Commercial Union/York Ins. v. Transamerica Ins. (06/29/04)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Commercial Union/York Insurance Company Claimant	)	
v.	)	State File No. K-06034
Transamerica Insurance Company Defendant	)	Christopher McVeigh, Esq. Arbitrator

ARBITRATION DECISION AND ORDER

Parties stipulated to arbitrating this matter on the submitted records.

APPEARANCES:

Christopher Callahan, Esq. for Commercial Union.

Keith Kasper, Esq., for TIG Insurance Company/Hillcrest Trucking

EXHIBITS:

Joint Exhibit 1: Medical Records

Joint Exhibit 2: Charles King's April 28, 2004, deposition

ISSUE:

Whether Charles King aggravated his low back condition on September 20, 1996, entitling Commercial Union to reimbursement for previously paid workers' compensation benefits.

FINDINGS OF FACT

1. Commercial Union York Insurance Company did not insure Hillcrest Trucking for its workers' compensation obligations, but starting paying benefits to Mr. King for his July 18, 1996, injury and executed a Form 21 Agreement on November 21, 1996, which the Department of Labor and Industry approved on April 28, 1997. This Form 21 cited July 18, 1996, as the date of the accident.

2. TIG Insurance Company began insuring Hillcrest Trucking for its workers' compensation obligations on August 18, 1996.

3. On July 18, 1996, Charles King worked for Hillcrest Trucking and Hillcrest Sales in a dual capacity. He had been working for Hillcrest for a couple of years prior to 1996. On Mondays, he worked for Hillcrest Sales as a salesperson, drumming business in Vermont and part of New Hampshire. On Tuesdays through Fridays, Mr. King worked as a truck driver for Hillcrest Trucking, delivering a variety of restaurant products to customers throughout Vermont and parts of New Hampshire. These products included bags of sugar and flour weighing up to 100 pounds. On Tuesdays through Thursdays, Hillcrest Trucking assigned a helper to deliver product with Mr. King. On Fridays, he worked on his own delivering product in the greater Burlington, Vermont area.

4. On July 18, 1996, Charles King was an employee as defined under Vermont's Workers' Compensation Act and Hillcrest Trucking was an employer as defined under Vermont's Workers' Compensation Act.

5. On July 18, 1996, a Thursday, Charles King was working in the course and scope of his employment, delivering product to Louis' Restaurant, in Hanover, New Hampshire. This delivery required Mr. King to put the product he was delivering on a handcart and then pull the handcart up a flight of stairs into the restaurant area. Because it was raining and because of the stairway's greasy condition, Charles King slipped when at the top of the stairs, bouncing down the stairs until he came to rest sitting on his buttocks on the asphalt at the bottom of the stair. Mr. King's helper, a gentleman named Paul, completed this delivery while Mr. King rested on a stool in the restaurant kitchen.

6. Mr. King experienced a low back injury as a result of this fall, which caused black and blue marks, stiffness, and soreness. He had to roll out of bed the next morning for work. He did not seek immediate professional medical treatment for this condition, but consumed ibuprofen at a rate of 30 to 40 tablets a day. This rate of self-medication kept the edge off of Mr. King's low back pain, which has never completely resolved since July 18, 1996.

7. Charles King notified his employer about this accident when he returned to Vermont on July 18, 1996, and continued in his employment up until September 20, 1996. Between July 18, 1996, and September 20, 1996, Mr. King continued to experience low back pain of a generalized nature and continued to consume ibuprofen at a rate of 30 to 40 tablets a day. He did not seek any specific medical care for his low back condition, a circumstance on which he testified "Yeah, which was dumb. I should have sought medical help immediately, but, you know." During this July – September 1996 period, Charles King took longer to perform his work than he had prior to July 18, 1996.

8. Between July 18, 1996 and September 20, 1996, Mr. King's low back condition did not improve. In his April 28, 2004, deposition, over seven years after the accident, Mr. King testified that he could not remember if his condition worsened between July 18, 1996 and September 20, 1996, but it is clear that his condition did not improve and was only maintained because of his excessive use of ibuprofen throughout the day.

9. September 20, 1996 was a Friday. On Fridays, Mr. King worked alone making local deliveries in the Burlington-Essex area initially, then returning to his warehouse in Fairfax, Vermont, for another truckload of deliveries to customers in the outlying districts around Burlington, Vermont. Mr. King made a delivery to a customer in Essex,

Vermont, which involved carrying bags of sugar and flour weighing up to fifty and one hundred pounds from the front of the truck to the end of the truck trailer where he then carried those bags of sugar and flour from the end of the trailer to the delivery site. Mr. King was able to complete part of the delivery before his back just gave out. No specific lifting, carrying, or twisting event caused Mr. King's increased back pain. Mr. King called Hillcrest Trucking for a helper to complete the delivery, drove himself back to Hillcrest Trucking, and, at his employer's urging, treated at Northwest Medical Center in St. Albans, Vermont. Mr. King has not worked for Hillcrest since September 20, 1996, but returned to work for another employer in 2001.

10. Prior to lifting and moving the fifty and one hundred pound bags of sugar and flour on September 20, 1996, Mr. King located his low back pain in a specific but general area, and after lifting and moving the bags of sugar and flour, his pain was more intense and located in a more narrowly specific area. Mr. King also began experiencing numbness in his left thigh after lifting the bags of sugar and flour, and he started experiencing falls at home, which Mr. King attributes to left leg numbness.

11. Since September 20, 1996, Mr. King has treated his low back condition with conservative medical treatments. He initially treated at Northwest Medical Center, then treated with Dr. Deogracias Esquerra, in St. Albans, Vermont. He has also undergone physical therapy, aquatic therapy, he has participated in the multi-faceted psychological and physical program at the Center for Musculoskeletal Medicine, he treated with Dr. George White and Dr. Roland Hazard at the Spine Institute, he has undergone injection therapy at the Pain Management Center at Fletcher Allen Health Care, and Dr. Kenneth Ciongoli and Dr. Andres Roomet have evaluated him for radiculopathy and tremulousness. Dr. Paul Scibert also performed an independent medical evaluation on April 14, 1998.

12. On September 26, 1996, Commercial Union prepared an Employer's First Report of Injury, citing the July 18, 1996, fall down the stairs at Louis' Restaurant as the work accident. On November 21, 1996, Commercial Union prepared a Form 21 Agreement for the payment of temporary total disability benefits which Mr. King signed on November 25, 1996, and which the Department of Labor and Industry approved on April 28, 1997. The Form 21 cited July 18, 1996, as the date of injury.

13. In his subjective reports to medical care providers about the cause of his low back condition, Charles King primarily cited his fall down the stairs at Louis' Restaurant on July 18, 1996, as the cause of his low back difficulty. On October 9, 1996, he also reported to Dr. George White at the Spine Institute that he had fallen down stairs landing on his buttocks, and that "He reported the incident and tried self treatment with Ibuprofen which does not seem to be helpful. He continued to work and on December (sic) 20 while unloading a truck, he noted that his pain was much worse." See October 9, 1996 Spine Institute Records

14. On October 26, 2000, Commercial Union entered into a Form 22 Permanent Partial Impairment agreement with Charles King, citing the July 18, 1996 injury as the applicable injury. Commercial Union did not condition this Form 22 or in any way reserve rights against any other party for the permanency benefits to be paid pursuant to the Agreement. Charles King signed this Form 22 on November 2, 2000, and the Department approved it on December 15, 2000.

15. Commercial Union first filed a claim against TIG Insurance Company seeking reimbursement for benefits paid to Charles King on January 21, 2003.

CONCLUSIONS OF LAW

1. In this litigation, Commercial Union claims that Charles King aggravated his low back condition on September 20, 1996, when unloading fifty and one hundred pounds bags of sugar and flour and that TIG Insurance Company is responsible for the benefits Commercial Union paid to Mr. King since that time. In response, TIG Insurance Company argues that Commercial Union's claim for reimbursement, first asserted on January 21, 2003, is barred by the statute of limitations, has been waived, is barred by the equitable doctrine of *laches*, it is not supported by expert medical evidence, and finally, that Mr. King did not aggravate his preexisting condition on September 20, 1996, when TIG was on the risk for Hillcrest Trucking.

A. Applicable Legal Principles

2. Since Commercial Union is seeking to relieve itself of an obligation for Charles King's workers' compensation claim, it has the burden of proof in this matter. See Trask v. Richburg Builders, Opinion No. 51-98WC, dated August 25, 1998, at Conclusion 1.

3. In a worker's compensation claim, the party with the burden of proof, here Commercial Union, must create in the mind of the trier of fact something more than a possibility, suspicion, or surmise that the event complained of caused a compensable injury, or in this instance, caused an aggravation. See Burton v. Holden & Martin Lumber Company, 112 Vt. 17, 19 (1941). When the hypothesis offered is one about which a layperson could have no well-grounded opinion, expert medical evidence is necessary to establish the causal connection or the proposition offered. See Lapan v. Berno's, Inc., 137 Vt. 393, 395-396 (1979); Marsigli's Estate v. Granite City Auto Sales, Inc., 124 Vt. 95, 103 (1964); Laird v. State Highway Department, 110 Vt. 195, 199 (1939). Under Vermont's Workers' Compensation Act, the party with the burden of proof must prove more than a temporal relationship between an activity and a medical condition; temporality alone does not equal causality. See Norse v. Melsur Company, 143 Vt. 241, 244 (1983).

4. When determining whether a stated event is an aggravation of a preexisting condition or is a recurrence of it, the Department applies the following factors:

    A. Whether a subsequent incident or work condition destabilized a previously stable condition;

    B. Whether the claimant had stopped treating medically;

    C. Whether the claimant had successfully returned to work;

    D. Whether the claimant had reached a medical end result

    E. Whether a subsequent work event contributed independently to the final disability.

5. Trask v. Richburg Builders, supra, at Conclusion 3. The greatest weight is given to the fifth and final factor, of whether a subsequent work event contributed to the final disability. See Holland v. Okemo Mountain, Opinion No. 65-98WC, dated November 5, 1998, at Conclusion 9. In addition to the Department's five factor test, the Vermont Supreme Court has provided guidance in aggravation/recurrence cases in Pacher v. Fairdale Farms, 166 Vt. 626, 627- 628 (1997), where it stated:

> In workers' compensation cases involving successive injuries during different employments, the first employer remains liable for the full extent of benefits if the second injury is solely a recurrence' of the first injury – i.e., if the second accident did not causally contribute to the claimant's disability. [citations omitted] If, however, the second incident aggravated, accelerated, or combined with a preexisting impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an 'aggravation,' and the second employer becomes solely responsible for the entire disability at that point.

6. By definition, the Department views aggravation as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." See Workers' Compensation Rule 2.1110. Recurrence, on the other hand, is defined as "the return of symptoms following a temporary remission." See Workers' Compensation Rule 2.1312.

7. Although the determination of whether an event is an aggravation or a recurrence is ultimately a legal determination, that legal decision is necessarily based on expert medical evidence. See Bushor v. Mower's News Service, Opinion No. 75-95WC, dated October 16, 1995, at Conclusion 4.

8. An insurance carrier who has accepted a claim it was not ordered to pay and entered into settlement agreement without conditioning that agreement to preserve rights against other parties believed responsible for the benefits to be paid, has made a voluntary payment for which it cannot seek reimbursement from another. See Craig v. Alpine Vanity, Opinion No. 8-93WC, dated July 15, 1993, at Conclusions 3 – 5.

B. Aggravation/Recurrence

9. Charles King suffered a work injury on July 18, 1996, when he fell down the stairs at Louis' Restaurant in Hanover, New Hampshire. Because of this fall, Mr. King injured his low back, and almost uniformly cited this incident as the cause of his low back injury when treating with various medical care providers after September 20, 1996. Initially, Charles King self-treated his low back condition by consuming between 30 and 40 tablets of ibuprofen a day. This medication, which took the edge of his continuing low back pain. He continued his work, both as sales staff on Mondays and delivery staff on Tuesdays through Fridays, but worked more slowly than he had prior to the accident. Finally, on September 20, 1996, in the process of delivering fifty and one hundred pound bags of sugar and flour, his back gave out and he could no longer continue in his work at Hillcrest Trucking.

10. It is clear that on September 20, 1996, Charles King's pain symptoms increased in intensity and became more focused anatomically. He also began experiencing numbness in his left leg that he had not experienced before September 20, 1996. This fact pattern, however, presents a fact pattern for which the aggravation/recurrence formula does not easily apply. For example, Charles King did not treat medically other than self-medicating with 30 to 40 tablets of ibuprofen a day. In hindsight, he wished he had sought professional medical treatment immediately after the July 18, 1996 fall and before September 20, 1996. While Charles King did not see a medical care provider between July 18, 1996, and September 20, 1996, the inordinate amount of ibuprofen he consumed strongly suggests a significant medical problem, which Mr. King simply did not treat. Mr. King's extensive use of pain medication also undermines any suggestion that his condition had stabilized between July 18, 1996, and September 20, 1996. Instead, it appears that Mr. King had just not yet treated his back injury from the July 18, 1996, fall down the stairs. Since Mr. King continued in his work with the use of significant amounts of pain medication, it cannot be said that he successfully returned to work. Common sense dictates that an injured worker with a low back injury who maintains his employment through immoderate use of medication cannot be said to have successfully returned to or continued in her or his work.

11. Finally, it appears that Charles King's symptoms worsened on September 20, 1996. Although Mr. King describes performing physically demanding work that day, he cites no specific event, which caused his back symptoms to increase. Under Vermont's Act, expect medical evidence is a necessary foundation for the rendering of an opinion on the causal connection between a work activity and a medical condition. Under the Act the finder of fact must rely on expert medical opinion in order to build a proper foundation for determining whether Charles King's work efforts on Friday, September 20, 1996, worsened his underlying medical condition, thus constituting an aggravation, or simply worsened his pain symptoms, thus constituting a recurrence. No expert medical evidence in the record suggests that Charles King's work on Friday, September 20, 1996, worsened his underlying, pre-existing low back condition as opposed to worsening his symptoms alone. See Martell v. Dowlings, Inc., Opinion No. 15-04WC, dated March 30, 2004, at Conclusion 11; Stannard v. Stannard Company, Opinion No. 33-01WC, dated October 5, 2001 at Conclusion 2.

12. Without this necessary expert medical opinion evidence, Commercial Union's claim that Charles King's work on September 20, 1996, aggravated his pre-existing condition cannot succeed.

13. Therefore, Commercial Union's claim that Charles King aggravated his pre-existing low back condition on September 20, 1996, cannot be substantiated with the requisite evidence, and is not accepted.

C. Waiver

14. On November 21, 1996, Commercial Union signed a Form 21 Agreement for Temporary Total Disability Benefits with Charles King related to his July 18, 1996, injury. Mr. King signed the Form 21 on November 25, 1996, and the Department of Labor and Industry approved the Form 21 on April 28, 1997. Upon approval, the agreement became binding between the parties to the agreement absent fraud or mutual mistake. See Catani v. A.J. Eckert, Opin. No. 28-95WC, dated May 17, 1995, at Conclusion 2; Blais v. Church of Jesus Christ of Latter-Day Saints, Opinion No. 30-99WC, dated July 30, 1999, at Conclusion 24.

15. On October 26, 2000, Commercial Union signed a Form 22 for Permanent Partial Impairment Benefits for Mr. King related to his July 18, 1996 fall down the stairs at Lou's Restaurant. Mr. King signed this agreement on November 2, 2000, and the Department of Labor and Industry approved it on December 15, 2000. Upon Departmental approval, the agreement became a binding contract between those parties, absent fraud or mutual mistake. See Catani, supra.

16. When Commercial Union signed the Form 21 on November 21, 1996, enough time had passed for it to have investigated Mr. King's claim and to determine whether his

activities on September 20, 1996, constituted an aggravation of his July 18, 1996, workplace injury.[1]

17. When Commercial Union signed the Form 22 Permanent Partial Impairment agreement, which was not conditioned in any way to preserve rights against another insurance carrier, sufficient time had elapsed to allow Commercial Union to have investigated its claim of aggravation and to have conditioned the Form 22 to preserve any reimbursement rights against TIG. The Form 22 is not conditioned in this manner. See Craig v. Alpine Vanity, supra.

18. Under Vermont's Workers' Compensation Act, a workers' compensation insurance carrier has a duty of prompt investigation into a claim. Having had the opportunity to investigate this claim, and not having protected its interests by conditioning agreements made with Mr. King, Commercial Union has waived and relinquished any claim for reimbursement against TIG.

19. Given the decisions on aggravation and waiver, TIG's other arguments need not be addressed.

ORDER

1. Based on the above findings and conclusions, Commercial Union's demand for reimbursement from TIG is denied.

2. The parties shall share equally in the costs of this arbitration.

DATED this 29th day of July 2004 in Burlington, Vermont.

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Christopher McVeigh, Esq.
Arbitrator

[1] Although Commercial Union did not have a policy insuring Hillcrest Trucking on July 18, 1996, Commercial Union accepted Mr. King's claim and paid it as if coverage existed. Commercial Union's acceptance of Mr. King's claim is not an issue in this arbitration, particularly since Mr. King is not a party to this arbitration.