STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File Nos. H-19457; P-16667; Z 8716
	)	
John Stebbins	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Willis
Cepco Inc.	)	Commissioner
	)	
	)	Opinion No. 16-02WC

Hearing held in Montpelier on November 30 and December 3, 2001 and
January 3 and 4, 2002
Record Closed on March 6, 2002

APPEARANCES:

John Mabie, Esq. for the claimant
Andrew Boxer, Esq. for defendant Travelers/Cepco
John Valente, for the defendant, National Union/Cepco
Christopher McVeigh for the defendant RSKCo./Cepco

ISSUES:

1. Did the claimant suffer a work-related injury at Cepco on October 14, 1999?

2. Is the claimant permanently totally disabled as a result of injuries at Cepco?

3. If the claimant is not permanently totally disabled, what degree of permanency, if any, does he have as a result of work-related injuries at Cepco?

4. Did the claimant willfully make a false statement in order to obtain workers' compensation benefits?

EXHIBITS:

Joint Exhibit A:	Medical Records:
Claimant's Exhibit A-1:	Cheshire Medical Center Record 9/5/00
Claimant's ExhibitA-2:	MHMC Letters from Dr. Philips 1/29/88 and 2/24/88
Claimant's Exhibit A-3:	Mt. Ascutney Hospital x-ray report 10/85
Claimant's Exhibit A-4:	Note from Dr. Donaldson 8/9/01
Claimant's Exhibit A-5:	Social Security Decision

Claimant's Exhibit 6:	Retainer Agreement
Claimant's Exhibit 7:	Attorney Draft bill
Claimant's Exhibit 7A:	Dr. Grubman's bill
Claimant's Exhibit A-8:	Three First Reports of Injury
Claimant's Exhibit A-9:	Supplemental Records of Dr. Aronowitz

Defendants' Exhibits:

Travelers Exhibit 1:	Vocational Evaluation Referral Form
Travelers Exhibit 2:	Chronology of Reports from Charlene Davis
RSKCo. Exhibit 6:	Exhibit from Charlene Davis's deposition
Travelers Exhibit 7:	Memorandum, 10/27/99
Travelers Exhibits 10-41	(except 36, 40): Photographs
Travelers Exhibit 42:	Functional Capacity Evaluation
Travelers Exhibit 43:	Memorandum from Norton to Weiner 10/22/99
National Union Exhibit 45:	Fran Plaisted Report
RSKCo. Exhibit 46:	Springfield Hospital Records (submitted 2/25/02)

FINDINGS OF FACT:

1. At all times relevant to this action, claimant was an "employee" and Cepco his "employer" as those terms are defined in the Vermont Workers' Compensation Act (Act) and Rules.

2. In 1979 claimant began working at Cepco where he polished aircraft engine blades and other parts. He regularly worked all available overtime shifts and was a good employee. Over the years claimant worked on various lightweight and heavy weight parts. His work required him to sit hunched over for extended periods of time, use his arms while applying pressure on the parts being polished, bend, twist, stand up and sit down, all repeatedly.

3. At the time he left his job at Cepco, claimant was a level 4 polisher. He polished all sizes of parts, set up the job, chose wheels and belts, and trained other polishers. In fact, he had trained other workers for nineteen years and was known as one the fastest workers in the shop.

4. Claimant has a limited cognitive capacity as evidenced by a measured IQ in the low 70's and his inability to read a book. He reads at a second grade level, spells at a first grade level, and has math ability at a fifth grade level. Yet, he was able to perform tasks at work that required various gauges and the need to follow written instructions on the proper blade widths. He performed his work well. And, he has good social/behavioral skills.

5. Claimant was first diagnosed with lumbosacral strain in 1985, which Dr. Frederick Lord attributed to his employment history.

6. On October 21, 1986 claimant twisted his back when he got up from a stool at work. Dr. Aronowitz treated him for his injury that was diagnosed as a disc herniation. Several specialists treated him at first conservatively with physical therapy, non-steroidal anti-inflammatory medications and advised him to avoid sitting and other postures that loaded the disc. Those efforts failed.

7. Therefore, on June 21, 1987 Dr. Bernini performed a laminotomy and disc excision at the L4-5 vertebral level. Claimant was out of work from the date of his injury on October 28, 1986 until his return on September 21, 1987 during which time he received temporary total disability benefits. However he never received permanency benefits for that injury and no permanent impairment was ever done.

8. Claimant returned to work. In January 1988 he was seen at Springfield Hospital for low back pain and numbness in his arms and fingers. Within a month an MRI taken at Mary Hitchcock Memorial Hospital revealed spinal stenosis at the cervical level with bulging at C3-4. Dr. Bernini noted that the onset of symptoms followed injudicious body mechanics involving leaning forward to lift something.

9. On December 2, 1989 claimant strained his lower back at work. A First Report of Injury was filed, but claimant lost no time from work.

10. Claimant did not treat for back pain on a regular basis again until February of 1995 when he was shoveling ice and snow and soon afterwards felt a pop in his back. Heavy lifting made the pain worse. He saw his primary care physician Dr. Edward Mulhern, chiropractor Dr. Temple, and neurosurgeon Dr. Savoy, for the back pain in 1995. An April 24, 1995 CT Scan revealed bulging at L3-4 and L4-5 and protrusions of the disc margins at L4-5 and L5-S1.

11. Dr. Temple released the claimant to work on June 14, 1995 and did not see him again until July 15, 1997 when he treated him for leg pain. Claimant received temporary total disability benefits for the lost time from work in 1995 but was never assessed or paid for permanency.

12. With the exception of an emergency department visit in 1997 for right leg pain and the suggestion that it could have been related to radiculopathy, claimant did not treat for back pain between June of 1995 and October of 1999. He performed his regular job during that time.

13. Claimant experienced low back and leg pain when he woke up late in the night of Sunday, October 10, 1999 or early in the morning of Monday the 11th. On Monday morning he called in to his employer to report that he would not be in to work. He also called in sick on Tuesday and Wednesday of that week.

14. On Thursday, October 14, 1999 claimant returned to work, but within an hour and a half reported that he had hurt his back and felt a pop. Contrary to his assertion at the hearing, in the face of direct contradictory testimony, I find that claimant did not tell his coworker Keith Hitchcock that he had injured his back.

15. Claimant walked from his workstation to the office with no limps obvious to a layperson. When he later was aware that someone was watching, he limped.

16. Claimant called his wife Pam Stebbins who took him to the hospital that day.

17. At the hospital, Susan Barton, a registered nurse, evaluated claimant. She recorded his report of the onset of back pain after he sat down, got up and heard a pop. She also noted his report that the pain had begun on Sunday. She then recorded "10/10/99" as the date of onset. The physician who examined him prescribed a narcotic for pain, diagnosed low back strain and advised him to stay out of work for four days.

18. When he saw Dr. Edward Mulhern on October 18, 1999 claimant reported that on the night of October 10th he awoke "with the feeling of numbness in both of his legs from the thighs to the toes [and] felt he had recently strained his back."

19. Claimant testified that he had called in sick because of flu-like stomach symptoms and overall body aches. Nothing in the medical records corroborates that testimony. At the hearing he denied the onset of back pain on Sunday beyond the general aches associates with the flu, adhering to his earlier testimony that it was his work later that week that caused the pain. However, on cross-examination, his wife conceded that the back pain had begun at home the previous Sunday night.

20. Although the claimant left work that Thursday morning because of back pain, it was not as a result of any incident at work that morning.

21. On October 22, 1999 a CT Scan of the claimant's lumbar spine showed a disc herniation at L5-S1 on the right. An MRI showed no abnormalities at L1-2 or L3-4, although he showed evidence of the surgery at L4-5. Films later that year revealed degenerative osteoarthritic disease.

22. On November 3, 1999 Geoff Weiner, Director of Human Resources, sent a letter to Dr. Mulhern with a summary of the claimant's attendance records. That letter followed a telephone conversation between Weiner and the physician.

23. Cepco denied the claim for workers' compensation benefits following the claimant's back complaints in 1999.

24. Claimant understood that one must have an injury at work in order to claim workers' compensation benefits.

25. In late December 1999 claimant spoke with Cepco personnel and agreed to return to light duty work.

26. Geoff Weiner misrepresented medical facts in his attempt to manage this claimant's attendance. On January 3, 2000 he telephoned Dr. Mulhern reporting that Dr. Bernini had released the claimant to work on November 19, 1999, although Dr. Bernini's note from that date does not even address the return to work issue. Dr. Mulhern had written a note on December 21, 1999 stating that the claimant was to be out of work until re-evaluated in a month, but changed that opinion and gave the claimant a note stating he could return to work on light duty.

27. At 7:00 a.m. on January 5, 2000 the claimant reported for work. At 7:40 he said he was unable to do the work because of pain. Cepco took this statement of an inability to do the work as a "voluntary resignation." Claimant has not worked since.

28. Since January of 2000 the claimant has sought treatment and therapy from Springfield Hospital, Bellows Falls Clinic, Grace Cottage Hospital, Brattleboro Memorial Hospital, Dr. Thomas Provost, Dr. Temple, Dr. Donaldson and Dr. Mulhern. From those providers he received physical therapy, chiropractic care, pain management, epidural injections, medications and general primary care.

Medical Opinions

29. Dr. Donaldson opined that claimant's report of waking up with pain during the night of October 10, 1999 was consistent with the scarring and chronic degenerative disk disease he suffered due to cumulative work trauma to his back. Her out of work note dated May 12, 2000 states, "low back and right leg pain, probably as a result of post-surgical scarring within the spinal canal that is trapping some of the nerve roots at the L4-L5 level and to a lesser extent L3-4. This gives him pain radiating to his foot…I do not expect he will be able to do any work for at least another month."

30. Notes from Doctors Temple, Donaldson, Mulhern and Provost, a pain specialist, all reflect the claimant's reports of a high degree of pain.

31. Dr. Mulhern explained that because the sitting position causes more pressure on the discs in the spine than any other position and because claimant's work required him to sit in a hunched over position for long periods of time, his work may have been the source of the apparent new disc rupture at L5-S1. He also said he would defer to a specialist on this issue of causation.

32. Dr. Vernon Temple performed a permanent partial impairment evaluation on the claimant on September 7, 2001. He then determined that claimant has 13% percent whole person impairment, with 8 percent due to his 1986 injury and 5% due to a later injury or injuries. The ratings are based on the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment, which on these particular ratings does not differ from the 4th edition.

33. With hindsight, Dr. Temple found that claimant had reached medical end result for his 1986 injury by the time he returned to work.

34. Dr. James Grubman, psychologist, performed a clinical interview and psychological testing to determine the claimant's level of intelligence and literacy and assess emotional and personality factors related to his chronic low back pain and disability. In his opinion, the claimant has lost his primary means of making a living. With claimant's limited education and low intelligence, Dr. Grubman predicts that his securing a job is not likely. He would be starting from a low baseline, would not be able to read training information, would not be able to use a computer for a task involving verbal ability and would have trouble with even moderate problem-solving. He observed that most individuals with his cognitive abilities work in unskilled labor jobs requiring physical stamina.

35. Dr. Grubman also opined that the claimant might not understand what is asked of him, particularly when dealing with technical matters or when speaking with professionals such as doctors and lawyers. He often gives answers or signifies acknowledgment suggesting to the listener that he understands when in fact he does not. He may give less than precise answers as a result of misunderstanding rather than with an attempt to mislead. Therefore, the claimant understands some questions and does not understand others. His comprehension depends on the relative simplicity of the question presented. None of the questions claimant was asked at the hearing were complicated ones. It was clear he understood them.

36. Dr. James Rosen, also a psychologist and full Professor of Psychology, assessed the claimant's psychological status. He found the claimant's concentration, functional memory and conversation to be good. Dr. Rosen found nothing in the assessment to suggest that claimant lacked the ability to be trained to perform tasks. He assessed the claimant's practical verbal comprehension as good and found strengths in his nonverbal comprehension. Dr. Rosen concluded the claimant is capable of performing work.

37. After her evaluation of the claimant, Charlene Davis, a Certified Vocational Evaluator for the State of Vermont, was unable to suggest any potential full-time or part-time competitive employment that the claimant could do. She stated, " his lack of abilities, poor concentration and inability to sustain physical effort for even brief periods of time is unfortunate and leaves no recourse." Ms. Davis relied on some of claimant's medical records, his social security disability determination and award and vocational testing results.

38. Dr. Mulhern, Dr. Temple, Dr. Donaldson, all treating physicians, opined that the claimant suffers from total and permanent disability as a result of his cumulative work-related injuries at Cepco. However, those doctors also completed forms stating that the claimant could work up to 4.5 hours per day with some sitting, lifting up to 20 pounds occasionally, 10 pounds frequently and standing one hour, sitting, one hour.

39. Fran Plaisted, vocational rehabilitation counselor who testified for the defense, opined that a determination of the claimant's employability at gainful employment had not yet been undertaken. She suggested that a labor market survey, transferable skills analysis and assessment of training programs be conducted to assess whether the claimant has the physical and cognitive capability of becoming employed. In her opinion, a determination of permanent total disability at this juncture is premature.

40. Dr. Kuhrt Wieneke, an orthopedic surgeon, examined the claimant, analyzed the CT and MRI films and performed a records review for the defense. The CT scans were performed on April 1995 and October 1999; the MRI in November 1999. Based on those films Dr. Wieneke observed no change in the claimant's degenerative disc disease from April 1995 to October 1999. The CT scans were the same. And the MRI confirmed that claimant did not have a recurrent rupture at L4-5 or L5-S1.

41. There is not necessarily any clinical significance to one feeling a "pop" in the back. Such a sensation can be associated with a ruptured disc, but with no evidence of acute rupture on imaging studies, it is clear that the claimant did not rupture a disc in 1999.

42. If Dr. Wieneke were treating the claimant, he would send him back to work.

43. Claimant submitted a copy of his contingency agreement with his attorney and evidence of the 277.80 hours worked and $1,756.29 in costs expended pursuing this claim.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks,* 123 Vt. 161 (1963). 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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

Permanent Impairment

3. Claimant seeks permanent total disability benefits and in the alternative, permanent partial impairment benefits. Essential to this claim is the 1999 incident. To prevail, the claimant must prove it was work-related.

4. Before the significant Sunday night, claimant had been working full time, without restrictions. He was off for the weekend. He testified that he was out of work on Monday, Tuesday and Wednesday because of flu-like symptoms, even though no medical record corroborates such a history.

5. Clearly the symptoms began the previous Sunday, suggesting that the claimant suffered a cumulative trauma injury, supported by Dr. Donaldson's suggestion that scarring and the trapping of nerve roots caused the painful incident, or a non-work related event intervened.

6. Claimant's theory of work-related causation is clouded by the fact that the claimant had been working full time without restriction before the Sunday night he awakened in pain. His and his wife's testimony that he sat around and did no physical activity that weekend is not credible.

7. When false history is removed from Dr. Donaldson's opinion we are left with the possibility of a work connection, but not the probability required by B*urton*, 112 Vt. 17 and its progeny.

8. Because the claimant has not proven that the 1999 onset of symptoms is work-related, any resultant disability is not work-related either. Without that crucial causal link, he cannot sustain his burden of proving work-related permanent total disability.

9. Next, is the claimant's request for permanent partial disability for his 1986 injury. The Vermont Supreme Court in *Longe v. Boise Cascade Corp.*, 171 Vt. 214 (2000) made clear that the six-year statute of limitations under the Workers' Compensation Act includes claims for permanent partial impairment. That six-year period begins to run from the time the claimant knew or should have known he had a permanent impairment. Id. 21 V.S.A.§ 656 § 660. Because claimant should have known of the permanency rating when he reached medical end result in 1988 and had not filed a claim within six years of that date, he is now time-barred from asserting that claim.

Misrepresentation

10. There has been misrepresentation on both sides in this case. Geoff Weiner went beyond the role of a human resource manager and inappropriately interjected his opinion in the physician-patient relationship. In the process, he relayed inaccurate information to the claimant's primary care physician about a specialist's opinion. He was attempting to "adjust" this claim although there is no evidence to suggest that he has a license to do so.

11. Claimant, too, misrepresented facts in his attempt to create a worker's compensation claim for his 1999 back symptoms. He relies on his intellectual limits to justify the missteps. However, this claimant understood enough about the workers' compensation process to know what he had to do to make a claim. He had past experience with a "pop" in his back that was a legitimate worker's compensation claim. By working for a short time on Thursday morning and from there complaining of the onset of pain, he thought he could create a claim. More difficult, and even less convincing, was the reason given for missing work the first three days of that week—flu like symptoms never reported to his doctors.

12. Under 21 V.S.A.§ 708(a), the defendant has the burden of proving by clear and convincing evidence that an injured worker willfully made a false statement or representation for the purpose of obtaining any workers' compensation benefit or payment. See, *Butler v. Huttig Building Products*, Opinion No. 43-01WC (Nov. 16, 2001); *In re Smith*, 169 Vt. 162 (1999).

13. In retrospect it is clear that the claimant made false statements repeatedly when he attributed his back pain on October 14, 1999 to an incident at work and the previous three-day absence from work to flu-like symptoms. He knew from past experience that an injury at work was necessary for him to obtain benefits, whereas one outside of work was not. Therefore, when he made the false statements, he did so knowingly and intentionally and therefore, willfully. See, *Workers' Compensation Division v. Blow*, Opinion No. 26-97Pen (Aug.27, 1997). And he did so for the obvious purpose of obtaining workers' compensation benefits. Therefore, the defendants have met their burden.

14. Given the denial of this claim, the question of what rights are forfeited, as a result of the claimant's false statements, need not be addressed.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 2nd day of April 2002.

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R. Tasha Wallis
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.