

A. G. v. Burlington School System

(October 10, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

A. G.

Opinion No. 27-07WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

Burlington School System

For: Patricia Moulton Powden
Commissioner

State File No. X-59442

OPINION AND ORDER

Hearing held in Montpelier on August 29, 2007

Record closed on August 29, 2007

APPEARANCES:

Arnold Gunderson, Claimant, *Pro Se*

Eric Johnson, Esq., for Defendant/ The Hartford

Wesley Lawrence, Esq. for Defendant/Royal and SunAlliance

CLAIMANT'S EXHIBITS

1. Letter from Department of Labor Specialist dated April 20, 2006
2. Letter from Scott Meyer, WorkSAFE to Mr. Chris Giard
3. Letter to Chris Giard from Sheri Lynn, ENVISION Coordinator
4. Notice Regarding Air Safety Displayed at Burlington High School (with statistical data)
5. A Report from ATC, December letter from Chris Giard
6. B Air Quality Data from ATC Regarding Burlington High School
7. E-Mails between Amy Mellancamp, Burlington High School and Claimant
8. Memo to Lyman Amsden from Chris Giard

JOINT EXHIBIT

- A. Medical Records of Arnold Gunderson (576 pages)

ISSUES:

1. Did the Claimant suffer an injury or occupational illness in the course of his employment at Burlington High School?
2. If so, was it causally related to his employment?
3. If so, to what benefits is Claimant entitled?
4. If Claimant suffered a work related injury or illness, during what time period did the injury or illness occur, for the purpose of assigning compensability?

PRELIMINARY MATTERS

1. Prior to the hearing date of August 29, 2007, Claimant filed a Motion to Strike/ and or Motion to Compel Discovery. Claimant wanted all correspondence relating to the Department of Labor's WorkSAFE File. On January 3, 2007, a letter was sent by the Department of Labor's Attorney stating that the WorkSAFE file was confidential. The letter further stated WorkSAFE had determined that no investigation of air quality was needed based on information in their file. WorkSAFE is a division of the Department of Labor that provides consultation services to employers to identify and remedy possible safety and health hazards such as noise, toxic air contaminants and other substances in the work place. The safety standards for levels of Carbon Dioxide (CO2) in Vermont are 10,000 parts per million (ppm). The employer is obligated to correct all serious hazards found by consultants within a reasonable period of time. All information is confidential unless an employer fails to correct serious hazards within a reasonable period of time and WorkSAFE has made more than one attempt to work with the employer. This program encourages and provides employers with help addressing possible safety concerns of their employees while ensuring confidentiality.
2. The Burlington School District did contact WorkSAFE regarding air safety concerns within their schools following the Claimant's illness. Notes from a meeting between WorkSAFE and the members of the school administration and the health department were provided to the hearing officer for an "in camera" inspection. The notes did not contain anything that would help the Claimant prove that the air within the Burlington Schools was unsafe at the time the meeting was held or at the time of Claimant's illness (testing was not done until months after the Claimant's illness.). The notes were made in preparation for possible litigation, not by an employee of the State, but by a Burlington School employee. The notes will remain confidential.

3. The Claimant is aware that there was a replacement of the intake air filtration system in the High School approximately a year after he became ill. He also knows that the exhaust system in the Burlington High School's air system was turned off at a certain temperature (40 degrees Fahrenheit) to save on heating costs during the winter months.
4. The issue of a possible conflict between the Department of Labor deciding this case and the Claimant's request for WorkSAFE records was addressed because the Claimant was in part contesting the withholding of material from another division within the Department of Labor. After a recess, where Defendant consulted with his wife, a paralegal, he did state that he did not believe that the hearing officer could be fair since the "Department would not rule against itself." The hearing officer explained to the Claimant that the case was not against the Department but was against the Burlington School District and its insurers. The hearing officer stated that the Department of Labor had no conflict in deciding a case involving the school system or its insurers. The Claimant decided to go forward with the hearing.
5. At the day of hearing, the Claimant presented his case which included hearsay evidence. The Department allowed this to ensure that the Claimant was able to present all the information he felt necessary in the manner in which he wanted to do it. Since the Claimant was *pro se*, the Department did allow him to proceed in a manner which was not the norm. However, after the Claimant presented his case, the Defendants moved to dismiss the case based on the facts presented and moved for a directed verdict. The Claimant did have four witnesses that he wanted to call: Walter Elliott, Chairman of the Technology Sub-Committee for the Burlington School System who is the facilities engineer at Fletcher Allen Health Care; Laura Allyn, another teacher who works for the Burlington School District and has a heart related condition; Terry Buenher, President of the Burlington Educational Association who works at the school system and repeatedly complained of air quality issues and Mr. Chris Giard, Facilities Director of the Burlington School District. However, none of these people could have provided testimony regarding what caused the Claimant's particular illness or current symptoms. There was no witness offered regarding the causal link between the air quality at the Burlington High School and the Claimant's viral bronchitis, pericarditis and chronic fatigue type symptoms.
6. None of the witnesses offered by the Claimant could provide evidence as to whether the Claimant's illness or injury was causally connected to the Burlington School System's air quality. Therefore, the hearing officer decided to proceed with Defendant's Motion for a Directed Verdict. If the Claimant had wanted to call an expert who could testify regarding the relationship of his illness to his work environment, the Department would have allowed it.

7. Defendant is relying on the following to make his case: Air Quality Associates' (ATC), an environmental testing firm hired by the Burlington School District, air quality samples which show carbon dioxide levels above 1,000 parts per million at Burlington High School in November of 2004 and a finding of fact from *Taft v. Blue Mountain*, Opinion No. 10-99WC, which states that when carbon dioxide rates are over 1,000 parts per million people may become lethargic and memory can be affected. Claimant also relies on a letter from Dr. Robert Battle, a Burlington cardiologist, dated November 14, 2004 in which Dr. Battle states the Claimant's illness stemmed from an airborne virus and the Claimant's own description of the air quality in his classroom prior to his illness.

FINDINGS OF FACT:

1. The Claimant was an employee of the Burlington School System under the Workers' Compensation Act from 1991 until the present. He works as a physics and mathematics teacher.
2. Royal and Sunalliance Insurance Company insured the Burlington Public Schools until June 30, 2003.
3. The Hartford Insurance Company insures the Burlington Public Schools presently and began their coverage on June 30, 2005.
4. The Claimant is a 58 year old man who is married and has two children. Prior to working as a teacher in Vermont, he also worked as a teacher in Connecticut. Before teaching the Claimant worked as a nuclear engineer at a nuclear facility. The Claimant was in good health until the late fall of 2002 or early winter of 2003. He has been married for almost thirty years to his wife, Margaret. He presents as an intelligent, articulate man who is frustrated by his illness and what he perceives as the lack of a proper response from the system.
5. The Claimant has a Bachelors Degree and a Master's degree in atomic and nuclear engineering from Rensselaer College. He is a non-smoker and has a seasonal allergy to pollen and asthma. Claimant's father had heart disease and died from a heart attack at an early age and his mother had diabetes.

6. Defendant describes his work conditions at the time he became ill as follows. His normal teaching classroom at Burlington High School was cold in the winter due to a faulty air infiltration system and he would “fool” the thermostat or heat control by placing a frozen burrito or ice on it to force the system to produce more heat. Also, in the winter, the Claimant often taught in the morning with his coat on. He had a student who suffered from extreme body odor and due to other student’s complaints, he sprayed air freshener in the room daily. He went through a can of air freshener a week. (This possible source of toxins was never investigated.) The Claimant’s classroom had an overhead pipe which ran the length of the classroom directly over where the Claimant stood when he taught. Due to condensation in the room in the winter months when twenty-six students were present, the pipe, which was located over his teaching area and carried cold water, often dripped water on the Claimant or paperwork on his desk. Although he states that he frequently complained of these conditions, nothing was done to the air infiltration system until after the winter of 2003. The pipe over his head was insulated just a few months prior to this hearing. The Claimant also learned in 2006 that the school’s air exhaust system was turned off at 40 degrees Fahrenheit to save on heating costs.
7. The Claimant became ill with bronchitis in late January or early February of 2003. His wife also suffered from an upper respiratory ailment but recovered after taking antibiotics. The Claimant’s bronchitis did not resolve and he had chest pain.
8. Finally, the Claimant was hospitalized at Fletcher Allen Health Care between February 13 and February 15, 2003. He was taken to the emergency room by ambulance and later admitted. No specific tests for viruses were done. However, he was diagnosed with pericarditis of a viral nature. He recovered from the pericarditis. The episode of pericarditis was considered uncomplicated and further testing of the heart has been normal. However, after the Claimant’s pericarditis was resolved, he has experienced chest pains, dizziness, low blood pressure, heart arrhythmias, heart palpitations, and shortness of breath, inability to participate in any running or biking, depression, difficulty walking upstairs and chronic fatigue. These symptoms persist today, four and a half years after viral pericarditis was diagnosed.

9. The Claimant's first report of injury stated his disability began 2/18/2006 following his acquired knowledge about the air exhaust system being turned off at 40 degrees. In the Claimant's mind, this connected his illness and the air system at his employment. The Employer denied the claim because at that time the only evidence available was a letter from the WorkSAFE program to Chris Giard at Burlington High School. The letter stating that testing done by ATC had been reviewed and there were no indications that unsafe air quality was detected. However, WorkSAFE did state that viruses are beyond their ability to detect with their analytical systems. The testing for viruses has to be done within two to eight hours in its infective form. Also, airborne viruses resulting in occupational illnesses are not covered by Workers' Compensation, if they are of the type that a person would normally be subjected or exposed to outside of or away from work, like a common cold. *See*, 22 V.S.A. § 601(23). However, even if injury and not occupational illness standards are applied, a causal link must still be established. Since there was no evidence submitted by the Claimant regarding a causal link between the Claimant's illness and his work environment, his claim was denied.
10. Another First Report of Injury was filed with the "Date of Accident" listed as January 15, 2003 and another listed June of 2003 as the relevant date. Regardless of what date is accurate, the causal nexus between the injury and the Claimant's work is the key to this case.
11. The Claimant did introduce air testing results from ATC Associates, the environmental testing firm hired by Burlington High School, in which a classroom at Burlington High School had carbon dioxide levels of over 1,000 parts per million (ppm). The tests were done in November of 2004. The test results, in the Claimant's mind, are the most similar to the conditions present when he became ill in 2003 when twenty-six students were present and the air exhaust system was turned off. The November 2004 test results showed a carbon dioxide level over 2,700 parts per million for one room (not defendant's classroom) which is well under the Vermont safety standard (10,000 ppm) but above the American Association of Heating, Refrigerating and Air Conditioning (ASHRAE) standard. (1,000 ppm.) When the carbon dioxide levels rise over 10,000 parts per million some people may be uncomfortable and experience symptoms like lethargy or memory problems. However, when a person is exposed to oxygen, the symptoms should go away. There was no evidence presented that the air quality at Burlington High School could create all of the symptoms that the Claimant is experiencing. No evidence exists regarding the quality of the air at Burlington High School in Defendant's classroom in February of 2003 when he became ill.

12. In the spring of 2003, the Claimant was treated for his viral pericarditis by Dr. Robert Battle. Dr. Battle is a cardiologist at Fletcher Allen Health Care. He is the only treating physician that the Claimant is relying on. He opined on February 14, 2004, with a high degree of certainty, that the Claimant suffered from a viral illness transmitted by airborne viral pathogens. Dr. Battle also knew of at least one other person who had a heart related illness at Burlington High School. He strongly believed that both the Claimant and the other person who experienced a heart related illness (different than pericarditis) resulted from a cluster of viral airborne illnesses at Burlington High School. However, Dr Battle never determined what the viral pathogens were or where or how they were transmitted. Dr. Battle is not an epidemiologist and is not an expert in chronic fatigue syndrome. He cannot explain the Claimant's current condition. He has seen the Claimant numerous times and believes that the Claimant has developed Chronic Fatigue Syndrome. He has referred the Claimant to other doctors and specialists. The Claimant has undergone several extensive medical tests for his heart which were found unremarkable. He has also undergone pulmonary testing which was unremarkable and various other tests for related conditions. None of these tests revealed any objective findings regarding causation.
13. After a review of all of the Claimant's extensive medical testing, Dr. John Davis, a Doctor in New Hampshire and Massachusetts who has an extensive resume including credentials from the American Disabilities Evaluation Research Institute and has a specialty in Occupational Medicine, concluded "it is my opinion to a reasonable degree of medical certainty that there is no data in the available files that relates either his (the Claimant's) episode of acute pericarditis in 2/03 or his ongoing symptoms to his work at Burlington Vermont High School." Dr. Davis writes that there is "no specific diagnosis established that would support a disease related to working as a teacher in the Burlington High School. In addition, there is no evidence that he has developed any definable chronic cardiac condition as a result of his reported episode of acute pericarditis in 2/03."
14. Dr. Daniel Weiss, a doctor at the Fletcher Allen Pulmonary Clinic, examined the Claimant on December 23, 2003. Dr. Weiss stated that the Claimant developed bronchitis in February, 2003 with associated exertional dyspnea which developed into pericarditis. The dyspnea continued when carrying heavy loads upstairs. He did not have dyspnea exacerbated by exposures to cold air, cigarette smoke, strong perfumes, wood smoke or flowers. The Doctor noted that the Claimant did have a history of seasonal allergies and noted a "history" of anemia. He was diagnosed with mild asthma. Dr. Weiss stated the Claimant also related past breathing difficulties when working outdoors and being around cattle. He did not determine the source of the Claimant's syndrome.
15. Claimant also had a record review by Dr. David Leaman, a cardiologist and Professor of Medicine located in Hershey, Pennsylvania. Dr. Leaman wrote that it is impossible to determine how and where the Claimant's presumed viral illness was contracted.

16. Dr. Richard L. Levy, a Board certified neurologist in Exeter, New Hampshire reviewed all of the extensive medical files of the Claimant. He wrote a report dated April 18, 2007. In it he opined that he could not say what caused the viral pericarditis of the Claimant or where the virus may have been acquired. "Viruses are everywhere" he stated. He also said that in his medical opinion there is no proof of the theory that the Claimant obtained the virus at work even if there was another person at the school who had it. Dr. Levy also stated that it was difficult to say what the Claimant was suffering from. He stated that it could be chronic fatigue, depression or some endocrine or metabolic dysfunction. He also stated that he could not link the Claimant's current panoply of symptoms to pericarditis.
17. Dr. Carrie Redlich, a doctor at Yale University's School of Medicine in its Occupational and Environmental Medicine Program, after doing a "careful" review of the Claimant's medical records stated in a letter dated August 22, 2007 that the Claimant's illnesses are not related to his work based on the fact that his pericarditis was mild and that his current symptoms are not consistent with a viral disease. She stated that outbreaks of viruses are common in school or public settings and not typically related to viral pericarditis. Viral pericarditis is not transmitted through contaminated air or water systems she opined. She stated the Claimant's symptoms can occur in chronic fatigue syndrome, fibromyalgia or chemical sensitivity cases. However, Dr. Redlich stated the origin of these diseases cannot or has not been specified.
18. Claimant said at hearing the only question he would ask the experts who were confounded by his symptoms was if they had ever had a patient who worked in a classroom like his classroom as he described it; cold, smelly, lack of an exhaust system when it was less than 40 degrees Fahrenheit and a faulty air intake system.

CONCLUSIONS OF LAW:

1. Claimant bears the burden of proof in all workers' compensation matters. *King v Snide*, 144 Vt. 395, 399 (1984). The Claimant's hypothesis that his illness was work related must be something more in the trier of fact's mind than mere possibility, suspicion, or surmise. *Burton v Holden Lumber*, 112 Vt. 17 (1941).
2. Where a causal connection between an illness or injurious event is obscure, expert testimony is necessary. *Lapan v Berno's, Inc.*, 137 Vt. 393 (1979). The expert testimony "must meet a standard of reasonable probability or a reasonable degree of medical certainty and there must be a causal connection with the Claimant's employment." *White v. Porter Hospital*, 139 Vt. 31, 34 (1980.) Unless other evidence in the case fairly warrants a finding of causation or excludes all other causes, a conclusion based upon medical evidence of "possibility" would be entirely speculative. *Burton v Holden Lumber*, 112 Vt. 17, 18 (1941).
3. For the purposes of this decision, the Department will take the facts presented by the Claimant regarding the ventilation system at Burlington High School as represented by the Claimant at hearing. Although the defendants dispute these facts, they agree to the assumption that they are true for the purposes of this motion.

4. Therefore, we will consider, for the purposes of this opinion, that the air quality at the high school was above the ASHRAE standard for carbon dioxide but sufficient for State regulatory standards.
5. We will also take as fact that the Claimant had viral pericarditis. We will also assume that the Claimant has Chronic Fatigue Syndrome. However, there still needs to be a causal connection between the Claimant's injury and the course of his employment.
6. Dr Battle in his November 14, 2004 letter states with a high degree of certainty that the virus was airborne and acquired while working at Burlington High School. He does not say what the virus was or how it was acquired. He merely states that it was acquired by airborne pathogens while the Claimant was working at the high school. All other experts disagreed. When conflicting expert medical opinions arise, the Department applies the following test to determine which expert was most persuasive: 1) the nature of the treatment where a patient-provider relationship has existed; 2) whether the expert had an opportunity to examine all the relevant records; 3) the comprehensiveness of the evaluations; and 4) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003). The opinions of Dr. Levy, Dr Redlich, and Dr. Davis collectively are considered the most persuasive. Even though some of the experts did not examine the Claimant personally, they all agreed that the source of the pericarditis virus was unknown even if others had similar illnesses at Burlington High School. Although Dr. Battle has good credentials and experience, he does not have expertise in occupational diseases or chronic fatigue syndrome. He is a cardiologist. He appeared to accurately diagnose and treat the Claimant for pericarditis. Although he was a treating physician which can weigh in his favor, the opinion of Dr. Redlich, an occupational and environmental disease specialist is more persuasive due to her area of expertise. Dr. Levy did not even agree that the Claimant had chronic fatigue syndrome or that his current symptoms could be linked to pericarditis even if we knew how that disease was acquired.
7. To surmise that just because two people or even three in the school system had differing heart ailments within a period of a year or so does not provide a causal link when a well credentialed expert states that viral pericarditis is not caused by air ventilation systems. As Dr. Levy said, "Viruses are everywhere." There is no evidence more than mere guesswork that the Claimant caught a virus that turned into chronic fatigue from poor air quality.

8. Even if we agree that the Burlington High School air system was less than adequate, there is no evidence that links it to the Claimant's particular ailments which include pericarditis which resolved quickly, fatigue, shortness of breath, chest pain, chest tightness, dizziness, weakness, leg pain, low blood pressure, neck pain and some memory difficulties and depression. The Claimant has undergone numerous and extensive medical examinations. His symptoms have been somewhat intermittent but consistent in nature. They seem to get better in the summer when the Claimant is not in school but worse in the winter. Since the Claimant became ill in the winter of 2003/2004, the High School ventilation system has had an overhaul which was scheduled in advance of the Claimant's concerns. However, the Claimant continues to suffer from various symptoms and has gotten worse since 2005.
9. We also know as fact, agreed to by the Plaintiff, that his illness was viral. Dr. Redlich, an expert in environmental diseases, stated that it is bacterial illnesses that can be passed through ventilation systems such as Legionnaires' disease, not viral diseases. No one has ever even identified the virus that the Claimant suffers from other than it resulted in pericarditis. No one, to a degree of medical certainty, has testified or offered evidence of what causes chronic fatigue syndrome.
10. The Claimant deserves to work in an environment where the heating system, air ventilation system and exhaust system are all working properly and providing good air quality. However, since the Claimant has the burden of proof in this matter. He failed to prove by a preponderance of the evidence that his ongoing condition or his pericarditis was caused by conditions of his employment.

ORDER:

The Claimant has failed to show the nexus between the air quality at Burlington High School and his work related illness and symptoms. Therefore, his claim is denied. The Motion for Dismissal is GRANTED.

DATED at Montpelier, Vermont this 10th day of October 2007.

Patricia Moulton Powden
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.