STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No.R-23849
	)	
Donald Fleury	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Legion Insurance as insurer	)	Commissioner
for the City of Montpelier	)	
	)	Opinion No. 43-02WC

Hearing held in Montpelier on April 25, 2002
Record closed on May 27, 2002

APPEARANCES:

Craig A. Jarvis, Esq. for the Claimant
J. Christopher Callahan, Esq. for Defendant

ISSUES:

1. Did Claimant's shoulder injury arise out of and in the course of his employment with the City of Montpelier?

2. If so, did Claimant's subsequent activities at home constitute an intervening cause that severed the link between his work-related injury and the natural consequences flowing from it?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	Form 25 Wage Statement
Claimant's Exhibit 2:	Transcript of deposition of Stephanie Landvater, M.D.

FINDINGS OF FACT:

1. Claimant has worked for the City of Montpelier since 1981, first as a mechanic and more recently as a truck driver and laborer for the Streets Department.

2. Claimant's hobbies include riding a motorcycle, bow hunting, and rifle and musket hunting.

3. Claimant does a variety of jobs for the City. He picks up debris, moves furniture at City Hall, uses a chain saw and jackhammer, prunes trees, sweeps sidewalks and cleans equipment. In the winter, most of his work involves driving trucks, which are used to plow and salt streets and to haul snow. He generally steers the truck with his left hand, placed on the upper part of the wheel. Because of an air-cushion seat that can bottom out when driving over bumps, he often hits his left elbow on the armrest of the truck. Also in the winter, he lays "cold patch."

4. During the summer, much of Claimant's time is spent laying out "hot mix" to pave and patch streets. In the process, Claimant stands at the ground level and shovels the hot mix out of the back of the truck. The truck bed is about waist high and Claimant holds the short shovel at about chest level. Once it is shoveled out of the truck, the hot mix is then raked into place. Then it is compacted with a tamp. This summer work includes shoveling tons of hot mix in a day and dragging a 200-pound motorized tamp into place.

5. In March of 2001 Claimant began to experience problems with his left shoulder after his left elbow struck the arm of a truck he was driving. He had intermittent pain he attributed to bursitis and continued working.

6. In May of 2001 Claimant noticed shoulder problems while moving half-barrel flowerpots in the back of a truck. He did not seek medical care.

7. Also in May 2001 Claimant took a week off from work to lay a metal roof on part of his house, although he did not work on the roof everyday or even for a full day at a time. During that week he covered an area about 20 feet long and 11 feet wide. In the process he hoisted 38-pound sheets of roofing with a rope and screwed the roofing onto the strapping using an electric screwdriver.

8. On May 28, 2001, as he was about to work on his roof, Claimant fetched his 40-pound ladder from the garage. When he tried to lift it with both arms, he felt a pop in his left shoulder and the onset of pain. He sought treatment in a hospital emergency department that day and was eventually referred to an orthopedic surgeon, Dr. Stephanie Landvater. In the emergency department, he reported left shoulder stiffness of a week's duration, the time when he was roofing his house.

9. Claimant remained out of work for the following week.

10. Dr. Landvater diagnosed two injuries: rotator cuff tear and ruptured biceps tendon. On August 27, 2001, she surgically repaired the rotator cuff tear, but given the Claimant's age, did not repair the ruptured biceps tendon.

11. Dr. Landvater provided testimony by deposition in this case. She is a board certified orthopedist who has practiced for ten years. In the course of her practice, she has treated numerous rotator cuff and biceps tendon injuries. Generally, she takes her patients out of work following the discovery of a rotator cuff tear.

12. Based on measurement of the subacromial space, the history of the Claimant, the surgery and her training and experience, Dr. Landvater opined that the rotator cuff tear was chronic, preexisted the roofing incident and was due to repetitive work for the City. However, she did not know the extent of the tear before the ladder incident.

13. The "pop" Claimant felt in his shoulder, according to Dr. Landvater, was a tear to the biceps tendon that probably occurred when Claimant attempted to lift the ladder.

14. In Dr. Landvater's opinion, Claimant has no permanent impairment from the biceps tendon tear. She has not yet determined what impairment, if any; he has for the rotator cuff tear.

15. Medical bills to the date of the hearing total $12,021.67.

16. Claimant submitted an itemized account demonstrating that his attorney worked 52.2 hours on this case and incurred $981.35 in expenses.

DISCUSSION:

1. Claimant urges this Department to conclude that he suffered a work-related injury to his left shoulder and order the defendant to pay all related benefits. Defendant argues that it was Claimant's hobbies and home repair activities that account for any shoulder problems he has and that, even if they were initially work related, roofing work at home was an aggravation that broke any causal chain.

2. Dr. Landvater explained that Claimant's rotator cuff tear was chronic and related to Claimant's work as a laborer for the city. However, Claimant's shoulder condition before the roofing incident did not prompt him to seek medical care and did not keep him from working. Only after lifting the ladder did he seek medical care. Such facts together with Dr. Landvater's inability to identify when the tear reached the point when surgical intervention was warranted supports the defense position that even if work caused the Claimant shoulder problems, the roofing work precipitated the need for surgery.

3. As the leading commentator has written:

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional conduct. More specifically, the progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause.

1 Larson's Workers' Compensation Law, Ch. 10, Scope. See also, *Bowen v. Job Site Services and Travelers*, Op. No. 23-00WC (2000).

4. This Department has held that a normal activity of daily living does not constitute an intervening nonindustrial cause sufficient to break the causal chain from a work-related injury because everyone, including an injured person, necessarily performs such activities. Therefore, shoveling was not found to be an intervening cause in *Correll v. Burlington Office Equipment*, Op. No. 64-94WC (1994) and carrying groceries was not an intervening cause in *Verchereau v. Meals on Wheels*, Op. No. 20-88 (1988). Claimant urges this Department to conclude that his shoulder problems were work related and that lifting a ladder, like shoveling and carrying groceries, was simply a normal activity of daily.

5. However, roofing work is unlike the necessary task of carrying groceries in *Verchereau*, Op. No. 20-88 because it is not an expected and common activity of daily living. Therefore, an injury incurred while Claimant was roofing his house is an independent non-work related intervening event sufficient to sever any causal connection to work.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence 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).

2. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. Claimant is correct in distinguishing between cases in which we must consider the impact of non-work activities on an individual claim and disputes between carriers where an aggravation -recurrence analysis is applied. See, *Trask v. Richburg Builders*, Opinion No. 51-98WC (1998). When an employee incurs a work-related injury, the employer is responsible for benefits associated with that injury unless an independent intervening event intervenes to break the causal relationship. 1 Larson's § 10.

4. In this case, Claimant's home roofing work clearly was an independent intervening cause. As such, under the standards articulated in *Larson's* and *Burton, supra,* the Claimant cannot sustain his burden of proving that his shoulder problems are work-related.

ORDER:

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

Dated at Montpelier, Vermont this 15th day of November 2002.

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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.