STATE OF VERMONT
DEPARTMENT OF LABOR

Thoburn Stamm, III	)	Opinion No. 44-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
D.C. Construction	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. T-00582

Pretrial conference held on August 20, 2004
Hearing held on June 2, 2005
Record closed on July 1, 2005

APPEARANCES:

Katina F. Ready, Esq., and E. William Leckerling, Esq. for the Claimant
Glenn S. Morgan, Esq., for the Defendant

ISSUE:

Were claimant's injuries caused or aggravated by his work for D.C. Construction?

EXHIBITS:

Joint I: Medical Records

Claimant's 1: CV of Philip Trabulsy, M.D.

Defendant's A: CV of Gerald DeBonis, M.D.

FINDINGS OF FACT:

1. Claimant began working for D.C. Construction, a deck construction business, in April 2002. Before that he had worked in carpentry at his father's house and for two other employers when he was not in school. In 1996 and 1997 he worked 40 hours per week in carpentry. In the fall of 1999 he was a full time student, then returned to carpentry from January to the summer of 2000. He was back in school in the fall of 2000, then worked three to four days a week in carpentry during the winter and summer of 2001.

2. On June 26, 2002, after hammering at a job at D.C. Construction, claimant's right arm fell asleep and he lost his grip on the hammer. When he tried hammering with the left

hand, that arm also fell asleep. His right hand pain, numbness and tingling awakened him that night.

3. The next day, on June 27, 2002, claimant did not go to work, but sought medical care from Dr. Philip Trabulsy for his right hand pain. Claimant reported a two-year history of increasing pain and numbness in this right hand. On examination, he had positive Tinel's and Phalen's tests on the right and negative tests on the left. Dr. Trabulsy determined that claimant's problem was chronic, and gave him a steroid injection to his right wrist.

4. Claimant has not done any carpentry work since he left D.C. Construction on June 26, 2002

5. On July 24, 2002, the carrier for the employer sent claimant to Dr. Jonathan Fenton for an independent medical examination. Dr. Fenton diagnosed bilateral carpal tunnel syndrome and agreed with Dr. Trabulsy's plan for care and diagnostic studies. From the information available to him, Dr. Fenton found the work at D.C. Construction was a "significant event causing either aggravation of a quiescent syndrome or actually causing the syndrome in question." He added, "it would be hard to imagine that there was not some underlying condition, even if it was asymptomatic, prior to this precipitating event."

6. In the fall of 2002 claimant returned to school full time.

7. Claimant did not seek medical care again until December 2, 2002 when he again consulted with Dr. Trabulsy. In the intervening six months, claimant had not been doing any construction work, but was involved in drawing and keyboarding work at school. At that December visit, claimant reported that the return of symptoms related to typing and keyboarding work at school.

8. Dr. Trabulsy's examination revealed that claimant's symptoms then involved both hands, not simply the right hand involved in June. Tinel's and Phalen's tests were positive bilaterally for carpal tunnel. On the left, the cubital tunnel Tinel's was positive. Dr. Trabulsy recommended surgery.

9. Nerve conduction studies confirmed diagnoses of left cupital tunnel and bilateral carpal tunnel syndromes. Claimant underwent a carpal tunnel release on his right wrist in May 2004 and on the left wrists the following September.

Medical Opinions

10. Dr. Trabulsy is a board certified in general surgery, plastic surgery and hand surgery. He opined that claimant's carpentry work was a "cause and/or a significant aggravating factor in his nerve compression problem." He opined that the mild and sporadic symptoms claimant had would likely have remained stable were it not for the work he was doing at D.C. Construction. He based that opinion on work claimant was doing and the claimant's report of never having had similar problems such as pain, numbness, tingling and night wakening before June of 2002.

11. Dr. Trabulsy also opined that it is not unusual for a steroid injection to relieve symptoms for a time, without a change in the underlying condition, but that those symptoms often return.

12. Dr. DeBonis is a board certified orthopedic surgeon specializing in upper extremity surgery. He performed a medical record review for the defendant, but did not examine the claimant. Dr. DeBonis concluded that the injection administered to the claimant in July 2002 resolved the claimant's carpal tunnel condition and that the symptoms claimant had when he sought care in December were related to the cumulative trauma of keyboarding and art work. Claimant's symptoms in June involved only one side; in December both sides were involved. In June Dr. Trabulsy did not believe claimant needed surgery; in December he did.

CONCLUSIONS OF LAW:

1. At issue is whether the work claimant did at D.C. Construction caused the upper extremity problems that necessitated bilateral carpal tunnel surgery. On this issue, claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). 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 from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. The parties agree that the issue involves a question of aggravation and recurrence, a familiar dispute in this forum. "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. WC Rule 2.1110. "Recurrence" means the return of symptoms following a temporary remission. Rule 2.1312. See also *Pacher v. FairdaleFarms* 166 Vt. 626, 629 (1997) (mem). Facts this Department examines to determine if an aggravation occurred, with the greatest weight being given the final factor, are whether: 1) a subsequent incident or work condition destabilized a previously stable condition; 2) the claimant had stopped treating medically; 3) claimant had successfully returned to work; 4) claimant had reached an end medical result; and 5) the subsequent work contributed independently to the final disability. *Trask v. Richburg Builders*, Opinion No. 51-98WC (1998).

4. At times when a claimant does similar work at different employments, we have what has been called a flare-up. Under the flare-up doctrine, where the claimant suffers unrelated injuries during different employments, the employer at the time of each accident becomes responsible for the respective workers' compensation benefits. *Pacher v. Fairdale Farms*, 166 Vt. 626, 628 (1997). The second employer pays for whatever treatment is necessary to return the claimant to his or her baseline, after which

the employer at the time of the original injury resumes responsibility for the underlying condition. *Cehic v. Mack Molding Co., Inc.*, Opinion No. 16-04WC (2004).

5. In this case, claimant worked in carpentry for several years before April 2002. He had undiagnosed carpal tunnel syndrome, a condition Dr. Trabulsy described as "chronic." Dr. Fenton wrote, "it would be hard to imagine that there was not some underlying condition, even if it was asymptomatic, prior to this precipitating event." It is possible that the work for defendant "flared" his condition, but the baseline is not known. More likely, we are presented with two aggravations.

6. Claimant's work between April and June 2002 caused symptoms that necessitated medical treatment. Therefore, D.C. Construction is responsible for the care claimant received in June 2002. However, the inquiry cannot end there.

7. Almost six months passed between the first visit with Dr. Trabulsy in June and the second in December. In the interim, claimant did no construction work, yet his condition clearly destabilized, which means the first *Trask* criterion has been met. During those six months, claimant had not treated medically; therefore defendant also meets the second criterion. The third *Trask* supports the claimant because there is no support that he had reached medical end result. However, claimant's subsequent activities clearly contributed independently to his disability, the final and most important criterion. Symptoms were more intense; both hands became involved; surgery was necessary.

8. Four of the five factors support the defense position that claimant's activities after he left D.C. Construction aggravated the condition of his right hand and caused an injury to his left. Because that aggravation was nonindustrial, claimant is not entitled to benefits.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, D.C. Construction is responsible for medical care claimant received in June 2002. All other aspects of this case are DENIED.

Dated at Montpelier, Vermont this 19th day of July 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.