abate, as they had done during her leave of absence, and as they did after light duty restrictions were imposed. It is not too speculative to conclude that with added rest her condition may have resolved entirely.
14. Workers' Compensation Rule 8.3119 gives the arbitrator authority to apportion liability for an aggravation/recurrence claim among the respective employers or insurers. It is reasonable to do so in a claim such as the current one, where the claimant's initial injury was caused by her first employment, but her ultimate disability was aggravated or accelerated by continued work-related overuse during her subsequent employment.

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

1. Liability for the workers' compensation benefits paid and/or payable to the claimant as a result of her work-related neck injury is apportioned 80% to Heritage Personnel Services and its workers' compensation carrier, Wausau Insurance Company, and 20% to Hubbardton Forge and its workers' compensation carrier, Ace/Cigna.
2. The arbitrator's fee, which will be submitted separately, shall be split evenly between the insurers.

DATED at Burlington, Vermont this 1st day of July 2003.

Phyllis Severance, Esq.
Arbitrator