STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

John Tatro	)	State File No. J-14592
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Town of Stamford	)	
	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 25-00WC

Case submitted on records, depositions, proposed findings of facts and conclusions of law. Record closed on January 26, 2000.

APPEARANCES:

Keith J. Kasper, Esq., for Aetna/Travelers
Barbara H. Alsop, Esq., for Acadia Insurance
John T. Leddy, Esq., for Vermont League of Cities and Towns

ISSUE:

The parties agree that the sole issue for decision is which workers' compensation carrier is liable for claimant's compensable injury.

THE CLAIM:

Vermont League of Cities and Towns ("VLCT") seeks reimbursement from either Aetna/Travelers and/or Acadia Insurance for all workers' compensation benefits paid to date.

EXHIBITS:

Aetna Exhibit A:	Medical records of claimant, John Tatro
Aetna Exhibit B:	Deposition of John Tatro
Aetna Exhibit C:	Original Deposition of Dr. Robert Legrand Van Uitert
Aetna Exhibit D:	Affidavit of Dr. Kurt Wieneke, dated June 22, 1999
VLTC Exhibit 1:	Medical records of claimant John Tatro
VLTC Exhibit 2:	Deposition of John Tatro, dated April 9, 1997
VLTC Exhibit 3:	Employer First Report of Injury, dated January 22, 1996
VLTC Exhibit 4:	Deposition of Dr. Kurht Wieneke, dated October 19, 1999
VLTC Exhibit 5:	Curriculum Vitae of Dr. Kurht Wieneke
VLTC Exhibit 6:	Supplement Report of Dr. Kurht Wieneke, dated January 11, 2000
VLTC Exhibit 7:	Deposition of Dr. Robert Van Uitert, dated December 10, 1999
VLTC Exhibit 8:	Supplement Report of Dr. Robert Van Uitert, dated October 6,1999

FINDINGS OF FACT:

1. Claimant is not a party to these proceedings because he has received all benefits to which he is currently entitled.

2. At all times relevant to this action, the claimant, John Tatro, served as Road Commissioner for the employer, the Town of Stamford.

3. From May 1989 through at least January 1994, Aetna Life & Casualty Company was the workers' compensation carrier for the Town of Stamford.

4. As of May 1995, Acadia Insurance Company was the workers' compensation carrier for the Town of Stamford.

5. Beginning on October 1, 1995, Vermont League of Cities and Towns (VLCT) became the workers' compensation insurer providing workers' compensation benefits for the Town of Stamford.

6. The claimant was injured on May 11, 1989 while at work when a tree struck him in the lower back. The claimant was out of work from May 11, 1989 through May 17, 1989. Aetna/Travelers paid benefits for this claim.

7. A CT scan was performed on September 25, 1989 by radiologist Dr. H.M. Gold. The scan report revealed a very large disc herniation at the L4-5 level. Additionally, there was a mild bulging, slightly greater on the right side, at the L5-S1 region of the claimant's spine.

8. The claimant was also examined by orthopedic surgeon Dr. Kurht Wieneke on September 28, 1989. Dr. Wieneke agreed with Dr. Gold's assessment and informed the claimant that surgery would be necessary to correct the problem with his spine; specifically the herniation at the L4-5 level. Claimant declined surgery at that time and returned to work with the Town of Stamford.

9. The claimant suffered other job-related injuries subsequent to his injury of May 1989.

10. On January 23, 1994, while trying to unplug a sander at work, the claimant was thrown off the back of a truck, causing him to fall ten feet to the ground. He suffered a back injury, and was out of work from January 24, 1994 through January 28, 1994. Aetna/Travelers paid benefits for this claim.

11. Claimant sought treatment from Dr. Daniel Sullivan who opined that claimant may be suffering from sciatica, an irritation of the nerve root. Sciatica is consistent with disc disease. Sciatica is further consistent with disc disease at the L5-S1 level. Claimant returned to work with the Town once again.

12. The claimant was again injured on the job on May 19, 1995 while changing a truck tire. Claimant hurt his back once more and was out of work from May 19, 1995 through May 29, 1995. Arcadia paid benefits for this claim.

13. Claimant again sought treatment from Dr. Sullivan who diagnosed a severe right low back muscle strain, possibly lumbar radiculopathy. Radiculopathy is nerve root irritation.

14. An x-ray film was taken on June 16, 1995 by radiologist Dr. Currie. The radiology report states: "There is disc narrowing at L3-4 and L5-S1…There is some sclerosis at the L5-S1 facet joint on the right."

15. Claimant underwent a CT scan by radiologist Dr. Kravitz on July 17, 1995. The scan report found a right disc protrusion at L5-S1 level with evidence of some impingement on the right S1 nerve root. Dr. Kravitz recommended a MRI for more definition. The claimant did not have a MRI done at this time.

16. Upon the recommendation of Dr. Sullivan, neurologist Dr. Van Uitert examined claimant in August 1995. He reported that the claimant was suffering from a right-sided L5-S1 disc irritation that was irritating the right S1 nerve root. He also found that the claimant had suffered lower back symptoms over the past six to eight years. He opined that the irritation "most likely relates to multiple injuries over the course of the past six to eight years."

17. Dr. Van Uitert opined that surgery might be needed in the future. Yet, the claimant wanted to avoid surgery, and instead, requested conservative treatment.

18. Claimant suffered back pain at work in December 1995 when he picked up a 4-inch tree limb. He did not miss any time from work. Instead, he telephoned his primary care doctor for a Medrol-dose pak, a pain relief prescription for acute problems.

19. Claimant sought medical treatment once more after suffering persistent lower back and right leg pain while raking the Town lawn in February 1996. Claimant was returned to the Medrol-dose pak and instructed to stay out of work indefinitely. But, by February 27, 1996, the claimant had returned to work.

20. An MRI was performed in March of 1996. This evaluation noted that the prior herniated disk at L4-5 was now a "small disc bulge." It demonstrated that the claimant's current problem was a right herniated disc in the L5-S1 region of his back. Claimant was referred to a surgeon for consideration of surgical intervention.

21. The neurological surgeon, Dr. Crowell, in conjunction with a trained radiologist, determined that claimant's problem had progressed to the point where surgery was necessary.

22. Dr. Crowell performed a right diskectomy at the L5-S1 region of the claimant's spine on April 3, 1996. This procedure confirmed the disc herniation at L5-S1 and also discovered "several free [disc] fragments." Dr. Crowell opined that these fragments were suggestive of a recent occurrence.

23. Following surgery, claimant recovered and returned to his previous employment with the Town.

24. Upon direct inquiry by the Department, both the treating surgeon (Dr. Crowell) and claimant's treating physician (Dr. Sullivan) affirmatively opined that claimant's "most recent" incident was the cause of claimant's surgery.

25. Dr. Sullivan further characterized the December 1995 incident as an "exacerbation" of his pre-existing back condition.

26. At the request of VLCT, Dr. Wieneke evaluated the claimant once more in October 1997 and opined that claimant's current condition was a recurrence of his original condition.

27. Upon Aetna/Travelers inquiry, Dr. Van Uitert testified in his deposition on December 10, 1999 that a disc herniation could self heal. He testifed that 85% of all disc herniations heal without surgical intervention. He opined that this is what probably happened to the disc herniation at the L4-5 level resulting from the May of 1989 injury. He also pointed out that if the current L5-S1 hernia or disc fragments were from 1989, then there would be scar tissue forming at the site of the herniation. He noted, however, that the operative report makes no reference to such scar tissue.

28. Dr. Van Uitert concluded that claimant's surgery was caused by a disc herniation resulting from the December 1995 injury, and the existence of the free fragments.

29. Dr. Wieneke agreed with most of Dr. Van Uitert's testimony. Yet, he disagreed with Dr. Van Uitert's opinion regarding the characterization of the cause of the surgery. He testified in his deposition that the primary cause of the claimant's surgery was the first injury in 1989, with the second most important injury being an aggravation due to the January 1994 incident.

30. Dr. Wieneke testified that he agreed with Dr. Van Uitert's August 1995 opinion that the claimant's condition was caused by right-sided L5-S1 disc irritation as a result of the claimant's multiple injuries over the past eight years. As such, Dr. Wieneke opined that the May 1995 incident was a recurrence.

31. By March 30, 1998, claimant was assessed at a 21% permanency to his back; an amount of permanency that is equal to 115.5 weeks of benefits. VLCT entered into an agreement with claimant for the payment of permanent partial disability compensation. Claimant requested and received a lump sum payment of benefits.

CONCLUSIONS OF LAW:

1. Aetna/Travelers argues that the claimant suffered an aggravation of his admittedly pre-existing back condition while VLCT was on the risk. Therefore, neither Travelers nor Acadia are responsible for reimbursing VLCT for its expenditures in this matter. They also assert that the December 1995 and February 1996 incidents led to a worsening of the claimant's condition because it led to new complaints of ongoing right leg numbness that had not existed prior to VLCT coming on the risk.

2. Acadia urges the Department to find that it cannot be responsible because this was an aggravation of a pre-existing condition. As such, they assert that VLCT, both as payor of the disputed benefits and as the carrier on the risk at the time of the most recent injury,

has the burden of proof. Furthermore, Acadia argues that the claimant significantly worsened after either the December 1995 or February 1996 incident; although regardless, VLCT was on the risk both times. Additionally, Acadia asserts that the medical testimony determined that the recent incident of injury led to the claimant's surgery.

3. VLTC asserts that it cannot be the responsible carrier because this was a recurrence of his prior injuries. It also asserts that the mild bulging in the L5-S1 region in 1989 could have naturally progressed into a disc protrusion and finally into a full-blown herniated disc over time without the occurrence of another traumatic event. Accordingly, they posit that this would indicate that all subsequent events were merely recurrences of the initial 1989 injury.

4. In the case before the Department, the evidence has sufficiently established a causal connection between all of claimant's injuries and his employment activities. This conclusion is further bolstered by the fact that no evidence or testimony was presented establishing any causation outside of the workplace. In fact, all parties to this action appear to agree that claimant's lower back injuries are directly work-related.

5. The law does not require one to identify a specific accident that caused or contributed to a subsequent disability. *Jacquish v. Bechtel Construction Co.,* Opinion No. 30-92WC (Dec. 29, 1992). A finding that a claimant's various work activities and duties contributed to and/or caused an injury satisfies the causal connection requirement. *Id.* Once the initial determination of causation is established, the burden falls to the carrier to prove that the claimant's work under its watch did not contribute to the condition.

6. The initial step of this analysis requires the proper assignment of the burden of proof. In disputes between carriers, the burden of proving which carrier is on the risk for a particular injury is generally placed upon the carrier that is attempting to relieve itself of liability. *Bressette-Roberge v. Personnel Connection,* Opinion No. 3-99WC (Jan. 26, 1999); *Trask v. Richburg Builders,* Opinion No. 51-98WC (Aug. 26, 1998*).* The employer at the time of the claimant's disability and surgery carries the burden of proving that the claimant's condition was a recurrence of his old injury. *Longe v. Boise Cascade Corp.,* Opinion No. 42S-98WC (Jul. 20, 1998).

7. Since VLCT was the carrier on risk and is attempting to relieve itself of liability, VLCT has the burden of proof. Thus, VLCT must prove that the claimant's work under its watch did not contribute to his herniated disc. VLCT must show that the claimant's injury was a recurrence and not an aggravation in order to absolve itself of liability.

8. The question then is whether VLCT, as the party that carries the burden of proof, demonstrated that claimant's condition resulting from the 1989 injury had resolved or become stable. If VLCT can demonstrate that the claimant's condition never resolved or stabilized, then VLTC is not liable. "If the injury … was an aggravation of the claimant's pre-existing condition, then [the subsequent insurer] is responsible, whereas if it were merely a recurrence, it would be the responsibility of [the initial insurer]." *Abbott, supra.*

9. In distinguishing between the terms "recurrence" and aggravation," the Vermont Supreme Court articulated that the difference between the terms is relevant when the original injury and the aggravation or recurrence are not covered by a single employer or

insurer. *Pacher v. Fairdale Farms and Eveready Battery Co.,* 166 Vt. 626, 627-28 (1997*), aff'd mem.* Under the *Pacher* reasoning, there first needs to be a determination of whether the claimant suffered "separate injuries." If so, then there must be a determination of whether each separate injury casually contributed to the disability and whether it is difficult or impossible to allocate liability among the potentially liable carriers. The Court has recognized that there are cases "where separate injuries all causally contribute to the total disability so that it becomes difficult or impossible to allocate liability among several potentially liable employers." *Pacher at 628, n. 2.* In such cases, the last injurious exposure rule would be appropriate, making the last carrier liable for the full extent of the benefits.

10. *Pacher* further stated that a second incident constitutes an "aggravation" if it "aggravated, accelerated, or combined with a pre-existing impairment to produce a disability greater than would have resulted from the second injury alone." *Id.* at 627-28.

11. Yet, the definitions of both "aggravation" and "recurrence" need to be clearly understood. The Department defines an "aggravation" as an "acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." *O'Neill v. Manchester Wood,* Opinion No. 24R-99WC (Jun. 29, 1999); *Abbott v. Bombardier, Inc.,* Opinion No. 10-96WC (Mar. 13, 1996); *Vermont Workers' Compensation and Occupational Disease Rule 2(i).* Furthermore, an aggravation has been additionally explained as a destabilization of a condition which had become stable, although not necessarily fully symptom free. *Cote v. Vermont Transit,* Opinion No. 33-96WC (Jun. 19, 1996). A "recurrence" is defined as the "return of symptoms following a temporary remission or a continuation of a problem that had not previously resolved or become stable." *O'Neill, supra; Abbott, supra; Rule 2(j), supra.*

12. Succinctly, the difference between an aggravation and a recurrence can be described as the difference between a "gradual worsening of the claimant's condition sufficient to constitute a new injury" and the "natural progression" of the injury itself. *Blanchard v. Vicon Recover Systems, et al.,* Opinion No. 31-96WC (May 9, 1996).

13. Furthermore, the Department has set forth the appropriate standard for an analysis of aggravation versus recurrence. *Momaney v. Geka Brush Manufacturing,* Opinion No. 44-99WC (Nov. 17, 1999); citing *Pacher, supra.* Under an aggravation/recurrence analysis, the Department utilizes several factors to assist in the classification of an impairment as a "recurrence" or an "aggravation of a pre-existing injury." A series of questions are asked to determine which carrier is responsible:

> (1) Did a subsequent incident or work condition destabilize a previously stable condition?
> (2) Had the claimant reached a medical end result in his recovery while one carrier was on the risk before moving to work under another carrier?
> (3) Had he stopped treating medically before his work moved from one carrier to another?
> (4) Had the claimant successfully returned to work?
> (5) Did any subsequent work contribute to the final disability?

Bressett-Roberge v. Personnel Connection, Opinion No. 03-99WC, (Jan. 26, 1999); See *Trask v. Richburg Builders,* Opinion No. 51-98WC (Aug. 26, 1998). An affirmative answer to each of the questions as worded here would lead to a conclusion that claimant suffered an aggravation.

14. When the Department's factors are examined and applied in this instance, they demonstrate that although there was a gradual worsening of claimant's condition, it occurred in a job that required excessive amounts of intensive physical labor. There is a distinct difference between a worsening due to the natural progression of a condition and a worsening resulting from the nature of a job.

15. From the onset of the initial injury in May of 1989, the claimant's condition was a natural progression of the injury itself that could only worsen due to the nature of his job. Further examination and application of the evidence demonstrates that the claimant's condition resulting from the initial incident in May of 1989 never resolved or stabilized.

16. The claimant testified that he has been in pain since May of 1989 that "never went away actually. It's always been here. It comes and goes." It is clear from the medical records, and testimony from the claimant and Dr. Wieneke that the claimant's condition never stabilized.

17. The claimant was clearly in a job that required excessive amounts of intensive physical labor; thus any or all of the subsequent incidents could have exacerbated his condition. Yet, none of the incidents could have destabilized a condition that had never been stable. As such, the first factor supports a finding of recurrence.

18. Until March of 1998, there had been no medical determination of whether claimant had reached a medical end result from his initial 1989 injury. With no medical determination of stabilization or resolution, it is impossible to establish exactly when, if ever, this occurred. Hence the second factor, whether claimant reached a medical end result under one carrier before moving to work under another carrier also supports a finding of recurrence.

19. Examination of the third factor also favors a recurrence determination. The claimant never stopped treating medically for his lower back condition. The notes in claimant's medical record of March 12, 1992 reflect a history of lumbar disc disease, although at that time he had no specific back discomfort or pain radiating to his legs.

20. More specifically, the January 25, 1994 medical record that notes by that time, the claimant was suffering from lower right back pain with pain radiations to his right leg. Furthermore, the claimant continued to suffer from recurrent back pain throughout 1994. Aetna/Travelers was the workers' compensation insurance carrier for the 1994 calendar year.

21. Claimant appears to have had long-term episodic back pain and right leg pain. The claimant testified that his pain has bothered him off and on since 1989 and has never gotten better. Although claimant returned to work after each incident, this is in tandem with the fourth factor; the claimant appears to just have simply worked while in pain and sought medical treatment when the pain became unmanageable. Just because the

claimant returned to work after every incident is not necessarily indicative of a "successful return."

22. Conversely, the fifth factor mandates an aggravation finding when a claimant's subsequent work independently contributed, even slightly, to the causation of a disabling condition. *Frederick v. Metromail Corp.*, Opinion No. 25-97WC (Sept. 22, 1997); *Lavigne v. General Electric Lockheed Martin,* Opinion No. 12-97WC (Jun. 17, 1997). Furthermore, the subsequent destabilization need not be instantaneous, but may develop over time. *Id*. However, the gradual worsening needs to be sufficient enough to constitute a new injury. *Blanchard, supra*. Accordingly, the greatest weight should be imparted to the element that points to an independent contributing cause of a claimant's disability. *Badger v. Cabot Hosiery Mills*, Opinion No. 21-97WC (Aug. 22, 1997 & Aug. 13, 1997).

23. Four physicians were consulted regarding the causation issue: Dr. Sullivan, as the treating physician; and Dr. Crowell, as the treating surgeon. Having previously treated and/or examined the claimant, Dr. Wieneke and Dr. Van Uitert were also consulted. All medical records were made available, and all four have comparable professional qualifications. However, all things being equal, there are some conflicting and bothersome interpretations.

24. When evaluating and choosing between conflicting medical opinions, the Department has traditionally considered several factors: (1) the nature of treatment and length of time there has been a patient-provider relationship; (2) whether accident, medical and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination; and (5) the qualifications of the experts, including professional training and experience. *Morrow v. Vt Financial Services Corp*., Opinion No. 50-98WC (Aug. 25, 1998); *Durand v. Okemo Mountain,* Opinion No. 41S-98WC (Sept. 1 & Jul. 20, 1998).

25. Three out of the four physicians testified that the claimant's fifth incident, which occurred in February of 1996, necessitated the surgery. Yet, two of these same physicians had previously recommended surgery. Although surgery was first recommended in 1989 for the claimant's condition at the L4-5 level which eventually self-healed, surgery was again recommended in 1995, this time in reference to the condition at the L5-S1 level. Apparently, no other incident after 1995 was needed to necessitate surgery and effectuate a possible stabilization of the claimant's condition at the L5-S1 level.

26. Notably, Dr. Van Uitert had opined that the claimant's condition in August 1995 was due to "multiple injuries over the course of the past six to eight years" and that surgical intervention would be necessary. By October 1999 he had decided that the surgery was actually necessitated by claimant's December 1995 injury.

27. At the least, this supports the earlier contention that the claimant's condition never resolved or stabilized. It also illustrates that although the claimant's condition gradually

worsened, it was simply a natural progression of the initial injury; it was not a destabilization.

28. The terms "aggravation" and "recurrence" are "legal rather than purely medical terms. To determine which applies requires close consideration of medical evidence, but ultimately the determination is a legal one." *Momaney, supra*.

29. In *Bushor v. Mower's News Service*, Opinion No. 75-95WC (Oct. 16, 1995), the Department held that "claimant's symptoms remained essentially unchanged since the [initial] injury. The claimant experienced brief periods of remission, followed by a return of the symptoms. When "claimant's symptoms were never completely absent," the Department found that an increase in those symptoms was a recurrence. *Correll v. Burlington Office Equipment*, Opinion No. 64-94WC (May, 1995).

30. The claimant, from his own testimony, was never free from pain; neither symptom-free nor stable following the 1989 injury. He has exhibited such pain since that time and throughout until the time of his surgery in April of 1996. Essentially, his symptoms were never completely absent; they simply increased with each new incident.

31. Furthermore, all of the doctors observed the same subsequent problems with claimant's lower back as had been observed at the time of the initial 1989 injury. Although the nature of the claimant's work contributed to the underlying pathology, the claimant experienced a continuation of a problem that had never resolved or stabilized.

32. Aetna/Travelers admits that the claimant had a pre-existing back condition. They assert that the December 1995 and the February 1996 incidents worsened the claimant's condition because it led to new complaints of ongoing right leg numbness that had not existed prior to VLCT coming on the risk.

33. Yet, this was not the first time that the claimant had experienced right leg pain. In January 1994, when Aetna/Travelers was the workers' compensation insurance carrier, the claimant sought medical treatment for right leg pain. At this point, the claimant was diagnosed with sciatica, an irritation of the nerve root that was suggestive of disc disease at the L5-S1 level. The same disc level that required surgery in April 1996.

34. Furthermore, the December 1995 incident was initiated by the claimant picking up a 4-inch diameter tree limb, and the February 1996 incident was initiated by the claimant raking the town yard. These are the incidents that both Aetna/Travelers and Acadia assert worsened the claimant's condition.

35. Yet, I find it hard to believe that being thrown ten feet from the back of a truck (the January 1994 prior incident) or changing a truck tire (the May 1995 prior incident), in which Aetna/Travelers and Acadia were the respective carriers, were not more labor intensive and straining than picking up a relatively small tree limb or raking.

36. If picking up a relatively small tree limb and raking can worsen a lower back injury to such a degree to necessitate surgery, it is suggestive that something much more major has previously occurred. Accordingly, the assertions that the December 1995 and/or the February 1996 worsened the claimant's condition are peculiar.

37. Additionally, only one of the Department's factors, the fifth, supports an aggravation determination, and it does so in a tenuous manner. However, although the fifth factor carries great weight, it must be balanced against the cumulative effect of the other factors. Therefore, when all of the factors are collectively weighed and taken in light of the overall evidence and evaluated accordingly, it supports a legal determination of a recurrence of claimant's May of 1989 lower back injury.

38. Accordingly, claimant's injury was a recurrence, and the liability lies with the initial insurer Aetna/Travelers.

ORDER:

Therefore, based on the foregoing Findings of Fact and Legal Conclusions Aetna/Travelers is hereby ORDERED:

> To the extent that Vermont League of Cities and Towns has paid any workers' compensation benefits, Aetna/Travelers shall reimburse Vermont League of Cities and Towns for such payments.

Dated at Montpelier, Vermont, this 9th day of August 2000.

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R. Tasha Wallis
Commissioner