STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Audrey Beauregard	)	State File No. J-02947
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Montpelier Public School System	)	
	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 26-00WC

Hearing held in Middlebury, Vermont, on June 2, 2000.
Record closed on June 22, 2000

APPEARANCES:

Richard E. Davis, Jr., Esq. for the Claimant
Andrew W. Goodger. Esq. for the Defendant, The Travelers
Tammy M. Besaw Denton, Esq. for the Defendant, AIG

ISSUES:

1. Did claimant suffer an aggravation, recurrence or new injury after returning to work from an injury she sustained in August 1995?

2. Which insurance company is liable for claimant's injuries?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	Receipt for physical therapy treatment 3/12/99
Claimant's Exhibit 2:	Prescription receipts
Traveler's Exhibit A:	Curriculum Vitae of George P. White, M.D.
AIG's Exhibit 1:	Curriculum Vitae of S. Glen Neale, M.D.
AIG's Exhibit 2:	Curriculum Vitae of Victor Gennaro, M.D.

STIPULATIONS:

1. At the time in question, defendant, Montpelier Public School System, was an employer as defined under the Workers' Compensation Act.

2. At the time in question, claimant, Audrey Beauregard, was an employee of the defendant as defined in the Workers' Compensation Act.

3. At the time in question, claimant worked as a custodian for the defendant.

4. AIG was the insurance carrier on the risk up to June 30, 1998.

5. The Travelers was the insurance carrier on the risk after July 1, 1998.

FINDINGS OF FACT:

1. Claimant's custodial work for defendant included cleaning, vacuuming and maintaining the Main Street School, Union Elementary School, and the Montpelier High School. Claimant's duties increased substantially during the summer months (last half of June, July and August) because claimant was required to clean classrooms in their entirety which entailed moving desks, chairs, shelves, books and other items.

2. On or around August 2, 1995, claimant in the course of her employment with the defendant slipped and fell down stairs sustaining injuries to her right hip, right thumb, and right shoulder.

3. As a result, claimant sought chiropractic treatment with Daniel Woodcock, D.C., who initially diagnosed her with cervicalgia, right brachial neuralgia, and right sacroilliac sprain. Claimant continued to treat with Dr. Woodcock until November 1995. She missed approximately one week of work due to this injury. John J. Pizzo, D.C., is a chiropractor in the same office as Dr. Woodcock and states in his letter dated February 8, 1999, that claimant resumed treatment in his office in May of 1996 for an unrelated matter. Claimant's primary care physician, Carol Vasser, M.D., who was treating claimant for unrelated matters, made notes of claimant's shoulder pain and hip pain in her treatment notes dated May 1997 through February 1999.

4. During the summers of 1997 and 1998, claimant testified that she was required to move items much more frequently than in summers past due to construction being performed at the schools. Also due to the construction, claimant was required to move much larger and heavier items including slate tables, refrigerators, aquariums, and science animals.

5. During the summer of 1997 claimant's workload was heavier than normal due to renovations at the Main Street Middle School. By the end of that summer, her hip and shoulder pain "let up" when she resumed her regular academic year duties.

6. In the summer of 1998 there was major construction at the Montpelier High School. As a result, her workload was increased not only over the normal academic year, but also over a typical summer. She began the summer with work at Main Street Middle School and Union Elementary School. By the end of July, she was working full time at the High School which required moving solid slate table tops, bigger and heavier desks, chairs, books and bookshelves. She also had to lift aquariums, refrigerators and furniture.

7. During the summer of 1998 the claimant worked more overtime than usual, including Saturdays and half days on Sundays. By the end of the summer, she had more pain in her right shoulder, thumb, and hip than she had had after other summers. She noticed that the pain did not decrease after she resumed duties of the regular academic year.

8. On August 11, 1998, at the time of a regular office visit, the claimant told her doctor, Carol Vassar, M.D., that she was having shoulder pain. Dr. Vassar then referred her to an orthopedist, Glen S. Neale, M.D. Claimant commenced treating with Dr. Neale in August of 1998. X-rays performed in Dr. Neale's office revealed degenerative arthritis in

both claimant's hip and shoulder. On an October 7, 1998 visit to Dr. Neale, claimant reported thumb tenderness as well as increased shoulder pain. Dr. Neale recommended that claimant seek physical therapy treatment for her injuries. The physical therapy notes indicate that claimant has had intermittent pain in her shoulder, hip, and thumb since the accident in 1995. The notes also indicate that the heavy lifting claimant did in the summer of 1998 increased her pain.

9. The claimant testified that she did not miss any time from work for her shoulder, hip, and thumb problems from 1995 until December 1998. She also testified that although she worked after the summer of 1998, she did so at a reduced capacity.

10. On December 21, 1998, Dr. Neale performed surgery on claimant's right shoulder to repair a SLAP lesion. On January 7, 1999, claimant underwent surgery to remove a ganglion cyst from her right thumb, also performed by Dr. Neale. Dr. Neale states in his correspondence dated February 2, 1999 that claimant's shoulder injury of 1995 was exacerbated by her injury in 1998. In a later correspondence, Dr. Neale tentatively stated that he felt claimant never fully recovered from her 1995 injuries and that her current injuries were an aggravation as defined by Workers' Compensation Law. Dr. Neale continued to treat claimant after her surgery. Throughout this treatment claimant's hip pain persisted, and Dr. Neale concluded that she had torn cartilage in her hip.

11. On August 3, 1999 George P. White, Jr., M.D., M.S., conducted a medical evaluation of the claimant's condition for the Travelers. Based on his evaluation and claimant's medical history, Dr. White stated that it is reasonable that the SLAP lesion Dr. Neale diagnosed n 1998 occurred when the claimant fell in 1995. He also said that although he does not consider physical exertion to be an "injury," the unusual physical activity in the summer of 1998 "could very well have worsened an underlying problem which was present since 1995." He concluded that she has reached a medical end result for her shoulder and thumb, but not for her hip. According to Dr. White, claimant has an 8% upper extremity impairment resulting in a 5% whole body impairment.

12. On September 1, 1999 claimant saw Victor Gennaro, D.O., for a medical examination at AIG's request. Dr. Gennaro concluded that claimant's exertions in 1997 and 1998 aggravated her pre-existing shoulder and thumb injuries. Dr. Gennaro did not make a conclusive determination regarding claimant's hip injury.

13. On September 21, 1999, this Department issued an interim order requiring AIG to pay claimant temporary total disability benefits pursuant to 21 V.S.A. § 642.

CONCLUSIONS OF LAW:

1. Defendant AIG asserts that claimant suffered an aggravation of her shoulder, hip, and thumb injuries as a result of her work activities in the summer of 1998. In support of that assertion, AIG relies on the records and testimony of Dr. Neale, Dr. White and Dr. Gennaro, as well as the Commissioner's previous decision in *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998) and the Vermont Supreme Court's decision in *Pacher v. Fairdale Farms, et al*., 166 Vt. 626 (1997) (mem.). Primarily, defendant AIG avers that claimant's injuries stabilized following her 1995 accident only to be exacerbated and accelerated by her strenuous work in the summer of 1998.

2. Defendant, the Travelers, avers that the claimant suffered a recurrence of her 1995 injuries and that, therefore, AIG is liable for claimant's workers' compensation benefits. The Travelers contends that claimant never fully recovered from her 1995 injuries and that her current condition was directly caused by her accident in 1995. In support of this contention, the Travelers also cites *Trask* and *Pacher*; however, it claims that the claimant does not satisfy the aggravation test demonstrated in these cases. The Travelers also relies on the medical evidence presented to support its contention that claimant suffered a recurrence rather than an aggravation.

3. The Travelers is correct in pointing out that AIG, as the party attempting to relieve itself of liability, has the burden of proving that the Travelers is liable for claimant's work related injuries. *Lavigne v. General Electric*, Opinion No. 12-97WC (June 17, 1997); *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998); *Jeannett Bressett-Roberge v. Personal Connection and Ethan Allen Furniture*, Opinion No. 03-99WC (Jan. 26, 1999).

4. In order for AIG to satisfy its burden, it must show that claimant either suffered a new injury or that she aggravated a pre-existing condition while the Travelers was on the risk. Also, if it is too difficult or impossible to apportion liability amongst the carriers, the last injurious exposure rule applies which makes the Travelers liable. *Pacher*, 166 Vt. 626. *Bressett-Roberge*, Opinion No. 51-98WC, 5, (Aug. 25, 1998).

5. It has not been proffered and there is no evidence indicating that claimant sustained a wholly new and separate injury from her 1995 accident; therefore, the analysis is one of aggravation or recurrence. The analysis traditionally applied by the Commissioner weighs the following factors: "1) whether there is a subsequent incident or work condition which destabilized a previously stable condition; 2) whether the claimant had stopped treating medically; 3) whether the claimant had successfully returned to work; 4) whether the claimant had reached an end medical result; and 5) whether the subsequent work contributed independently to the final disability." *Lavigne*, Opinion No. 12-97WC, 6, (June 17, 1997); *Trask*, Opinion No. 51-98WC (Aug. 25, 1998). The greatest weight is given to the fifth factor. *Brewer v. Town of Springfield*, Opinion No. 27-97WC, 5, (Oct. 3, 1997) (referring to the *Pacher* decision).

6. In addressing the first factor, it seems more likely than not that the work claimant was doing at the high school in the summer of 1998, beginning at the end of July, destabilized a previously stable condition. There is evidence in the record that the claimant had some minor symptoms after her 1995 injury. In Dr. Pizzo's treatment note dated November 26, 1996, he referenced right shoulder and right hip pain experienced by the claimant. There is also another reference to shoulder pain in a note dated January 31, 1997, and a reference to hip symptoms dated May 5, 1997. Also, Dr. Carol Vasser's notes reference claimant's shoulder pain twice in 1997. However, those symptoms did not interfere with claimant's daily life. Dr. Vasser, who treated claimant extensively during the period in question for unrelated matters, was aware of claimant's 1995 injuries, yet did not refer claimant to an orthopedist for these injuries until 1998. This leads to a reasonable determination that although the claimant had occasional complaints of pain, her condition had stabilized after the 1995 injury. This case is clearly distinguishable from *Pelkey v. Rock of Ages Corp*., Opinion No. 74-96WC (Jan. 3, 1997) where this Department

concluded that the claimant had a recurrence when his injury occurred under the watch of the first carrier, but was not diagnosed until another carrier was on the risk. In this case, the claimant's condition was treated, then stabilized after a first injury under one carrier, then was destabilized by work the claimant was doing while the second carrier was on the risk.

7. Based on the medical records from Dr. Pizzo and Dr. Vasser, it seems that claimant was not treating regularly for the 1995 injuries. Dr. Pizzo stated that he was not treating her for these injuries after 1995, and other than three minor references to claimant's shoulder and hip pain in his notes, there is nothing to discredit that evidence. Therefore, claimant did cease treating for these injuries after November 1995 and did not resume treatment until 1998.

8. Claimant missed approximately one week of work following her injury of 1995 and then returned. Claimant continued to work until 1998. This is substantial notwithstanding claimant's testimony that she continually experienced pain. She continued to work full time and in her full capacity until 1998, this qualifies as a successful return to work.

9. Whether claimant reached a medical end result is not conclusive, despite Dr. Gennaro's September 1, 1999 opinion that she had reached a medical end result sometime in 1996.

10. The most compelling factor as indicated by the *Pacher* court, is whether subsequent work contributed independently to the final disability. The medical evidence and claimant's testimony show that the work claimant performed at the high school beginning in late July 1998 independently worsened her condition. Dr. Neale asserted that claimant's exertions in 1998 aggravated her injuries. Dr. White for the most part concurred with that opinion. Dr. Gennaro claimed that the activities in 1997 and 1998 contributed to claimant's current injury; however, claimant was not treated in 1997 and continued to work until 1998. Claimant did not seek medical attention for pain in her shoulder, hip and thumb until 1998. Regardless of whether claimant felt pain prior to 1998, there is a preponderance of the evidence showing that claimant's current shoulder, hip and thumb injuries were aggravations of a pre-existing condition due to her work activities in July and August of 1998.

ORDER:

THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, AIG's claim for reimbursement is granted and the Travelers is ordered to pay claimant temporary total disability benefits pursuant to 21 V.S.A. § 642.

Dated at Montpelier, Vermont, on this 17th day of August 2000.

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R. Tasha Wallis
Commissioner