

Howe v. Town of Vernon

(September 2, 2004)

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Christiane Howe

Opinion No. 37-04WC

v.

*By: Margaret A. Mangan
Hearing Officer*

Town of Vernon

*For: Michael S. Bertrand
Commissioner*

State File No. F-00913

Hearing held in Montpelier on April 5, 2004

Record Closed on May 6, 2004

APPEARANCES:

David A. Gibson, Esq., for the Claimant

Corina N. Schaffner, Esq., for the Defendant

ISSUE:

Is claimant's current back condition causally related to claimant's 1991 work related injury?

EXHIBITS:

Joint I: Medical Records

Defendant's A: Police Report

FINDINGS OF FACT:

- 1. Claimant worked for the Town of Vernon until the end of 1995. During the course of that employment, on December 30, 1991, she fell on ice and injured her back.*
- 2. In April 1992, she treated at the Dartmouth Hitchcock Pain Clinic for low back pain with radiculopathy.*
- 3. Claimant is a smoker.*

4. *Claimant's 1991 injury eventually necessitated surgery, which Dr. Kuhrt Weineke performed on July 22, 1992 for a L5-S1 disc herniation. Post operatively, he noted that claimant had some residual stiffness in her back, but legs were pain free.*
5. *Dr. Wieneke placed claimant at medical end result on March 12, 1993, with a 16% permanent partial disability. An IME performed by another physician a few months later confirmed that she had reached medical end and assigned her with an 18% rating.*
6. *Richard Fletcher, Nurse Practitioner who treated claimant for years, noted that she had excellent relief of pain after the surgery.*
7. *Mr. Fletcher noted that claimant was treated for chronic low back pain on August 25, 1995. Later in 1995 she treated with Craig Anderson, D.C. for mid back pain related to a bronchial cough. Notes from November 1995 indicate that claimant's gait was normal.*
8. *On July 11, 1996 claimant was in a motor vehicle accident (MVA). She was traveling at 50 mph when she hit a car that was stopped. She was not wearing a seat belt and broke the dashboard with her knees. The other vehicle was propelled into the other lane. At the scene she complained to a police officer of shoulder, neck, low back and knee pain. She was transported by ambulance to a hospital.*
9. *At the Brattleboro Hospital Emergency Department, claimant complained of pain in her left shoulder, right knee, both legs and lower back. Plain x-rays of the back were negative, revealing no change in disc space height.*
10. *Jon Thatcher, M.D., board certified orthopedic surgeon, examined the claimant two weeks after the MVA. In the record for that visit is the note that claimant was walking with a cane, the first such reference to an assistive device. Dr. Thatcher opined that the MVA aggravated her low back pain and leg sciatica. He prescribed physical therapy.*
11. *No mention of back pain is made in an office visit in September of 1996, although there is one for a visit in October,*

12. *In November of 1996, claimant had physical therapy, which concentrated on her shoulder, but driving to the appointments was difficult because of back pain.*
13. *Claimant continued to treat with Dr. Anderson. At a May 1997 visit, he treated her for symptoms in her shoulder, neck, and mid back.*
14. *In September of 1997 she saw Mr. Fletcher with complaints of back pain. Records indicate that in April of 1998 she had an impaired gait and was walking with a cane. In August of 1998 her low back pain radiated to the left leg and foot. Office visits with these complaints continued into the fall of 1998.*
15. *Next, in January 1999, Mr. Fletcher asked Dr. Thatcher to reevaluate claimant for her back pain.*
16. *An MRI from January 19, 1999 revealed a new disc extrusion at L5-S1, the site of the previous surgery.*
17. *Dr. Thatcher performed surgery on January 25, 1999 but was not able to remove all scar tissue below the L5 nerve root. A few weeks later, a fragment was removed from under the nerve.*
18. *Dr. Thatcher treated claimant postoperatively and placed her at medical end result on May 19, 1999 with a 15% permanent partial impairment, less than what Dr. Wieneke had assessed after the 1992 surgery.*
19. *In October of 1999, claimant complained that her back and leg pain was increasing. By the following March, she complained that it was intolerable and interfering with her lifestyle.*
20. *Based on claimant's symptoms, but not on any neurological deficits, Dr. Thatcher referred claimant to Dr. Michael Mason at New England Baptist Hospital in Boston to assess whether a spinal fusion were warranted.*

21. *Claimant has not yet seen Dr. Mason because the carrier refused to pay for the consultation, the source of the dispute in this matter. The carrier has also refused to pay for medical services of Dr. Thatcher and other care providers, on the basis the work related injury did not account for the need for those services.*

Expert Medical Opinions

22. *In Dr. Thatcher's opinion, the original injury sustained by the claimant set in motion a series of events, including a fragment of disc becoming trapped in scar tissue. He opined, "In all likelihood, the recurrent disc is directly related to the original injury." Nurse Practitioner Fletcher concurs with this opinion. As noted above, Dr. Thatcher also opined that the MVA aggravated the radiculopathy.*

23. *Dr. Samuel Doppelt, an orthopedic surgeon who evaluated the claimant for the defense in this case, opined that injuries sustained in the motor vehicle accident in 1996 accelerated or aggravated claimant's underlying back condition. That the worsening did not occur immediately after the MVA did not alter Dr. Doppelt's opinion because it is not unusual for one to have fluctuating complaints that increase in frequency after such a trauma. The disc material probably migrated downward along the canal, increasing symptoms along the way. Once it became lodged, additional scar tissue formed. He supported this theory with a history indicating that claimant had a full recovery after the 1992 surgery and did not have leg symptoms until after the 1996 MVA.*

CONCLUSIONS OF LAW:

1. *Claimant alleges that her current back condition and referral to Dr. Mason were caused by her work related injury in 1991. Defendant argues that the motor vehicle accident in 1996 was an intervening event that severed any link between the need for a consultation with Dr. Mason and the work related injury in 1992.*
2. *In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, 123 Vt. 161 (1963).*
3. *Under 21 V.S.A. § 640(a), a claimant is entitled to "reasonable surgical, medical and nursing services and supplies" for injuries that arose out of and in the course of employment. 21 V.S.A. § 618(a).*
4. *One is entitled to continuing medical benefits as long as the causal relationship with work remains unbroken. As the leading commentator has written: "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).*
5. *The Larson passage is consistent with the Vermont definition of aggravation, "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." WC Rule 2.1110.*

6. *When all opinions are examined carefully, there is less of a difference between them than it seems at first blush. That is because the question at issue is not whether there is any relationship between claimant's current condition and her work related injury, but whether the MVA aggravated it.*

7. *The records and logic support the defense position that claimant's 1996 motor vehicle accident aggravated her pre-existing back condition, thereby severing the causal connection with the work related incident four years earlier. Dr. Thatcher's records support the defense position that the 1992 surgery had been successful and that the MVA was an aggravating factor. Until she was in the 1996 accident at 50 miles per hour with no restraints, claimant had not had leg pain nor had she needed devices to help her walk. Afterwards, albeit progressively, she complained of leg as well as back pain, began to walk with a limp and sought the support of a cane while walking.*

8. *Because the MVA was an aggravating event that broke the causal chain between claimant's symptoms and her 1991 work related accident, the carrier is not liable for the treatment that followed or that is proposed, including a consultation with Dr. Mason.*

ORDER:

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

Dated at Montpelier, Vermont this 2nd day of September 2004.

*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.