

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

)	State File No. H-22365
)	
John Desautels)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
The Howard Center)	Commissioner
)	
)	Opinion No. 40-00WC

Hearing Held in Burlington on June 26 and June 27, 2000.
Record Closed on August 7, 2000.

APPEARANCES:

Thomas Costello, Esq. for the claimant.
Barry Kade, Esq. for the claimant.

Andrew Boxer, Esq. for the defendant Travelers.
John Valente, Esq. for the defendant Cigna.

ISSUES:

Are claimant's current back problems causally related to his work for the Howard Center?

If so, is the claimant permanently totally disabled?

Which insurance carrier, if any, is responsible for the payment of benefits to the claimant?

STIPULATION:

Aetna/Travelers was the workers' compensation insurance carrier for the Howard Center for Human Services from November 20, 1989 through subsequent claims on February 26, 1990, December 5, 1991 and March 5, 1992.

CIGNA is the workers' compensation insurance carrier for Howard Center for Human Services from July 1, 1994 through July 1, 1995.

The claimant left the employment at the Howard Center for Human Services in August of 1996.

EXHIBITS ADMITTED:

Joint Exhibit I: Transcript of deposition of Allan Ramsay, M.D.

Joint Exhibit II: Transcript of deposition of Stanley Grzyb, M.D.

Claimant's Exhibit 2: First Report November 20, 1989.
Claimant's Exhibit 3: First Report February 26, 1990.
Claimant's Exhibit 4: First Report June 13, 1991.
Claimant's Exhibit 5: First Report December 6, 1991.
Claimant's Exhibit 6: First Report March 9, 1992.
Claimant's Exhibit 7: First Report June 1, 1995.
Claimant's Exhibit 35: Handwritten notes of Robin Gould, D.C.

Travelers Exhibit A: Medical records.
Travelers Exhibit B: Records of Dr. Renauld.

CIGNA Exhibit AA: Medical Records.

FINDINGS OF FACT:

1. John Desautels, the claimant, worked for Howard Human Services Center (Howard Center) from October 25, 1989 to September 4, 1996. During that time, the claimant was an employee and the Howard Center his employer as those terms are defined in the Workers' Compensation Act and Rules.
2. The claimant testified that his job responsibilities at the Howard Center were to maintain two office buildings and seven satellite housing buildings, consisting of 54 housing units. He testified that his job title was "maintenance supervisor," although for the most part he worked alone. His work included carpentry, plumbing and electrical work. His tools included shovels, picks, axes, hammers and other carpentry tools.
3. For many years prior to his work for the Howard Center, the claimant worked in manual labor jobs.
4. While working for the Howard Center on November 20, 1989, the claimant injured his back lifting a bench. A First Report of Injury was filed at that time. His medical records indicate that the injury from that visit cleared up completely in a couple of days.
5. The claimant testified that on February 26, 1990, he injured himself moving a refrigerator. He explained that he and another employee were moving a refrigerator down a flight of stairs when the other employee lost his grip. The claimant testified that he held on in order to prevent the refrigerator from injuring his fellow employee who was on the lower end. A First Report of Injury for the refrigerator incident was filed.
6. The next day, the claimant went to the MCHV emergency department with a complaint of a back injury prior to admission, from lifting. The note indicates that he had low back pain radiating to the right leg from moving boxes two to three weeks prior to admission, pain that increased the day before when he moved a refrigerator. The examiner noted tenderness over the L4-L5 area. In all other respects the examination was normal, including a negative straight leg test and normal lumbar spine x-ray. He was put on complete bed rest, given Advil for pain and told to see Dr Mahoney whom he saw on

March 6. In his note for that visit, Dr. Mahoney wrote that the claimant had good range of motion, normal reflexes and normal straight leg raising. He suggested that the claimant engage in a strengthening program for general fitness.

7. Dr. Liebman and Dr. White both testified that a straight leg-raising test is useful, but not conclusive in screening for radiculopathy.
8. At the hearing, the claimant testified that the person in the emergency department who had written that the claimant had been lifting boxes two weeks earlier was mistaken. He believes that the examiner must have meant “benches,” not “boxes.” Furthermore, the claimant testified that because Dr. Mahoney had told him that he had chronic disc disease, he believed that his condition was part of the aging process and could not be treated. Consequently, he said that although he always had back pain after the refrigerator incident, he did not tell his doctors because he did not think they could help him.
9. Claimant did not lose any time from work for the February 1990 incident. Nor did he return to Dr. Mahoney for treatment. However, he obtained chiropractic treatment from Dr. Liebman from March to June 1990.
10. Claimant did not treat with anyone between June 1990 and December 1990. According to Dr. Liebman’s handwritten note, the claimant was asymptomatic between June 1990 and December 1990 and had resumed full activities. In Mid-December 1990 the claimant returned to Dr. Liebman for treatment with complaints of an achy low back with tingling into his thighs. On examination, Dr. Liebman noted tenderness along the spinal processes and hypertonicity, but no nerve root signs. His neurological examination was normal. Dr. Liebman recorded his impression that this was an exacerbation of a February 1989 injury. He predicted that the claimant would need treatment for two weeks to a few months.
11. On December 5, 1991 a third First Report of Injury was filed. The claimant testified that he hurt his back by removing a moveable wall panel and carrying it to a storage area.
12. A fourth First Report of Injury was filed following claimant’s attempt to move a wall section on March 5, 1992.
13. Dr. Liebman continued to treat claimant between December 1990 and February 1992. During that period of time, he noted at almost each visit that the claimant was getting better. He described the claimant’s condition as “good” in December 1991, January 1992 and February 1992.
14. In an August 3, 1997 letter, Dr. Liebman wrote that when the claimant discontinued care on February 9, 1992, he was essentially pain free, an observation he confirmed during his testimony at the hearing.
15. Claimant testified at the hearing that he was not honest with Dr. Liebman in 1992 when he said was fine. He testified that when he told the doctor he was fine, he wanted to

discontinue treatment, although he was in terrible pain.

16. After he discontinued treatment with Dr. Liebman in February of 1992, the claimant had no further treatment for back pain until June 1, 1995. In the interim the claimant saw a number of physicians for problems including sinus problems, Adult Attention Deficit Disorder, depression, smoking and wrist pain.
17. The claimant lost no time from work between February 1990 and June 1, 1995. His job duties remained the same.
18. On May 31, 1995 the claimant lifted a mattress at work with resultant back pain that he said was as intense as what he felt when he lifted the refrigerator. A fifth First Report of Injury was then filed. The claimant sought treatment from his family physicians as well as a chiropractor, Dr. Tiffany Renaud. In her documentation of the claimant's history, Dr. Renaud wrote that the claimant had back pain two weeks before when he was shoveling at work, then felt a "pop" when he lifted the mattress. She also noted that he had back pain from lifting a refrigerator five years before for which he saw a chiropractor for 8 months, but that he had no recurrence of that pain until recently.
19. At the hearing, Dr. Renaud testified that the 1990 and 1995 incidents contributed to the claimant's condition. She also testified that the work the claimant did after 1995 contributed to his condition.
20. Dr. Renaud reviewed the November 1997 CT scan report which showed a disc bulge at L3-L4 without focal herniation and a bulge at L5-S1 that was impinging on a nerve root. It is her opinion that the disc bulge existed when she treated the claimant in 1995 because her physical findings were consistent with damage to the lumbar spine from the concrete bench incident in 1989 as well as the refrigerator incident in 1990. A disc bulge would not have shown on the plain x-rays she took in 1995.
21. The claimant sought no treatment for his back from June 1995 until March 1997, although during that time, he treated for stress, epigastric discomfort, chest pain, memory problems and sinus problems.
22. Since he left the Howard Center in 1996, the claimant has worked approximately 20 hours per week. He has done carpentry work, including building decks, windows and frames. The claimant's wife is also a contractor and he has done work for her.
23. On May 23, the claimant underwent a Functional Capacity Evaluation (FCE) at Workers' Recovery Services (WRS). Robin Gauld, P.T., the physical therapist who conducted the examination, determined that the claimant has a light duty work capacity.
24. Dr. Kenneth Leibman, a graduate of the National College of Chiropractic and a treating physician, testified for the claimant. He opined with a reasonable degree of medical certainty that the claimant had a bulging disc at the time he treated him. Although no scan was taken at that time to verify the lesion, Dr. Leibman said that he based his conclusion on the following observations of the claimant: 1) a severely decreased

lordotic curve; 2) loss of cervical curve; 3) bilateral spondylolysis shown on x-rays; 4) radiation of pain to the right leg; 5) loss of sensation to pinwheel tests in the right foot along the third and fourth digits paresthesia to the leg; 6) spasms in the lumbosacral region; 7) broad based disc bulging as shown on the 1997 scan and 8) Valsalva sign.

25. Dr. Liebman opined that the refrigerator incident of 1990 is likely to result in this sort of injury to the discs. He based that opinion on the kind of pain the claimant had, the mechanism of injury, the claimant's numbness, the Valsalva sign and his belief that the refrigerator incident was the most significant trauma.
26. On behalf of the Travelers, Dr. White, who is board certified in occupational medicine, performed an examination and evaluation of the claimant. Dr. White confirmed that the claimant has a work capacity and deferred to any FCE report. He opined that one could only speculate as to the cause of the claimant's back condition. Dr. White further opined that the conditions evident in the claimant's spine are degenerative in nature and common to males in the claimant's age group.
27. Dr. Kenosh performed an examination and evaluation on behalf of CIGNA. He had reviewed the radiology report as well as the films from June 1995. When he examined the claimant, among other observations, he noted step length and stride, the normality of his gait, and heel and toe walking. He tested sensation as well as strength. Dr. Kenosh also opined that the claimant's current back problems are unrelated to either the 1990 or 1995 incidents. In his opinion, the problems are degenerative in nature.
28. Dr. Gryzb is an orthopedic surgeon practicing with the Spine Institute in Williston, Vermont where Dr. Ramsey, his primary care physician, referred the claimant. Dr. Gryzb noted that the claimant had a bulging disc at L5-S1. Although he did not know what caused it, Dr. Gryzb noted that the claimant had multilevel disk disease of the lumbar spine, related to aging. Although he was familiar with the claimant's history, Dr. Gryzb could not identify a cause of the claimant's bulging disks at L3-5 and L4-5.
29. When Dr. Gryzb examined the claimant he found that the claimant had no trouble standing, walking, heel and toe raising or getting up and down in a squat. He found no evidence of injury to the L5 nerve root on physical examination. Other than slight restriction of motion, found no evidence of any other disease in the low back on physical examination.
30. Dr. Ramsey is a family practice physician in Colchester, Vermont who has treated the claimant for several conditions since the early 1990's. Dr. Ramsey is board certified in internal medicine and geriatrics. He first treated the claimant for back pain on June 1, 1995, the day after the incident with the mattress. Although he noted evidence of sclerosis, facet joint narrowing and moderate hypertrophic changes on a June 1995 x-rays, he could not say that those changes were related to any specific event or events.
31. After June 1995, the claimant did not treat with anyone for back pain until March 1997, although during that time, he treated with a number of physicians for a number of other medical problems.

32. In March 1997 Dr. Ramsey determined that the claimant had a positive straight leg-raising test. The claimant continued to work in the building trades.
33. In an October 7, 1997 office note, Dr. Ramsey concluded that the claimant's back problems were related to the 1989 injury, although at that time he had not reviewed medical records from 1989 through 1992. Dr. Ramsey also could not say whether any of the mechanical defects evident in the 1997-CT scan were present in 1989. There is no CT scan from 1989 for comparison.
34. Dr. Ramsey testified that the 1995 incident contributed to the claimant's condition. He also testified that the claimant's continued work in the building trades had a cumulative effect on the claimant's back condition. In particular, he opined that a lifting incident on November 10, 1997 could have caused the disc bulge at L5-S1 that appeared on the November CT scan. Dr. Ramsey also noted that on the basis of CT scan comparisons, the claimant's disc herniation at L3-4 to L4-5 actually improved between November 1997 and October 1998.
35. Dr. Ramsey concluded that the claimant is 100% disabled "given that fact that he cannot sit or stand for prolonged periods of time, he cannot lift, and he has both numbness and weakness in the right leg."
36. In Dr. Ramsey's opinion, and FCE does not give an accurate picture of the whole person because it ignores pain and the fact that the claimant must get into a comfortable position many times throughout the day in order to relieve his pain.
37. At the hearing, Kate Desautels, the claimant's wife, testified that she observes her husband suffering from chronic pain, that he limps and has trouble sleeping. He can no longer coach or play hockey or basketball with his teenage children, nor jog or walk with his wife. His work is presently limited to small carpentry jobs, "fix-it stuff," renovation and replacing doors and windows. She testified that he can work only for a few hours at a time. His schedule is so open he can even drive his son to school at noon. When she returns from work, he is lying flat on his back in order to obtain some comfort.
38. The claimant presented evidence that he has Attention Deficit Hyperactive Disorder (ADHD). This condition was first diagnosed in 1993 and is treated with medications. Because of this condition, the claimant says that he has difficulty focusing, including filling out physician's intake forms properly. The claimant has a computer but says that he has been unable to learn to use it.
39. After the claimant left the Howard Center, he received unemployment compensation, actively sought work and received counseling. He was referred to the WERC program and attended physical therapy for nine sessions, after which he stopped after what he described as a setback.
40. Claimant's attorneys filed time and expense reports demonstrating 92.24 hours and \$1,922.38 in expenses incurred by the law firm of Thomas W. Costello.

41. Attorney Barry Kade has submitted evidence of 97.3 hours worked on this case and reasonable expenses in the amount of \$267.20.
42. The claimant has also submitted a claim for \$282.00 in medical expenses and \$142.20 in other expenses in pursuit of this case.

CONCLUSIONS OF LAW:

1. In workers' compensation cases the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1962). He must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The 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 most probable hypothesis. *Burton v. Holden Lumber*, 112 Vt. 17 (1941). Where the causal connection between an accident and an injury is obscure and a layperson would have no well-grounded opinion as to causation, expert testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
3. When determining the weight to be given expert opinions in a case, this Department traditionally has looked at several factors: 1) whether the expert has had a treating physician relationship with the claimant; 2) the professional's qualifications, including the education and experience of the expert; 3) the evaluation performed, including whether the expert had all medical records in making the assessment; and 4) the objective bases underlying the opinion. *Yee v. International Business Machines*, Opinion No. 38-00WC (Nov. 9, 2000); See also, *Morrow v. Vt. Financial Services Corp.*, Opinion No. 50-98WC (Aug. 25, 1998); *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (Aug. 4, 1997).
4. In this case there is a clear conflict between the experts. The claimant offers the testimony of his treating physician who has had an eight-year relationship with his patient and that of two chiropractors, one of whom treated the claimant frequently over a two-year period. The claimant contrasts his experts with those of the defendants who saw the claimant only once. He also challenges the results of the FCE as suspect because of what he describes as minimal training of the physical therapist who conducted the examination. With regard to the first criterion, the claimant's experts have the advantage of having developed a therapeutic relationship with the claimant over time.
5. On the second factor, the defendants have the advantage of more appropriate professional qualifications for the expert opinions offered. Dr. Renaud and Dr. Liebman have demonstrated their expertise in chiropractic and appropriateness of treatment. However, Dr. Kenosh and Dr. White, both of whom have extensive experience in the area of rehabilitation medicine, have superior qualifications to those offered by the claimant on the issues central to this case. On the third criterion, the defendants again have the

advantage of having reviewed all of the claimant's medical records as well as depositions in this case and performed thorough evaluations. Although Dr. Liebman's testimony was offered in support of the claimant, his note that the claimant was pain free when he discontinued care in 1992 renders unconvincing his opinion that the claimant's current problems are due to any injury between 1992 and 1995, particularly when he did not treat the claimant or review his records for that time period.

6. Dr. Kenosh reviewed the radiology report as well as the films from June 1995. When he examined the claimant, among other observations, he noted step length and stride, the normality of his gait, and heel and toe walking. He tested sensation as well as strength. Dr. White exhibited similar comprehensiveness in his evaluation. Finally, the defense experts present the most objective assessments in this case, assessments in which objective findings on examination are given more weight than subjective reports and ones in which objective findings from other physicians, such as Dr. Mahoney, can be compared to findings years later. The claimant points to the opinion of Dr. Ramsey as the most persuasive one. Dr. Ramsey is a medical doctor well qualified as an expert in pain management and treated the claimant for years. Specifically, the claimant urges us to accept Dr. Ramsey's opinion that the forced flexion load from the refrigerator incident weakened the claimant's spine to the point where even normal activity would create symptoms. Although such a conclusion is true in the abstract, it is not true in this case. Had the refrigerator incident been as severe as the claimant now alleges, and his experts accept, he would not have recovered as completely as the records clearly document. Furthermore, the work that the claimant did after he left the Howard Center cannot be considered the normal activities that Dr. Ramsey maintains would make a work related injury symptomatic. Finally, Dr. Renaud's testimony that the claimant's work at the Howard Center as well as his work after he left the Howard Center have been "contributory" suggests that work claimant did after he left the employ of the Howard Center is responsible for his current problems.
7. After a careful review of all the evidence, I conclude that the claimant has failed to meet his burden of proving that his current problems are the result of any injury at the Howard Center. Large gaps in the treatment and clear documentation by his treating physicians that he had improved, contrary to the claimant's testimony, support the defense position that the claimant had recovered from any work related back injuries.
8. Because the claimant has not proven the necessary causal connection, it is not necessary to address the aggravation vs. recurrence issue between insurance carriers, or the permanent total disability issue.

ORDER

Based on the Foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 17th day of December, 2000.

R. Tasha Wallis
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.