

Minkler v. Town of Brattleboro (June 23, 2003)

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

Mark Minkler)	State File No. L-14825
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
Town of Brattleboro)	For: Michael S. Bertrand
)	Commissioner
)	
)	Opinion No. 29-03WC

Hearing held in Montpelier on February 3, 2003
Record closed on March 5, 2003

APPEARANCES:

David A. Gibson, Esq., for the Claimant
John T. Leddy, Esq., for the Defendant

ISSUES:

1. Did the Claimant suffer a compensable injury arising out of and in the course of his employment?
2. Is so, has his medical treatment to date been reasonable and necessary?
3. Has Claimant been totally or partially disabled as a result of a work-related injury?

CLAIM:

1. Temporary total and partial disability compensation pursuant to 21 V.S.A. § § 642, 646.
2. Medical and hospital benefits pursuant to 21 V.S.A. § 640.
3. Attorney fees and costs pursuant to 21 V.S.A. § 678(a).
4. Permanent partial disability compensation pursuant to 21 V.S.A. § 648, although the parties agree to defer the issue of medical end result and the degree of permanency until after the issue of compensability has been determined.

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit A:	Curriculum Vitae of Richard Edelstein, M.D.
Claimant's Exhibit 1:	Deposition transcript of Dr. Edelstein
Claimant's Exhibit 2:	Personnel Records
Claimant's Exhibit 3:	VOSHA Records
Claimant's Exhibit 4:	Working papers re: VOSHA reports
Claimant's Exhibit 5:	Inspection report generated for Brattleboro Police Dept.
Claimant's Exhibit 6:	Report from AIM
Claimant's Exhibit 7:	Asbestos Control Regulations Dept. of Health
Claimant's Exhibit 8:	Photographs A through N
Claimant's Exhibit 9:	Job description 1992
Claimant's Exhibit 10:	CFR re: asbestos (4 pages)
Claimant's Exhibit 11:	Custodial work (3 pages)
Claimant's Exhibit 12:	Contract between CIFCO and Town of Brattleboro
Defendant's Exhibit 1:	Curriculum vitae of James C. Rosen, Ph.D.
Defendant's Exhibit 2:	IME report of Dr. Rosen dated December 17, 2001
Defendant's Exhibit 3:	Application for employment Town of Brattleboro 7/13/89
Defendant's Exhibit 4:	Application for employment Town of Brattleboro 5/27/91
Defendant's Exhibit 5:	Letter of Marc Minkler received 5/29/01
Defendant's Exhibit 6:	Handwritten note of Jerome Remillard, 3/4/97
Defendant's Exhibit 7:	Counseling and education statement 3/4/87
Defendant's Exhibit 8:	Employee assistance Referral form 3/4/97
Defendant's Exhibit 9:	Letter of Jerome Remillard 3/10/97
Defendant's Exhibit 10:	Letter of David Gibson 3/14/97
Defendant's Exhibit 11:	Letter of Theodore Kramer 3/21/97
Defendant's Exhibit 12:	Letter of David Gibson 4/3/97
Defendant's Exhibit 13:	Letter of Jerome Remillard 4/11/97
Defendant's Exhibit 14:	Letter of Jerome Remillard 6/26/97
Defendant's Exhibit 15:	Letter of Jerome Remillard 7/17/97
Defendant's Exhibit 16:	VOSHA data 3/24/97 submitted by Town of Brattleboro
Defendant's Exhibit 17:	VOSHA employee rep. Police Assoc. data, 4/2/97
Defendant's Exhibit 18:	VOSHA employee rep. Firefighters 4/2/97
Defendant's Exhibit 19:	VOSHA employee rep Municipal Workers 3/24/97
Defendant's Exhibit 20:	Dr. Bresnahan note 8/17/95
Defendant's Exhibit 21:	Brattleboro Retreat Discharge Summary

STIPULATED FACTS:

1. At all relevant times, the Claimant was an employee of the Town of Brattleboro within the meaning of the Workers' Compensation Act (Act).
2. At all relevant times, the Defendant was an employer within the meaning of the Act.
3. Claimant has not worked at the Town of Brattleboro since March 1997.

FINDINGS OF FACT:

1. Claimant worked for the Town of Brattleboro (Town) from 1989 to 1997, at first in the Public Works Division in the highway department and later as the building maintenance coordinator, the position he held at the time of the events at issue here.
2. Prior to his employment with the Town, Claimant had been a member of the U.S. Marine Corps and had worked at the Brunswick Naval Air Station in Brunswick, Maine from 1983 to 1985. At that time, he oversaw a crew who maintained the grounds of the Naval Air Station.
3. While working for the Town, Claimant performed his work in the Public Works Department in a satisfactory manner. In the early 1990's he received outstanding, good and average efficiency reports, pay increases and promotions.
4. In 1993 the Town entered into an agreement with a company for repairs and renovations of the heating system, a process that included the removal and disposal of asbestos.
5. While in the service, Claimant received training in the handling of materials that contained asbestos and led crews in its removal. He held a federal license as a respiratory instructor in the handling of asbestos and became aware of the dangers of exposure to friable asbestos.
6. Federal regulations pertaining to asbestos apply to every place of employment where construction works takes place. 29 C.F.R. § 1910.12(b).
7. If inhaled, asbestos can cause respiratory disease and cancer, with symptoms that generally do not appear for 20 years or more after initial exposure. Id. § 1926.1101 appendices H and I.
8. Employers must inform employees of the presence and location of asbestos containing materials and those materials presumed to contain asbestos. Signs must be posted and materials labeled.
9. Asbestos was present in the basement of the Town's municipal center; the Town was not in compliance with asbestos regulations.

10. Over time, Claimant began to voice dissatisfaction at work. For example, he was concerned about the use of public monies in the purchase of public light bulbs and Christmas decorations. He took that concern to the Town Manager at the time but felt his concern was never addressed adequately.
11. Claimant did not approve of the manner in which recycling in the Town was handled because he believed it undercut efficiencies. When a recycling container was filled beyond capacity after he had complained, he felt it had been done deliberately as a vendetta against him. He was upset that Town officials did not take action on this draft of a town-wide directive outlining recycling procedures.
12. When his application for a job at a local high school was not successful, he blamed the Town Manager for not having evaluated him annually.
13. Claimant disapproved of the Town Manager's management style and felt that their conversations were taped.
14. Claimant suspected that there was friable asbestos in the municipal center basement, resulting in a white powdery substance on the floor. He claims that a short time before March 4, 1997, he realized that he had been unwittingly exposed to the presence of friable asbestos for the prior six years and voiced those concerns.
15. A meeting was scheduled for March 4, 1997 at 9:00 a.m. for the Claimant, Town Manager and Head of the Library Department to discuss: 1) Claimant's sense that he was unappreciated in his work; 2) the inability of Claimant and his supervisor to work through problems; and 3) Claimant's belief that the Town Manager was tape recording conversations and sabotaging Claimant's efforts to secure a job elsewhere.
16. Before the meeting on March 4th, Claimant had a "blackout" while at work at the municipal center and became alarmed for his health and safety. He left the workplace without speaking to anyone and sought care at the Cheshire Medical Center in Keene, about 20 miles from Brattleboro. He returned home later that day. He has not returned to work since March 4, 1997.
17. After several medical tests, including a pulmonary evaluation, Claimant was referred to Richard Edelstein, M.D., a psychiatrist who diagnosed a paranoid personality with predispositions toward depression and anxiety from past trauma. Later diagnoses of posttraumatic stress disorder (PTSD) and sedative dependence were also made.
18. Records from Dr. Edelstein note his assessment of Claimant's paranoid thinking, including delusional ideas and religious grandiosity.
19. Those with the Claimant's diagnoses can function appropriately in the workplace. And it is clear that this Claimant had worked successfully for years.
20. Claimant believes that he was exposed to friable asbestos and is at risk of developing a respiratory disease as a result, although such a condition would not manifest for 20 years.

21. Claimant has smoked a pack of cigarettes a day for 25 years.
22. Claimant took photographs of areas in the basement of the municipal building where he believes there is exposed asbestos. However, he never showed those photographs to his supervisor.
23. In June 1997, in response to a complaint, the Vermont Occupational, Safety and Health Administration (VOSHA) inspected Town offices and determined that asbestos containers were not properly labeled and housekeeping employees were not properly informed of the presence and location of asbestos “in areas which may be contacted during housekeeping activities.” Claimant’s Exhibits 4 and 5.
24. An environmental consultant took air samples from the basement of the municipal building, with results reported on October 14, 1998. At that time, the recommendations were that the “building owner should develop and implement an asbestos operations and maintenance plan to insure the material remains in good condition.” Claimant’s Exhibit 6.
25. Dr. Edelstein opined that the Claimant’s exposure to asbestos and the Town’s failure to deal adequately to the presence of asbestos in the workplace triggered the Claimant’s episode of major depression and anxiety, thereby rendering him unable to function in his job as a building maintenance coordinator. Yet he also agreed that the Claimant’s perception of the exposure to asbestos was a function of his own make-up.
26. No other Town employees made any stress claims alleging exposure to asbestos. Unions representing municipal employees expressed no concern about work area safety.
27. After examining and testing the Claimant for the Defendant, Dr. James Rosen, a clinical psychologist, opined that Claimant’s own personality and not job stressors created the psychological problems that plague him. Among other things, he is rigid and judgmental and holds higher standards for himself as a worker than most people. He exaggerated minor slights and was unable to resolve grievances because of his personality type.

CONCLUSIONS OF LAW:

28. 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).
29. 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).
30. In this as in all so called mental-mental claims, the Claimant must show that the stresses at work were objectively real and “of a significantly greater dimension than the daily stresses of all employees.” *Bedini v. Frost*, 165 Vt. 167, 170 (1996).

31. Furthermore, stress from bona fide personnel actions, such as transfers or disciplinary actions, is not compensable. *Bluto, v. Compass Group/Canteen Vending*, Op. No. 11-02WC (2002).
32. In this case, the primary reason for the Claimant's extreme anxiety and "black out" on March 4, 1997 was a 9:00 scheduled meeting, not anything to do with asbestos. The stress that resulted from the anticipation of a meeting that never occurred was personal to the Claimant and related solely to his personality and to personnel issues.
33. That Claimant later causally linked asbestos exposure to that anxiety and subsequent disability, a connection he repeatedly told his physicians, is not proof of causation. In fact, given his history and growing dissatisfaction, the more likely cause was his personal, subjective reaction.
34. As a whole, the persuasive evidence fails to support his claim that objectively real stresses significantly greater than the daily stresses of other employees caused his illness and disability. *See Bedini*. 165 Vt. 167.

ORDER:

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

Dated at Montpelier, Vermont this 24th day of June 2003.

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.