J. T. v. Alpine Construction (October 24, 2005)

**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

| | | |
|---|---|---|
| James Thayer | ) | Opinion No. 51S-05WC |
| | ) | |
| | ) | By: Margaret A. Mangan |
| v. | ) | Hearing Officer |
| | ) | |
| Alpine Construction | ) | For: Patricia A. McDonald |
| | ) | Commissioner |
| | ) | |
| | ) | State File No. U-13418 |

**RULING ON DEFENSE MOTION FOR RECONSIDERATION AND STAY**

Defendant moves for reconsideration of the ruling finding that claimant's shoulder injury, though not his back condition, resulted from a work related fall from a bridge.

Claimant argues that the motion, filed 30 days after the order was mailed from this Department, was untimely. He cites *Fournier v. Fournier,* 169 Vt. 600 (1999) for the proposition that a post judgment motion, even if labeled a motion to reconsider, is a motion to alter or amend the judgment and subject to the V.R.C.P. 59 (e) requirement that the motion be filed within 10 days of entry of judgment.

Under Workers' Compensation Rule 7.1000 the "Vermont Rules of Civil Procedure and Rules of Evidence as applied in Superior Court shall, in general, apply to all hearings … except as provided in these Rules, and only insofar as they do not defeat the informal nature of the hearing." Part of the nature of a worker's compensation hearing is a speedy and expeditious process, a goal facilitated by the 10-day time limitation of V.R.C.P.59. Therefore, that 10-day rule shall apply to all motions for reconsideration filed in this Department following a workers' compensation decision.

However, since this is the first application of the 10-day limit for filing motions to reconsider, it is important to address the merits of the defense argument in this case. The disputed factual and expert evidence at hearing and in the record required judging credibility and sifting through medical records that included evidence of preexisting conditions. The defense disagrees with the Department's interpretation of that evidence and inferences formed. The ultimate decision finding that the shoulder claim is compensable followed a thorough analysis. While defendant's current arguments form a basis for an argument on appeal, they do not justify reconsideration of the judgment entered here.

Defendant also asks that the order be stayed pending appeal. 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) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) a stay will not substantially harm the other party; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co*., 132 Vt. 554 (1974). 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 (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v.Webster Corporation*, Opinion No. 62S-96WC ( 1996).

Defendant has not demonstrated that it is likely to succeed on the merits on appeal, given the nature of this claimant's fall. On the contrary, a fall from a bridge more than likely would aggravate a person's shoulder condition. Nor does defendant prove that it will suffer irreparable injury by paying this claim. Benefits due will not harm Travelers. Next, since the injury in February of 2004, claimant has lost income and incurred bills. If a stay were granted, he would be substantially harmed. Finally, payment without further delay will best serve the interests of the public.

**ORDER:**

Therefore, the defense motions for reconsideration and for stay are DENIED.

Dated at Montpelier, Vermont this 24th day of October 2005.

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Patricia A. McDonald
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.

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Pretrial conference held on March 7, 2005
Hearing held in Montpelier on June 24, 2005
Record closed July 26, 2005

**APPEARANCES:**

Joseph C. Galanes, Esq., for the Claimant
Stephen D. Ellis, Esq., for the Defendant

**ISSUES:**

1. Was the claimant involved in a work related accident at Alpine Construction in February of 2004?

2. Is the claimant barred from obtaining workers' compensation for failing to wear his safety harness?

3. Was the work accident causally related to his current symptoms and injuries?

**EXHIBITS:**

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|---|---|
| Joint I: | Claimant's medical records |
| | |
| Claimant 1: | Statement of Alan Wood |
| Claimant 2: | Statement of Myron Bennett |
| Claimant 3: | Deposition of Dr. Gennaro |
| | |
| Defendant A: | Deposition of Alan Wood |
| Defendant B: | Deposition of Myron Bennett |

**CLAIM:**

1. Medical benefits for claimant's cervical spine injury;
2. Medical benefits for claimant's left shoulder injury;
3. Permanent Partial Disability Benefits in the amount of 3% whole person impairment to the spine, for 16.5 weeks at the rate of $348.46 per week;
4. Statutory interest under 21 V.S.A § 664 from the date each benefit became due
5. Litigation costs of $1,955.77; and
6. Attorney fees of 20% of the total award, or $9,000.00, whichever is less.

**FINDINGS OF FACT:**

Work history

1. Claimant was a construction worker, and worked on various construction projects in the past six years.

2. In 1999, claimant worked as a laborer for Griswold Concrete. In June 1999, while working for this employer, claimant was injured in a work related accident. While hanging from his harness and attempting to stabilize a very heavy concrete form, he fell and twisted with the form.

3. Despite this incident, claimant continued to work for approximately three more months without seeking medical attention. He continued to work with this pain until December 1999.

4. In March 2000, Dr. Bruce Tranmer at Fletcher Allen Healthcare in Burlington evaluated the claimant. Dr. Tranmer noted that the claimant suffered significant pain, including pain along the posterior lateral left arm and forearm with some numbness, not extending to the fingers. A subsequent MRI revealed a left sided disc bulge/ herniation at C5-6 with mild degenerative changes.

5. Because of these findings, Dr. Tranmer performed a C5-6 anterior discectomy and fusion on April 19, 2000. The results of this procedure were a success, and in the following months, Dr. Tranmer noted that claimant's arm pain had completely disappeared. Up until August 2003, claimant made no report of arm pain.

6. In June of 2001, claimant suffered a work related lumbar spine injury. Claimant worked for 3 months after receiving this injury. In August 2001, Dr. Nancy Binter performed a surgical repair of a herniated disc. Claimant reached medical end point in December 2001, and immediately returned to work.

7. On August 2, 2003, claimant was involved in a car accident. He initially complained of "exacerbation of chronic low back pain, and right wrist pain."

8. Claimant reported to Dr. John Fogarty on August 5 2003 with complaints of neck, back and arm pain. He had decreased range of motion of the cervical spine.

9. On August 5, 2003, Dr. Fogarty noted that the claimant "has a long complicated history of back and neck pain…he is a concrete worker who was working up until last week in spite of his neck, shoulder and back pain."

10. On August 12, 2003, medical files indicate that the claimant reported "significant spasms up and down the whole paraspinous area in the thoracic and lumbar area. He has tenderness in the upper left trapezius." On August 22, 2003, claimant complained of "pain in the upper trapezius and left shoulder area with numbness and tingling down the left arm" and "coldness of the upper extremity at times."

11. On October 10, 2003, claimant reported to Dr. Anne Marie Gonzalez- Munoz, at the pain clinic. Dr. Munoz noted that claimant's primary complaint was neck, left shoulder and left arm pain to the elbow. She also noted that this pain had been on and off, but worsened with the August 2003 motor vehicle accident.

Alpine Construction

12. Claimant began to work for Alpine Construction on November 12, 2003. He claims that he felt no neck or shoulder pain when he began working with the defendant. However, claimant explained that the pain intensified while he spent many hours working from his harness and working overhead.

13. On February 6, 2004, claimant was seen my Dr. Ferguson. Dr. Ferguson noted that the claimant had trigger point injections "last October" and had felt remarkably better, "however sx [symptoms] have gradually recurred and he now has chronic neck and left parascapular and left arm pain." Dr. Ferguson also noted right arm pain as well as left arm problems, noting "left arm gets cold and numb." Dr. Ferguson characterized this as "exacerbation of chronic and recurrent cervical disc disease related to an old injury in 1996."

14. Following his visit with Dr. Ferguson, claimant worked the following Monday, Tuesday and Wednesday (February 9, 10, 11).

15. On Wednesday, February 11, claimant was working on a bridge, drilling holes and installing metal clips. Claimant was working at one end of the bridge, his coworker at the other. Claimant was wearing a safety harness that he tried to clip onto the bridge so that he could swing out and drill the necessary holes. He wrapped the strap around a part of the bridge, thought he fastened the clip and swung out. He knew the fastening attempt failed when he swung out from the bridge, drill in hand, and tried to drill a hole. He then heard a click and fell to the snow covered ground about 14 feet below.

16. Alan Wood, a co-worker, saw claimant climbing up the embankment next to the bridge, covered in snow. When he asked the claimant what happened, claimant said that he had fallen off the bridge to the ground below. Claimant was wearing his safety harness.

17. About a week later, Myron Bennett, another coworker, learned of the fall.

18. Despite this fall, claimant did not seek medical help until three weeks after the fall. Claimant called in to the Milton Family Practice on March 3, 2004. He stated that he thought his left arm was broken. He also appeared on the morning of March 3 at an ER and reported that he had fallen off a bridge and was experiencing "left elbow pain and pain on moving the left arm." He also reported "symptoms of tingling in his left hand." Claimant stopped working on March 2, 2004.

19. On March 4, 2004, claimant appeared at a Pain Service appointment scheduled by Dr. Ferguson on February 6. Dr. Gonzalez Munoz noted that, among other things, the patient "approximately one week ago, the patient fell off a bridge" and that he had "severe pain in his left arm with numbness and weakness in the third, fourth and fifth fingers of his left hand since the fall."

20. Over the following months, claimant was evaluated by orthopedic surgeons Dr. Warren Rineart and Dr. Bruce Tranmer. Claimant continued to complain of the severe pain. He reported constant pain and numbness in his left hand, in particular in his third, fourth and fifth digits.

21. On July 13, 2004, Dr. Tranmer reevaluated the claimant. He noted significant pain, decreased range of motion in his neck and pain going down his left arm. He suspected C7 or C8 radiculopathy.

22. An MRI of the claimant was performed on August 16, 2004. Dr. Tranmer noted a bone spur was impinging on the C6-7 nerve root and producing claimant's arm pain. He performed a surgical repair on September 22, 2004. The procedure produced immediate relief for the claimant's arm pain. However, his shoulder pain persisted. Claimant was referred to Dr. Thomas Zweber.

23. Dr. Zweber determined that in addition to the C6-7 radicular injury, claimant also suffered mechanical damage to his left shoulder. Apparently, the radicular pain had masked the mechanical shoulder injury. A shoulder MRI was performed on November 17, 2004 showed extensive labral tears located anterior and posterior of the shoulder.

24. Claimant underwent surgery to repair the mechanical damage on his shoulder on February 7, 2005. His pain became worse post-surgery, and he is scheduled to undergo additional surgery.

25. Dr. Gennaro, an orthopedic surgeon, testified for the claimant. He opined that the mechanical shoulder injury was caused by the claimant's fall from the bridge. He noted that the damage to the shoulder is consistent with the fall from the bridge that the claimant described. Furthermore, Dr. Gennaro believes to a reasonable degree of medical certainty that the fall from the bridge aggravated the claimant's degenerative disc disease, increasing the severity of the symptoms and scope of neurological damage. That decision is based at least in part on claimant's history that he had stuck his head in the fall.

26. Dr. Levy, a neurologist, testified for the defendant. Dr. Levy did not perform a physical examination of the claimant. However, he did perform a record review of the claimant's medical records. Dr. Levy concluded that the fall was neither the cause of the claimant's mechanical shoulder injury, nor the claimant's spinal injury. Dr. Levy does not believe there was any aggravation of the symptoms. He concluded that the claimant's current injuries are caused by a recurrence of his cervical disc disease, caused by injuries incurred by the claimant prior to February 2004.

27. Claimant seeks medical benefits associated with his left shoulder injury and the C6-7 nerve root damage. Claimant also seeks permanent partial disability benefits at a 3% whole person impairment rating. Claimant further seeks temporary total disability benefits from the date claimant left work until the present day. The claimant requests that any award include interest at the statutory rate. Lastly, claimant requests an award of attorney fees and costs of litigation.

**CONCLUSIONS OF LAW:**

1. Issues for decision are: first, whether the claimant was involved in a work related fall from the bridge in February 2004. If so, whether the claimant is nevertheless barred from receiving workers' compensation benefits for failing to use a safety device. If not, whether there is a causal relationship between claimant's back and shoulder conditions and the work related fall.

2. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1962). The plaintiff must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

3. 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 proven must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941). Where the causal connection between an accident and an injury is obscure, and a lay person would have no well grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).

Occurrence of the work incident

4. The defendant contests whether a work injury even took place on February 11, 2004. The defendant argues that there were no witnesses to the claimant's fall from the bridge and that the claimant had difficulty remembering the correct date of the fall. Most notably, claimant first claimed that the fall occurred on a day he did not work.

5. The evidence presented demonstrates that it is more probable than not that the claimant was involved in a work injury. Despite the minor discrepancies noted by the defendant, other evidence indicates that it is more likely than not that an accident occurred on February 11, 2004. First, Alan Wood, the claimant's co-worker testified that he noticed the claimant climbing up on the embankment, covered in snow. Another co-worker, Myron Bennett, also testified that he learned of the fall approximately one week later. The fact that nobody witnessed the claimant fall is not surprising in this situation, as claimant's co-workers and claimant were working at opposite ends of the bridge that day. The persuasive evidence proves that it is probable the claimant was involved in a work related accident on February 12, 2004.

Claimant's Failure to Use a Safety Device

6. Having decided that a work related accident occurred, we must still decide whether the claimant should be barred from claiming workers' compensation benefits because he failed to use a safety device. Compensation shall not be allowed for an injury caused by an employee's "willful intention to injure himself or another by or during his intoxication or by an employee's failure to use a safety appliance provided for his use. The burden of proof shall be upon the employer if he claims the benefits of the provisions of this section." 21 V.S.A §649.

7. The defendant argues that even if an accident occurred, the defendant did not use the safety device provided to him. Specifically, the defendant points out that when the claimant worked on the bridge, he was required to "clip on" his harness onto the bridge, to prevent him from falling. Defendant argues that the claimant deliberately failed to clip on the harness onto the bridge. Claimant's supervisor testified that he had no personal knowledge of any accidents involving the harness and, if used correctly, has never known a safety harness to fail. Furthermore, defendant notes that the claimant found it painful to use the harness and safety clip. Defendant argues that the evidence shows that it is more likely that claimant did not clip on the harness onto the bridge, and therefore failed to use the safety device provided to him.

8. The claimant argues that he was using the safety harness properly. He testified that he attempted to "lasso" the lanyard around one of the bridge's beams, and fell when it was not done properly. He argues that he was properly using the harness and any carelessness on his part does not rise to the level sufficient to preclude his claim for workers' compensation.

9. Weighing the evidence presented, it is more probable than not that the claimant was using the safety device provided to him. The defendant correctly points out that §649 does not require the failure to use a safety device to be willful. However, in this situation it does not appear that there was a "failure to use a safety appliance" by the claimant within the meaning of the statute. Similar to a past ruling, the defendant seems to ignore the no fault aspect of our workers' compensation system with a negligence defense that must fail. See, *Hewes v. Meadow Birch Gallery*, Opinion No. 66-98 (1998). The facts of this case show that the claimant, acting within his required work capacity, was wearing a safety harness at the time he fell. It appears that the dispute is essentially how the claimant hooked up his safety harness. The claimant's negligent use of his safety device cannot bar his claim. Thus, the defendant has failed to meet its burden on this issue.

10. Furthermore, from the description of claimant's work activities, it appears that the claimant was required to bend back in order to get around on the bridge. Although the safety harness caused some discomfort to the claimant, it appears less probable that the claimant made no attempt at connecting the lanyard to the bridge. It would have been difficult for him to have maneuvered without any sort of connection. Also, it is unlikely the claimant would have risked falling on an already injured back solely to gain some minor comfort while working.

Causation

11. The claimant argues that a causal connection exists between his neck injury and his mechanical shoulder injury. Although the claimant suffered from recurring degenerative disc disease prior to the accident, he argues that the fall from the bridge aggravated the spinal injury and caused the mechanical injury to his left shoulder. Claimant further notes that although he suffered from pain prior to the fall, the pain increased dramatically after the incident, forcing him to leave work and seek medical attention.

12. The defendant, with Dr. Levy's testimony, argues that there has been no aggravation of the claimant's degenerative disc disease. Rather, the injuries that the claimant has suffered and continues to suffer are recurrences of his pre-existing degenerative disc disease.

13. An aggravation is defined as an acceleration of exacerbation of a previous condition caused by some intervening event or events, whereas a recurrence is a return of symptoms following a temporary remissions or continuation of a problem which had not previously resolved or become stable. *Kerin v. Burlington Free Press*, Opinion No. 50-99WC (1999); *Lavigne v. General Electric*, Opinion No. 12-97WC (1997).

14. When classifying a condition as a recurrence or aggravation this department examines several factors addressed by these questions: 1) Did a subsequent incident or work condition destabilize a previously stable condition? 2) Had the claimant stopped treating medically? 3) Had the claimant successfully returned to work? 4) Had the claimant reached a medical end result? 5) Did the subsequent work contribute independently to the final disability? *Trask v. Richburg Builders*, Opinion No. 51-98WC (1998).

15. With regard to his C6-7 spinal injury, it is more probable than not that it was a recurrence of his pre-existing degenerative disc disease. Claimant's main argument, that there was an aggravation because the amount of pain increased after February 2004, is unpersuasive. Although the claimant has produced medical opinions that confirm this causal link, these opinions are primarily based on his subjective reports. See, *Webster v. Vermont Yankee Nuclear Power Plant*, Opinion No. 20-01WC (2001). Furthermore, Dr. Gennaro based his opinion on some questionable assumptions. First, he noted that an injury to the head of a fall from 14 feet would cause an aggravation of the claimant's pre existing condition. Yet records from early March clearly indicate that the claimant suffered no head injury. Furthermore, the nerve root injury which led to the C6-7 surgery in September 2004 did not show up on a June EMG study of the claimant. In this instance, we cannot disregard objective medical records and solely rely on the claimant's subjective reports in order to find a causal link.

16. Despite this, the claimant's fall more likely than not caused the separate mechanical shoulder injury. On this point it is the defendants who rely substantially on the claimant's subjective reports. Defendant's argument as well as Dr. Levy's testimony, primarily focused on the fact that the claimant had suffered shoulder pains prior to his fall, that the claimant sought no medical attention for a shoulder injury until 3 weeks after the accident and that Dr. Levy believes the shoulder pain to be a "false positive." With respect to this injury, medical reports show otherwise. His treating doctors, Dr. Nichols and Dr. Tranmer found extensive labral tears in the shoulder that were masked by the pain from his spine. Furthermore, although there had been complaints of shoulder pains prior to the accident at work, the pain apparently became so debilitating that the claimant, who is used to working despite injuries sustained, had to stop working. With these subjective and objective reports in mind, it is more probable that the shoulder pain arises from the mechanical injury and that this mechanical injury occurred when the claimant fell at work.

17. Furthermore, the defendant's argument regarding an unwitnessed incident, as well as the amount of time it took the claimant to seek medical attention, is unpersuasive. Although a late report in many cases would support a denial, a blanket denial in all late reported cases would create unfairness to an injured worker who is unaware that a gradual onset injury is work related, does not understand the workers' compensation process and/ or believes a report is not necessary for a minor injury expected to resolve. *Seguin v. Ethan Allen Inc.*, Opinion No. 28-02WC (2002). This case demonstrates the need to weigh several considerations in a late-reported case: 1) are there medical records contemporaneous with the claimed injury and/or a credible history of continuing complaints? 2) Does the claimant lack knowledge of the workers' compensation reporting process? 3) Is the work performed consistent with the claimant's complaints? And 4) Is there persuasive medical evidence supporting causation?

18. In this case, the claimant did not suffer "minor" injuries, though he does have a history of high tolerance of pain. The claimant meets the first factor, as there are medical records associated with his shoulder injury, beginning in early March, as well as a history of increased pain to his left shoulder after the accident. Although these were reported weeks after the incident, the claimant has a history of "working through" his pain, and having high levels of pain go unreported until such levels are too excruciating to work with. Furthermore, his account of the fall, although inconsistent with an injury to his neck, is consistent with mechanical damage to his arm. Also, as outlined previously, there is persuasive medical evidence indicating extensive mechanical left shoulder injuries consistent with claimant's account of the accident.

19. Having partially prevailed, the claimant is entitled to a mandatory award of necessary costs and a discretionary award of reasonable attorney fees. Pursuant to Rule 10.1220, claimant requests an award of attorney fees in the amount of 20% of the award or $9,000, whichever is less. The costs incurred were necessary, given the amount of work to litigate this claim.

**ORDER:**

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to:

1. Adjust this claim for claimant's shoulder injury;

2. Pay Statutory interest under 21 V.S.A §664 from the date each benefit became due;

3. Pay attorney's fees in the amount of 20% of the award and litigation costs of $1,955.77.

Dated at Montpelier, Vermont this 18th day of August 2005.

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Patricia A. McDonald
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.