

Trombley v. SOV, Agency of Transportation

(October 6, 2004)

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

David Trombley

Opinion No. 44-04WC

v.

*By: Margaret A. Mangan
Hearing Officer*

*State of Vermont
Agency of Transportation*

*For: Michael S. Bertrand
Commissioner*

State File No. T-18580

*Hearing Held in Montpelier on June 23, 2004
Record closed on July 6, 2004*

APPEARANCES:

*Heidi S. Groff, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant*

ISSUE:

Did the claimant's eye injury, discovered on May 12, 2003, arise out of and in the course of his employment? If so, what is the extent of the workers' compensation benefits owed?

EXHIBITS:

Joint I: Preservation testimony of Dr. Tabin (videotape and transcript).

Joint II: CV of Dr. Tabin

Joint III: Medical Records

Joint IV: Medical Bills

Joint V: Form 25

Joint VI: Employer Records of Work Performed

Joint VII: Form 10/10S

Claimant's 1: Specials chart, including only those bills related to foreign body

Claimant's 2: Co-worker statements

STIPULATION:

1. *Claimant was an employee of defendant and defendant his employer within the Workers' Compensation Act ("Act") since 1986.*
2. *Prior to his employment with defendant, he had suffered a non-work related significant injury to his right eye resulting in almost complete loss of vision in that right eye.*
3. *As a result of this pre-existing condition, claimant has regular annual eye examinations.*
4. *For the three weeks prior to the discovery of his injury, claimant had not been at work as he was out of state on vacation.*
5. *Claimant underwent surgery for the eye injury on August 19, 2003, resulting in a significant improvement in his prior vision in his eye.*
6. *At the time of the discovery of the eye injury, claimant's average weekly wage was \$1,029.22 with an initial compensation rate of \$686.15 plus \$10 (for a dependent), which equals \$696.15. After the July 1, 2003 COLA, it would be \$702.62 plus \$10.00 which equals \$712.62.*

FINDINGS OF FACT:

1. *Claimant began working for the State of Vermont in 1986 patching roads, cutting brush, digging ditches and culverts, seeding, cleaning up after accidents, scraping roads, fixing guardrails, plowing and otherwise doing what needed to be done as a maintenance worker.*
2. *From the time of his adolescence, claimant has had trouble with his right eye, a problem that began when a fishhook got caught in that eye. As a result, the only vision he had in the right eye was the ability to distinguish light from dark.*
3. *In 1989, while working for the State, claimant was pounding stainless steel pins and got a "bullet" in his left eye. Protective eye gear was not required at that time and he was not wearing any. He did not feel the metal enter his eye, but noticed a floating black dot. He went to the hospital that day and had surgery during which the metal was removed with a foreign body magnet. A laboratory culture report showed no growth in the foreign body removed from the left eye. During the postoperative recovery, claimant was blind. All*

treatment, including safety glasses and temporary total disability, was covered under workers' compensation, although no permanency determination was ever made. Replacement for safety glasses continues to be covered as needed.

- 4. Claimant's eyesight returned. Before he was permitted to return to work, however, he was required to wear OSHA approved safety glasses. The glasses have non-removable side shields, although they are not sealed to the face, having small gaps around the nosepiece and around the outer rim. He wears the glasses at all times, not only at work.*
- 5. In December 2002, while working, his left eye started burning, a problem that turned out to be rust in his eye, which Dr. Coco removed.*
- 6. In the several months before May 2003, claimant did winter maintenance that included plowing, sanding, and making pins for a plow, which involved grinding, i.e. using a carbide wheel blade on a chop saw. At times, claimant was near coworkers who were grinding metal at work.*
- 7. A few weeks before May 2003, claimant was on vacation in Reno for the bowling nationals.*
- 8. On May 3, 2003, claimant went to see Dr. Tomasi for his annual eye examination. He was not having symptoms. However, Dr. Tomasi noted a foreign object embedded in the cornea of his right eye, prompting him to refer claimant to Dr. Herzen who suspected metal from a grinding wheel at work and suggested claimant file this claim.*
- 9. Dr. Herzen referred claimant to Dr. Tabin who testified for the claimant by deposition.*
- 10. Dr. Tabin is Associate Professor of Surgery and Chief, Cornea and External Diseases in the Division of Ophthalmology at the University of Vermont. He has had exceptional education and experience, is Board Certified in Ophthalmology and specializes in corneal diseases. He has done thousands of eye operations.*
- 11. Dr. Tabin ruled out the old fishhook injury as the source of the metal in claimant's eye because the operative report following that injury indicates that the hook was completely removed and because records from 1990 show the cornea with no evidence of a foreign body.*

12. *Because the object was deeply embedded in the cornea, Dr. Tabin opined that it had to have gotten there from a high-impact injury from the front or side and not from the gradual movement of the object.*
13. *Because of the extent of the inflammation, Dr. Tabin estimated that the metal got into claimant's eye within six months of the discovery. There was no rust.*
14. *Dr. Tabin performed surgery to remove the object from claimant's right eye. During the surgery, he also removed a cataractous lens, placed an intraocular lens in the eye and transplanted a cornea.*
15. *The pathology report from the surgery identifies a metal foreign object as part of the history, but describes the only specimen as a cornea with a red-brown soft material.*
16. *Dr. Tabin explained that had the foreign body been the only reason for the surgery, the anesthesia used and resultant discomfort would have been no different from that related to the actual, more extensive, surgery performed, although the resultant disability would have been only three weeks.*
17. *Claimant's right eye is better now than it had been for years preoperatively.*
18. *Claimant's attorney submitted an itemization of expenses totaling \$284.53 and copy of a contingent fee agreement.*

CONCLUSIONS OF LAW:

1. *Claimant alleges that a metal foreign object entered his eye at work, the only place in his life where he was exposed to high velocity metal. He is not claiming that the extensive eye surgery, including corneal transplant, is compensable. He seeks benefits associated only for removal of the object and the limited period of temporary total disability postoperatively for the time he would have been disabled had the only surgery been the removal of a foreign object.*
2. *In workers' compensation cases, the 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).

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 proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).*
4. *Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's Inc., 137 Vt. 393 (1979).*
5. *Despite the support of a credible medical expert, claimant is unable to sustain his burden of proof. Claimant was away from work in the three crucial weeks prior to the discovery of the eye injury. Doctors saw an object in his eye that he never felt, even though it apparently entered at a high velocity. It could have been from a roadway or from myriad unknown sources. The suspicion that a work situation was the source cannot be proven when claimant did not work for three weeks before the discovery and when the pathology report fails to describe a metal object.*
6. *It is certainly possible that a metal object from grinding blades got into claimant's eye through a gap in his safety glasses. It is also possible that the pathology department at FAHC misplaced the metal foreign object. However, under the requirements of Burton, 112 Vt. 17, such possibilities cannot support a claim.*

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 6th day of October 2004.

*Michael S. Bertrand
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.