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

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| | ) | State File No. D-21586 |
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| John Demgard | ) | By: Margaret A. Mangan |
| | ) | Hearing Officer |
| v. | ) | |
| | ) | For: R. Tasha Wallis |
| | ) | Commissioner |
| | ) | |
| Rutland News, Inc | ) | Opinion No. 32-00WC |

Hearing held in Rutland on June 6, 2000
Record closed on July 10, 2000

**APPEARANCES:**

John N. Bilinski, Esq. for the claimant
Andrew W. Goodger, Esq. for the defendant

**EXHIBITS:**

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| Claimant's I: | Medical Records submitted by the claimant<br>a. Edward Brown. D.C.<br>b. Peter Upton, M.D.<br>c. Howard Weaver, M.D.<br>d. Castleton Health Associates |
| Claimant's II: | Stipulation |
| Claimant's III: | Attorney Fee agreement and supporting documentation |
| Defendant's A: | Medical records submitted by the defendant |

**ISSUES:**

1. Whether the claimant's current back condition is causally related to his May 8, 1991 work-related injury.

2. Whether the periodic chiropractic treatments provided to claimant and treatments provided by Dr. Upton and Dr. Dirksen were necessary and causally related to the claimant's 1991work-related injury.

3. Whether claimant is entitled to temporary total disability benefits.

4. Whether claimant is entitled to an award of attorney's fees.

**Stipulation of uncontested facts:**

1. On or about May 8, 1991 Rutland News Co. was an employer within the meaning of the Vermont Workers' Compensation Act and Rules.

2. On May 8, 1991 the claimant John Demgard was an employee of Rutland News as defined under the Vermont Workers' Compensation Act and Rules.

3. On May 8, 1991, while in the employ of Rutland News Co, the claimant had an average weekly wage of $512.50.

4. On May 8, 1991 claimant suffered a work place injury of a lower lumbar sprain to his back in the course of his employment for Rutland News Co.

5. The parties entered into an agreement for permanent partial disability benefits based on a 25% impairment to the claimant's spine. This Department approved that agreement on April 1, 1996.

6. There are no objections to the admission of the medical records and reports in this case.

**FINDINGS OF FACT:**

1. The exhibits have been admitted into evidence. Official notice is taken of all forms filed in this Department.

2. The claimant, John Demgard, worked for the Rutland News for eleven years. He testified that his job involved driving a truck from Rutland, Vermont, early every morning to Troy, New York, loading the truck with bundled newspapers weighing 30 to 50 pounds then driving back to Rutland where he unloaded the truck.

3. On about May 8, 1991 the claimant injured his back in the course of his employment with the defendant. The First Report of Injury, filed on May 15, 1991, states that he was "picking up a pallet in back of truck." The injury itself was described as "lower lumbar sprain--lower back."

4. The claimant did not assert a claim for, nor did he receive temporary total disability benefits as a result of the work-related accident on May 8, 1991. However, he testified that he has suffered from continued back pain since that injury and that he has had no new injuries. He also testified that his low back pain increases at times with no apparent precipitating event or with only a trivial event, such as bending over to pick up a belt. Furthermore, he testified that his pain increases when he rides in a car or truck or drives a tractor.

5. Shortly after the accident, the claimant left the employment of Rutland News and began working for Guy Wilson driving an eighteen-wheeler, delivering groceries to Grand Union supermarkets. The claimant testified that he did not lose more than a few days work between jobs.

6. From the date of the injury until October 1991, the claimant received approximately six chiropractic treatments from Edward W. Brown, D.C., and one from another chiropractor, Dr. Ashcroft, on October 21, 1991. Almost five years elapsed before he sought chiropractic care again on July 10, 1996.

7. A CT scan of the claimant's lumbar spine performed on August 4, 1992 indicated a disc protrusion at L3-4 on the left and at L4-5 on the right.

8. Peter D. Upton, M.D., a neurosurgeon, first saw the claimant on August 20, 1992. He examined the claimant and reviewed the CT scan taken two weeks earlier. He found no evidence of spinal stenosis at the level scanned. Dr. Upton also found no evidence, historically or clinically, of nerve root compression and "no reason in the world" why he could not continue to drive for Guy Wilson. However, at that time Dr. Upton believed that there was a risk that one of the protruding discs could rupture.

9. The claimant testified that he was able to function at his job at Guy Wilson with adaptations such as stopping and stretching.

10. When Dr. Upton next saw the claimant on April 30, 1993, he noted that the claimant had continued to work as a truck driver for Guy Wilson and that he was performing work activities, such as plowing and operating a backhoe.

11. The claimant testified that he continued to work for Guy Wilson driving a tractor-trailer until mid-1993 when he left that job to become self-employed. He also testified that he did not lose any time from work due to back pain while he was employed with Guy Wilson. Yet, the claimant also testified that it was back pain that prompted him to quit the Guy Wilson job. However, that testimony was in conflict with the explanation he provided at his deposition, i.e., that he left Guy Wilson because he had reason to believe that the company was going to dissolve in the near future and he thought it would be better if he left beforehand. Claimant conceded that his belief that the business was going to fold was the real reason he left.

12. The claimant testified, unconvincingly, that the purpose of becoming self employed was, in part, to give him more control over his working conditions to better control his back symptoms.

13. While still employed by Guy Wilson, the claimant purchased heavy equipment, including a dump truck, front-end loader and a backhoe. He repaired that equipment then used it to haul dirt and gravel to construction sites, build roads with gravel, pull out tree stumps and deliver firewood.

14. The claimant testified that he continued to do that work on a full-time basis after he left Guy Wilson in 1993. In addition, the claimant seeded lawns, spread hay and cut firewood for his personal use as well as for sale. He used the dump truck to deliver the wood.

15. In his estimate, claimant cut and split six to eight cords of wood each year for his personal use and several more cords for sale. He testified that he cut the wood himself

using a chainsaw then spit it with a hydraulic wood splitter and loaded the cut and split wood onto his dump truck for delivery.

16. Claimant testified at the hearing that he also had experience performing paving work, roofing work and repairing underground septic systems which he would excavate using his backhoe.

17. The claimant was self-employed when Dr. Upton next saw him on June 8, 1993. The doctor determined that the claimant was not a surgical candidate. Although he had "a couple of bulging lumbar discs, [he had] no sign of any nerve root compression." Dr. Upton noted that the claimant was working with a crew and was operating heavy equipment. However, the claimant told Dr. Upton that after an hour or so, he had to get off and walk around because his back ached.

18. On June 29, 1993 Dr. Upton placed him at a medical end result and assessed him with a 27% permanent partial impairment of the spine. Later, the parties agreed to a 25% rating, which the Department approved on April 1, 1996.

19. Since 1996 the claimant has owned and operated his own 54-acre campground, Big D Campgrounds. As owner he has been responsible for maintaining the campground himself, which involves landscaping, excavation work, plumbing, cutting wood and maintaining the roads. For the last six to eight years, he has been raising beef cattle on that campground and does the work necessary to care for them, including feeding them hay.

20. The claimant began seeing Dr. Brown again in July 1996 and continued to treat with him for low back pain until the end of 1999. He has also treated with Dr. Dirksen at the Castleton Health Center. No medical records have been produced for the time between June 1993 when Dr. Upton placed him at a medical end result and July 1996 when he returned to Dr. Brown, a three-year period during which I conclude he received no medical treatment for his back.

21. As Dr. Brown's records amply demonstrate, claimant's heavy work activity prompted him to seek chiropractic care. For example, his August 6, 1996 note states that the claimant "works daily outdoors either on his feet or climbing in and out of heavy equipment." The October 9, 1996 note indicates that the claimant had been "driving his dump truck all day 5-6 days a week which he admits is aggravating his back…." The July 9, 1997 note states that the claimant had "extreme low back pain across the LS level with pain radiating down both post thighs to calfs. Says has been driving truck again delivering gravel the past month or so which he thinks brought it on."

22. In his July 18, 1997 note, Dr. Brown indicated that the claimant had severe low back pain and right leg pain that he attributed to doing "three trips to Rutland and back with his truck yesterday." Less than a week later, in his July 22, 1997 note, Dr. Brown wrote that the claimant was driving his dump truck delivering soil and firewood, which caused him to experience pain. In September Dr. Brown again noted that the claimant had pain after driving his truck to Rutland.

23. On January 7, 1998, Dr. Brown noted that for the previous two to three weeks, the claimant had been "limping on an injured foot which in turn aggravated his back."

24. When the claimant treated with Dr. Brown on January 12, 1998, the doctor noted that the claimant's back was "very painful" because he had to cut firewood and fixed the road due to the winter storm and power failure." The next week Dr. Brown noted that the claimant aggravated his low back from driving his truck and hauling dirt, as reflected in his January 20, 1998 note.

25. After a couple of days of heavy work on firewood and a truck repair, the claimant treated with Dr. Brown on April 8, 1998. Driving his dump truck delivering gravel caused back pain as reflected in Dr. Brown's April 8, 1998 note.

26. An October 30, 1998 CT scan revealed a central and right-sided disc herniation at L4-5 with the remainder of the disc spaces intact.

27. After five years, the claimant returned to Dr. Upton for treatment of low back pain on November 5, 1998. After comparing the 1992 and 1997 CT scans, Dr. Upton concluded that the claimant's L4-5 condition had clearly worsened although the L3-L4 condition had improved.

28. A chiropractic note of May 17, 1999 indicates that the claimant experiences the onset of low back pain caused by lawn mowing work. The claimant testified that it was on that day, May 17, 1999, that he became totally disabled from work.

29. When Dr. Upton saw the claimant again on June 15, 1999, he noted that the claimant had been unable to work for the past six to eight weeks due to back pain. Significantly, the examination at that visit revealed for the first time that the claimant had a "fairly strikingly diminished right ankle jerk."

30. During his telephone testimony at the formal hearing, Dr. Upton testified the claimant is totally disabled from work and that but for the 1991 injury, the claimant would not be in the position he is in today. Nothing in the videotape changed Dr. Upton's opinion. The doctor agreed that he based his statement about the claimant's total disability from work on the claimant's statement to him. He further testified that a diminished ankle jerk is a sign associated with the nerve roots of the lumbar spine. If the claimant had not had the diminished ankle jerk before June 15, 1999, Dr. Upton explained, the emergence of the sign means that his condition had worsened.

31. Dr. Upton's September 24, 1999 and March 23, 2000 notes reflect the claimant's statements that he was unable to work.

32. The claimant testified at the hearing that he had been unable to work at all since May 1999. A surveillance videotape taken on July 13, 1999 depicted him unloading a haying tractor from trailer. In the process, the claimant used a large wrench to remove heavy chains that secured the tractor to the trailer. He climbed up onto the trailer bed and jumped off with ease, demonstrating no limitation in his movements and providing no indication of pain or discomfort. The claimant then was shown on his tractor haying a field.

33. The claimant testified that he had loaded the tractor onto the trailer at his home, where both pieces of equipment were kept, in order to transport the equipment to the hay field. He explained that after he had finished haying that day, he would have loaded the tractor back onto the trailer, driven home and then unloaded the tractor from the trailer that evening or the next day.

34. It was a sheer coincidence, according to the claimant, that an investigator filmed him on the only day since May 1999 that he had tried to do some work.

35. In the nine years since he left the Rutland News, the claimant testified he never once injured his lower back.

36. Dr. Upton agreed that the work activities the claimant had engaged in, as reflected in Dr. Brown's records, could have caused a new low back injury or aggravated his low back condition.

37. The claimant admitted at the hearing that the work he had done since leaving the Rutland News frequently caused him to experience low back pain.

38. Dr. Upton testified that when he treated the claimant in 1993, there was no sign of nerve root compression and that he was not a surgical candidate. By June of 1993 the claimant had reached a medical end result for the Rutland News work-related injury.

39. On September 15, 1998, Joseph L. Quellman, M.D., an orthopedic specialist, performed a medical examination of the claimant for the insurer and reviewed the available medical records. Dr. Quellman concluded the claimant's 1991 work-related injury had long since resolved. He further opined that the chiropractic treatments the claimant had been receiving form Dr. Brown were unnecessary and unrelated to the 1991 injury.

40. In preparation for the hearing, Dr. Quellman reviewed those medical records produced after his September 1998 examination of the claimant. Dr. Quellman testified that the claimant's low back condition clearly worsened between 1992 and 1998, as demonstrated by the CT scans taken in each of those years.

41. Dr. Quellman described the work the claimant did after he left Rutland News, as described in Dr. Brown's notes, as heavy manual labor. When he examined the claimant, Dr. Quellman noted that his hands were calloused and pitted, adding further support to his conclusion that he had been doing heavy manual work.

42. In Dr. Quellman's opinion, based on the CT scan comparisons, the claimant's treatment notes and an examination of the claimant, the work activities the claimant had engaged in since 1992 most likely worsened the claimant's low back condition.

43. Dr. Quellman testified that the chiropractic treatments the claimant received from Dr. Brown were clearly unrelated to the 1991 work incident at the Rutland News. He attributed the necessity of those treatments to the work activities the claimant had engaged in after he left Rutland News, activities that are described in Dr. Brown's

treatment notes. Finally, Dr. Quellman testified that the activities shown on the videotape are inconsistent with a finding of temporary total disability.

**CONCLUSIONS OF LAW:**

1. The primary issue for decision is whether the claimant's current back condition is causally related to his 1991 work-related injury or whether the claimant suffered a new injury or aggravated his work-related injury after he left the employ of Rutland News. If this is an aggravation or new injury, Rutland News will not be responsible.

2. The claimant argues that Rutland News should continue to be liable because the claimant can point to no discrete injury since he left there that can account for his condition. Furthermore, he relies on the testimony of Dr. Upton that, but for the 1991 injury, the claimant would not be in the condition that he is in today.

3. Where, as here, the work related injury is unquestioned, the burden is on the employer who seeks to terminate compensation. *Merrill v. U.V.M.*, 133 Vt. 101 (1974).

4. It is well established under Vermont workers' compensation law that a claimant can recover benefits for a gradual onset work-related injury. In such a case, the exact date an injury occurred need not be established. *Campbell v. Savelberg*, 139 Vt. 31 (1990). It logically follows that an aggravation of a work-related injury might also be brought on gradually. *Bressett-Roberge v. Personnel Connection*, Opinion No. 03-99WC (1999).

5. To resolve the instant dispute we invoke the familiar aggravation versus recurrence analysis. The claimant prevails if his condition proves to be a recurrence.

6. A recurrence is a return of symptoms following a temporary remission. An aggravation is an acceleration or exacerbation of a previous condition caused by some intervening event or events. *Vermont Workers' Compensation Rule* 2(j) and (i).

7. This Department traditionally considers five factors when evaluating whether a claimant is experiencing an aggravation or recurrence: 1) Did a subsequent incident or work condition destabilize a previously stable condition? 2) Did the claimant reach a medical end result before leaving the employ of the original employer/carrier? 3) Had the claimant stopped treating medically for the original condition? 4) Had the claimant successfully returned to work? 5) Did the subsequent work contribute to the final disability? See *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998) and cases cited therein. An affirmative answer to the questions, with the greatest weight given to the final factor, indicates that the current condition is an aggravation.

8. With regard to whether subsequent work destabilized a previously stable condition, the evidence establishes that after his May 8, 1991 injury at Rutland News, the claimant lost little time from work and treated medically with six chiropractic visits over a five month period of time. Soon after his injury he began working for Guy Wilson, where he worked until 1993, losing no time from work. Only after he became self employed did he return to Dr. Brown for chiropractic care. That was in July 1996, almost five years after the previous visit. Dr Brown's notes are replete with references to the work activities the claimant was doing that caused him pain. Those activities included driving a dump truck,

hauling gravel, dirt and firewood, fixing roads, repairing heavy equipment and cutting and splitting firewood. Although Dr. Upton saw the claimant four times in 1992 and 1993, when he saw the claimant in 1998, it had been five years since his previous visit. Between 1993 and 1996, claimant sought no medical care for his back.

9. It is a reasonable conclusion that the work the claimant was doing in his own business destabilized a condition that had been stable for several years and that he had stopped treating medically for the original condition. Answers to the first and third questions, therefore, support a finding of aggravation.

10. The second question, whether the claimant had reached a medical end result, also supports a finding of aggravation. Dr. Upton concluded that the claimant had reached a medical end result for his 1991 injury in 1993. Permanency has since been paid.

11. The claimant's original injury did not keep him from working. In fact, he had no difficulty working until May 1999. He obviously had successfully returned to work.

12. Finally, and most importantly, is whether the claimant's subsequent work contributed to his final disability. It did, as clearly evidenced in the progressive change seen on the CT scans between 1992 and 1998. Both Dr. Upton and Dr. Quellman agreed that the claimant's back had worsened during that six-year period, a time that was between one and seven years after the claimant had left the Rutland News.

13. Common sense and the testimony of the experts lead to the inescapable conclusion that the work the claimant did after he left the Rutland News was hard physical labor. Dr. Quellman testified that a disc herniation may be caused by cumulative trauma and that claimant's years of heavy work activity likely progressively combined to produce the type of injury seen on the 1998 CT scan.

14. The evidence is clear. The claimant's self-employment work activities did not simply cause a return of symptoms following a temporary remission. His condition was clearly aggravated by the work he did after he left the employment of Rutland News. Consequently, the Rutland News is no longer responsible for his worker's compensation benefits, including medical care, temporary disability benefits or attorney's fees and costs.

**ORDER:**

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

Dated at Montpelier, Vermont, this 27th day of September 2000.

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R. Tasha Wallis
Commissioner