STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No.P-00839
	)	
Corydon Cochran	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Merrill Legare	)	Commissioner
	)	
	)	Opinion No. 36S-02WC

RULING ON DEFENDANTS MOTION FOR A STAY

Defendant, by and through his attorneys, Kiel Ellis & Boxer, moves for a stay of the order to adjust this claim and to pay attorney fees and costs. Claimant, through his attorney, Gregory W. Mcnaughton, opposes any stay at this juncture.

Any award or order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner, any appeal notwithstanding. 21 V.S.A. § 675. To prevail on its request in the instant matter, Defendant must demonstrate: (1) it is likely to succeed on the merits; (2) it would suffer irreparable harm if the stay were not granted; (3) a stay would not substantially harm the other party; and (4) the best interests of the public would be served by the issuance of the stay. *In re Insurance Services Offices, Inc.,* 148 Vt. 634, 635 (1987). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square* Co., Opinion No. 05S-97WC (May 29, 1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (Sept. 20, 1988)). The granting of a stay should be the exception, not the rule. *Bodwell v. Webster Corporation,* Opinion No. 62S-96WC (Dec. 10, 1996).

After a protracted and highly contested hearing, the Commissioner concluded that Claimant suffered an injury in the course of his employment. In fact, much of what the defendant had asserted throughout the hearing formed the basis for the Claimant's award, particularly with regard to the piston. It is not likely that a trial court will decide differently. With the delay associated with this case, substantial harm to the Claimant is likely if a stay were granted. Because the Defendant has not prevailed on each of the *In re Services Offices* criteria, his request for a stay is denied.

Date at Montpelier, Vermont this 28th day of October 2002.

_____
R. Tasha Wallis
Commissioner

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Merrill Legare	)	For: R. Tasha Wallis
	)	Commissioner
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Hearing held in Montpelier on April 11, 2002
Record Closed on May 24, 2002

APPEARANCES:

Gregory McNaughton, Esq. for the Claimant who appeared pro se at the hearing
Andrew Boxer, Esq., for the Employer

EXHIBITS:

Claimant's Exhibit 1:	One page time card photocopy and July 1998 Calendar
Claimant's Exhibit 2:	Feb. 28, 2002 letter from William Craig, M.D.
Claimant's Exhibit 3:	Medical records
Claimant's Exhibit 4:	Feb. 18, 2000 Statement of Tim LePan
Claimant's Exhibit 5:	Defendant's statement – Merrill Legare
Claimant's Exhibit 6:	Sept. 9, 1999 Prescription Note
Claimant's Exhibit 9:	Feb. 17, 2000 Statement of Alfred Larrabee
Claimant's Exhibit 10:	Health Center Records from 1998
Defendant's Exhibit A:	Apr. 27, 2000 Statement Ken Powers
Defendant's Exhibit C:	Earnings Register
Defendant's Exhibit D:	Deposition of Lauren Stutzman
Defendant's Exhibit E:	Deposition of Euclin Roberts
Defendant's Exhibit F:	Photographs
Defendant's Exhibit G:	Oct. 6, 1999 Statement of Ken Powers

ISSUE:

Whether Claimant suffered a shoulder injury arising out of and in the course of his employment with Merrill Legare.

FACTS:

1. Merrill Legare hired Claimant to work at his farm in 1997. Claimant had also worked for Legare on the farm as a child in the late 1960s. Mr. Legare described Claimant's job as a "kind of farm foreman. Tells people what jobs to do, makes sure they're doing them." Mr. Legare also described Claimant as a "jack-of-all-trades" with duties involving tractor driving, cultivating, field work, greenhouse work, setting up irrigation pumps and pipes, equipment repairs, electrical work, and "whatever needed to be done." Claimant was, at all material times to this case, an employee of Merrill Legare at Legare Farm.

<u>April 1999 Injury</u>

2. On or about April 1, 1999 Claimant injured his shoulder while erecting Greenhouse tables, which involved lifting cement blocks.

3. Ken Powers was working with Claimant stacking the cement blocks. At the hearing Mr. Powers did not remember any injury that Claimant suffered at work. In an earlier statement to an insurance investigator, Mr. Powers stated that Claimant told him "he hurt himself back in I don't know if it was April or what" and "[h]e's told me he has hurt himself a lot of different times on his job." Mr. Powers saw Claimant with his arm taped up at some point, but has no recollection of when he observed this. Mr. Powers is currently employed by Merrill Legare at the Legare Farm.

4. After Claimant and Ken Powers returned to the main farm from the location where they had been stacking cement blocks, Claimant told Merrill Legare that he hurt himself lifting cement blocks and that he would rather not return the next day to finish the job. An accident report was not filed at that time. Claimant iced his shoulder after he went home, but did not seek medical treatment for an injury to his shoulder until July of 1999, and there was no decrease in his work hours until July of 1999.

5. After the incident with the cement blocks, Claimant "took it easy," but still continued to do things around farm, such as working to lay out irrigation pipes, carrying bags of dirt, and performing other farm jobs.

6. Penny Baker began working at the farm in May of 1999. She remembered Claimant complaining of having a bad shoulder at that time and she recalled Claimant working on fixing a van prior to July of 1999. Baker also observed Claimant and another worker dragging a tree limb off his trailer located on the farm.

7. Claimant's shoulder got progressively worse, with pain going up and down, between April and July, the time at which he ultimately sought medical treatment.

July 1999 Injury

8. On or about July 4, 1999, Alfred Larrabe arrived at the Legare Farm with his backhoe to perform a job for Merrill Legare as an independent contractor. Larrabe was contracted to dig a trench around the greenhouse. Claimant knew Larrabe and referred him to Merrill Legare to do the job. Claimant complained of his shoulder hurting when Larrabe first arrived at the job. Claimant was present during periods of the backhoe operation, checking on the work. The backhoe work was interrupted when a piston on the backhoe broke. Claimant and Larrabe removed the piston. The backhoe was moved into Legare's shed and remained there until the piston was fixed and the job was completed. Larrabe did not take the piston in for repair that day because the shop was closed at the time the piston broke.

9. Larrabe was not available the next day to return to the farm to take the piston for repair because he had another job that he worked during the day. Claimant offered to take the piston in for repair the next morning while Larrabe was working so that Larrabe would be able to return in the evening and finish the job. It is disputed whether Claimant had help from Mr. Legare putting the backhoe in his truck or whether Claimant carried the piston alone. There is no evidence of whether Claimant had any assistance carrying the piston from his truck to the repair shop. The piston that broke weighed roughly 109 pounds. When the piston was ready, Larrabe picked it up from the shop on July 12, took it back to the farm, and put it on the backhoe himself.

10. Merrill Legare did not ask Claimant to take the piston for repair and if Claimant had asked him, he would not have given permission. Merrill Legare concedes that Claimant could have been "on the clock" when he delivered the piston. Merrill Legare destroyed the Claimant's time cards from 1999 when he thought the case had settled, although he kept time cards from 1998.

11. Claimant hurt himself carrying the piston.

12. Within days of carrying the piston, Claimant sought treatment at Central Vermont Hospital Emergency Department Records on July 10, 1999, complaining of left shoulder pain. The record notes, "patient first had trouble with his left shoulder lifting concrete blocks last spring. It had settled down and was doing okay until yesterday. He had a recurrence of pain in the interior upper part of the shoulder which relates mostly to abduction of flexion." The nurse applied a shoulder immobilizer.

13. In a follow-up visit to Dr. Craig of The Health Center on July 12, 1999, Dr. Craig's records reflect an injured left shoulder and several lifting-type injuries. The notes reflect that the claimant injured his left shoulder around May of 1999.

14. In a letter from Dr. Merriam to Dr. Craig dated July 29, 1999, Dr. Merriam wrote: "The patient states in May of 1999, he felt like he dislocated the left shoulder. He states he was lifting some concrete blocks. He had pain in the shoulder. It has settled down and the patient was in reasonably good health, until July 9, 1999. He began having more pain. He went to the emergency room on 7-10-99."

15. Medical records after July of 1999 indicate continued and increasing left shoulder pain, physical therapy for the left shoulder, and surgery for the left shoulder in November of 1999. On September 9, 1999, Claimant was instructed by a doctor to perform only light duty work because of his left shoulder.

16. Merrill Legare put Claimant on light duty in July after the piston incident.

Greenhouse Incident

17. Claimant performed some work on a greenhouse roof at the farm in late September of 1999. Claimant testified that the greenhouse work made his shoulder worse. Claimant and employer dispute the circumstances under which Claimant was working on the greenhouse roof. Claimant testified that Legare ordered him to work on the roof, then took pictures. Legare testified it was Claimant's idea to work on the roof, and once Legare found out Claimant was on the roof he took pictures. Claimant testified that he hurt his shoulder more while working on the roof.

18. Claimant's physical therapy records indicate "flare up" on September 20, 1999 and "repetitive work over 3 day period – driving tractor and roofing greenhouse."

19. Claimant complained of his arm hurting to Richard Wheeler who was also working on the roof job. Euclin Roberts, a former co-worker of Claimant, did not testify in person. His deposition was admitted at the request of the Defendant. He stated in his deposition that he was also working on the greenhouse roof and that Claimant appeared to be in pain because of his shoulder. When he asked Claimant about it, Claimant told him he could manage.

20. Claimant was seen driving his four-wheeler and helping a number of other men to move a freezer in the fall. Wheeler also testified that at some point Claimant told him that he once pulled an engine out of his truck, though he does not recall when this conversation took place and testified that Claimant did not say when he pulled the engine. Wheeler was not working at the farm between May and August of 1999, and returned to work at the farm in the fall of 1999.

21. In an earlier statement to an insurance investigator, Ken Powers testified that Claimant did things inconsistent with a shoulder injury, giving the example of claimant shifting gears forcefully on his truck. Powers also believed at the time of the statement that Claimant was claiming an injury to his right shoulder. Powers also stated at that time that it was his opinion that because Claimant continued to work he "couldn't have been hurt that bad."

Injuries Prior to Spring of 1999

22. Merrill Legare testified at the hearing that Claimant told him when was hired in 1997 that he hurt his back and left arm at a prior job. Legare also stated that Claimant wore a back brace a lot when he first started working. Legare testified that when Claimant reported to him that he hurt himself lifting the cement blocks that "he said he pulled a muscle again in his arm" and that it was the "same arm he'd done out west." In a prior statement to an insurance investigator in October of 1999, when Legare was asked about injuries prior to July 6, 2002, Legare stated that "sometime in possibly April" Claimant was setting up benches on cement blocks and that Claimant "came back and told me that he had pulled a muscle or something that his left shoulder was hurting." Legare made no mention in his statement to the insurance investigator about any injuries Claimant had from a prior job.

23. Lauren Stutzman, a former co-worker of Claimant, remembered Claimant's shoulder hurting before the spring of 1999 because he was "grimacing in pain from his shoulder" when she helped him to move a tractor and when he was laying pipe, and that he complained about a bad shoulder. Stutzman was not working at the farm in April of 1999. She stated that she did not recollect Claimant complaining about his shoulder when she returned to the farm in May, but remembered him complaining a lot in July and August of 1999. Stutzman was employed by Merrill Legare at the time of her deposition.

24. Euclin Roberts observed Claimant with shoulder pain in August of 1999. He also remembered observing Claimant in the Spring of 1999 carrying a brick on his head, and saw him carrying flowers in both arms. Roberts is a current employee of Legare Farm.

25. Claimant's medical records from August 19, 1998 from the Health Center in Plainfield Vermont reflect that he "hurt his back picking up machinery" and he was treated for "lumbar/sacral back strain/sprain/spasm." Records from September 23, 1998 state that the back improved. There was no mention in these records of any shoulder pain or injury.

Employer's Claims of Intimidating Behavior by Claimant

26. Merrill Legare believes that Claimant shot holes through irrigation pipes on the farm because Legare contested the workers' compensation claim. Legare called the police after he found the pipe damage, but the police could not match the bullet found to Claimant's gun.

27. Legare believed someone backed into the garage doors with what he "guessed" was a pick up truck. He thought that light green paint on the door matched Claimant's truck paint color.

28. Lauren Stutzman stated in her deposition that Claimant came to the farm drunk one night when Merrill Legare was not there and in a conversation about the dispute Claimant said "Merrill was going to get it, and the whole farm was going to get it," and that it would all come to a head in January. She also said that Claimant told her he had guns in his truck.

29. Ken Powers signed a statement in April of 2000, describing three interactions between himself and Claimant. The statement described Claimant telling Powers, "You guys were all pressured into making false statements by Merrill. I'm going to lure his deer off his land . . . ." Then Claimant reached into Powers' truck and shook his hand, then backhanded Powers in the face. The second interaction described Claimant telling Powers, "You lied, you screwed me, I'll see you around sometime." The statement also describes a barroom scuffle between Claimant and Powers. Powers testified at the hearing that he and Claimant are friends and that the incidents described were horseplay. He stated that Claimant was not the type of person that would really intimidate him or threaten him. He also testified that he thought the barroom scuffle occurred when he first started working at the farm.

Claimant's claim:

30. Claimant claims he was unable to work because of his injuries from October 1999 until February 2000 when he secured another position with a different employer. Claimant says that he stopped working for Legare farm because of pain. Legare claims he stopped working because of a personnel dispute in mid-August of 1999.

31. Claimant's counsel submitted an affidavit and supporting documentation outlining 17 hours of attorneys fees ($1,530.00) and $168.70 in expenses for Attorney Gregory W. McNaughton, as well as 38.7 hours in attorneys fees ($3,483.00) and $580.62 in expenses to Claimant's prior counsel, Biggam, Fox and Skinner.

Discussion

32. There are a number of credibility issues raised by the evidence presented at this hearing and the potential for bias in many of the witnesses who testified, due to employment relationships as well as personal relationships. There are also inconsistencies between prior statements and hearing testimony of some of the witnesses. What is abundantly clear is that there is bad blood between the employer and the Claimant as a result of this claim. Facts found and conclusions drawn are primarily from facts that are uncontested, from medical records, and from statements that have remained consistent over time.

33. In a workers' compensation claim, it is the burden of the claimant to establish all facts essential to support his claim. *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963). 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 hypotheses. *Burton v. Martin Lumber Co.*, 112 Vt. 17 (1941). Sufficient competent evidence must be submitted verifying the character and extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984); *Rothfarb v. Camp Awanee, Inc.*, 116 Vt. 172 (1950).

34. This hearing was held on the contested issue of whether Claimant incurred a compensable left shoulder injury in the course and scope of his employment with Legare Farm. However, the degree of disability resulting from these injuries and possible monetary awards were not the subject of this hearing. Upon the finding that Claimant suffered a left shoulder injury in the course and scope of employment with Legare Farm, any actual monetary award will be subject to negotiation between the parties or to be decided at a future hearing in which the reasonableness of the medical treatments will need to be determined as well as any proof of lost wages relating to the disability. Although some evidence was presented in this hearing that might relate to those issues, they were not issues that were squarely before the hearing officer and thus the record on those questions is incomplete.

35. After consideration of all the evidence, I find it more probable than not that Claimant suffered an injury to his left shoulder on or about April 1, 1999 when he was lifting cement blocks to erect greenhouse tables. Claimant's accounts have been consistent with this source of injury. The employer admits that Claimant reported to him he had injured the shoulder when he returned to the Farm that day. Claimant's medical records indicate that he told doctors he hurt his shoulder previously lifting cement blocks. I find no significance that Claimant apparently reported to his doctors that the cement block lifting occurred in May 1999. It is reasonable that Claimant, without going back to reconstruct the exact date he was working on the greenhouse tables at the time of his doctor's visits, would have only a general idea of the timing of that event.

36. However, Claimant has not satisfied his burden of showing that the April cement block-lifting incident solely brought about the injury for which he ultimately began seeking medical treatment in July of 1999. I find the more likely conclusion to be that Claimant suffered an intervening event that may have aggravated an already existing injury. This conclusion is based on the facts that while it is likely that Claimant continued to experience pain in his shoulder between April and July of 1999, the pain he experienced in July of 1999 was of a kind and quality significantly greater than pain he had experienced before because it led Claimant to go to the emergency room. I also find that although Claimant claimed to be taking it easy between April and July that he engaged in other work activities that could have also exacerbated the condition of his shoulder.

37. It is not necessary to resolve the conflict of whether or not the Claimant had help from Merrill Legare in carrying the piston to his truck. Given that there is no evidence that Claimant had help carrying the piston after he arrived at the repair shop, I find it more probable than not that Claimant did carry the piston at some point without assistance, and given the timing of carrying this heavy piece of equipment to experiencing substantially increased pain within days, the piston as an aggravating trigger to Claimant's shoulder injury is the more probable explanation of the injury complained of in July of 1999.

38. I do not find it significant that Claimant denies hurting himself on the piston. What Claimant believes to be the cause of his injury is not a dispositive of the compensability of his claim that he suffered an injury in the course and scope of employment. *See Hall v. Williams Smokehouse,* Opinion No. 26-98WC (May 29, 1998) (noting that claimant's belief that the new machine caused her problem was irrelevant and that it could not be ignored that she had experienced pain for several months due to her work). Likewise, Claimant in this case consistently reported to doctors that he had experienced pain in his left shoulder since he lifted blocks in the spring of 1999.

39. The defense did not present sufficiently persuasive evidence that Claimant had a prior injury to his left shoulder that is the source of his current condition. While the defense presented witnesses who claimed that Claimant told them of having a "bad shoulder" from a prior job, the witnesses' recollection of these events was not very specific as to the circumstances in which they were informed by Claimant of this condition. These witnesses rely on their eyewitness accounts that Claimant acted as though he had a hurt shoulder, but were not specific about these accounts. These same witnesses also recollect that it was Claimant's right arm that appeared to be hurt, but could have been the left. The vagueness of this testimony makes it less reliable.

40. The employer introduced his alleged personal knowledge of a prior injury for the first time at the hearing. At the hearing, Merrill Legare testified about Claimant's report of the April 1999 injury that Claimant "said he pulled a muscle again in his arm" and that it was the "same arm he'd done out west." In a prior statement to an insurance investigator in October of 1999, when Legare was asked about injuries prior to July 6, 2002, Legare stated that "sometime in possibly April" Claimant was setting up benches on cement blocks and that Claimant "came back and told me that he had pulled a muscle or something that his left shoulder was hurting." Legare made no mention in his statement to the insurance investigator about any injuries Claimant had from a prior job. Also, medical records from 1998, which described back injuries from moving equipment, make no mention of a bad shoulder. This switch in the employer's account was not disclosed to the Claimant in advance of the hearing to allow him the opportunity to request his prior medical records to counter these allegations. The employer has no objective proof of a shoulder injury prior to the Spring of 1999.

41. The defense's position seems to be that Claimant had a shoulder injury prior to April of 1999, but not one bad enough to prevent him from doing work, but if the July piston incident is deemed to be in the course of employment then the source of the injury occurred prior to 1997 or when Claimant allegedly pulled an engine out of his car, an event about which no witness has any personal knowledge.

42. However, whether Claimant had an injury prior to the spring of 1999 is immaterial. The persuasive evidence points to an intervening and aggravating event occurring in July of 1999.

Lent Employee

43. The defense maintains that when Claimant carried the piston he did so as an employee of Alfred Larrabe, not Legare Farm. The defense relies on the lent employee doctrine. The defense also seems to rely on the employer's testimony that he did not ask the Claimant to do any work in relation to the work being performed by the independent contractor Alfred Larrabe, nor would he have granted permission for the Claimant to bring the piston to the repair shop had he been asked. The defense seems to be merging the lent employee doctrine with a defense that the Claimant was acting outside the course and scope of employment, or presenting an alternative defense. However, the defense fails under either legal analysis.

44. The lent employee legal doctrine arises when one employer, the general employer, lends an employee to another employer, the special employer. The analysis begins with the presumption that employment continues under the general employer and the general employer remains liable for injuries suffered by the employee. See *Thorn v. Albany Ladder*, Opinion No. 17-02WC (April 2, 2002) (citing 3 Larson's Workers' Compensation Law, §67.03). There must be "a clear demonstration that a new temporary employer has been substituted for the old." *Id.* This presumption can only be overcome if the general employer shows that three conditions have been met:

> "[T]here are three important considerations if the special employer is to become liable for workmen's compensation: first, there must be a contract of hire, express or implied between the special employer and employee. . . This involves an informed consent by the employee before the employment-relation can be said to exist. . . . This requirement being met, there remains the necessity of showing that the work being done is essentially that of the special employer and lastly that such special employer has the right to control the details of the work."

Mercier v. Holmes, 119 Vt, 368, 373 (1956).

45. As the Supreme Court stated in *Mercier*, "the first question of all is: did [the employee] make a contract of hire with his special employer? If this question cannot be answered 'yes', the investigation is closed, and there is no need to go into tests of relative control and the like." *Mercier*, 119 Vt. at 374. See also *Delotto v. Penta Corporation and J&L Foundations*, Opinion No. 22-95WC (May 1995).

46. The lent employee defense fails on this threshold question because the evidence does not show that there was a contract of hire between Claimant and Larrabe. As much as the defense would like to characterize the conversation between Claimant and Larrabe as "offer" and "acceptance" when they agreed that Claimant would bring the piston to the repair shop, the defense fails to show any consideration flowing to Claimant from the transaction. There is no evidence presented that Claimant received any compensation or personal benefit from Larrabe for the service of taking the piston for repair. Without consideration, there can be no contract of employment between Larrabe and Claimant.

47. The evidence is persuasive to the conclusion that Claimant brought the piston to the repair shop in the hopes that it would be fixed that day so that Larrabe would be able to return in the evening to finish the job he was doing for Legare Farm. Having the job completed in the fastest possible time would also mean that Larrabe's backhoe would not need to be stored so long at the farm in the tool shed. As Larrabe himself stated in his hearing testimony, "I'd kind of forgotten how far the thing reached until this morning when Debbie was telling me that she had to drive around the backhoe. The backhoe was all the way in the garage . . . but the boom was extended out and it was going right out into the road so you could just about get by the end of the boom." The defense seems to rely heavily on the fact that the piston belonged to Larrabe and not to the Farm and that Larrabe benefited by not having to make a special trip back to the farm to bring the piston to the repair shop. However, as between Legare Farm and Claimant, it is Legare Farm that would reap the benefit of having the job completed sooner and its tool shed available again.

48. While the lack of consideration is enough to conclude there was no contract of employment between Larrabe and Claimant, even if there were consideration the defense would still fail because there is also no factual basis from which draw the inference that the Claimant expressly or impliedly consented to change employers. *See Mercier*, 119 Vt. at 374 ("[I]n this case it was a question, first of whether there actually had been express consent by Mercier to become the employee of the new employer, or if that was lacking, whether such consent could fairly be implied under the circumstances."). "Where a change of masters is claimed by the employer, the burden is upon him to show that the alleged change was made with the servant's assent." *Gonyea v. Duluth*, 19 N.W. 2d 384, 387 (Minn. 1945). All the evidence presented supports the conclusion that Claimant at all times considered his actions to be in the employment of Legare Farm, and that he did not consent to a change in employers.

49. For all the foregoing reasons, Merrill Legare has not presented evidence sufficient to overcome the presumption under the lent employee doctrine that Claimant's employment continued under Merrill Legare when Claimant brought the piston for repair.

Arising out of and in the course of employment

50. There is insufficient evidence from which to draw the conclusion that the work performed did not arise out of and in the course of employment due to the purpose for which the task was done. The Supreme Court addressed the question of an employee performing a task for the benefit of a third party in *Rae v. Green Mountain Boys Camp*, 122 Vt. 437, 441 (1961):

> 'In deference to the broad and liberal interpretation to be accorded workmen's compensation laws . . . the courts have expanded the concept of 'arising out of the employment' to include acts normally outside the employment performed for the benefit of third persons but the effect of which is to foster public good will toward the master.' *Green v. DeFuria*, 19 N.J. 290, 295-96, 116 A.2d 19, 22. The same principle of fostering good will is applicable as applied to an individual rather than to the public in general when the act of an employee for the benefit of a third person is to advance his employer's work.

51. As discussed above, Claimant's purpose in bringing the piston for repair was to advance his employer's work, even if it was not a specific task within Claimant's regular duties. "An act outside an employee's regular duties, which is undertaken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of employment." 2 Larson's Workers' Compensation Law at § 27.

52. Larson cautions that "it would be going too far to say that every act which benefits the employer is in the course of employment," and notes that "the employer must be conceded some right to keep employees within their respective spheres." *Id*. at 27.01[3]. The principle adopted by the Alabama Supreme Court strikes a reasonable balance in this area of compensation law:

> 'The effect of these and other well-considered cases is to firmly establish the principle, based of course upon the theory of a liberal rather than a strict or narrow construction, that an employee's injury may be properly held to have arisen out of his employment notwithstanding that the act or conduct of the employee to which the injury is proximately referable was not within the scope of his authority nor strictly within the line of his duty, provided it was reasonably related to the service he was employed to render and was in good faith done or undertaken in furtherance of the employer's business; and notwithstanding, also, that the injury in question was not one of the anticipated risks of the service.'

Riley v. Perkins, 213 So.2d 796, 798 (Ala. 1968) (quoting *Ex Parte Terry*, 100 So. 768, 769 (Ala. 1924)). In *Riley*, the court found the employee to be injured in the course of employment despite the employer's argument that the injured employee and other employees voluntarily took it upon themselves to unload a truck, the work was done contrary to the business custom of the employer, and the work was done without the employer's instructions or knowledge. Vermont's law also takes a very broad view of compensability in this area. "Ordinarily, if an injury occurs during the 'course of employment,' it also 'arises out of it,' unless the circumstances are so attenuated from the condition of employment that the cause of the injury cannot reasonably be related to the employment." *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 598 (1993).

53. As noted above, Legare Farm would reap the benefits of having the job completed sooner and its tool shed available if the piston was repaired sooner rather than later. Claimant's position, as described by his employer, was as a farm foreman and "jack of all trades" and his described duties included equipment repairs and "doing whatever needed to be done." I find that Claimant taking the independent contractor's piston to the repair shop to enable work on the farm to be completed sooner was reasonably related to the service he was employed to render for Legare Farm and was in good faith. I also find that it is not the nature of Claimant's position to have each and every task to be performed in a day spelled out for him by the employer. For all the foregoing reasons, I find that Claimant was acting in the course and scope of employment when he took Alfred Larrabe's piston to the repair shop.

Misrepresentation

54. I do not find that the defense has presented evidence sufficient to establish that Claimant made intentional fraudulent misrepresentations for the purpose of obtaining workers' compensation benefits. 21 V.S.A. §708, "Penalty for false representation," provides:

> (a) A person who wilfully makes a false statement or representation, for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for her or himself or for any other person, after notice and opportunity for hearing may be assessed an administrative penalty of not more than $1,000, and shall forfeit all or a portion of any right to compensation under the provisions of this chapter, as determined to be appropriate by the commissioner after a determination by the commissioner that the person has wilfully made a false statement or representation of a material fact.

55. Under 21 V.S.A.§ 708(a), the defendant has the burden of proving by clear and convincing evidence that an injured worker willfully made a false statement or representation for the purpose of obtaining any workers' compensation benefit or payment. *See In re Smith*, 169 Vt. 162 (1999); *Stebbins v. Cepco, Inc*., Opinion No. 16-02WC (Apr. 2, 2002); *Butler v. Huttig Building Products*, Opinion No. 43-01WC (Nov. 16, 2001).

56. The defense argues that claimant made multiple, serial misrepresentations of the timing and source of his shoulder pain under oath, and for the purposes of maintaining benefits. This allegation is based on what some witnesses claim to remember about when Claimant complained at work about pain, the fact that he did not go to a doctor, and the fact that he continued to perform tasks at work. However, the defense seems to ignore that while some of the defense witnesses claim they did not observe Claimant with an injury between April and July of 1999 or hear him complain, other witnesses did. The defense also ignores the uncontested fact that Claimant reported the shoulder injury of April 1999 to his employer the day that it happened and told his employer that he did not want to return to the job the next day.

57. In the final analysis, the fact that the Claimant experienced pain and suffered an injury does not depend on the lay observations of his co-workers. Although I find that the evidence does not support the claim that the source of Claimant's current condition is solely due to the April 1999 injury, that conclusion does not mean that Claimant's assertion or belief that the April injury was the source of his injury was a false statement or misrepresentation. It is entirely possible that Claimant did not experience pain at the time he carried the piston. I do not find the employer's report of a conversation where the employee allegedly admitted to hurting himself on the piston to be credible given the lack of consistency in other areas of his testimony. I believe the employer's testimony has changed over time in an attempt to find any reason other than the Claimant's work at the farm to be the cause of Claimant's shoulder injury.

58. There is also insufficient evidence to prove that Claimant attempted to intimidate witness Ken Powers into testifying fraudulently. Claimant testified that Ken Powers witnessed his shoulder injury in April of 1999. At the hearing Mr. Powers could not recall any specific time he stacked blocks with Claimant. The employer submitted a statement signed by Mr. Powers that described some verbal and physical interactions between Claimant and Mr. Powers. From the hearing testimony, it seems more than likely that one fight between the two men occurred in 1998, prior to any of the events relevant to this case. At the hearing Powers said that he and the Claimant are friends and that Claimant did not attempt to intimidate him. Additionally, the statement itself indicates that Claimant accused Powers of being pressured into making false statements by Merrill Legare, and accused Powers of lying. This does not indicate that Claimant was trying to pressure Powers to lie for him; rather it indicates that Claimant was upset with Powers because he believed Powers was not telling the truth. Given the history of horseplay between the two men as described by both Claimant and Powers at the hearing, I do not find that Claimant seriously attempted to threaten or intimidate the witness. I also find it plausible that Powers's failure to recall events of April 1999 is due to conflicting loyalties to his employer and to his friend.

59. The defense has not produced clear and convincing evidence to conclude that Claimant engaged in destructing property at the farm to intimidate or punish Legare. The evidence presented also does not meet a lower standard of a preponderance of the evidence. There are no witnesses to these events and the employer would like this fact finder to draw a conclusion based on vague hearsay and innuendo. The employer attempts to prove that claimant shot bullet holes in his irrigation pipe by the employer's testimony of alleged conversation with Claimant's sister. The conversation as reported by Legare does not automatically lead to a conclusion that Claimant was responsible for the shooting. As reported, Claimant only told his sister that Legare thought he was responsible. There is no evidence that the defense attempted to depose the sister or produce her as a witness to explain her statements.

60. Similarly, the damage to the garage doors is pure speculation on the part of Legare. It would be an incredible stretch to say that a dent and the existence of green paint on the garage, without more, is enough to conclude that Claimant intentionally backed into the garage.

61. Because the evidence does not support the defense's allegations, it is not necessary to determine whether any of these actions alleged would, if true, be a bar to benefits under 21 V.S.A. 708.

62. Pursuant to 21 V.S.A.§ 678 (a), a prevailing claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law.

CONCLUSION:

1. In sum, Claimant has met his burden in proving that he suffered a compensable shoulder injury in the course and scope of his employment with Merrill Legare, and there is no bar to benefits under 21 V.S.A. §708.

2. Accordingly, defendant must adjust the claim. And because the Claimant has prevailed due to the efforts of his attorneys, one of whom represented him at numerous depositions and another in the post hearing legal arguments, he is entitled to legal fees and costs. Attorney Gregory W. McNaughton's claim for 17 hours of attorney fees ($1,530.00) is reasonable and the $168.70 in expenses was necessary. 21 V.S.A. § 678. In addition, discovery involved made the 38.7 hours in attorneys fees ($3,483.00) and $580.62 in expenses to Claimant's prior counsel, Biggam, Fox and Skinner, reasonable and necessary.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, defendant is ORDERED to adjust this claim and pay attorney fees and costs as outlined above.

Dated at Montpelier, Vermont this 12th day of August 2002.

_____

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 court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.