Signorini v. Northeast Cooperatives *(September 1, 2004)*

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Lisa Signorini *Opinion No. 36-04WC*

By: Margaret A. Mangan
v. *Hearing Officer*

Northeast Cooperatives *For: Michael S. Bertrand*
Commissioner

State File No. F-23640

Submitted on written record and videotaped deposition
Record closed on May 5, 2004

APPEARANCES:

Beth Irwin Fontana, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUE:

Is claimant's requested surgery with Dr. Marinow compensable?

EXHIBITS:

Joint I: *Medical Records*

Claimant's 1a: *Deposition of claimant Lisa Signorini*
Claimant's 1b: *Videotape of deposition of Lisa Signorini*

STIPULATIONS:

1. *On May 17, 1993 claimant suffered a personal injury by accident arising out of and in the course of employment with defendant.*

2. *The issue to be addressed is the compensability of claimant's requested surgery with Dr. Harry Marinow. Claimant seeks an order requiring the defendant to pay for the proposed surgery and all ensuing medical treatment pursuant to WC Rule 40. Because claimant currently resides in California, issues may also arise concerning the reimbursement rates for claimant's medical providers. Claimant also seeks past due temporary total benefits retroactive to August 2, 2002,*

as well as ongoing temporary total disability benefits until claimant reaches medical end result, attorney fees and any other benefits which may be applicable, including, but not limited to permanent disability benefits and vocational rehabilitation benefits.

3. *The parties agree that this matter may be submitted on the basis of the joint medical records, including IME reports, and claimant's deposition transcript, without the need for formal hearing.*

4. *The parties agree that the hearing officer may take judicial notice of any and all official forms filed in this matter.*

FINDINGS OF FACT:

1. *Claimant was employed as a selector at Northeast Cooperative (Northeast) in Brattleboro, Vermont on May 17, 1993, the day of the injury.*

2. *While selecting grains for an order, claimant picked up a fifty-pound bag of grain, and then another bag fell on the first and claimant hyperextended backward.*

3. *The employer filed a First Report of Injury and found the claim to be compensable.*

4. *Claimant received conservative treatment for the injury, including physical therapy, a short time out of work, and light duty restrictions.*

5. *In 1994 claimant left the job with Northeast and moved to California.*

6. *An August 1995 MRI of claimant's lumbar spine revealed a disc bulge at L4-5 and protrusion at L5-S1. For the next two years, claimant had physical therapy, epidural injections and chiropractic treatments for back pain.*

7. *In 1998 claimant worked as a low-voltage technician with Don's Service Connection. Because the work was too physically demanding, claimant left that job after a few months.*

8. *In July of 1998, Dr. Marinow performed an independent medical examination of the claimant. He concluded that claimant would benefit from a surgical fusion at L5-S1. Dr. Marinow performed the surgery in November of 1998. Postoperatively, claimant participated in physical therapy and pool treatment.*

9. *Dr. Marinow placed claimant at medical end result on January 6, 2000. A month later, he assessed permanency at 13% whole person.*

10. *Claimant then participated in vocational rehabilitation and was trained as a construction cost estimator. Prolonged sitting involved with that work, which caused back pain, resulted in claimant's rejecting that work.*

11. *Claimant's back pain persisted. Epidural injections, ordered by Dr. Marinow, followed, resulting in some relief.*

12. *In 2001 claimant began working as a clerk in a pet store, two to three hours per day, between two and four days per week.*

13. *In early August 2002, claimant felt "excruciating pain" in the lower back while rising from a seated position. At the time, claimant was visiting friends who put claimant to bed for a few days.*

14. *On August 4, 2002, claimant went to a VA Hospital emergency department, where the pain was reported to have been more than 10 on a 10-point scale. Pain medication was prescribed.*

15. *On August 7, 2002, claimant was taken out of work. Next, a CT scan was performed, which revealed mild degenerative spondylosis with posterior disc bulging causing a mild anterior indentation of the thecal sac at L4-L5.*

16. *In September of 2002, claimant's out of work status was clarified as extending to January 6, 2003.*

17. *Claimant's treatment for the next two months was with medication and exercises, but no doctor visits because of cost.*

18. *On November 12, 2002, claimant saw Dr. Marinow who advised claimant to continue with conservative treatment. He also referred claimant for pain management and ordered additional radiographic testing.*

19. *Claimant then had a myelogram and CT scan, after which Dr. Marinow recommended a discectomy and fusion "in view of her severe ongoing back pain symptoms with radiation into the lower extremities."*

20. *The carrier refused to cover payment for the surgery.*

21. Claimant continued to treat with Dr. Marinow, with visits in July, September, October and December 2003.

22. In March of 2004, claimant had an independent medical examination requested by defendant with Dr. Laura Wertheimer Hatch. Dr. Hatch opined that the surgery proposed by Dr. Marinow was reasonable as supported by objective findings seen on radiographs and results of physical examination.

23. Dr. Hatch also noted that claimant had had multiple "flare-ups" of pain, including stepping in a hole in a neighbor's yard in May 2000, bending over to pick up an iguana in August 2000 and standing up from a seated position. She concluded, "the aggravation events were minor in nature. New injury is causally related to the original work related injury."

24. Claimant submitted a request for attorney fees and costs.

CONCLUSIONS OF LAW:

1. *In workers' compensation cases, the claimant initially has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. Egbert v. Book Press, 144 Vt. 367 (1984).*

2. *There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).*

3. *An injury remains compensable as long as the causal chain with work remains unbroken. As the leading commentator has written:*

> *When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional conduct. More specifically, the progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause.*

1 Larson's Workers' Compensation Law, § 10 at 10-1 (2003).

4. *Defendant argues that the law of aggravation bars this claim because nonindustrial causes intervened to sever the causal link.*

5. *'"Aggravation' means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." WC Rule 21.1110.*

6. *Claimant argues that all evidence points in favor of a ruling that the work connection remains unbroken, that the proposed surgery, necessitated by pain and objective radiologic findings, is compensable. Further, claimant contends that the final precipitating event, getting up from a chair, is an ordinary activity of daily living that under department precedent does not bar compensability. See e.g. Correll v.*

Burlington Office Equipment, Op. No. 64-94WC (1994) (shoveling not an intervening cause) and Verchereau v. Meals on Wheels, Op. No. 20-88 (1988) (carrying groceries was not an intervening cause).

7. *In Correll, the claimant had injured his back twice during the course of his employment. At the time of the alleged intervening event, within a year of a work related injury, the claimant was still employed doing work that was more strenuous than the shoveling incident at home. Correll Findings at ¶ 18. Consequently, the department held that the shoveling incident did not severe the causal relationship with the work related incident.*

8. *In Verchereau, the claimant injured her back in work that required repetitive lifting. Five months after the surgery necessitated by that work related injury, she reinjured her back while lifting a bag of groceries, an activity that was within restrictions established by her surgeon. The department held that the incident was not an aggravation because "[t]he act of lifting a bag of groceries is a routine activity that it[sic] is customary for people, even injured people, to customarily perform. Thus the reinjury in February is a normal consequence of the original work injury…." Conclusions, ¶ 4.*

9. *In Verchereau, the grocery bag-lifting incident occurred within a year of the work related injury and undoubtedly before she reached medical end result. In Correll, claimant's condition had not become stable before the shoveling incident, which also was within a year of the work related incident. The facts fully support the conclusion that the activities at issue were customary and the resultant injury a normal consequence of the original injury.*

10. *Although I am not willing to overrule this department's long standing precedent that a normal activity of daily living will not be considered an intervening event sufficient to sever the causal link with work, such an activity must occur within a reasonable time after the work related injury or surgery performed for the injury. Otherwise, time may obscure memories about activities that were aggravating ones, which makes objective findings more difficult. The instant case is illustrative. The most recent incident, getting up from a chair, is clearly a normal activity of daily living. But that incident occurred in August of 2002, nine years after the claimant's work related injury and four years after the surgery. In the interim, she had several jobs and numerous other activities. Consequently, it would be unfair to apply a relaxed activity of daily living standard of causation in this case. The standard law of aggravation must apply.*

11. Accordingly, the factors used in deciding whether an aggravation occurred must be applied: whether a subsequent incident or work condition destabilized a previously stable condition; whether claimant had stopped treating medically; whether claimant had successfully returned to work; and whether the subsequent work contributed to the final disability. Trask v. Richburg Builders, Opinion No. 51-98 (1998). The most important factor is the last, whether the subsequent injury contributed to the final disability. See Stannard v. Stannard Co., Inc, 2002 VT 52, ¶ 11 (citing Pacher v. Fairdale Farms, 166 Vt. 626, 627 (1997)).

12. In the workers' compensation context, the term "aggravation" is a legal determination, not a medical one. Cote v. Vermont Transit, Opinion No. 33-96 WC (1996). Consequently, it is necessary to look at the reasoning underlying a medical opinion, not merely at medical conclusions in determining whether one aggravated a work-related condition.

13. Dr. Hatch clearly cited aggravating events in the claimant's life, although she related claimant's condition back to the 1993 injury. At the same time, Dr. Hatch determined that claimant had incurred a "new injury...causally related to the original injury." The issue here is not if any relationship exists between claimant's current condition and the original injury, but whether independent intervening events worsened, and thereby aggravated, the condition.

14. As Dr. Hatch noted, claimant had several "aggravation events," the last of which was in August of 2002 when she rose from a sitting position in pain. Claimant's back condition had been stable before that incident. Medical end result had been reached in 2000. Claimant had stopped treating medically for this condition for a year prior to the August 2002 incident. Clearly, the August 2002 incident led to a new period of disability. All Trask factors devolve in favor of aggravation. The 2002 incident contributed to the final disability and need for the surgery. The chain of causation from the 1993 incident has been broken.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 1st day of September 2004.

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Michael S. Bertrand
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.