Dagesse v. Ethan Allen (February 12, 2002)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. M-14916; M-21889
Yvon Dagesse	)	
	)	By: Margaret A. Mangan
	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Ethan Allen and The Travelers	)	
	)	Opinion No. 45R-01WC

RULING ON CLAIMANT'S MOTION FOR RECONSIDERATON

Claimant, by and through his attorneys Robert Halpert, Esq. and Patricia Turley, Esq., move for reconsideration of the decision denying him benefits, Opinion No. 45-01WC (December 5, 2001). The defendant, by and through its attorney Andrew Boxer, Esq., opposes that motion.

Claimant argues that the conclusions are contrary to findings, the Department failed to consider crucial findings, failed to consider a theory of compensability advanced by the claimant and erroneously concluded that the claimant had the burden of proof. His arguments do not justify reversal of the decision but they point out the need for greater clarity.

The burden of proof issue should be addressed first. Claimant contends that the Department erred by assigning him the burden of proof. He urges application of the well-accepted rule that once a claim has been accepted by a carrier or employer, the burden of proof shifts to that party to establish the propriety of ceasing or denying further compensation. *Merrill v. University of Vermont*, 133 Vt. 101 (1974). The original Form 1 in File No. M-14916 specified that the claimant slipped on the ice and strained his lower back on January 15, 1999. The carrier subsequently accepted the claim, as reflected on a Form 21 approved by this Department on March 25, 1999, for injury to the back, neck, shoulders, left arm and bruised ribs. To now hold that the acceptance was one for a head injury and physical-mental claim that would shift the burden of proof to the defendant would be inconsistent with Department precedent, See e.g. *Kobel v. C& S Wholesale Grocer*s, Opinion No. 28-99WC (Aug. 2, 1999) and with public policy encouraging agreements for compensable claims. This is particularly true where a subsequent claim filed for this claimant in May 1999, State File No. M-21889, for mental stress was denied.

The fundamental conclusions reached after consideration of all the evidence was that the claimant had not met his burden of proving that the work-related parking lot fall caused his current problems. Based on the facts, including medical opinions interpreting radiological studies, I concluded that the brain lesion seen on MRI was as likely to have been caused by a stroke as by the claimant's work-related fall. As such, claimant failed to meet his burden of proving that the work-related fall was the more probable cause. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941). And I concluded that the claimant's psychological condition was caused from stress unrelated to that fall. Although the stress may have been work-related, it is not compensable because claimant did not prove that stresses at work were of a significantly greater dimension than the daily stresses encountered by all employees as required for a mental-mental claim under *Bedini v. Frost* 165 Vt. 167 (1996).

Included in the conclusions is a statement suggesting that a different conclusion would be reached had the symptoms that drove the claimant out of his job been presented sooner in time to the parking lot fall. Claimant argues that symptoms such as personality changes after the fall and before he stopped working demonstrate that he in fact had symptoms earlier. However, the credible evidence supports the conclusion that those symptoms the claimant now associates with a head injury began before the fall and derived from workplace stress for which the claimant did not seek treatment until April of 1999. That a fall happened in the interim without immediate symptoms is not proof of this claim.

Next, the claimant argues that the Department erred by not specifically articulating the test commonly used to distinguish between conflicting medical opinions. The factors considered are: whether the expert had a treating physician relationship with the claimant; the professional education and experience of the expert; the comprehensiveness of the evaluation performed, including whether the expert considered all relevant records in making the assessment; and the clarity and thoroughness of the evaluation, including the objective bases underlying the opinion. *Walker v. Johnson Fuels Services, Inc.* Opinion No. 39-00WC (Nov. 30, 2000). Of the experts in this case, Dr. Towle and Dr. McAllister who conclude that the claimant suffered from traumatic brain injury, had treating physician relationships with the claimant, an advantage in many cases that the defense experts lack. All physicians who testified for the claimant and the defense are well qualified by education, training and experience to render expert opinions in this case. Qualifications did not distinguish a particular expert. All performed comprehensiveness evaluations; all considered the relevant records. The usual advantage to the claimant of having a treating physician testify is offset in this case by the potential advocacy role of the treating doctors.

Therefore, the dispositive factor in evaluating the opinions was the final one: the clarity of the evaluation and its objective bases. Underlying each final conclusion are the data on which the opinion is based, which must be evaluated. Dr. Towle, who indeed has impressive Ivy League credentials, opined that the claimant suffered a brain injury when he fell in the parking lot. He based that opinion on the history of trauma and the location of the lesion, which he thought would be atypical of a stroke. Dr. Towle's opinion stands next to the one imbedded in the report of the March 2000 MRI by Dr. Dale Childs, the radiologist, that although the right frontal lesion "in the appropriate setting…could be posttraumatic … [it] is nonspecific." And Dr. Levine concluded, based on review of the CT and MRI films, that the claimant's lesion is not located where a traumatic lesion would be, is not consistent with the description of the fall and is more likely an embolus or stroke. Finally, Dr. Drukteinis testified that traumatic brain injury typically has an acute onset. He found on the facts in this case that the gradual onset of psychological symptoms is more likely the result of depression caused by work-place stress. Such a conclusion is highly persuasive in light of Dr. Soucy's May 1999 note referring to the onset of stress "last fall" and the factual testimony about other workplace stress including the incentive program.

The combined opinions of Dr. Levine and Dr. Drukteinis are the most persuasive because of their clarity and objectivity. They are based on objective facts including the location of the initial external head lesion compared to the lesion found on the brain, the gradual onset of the claimant's psychological symptoms, report of stress in the fall of 1998 and the claimant's reaction to stress at work. They convincingly demonstrate that while trauma may have caused the brain lesion, it is just as likely that a stroke caused it. Furthermore, they demonstrate that it is not likely that the claimant's depression and anxiety stem from the parking lot fall. Without that link between the fall and the claimant's anxiety and depression, the claimant cannot prevail on a physical-mental claim.

In sum, the claimant has not proven that his theories of causation are the more probable ones as required by *Burton* 112 Vt. 17 and its progeny.

THEREFORE, the claimant's motion to reconsider and change the judgment in this case is DENIED.

Dated at Montpelier, Vermont this 12th day of February 2002.

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R. Tasha Wallis
Commissioner

Dagesse v. Ethan Allen (December 5, 2001)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. M-14916; M-21889
	)	
	)	By: Margaret A. Mangan
Yvon Dagesse	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Ethan Allen	)	
	)	Opinion No. 45-01WC

Hearing held in Montpelier on May 3, 2001
Record closed on July 11, 2001

APPEARANCES:

Patricia K. Turley, Esq. and Robert Halpert, Esq. for the claimant
Andrew C. Boxer, Esq. for the defendant

ISSUES:

1. Did the claimant suffer a traumatic brain injury in a work-related fall? If so, were his subsequent psychological behaviors related to that head injury?

2. If the claimant did not suffer psychological symptoms as a result of his fall, did he suffer a mental-mental claim as a result of his job?

EXHIBITS:

Claimant's A:	Medical Records
Claimant's B:	Curriculum vitae of Parker Towle, M.D.
Claimant's C:	Attendance Records
Claimant's D:	Accident Report
Claimant's E:	Curriculum vitae of Dr. Soucy
Defendant's 1:	Curriculum vitae of Dr. Drukteinis
Defendant's 2:	Curriculum vitae of Dr. Levine
Defendant's 3:	Medical records

FINDINGS OF FACT:

1. Judicial notice is taken of all forms filed in this case. The exhibits are admitted into evidence.

2. Claimant, a French-speaking gentleman with limited English vocabulary, began working at Ethan Allen in Beecher Falls in 1958. For most of the time he worked as a sprayer of furniture in the finishing department and was working in this capacity in January 1999.

3. A translator assisted the claimant and the hearing officer during the hearing. Monique Dagesse, the claimant's wife, often helps the claimant communicate with health care providers.

4. Claimant has always been a proud man with a strong work ethic. He was a conscientious worker with an excellent attendance record. At home he was actively engaged in projects around his home and the homes of his children.

5. Claimant was not one to talk much about his work while at home with his family.

6. Production workers such as the claimant were paid through a combination of hourly wages and incentive payments. Having worked at the Company for so long, the claimant received one of the highest wages.

7. In 1997 Ethan Allen introduced a new incentive system, in which earnings were made according to the production of a group or line. Claimant's incentive payment was capped because he already received a high hourly wage. Despite the cap, however, he was still required to work beyond his cap (128%) or he would negatively affect the incentive payments for others in his group whose payments were not similarly capped.

8. Claimant complained on several occasions to Walter Noyes and Wendell Case, supervisors about the incentive system. However, he never complained of the system at home, nor did he complain about his supervisors to his family. And despite his dissatisfaction with the system, the claimant remained a productive and loyal member of his team. For example, he maintained his excellent attendance and arrived at work early each day as he always had.

9. In was common for smokers at the plant to take their breaks outside in the parking lot. On January 15, 1999, while on such a break, the claimant fell. He was standing next to his car, slipped on the ice and fell onto his back and head. He lost consciousness for a brief period and was taken to a hospital. Although witnesses testified that the claimant had not lost consciousness, a record signed by Wendell Case a few days later and gleaned from eyewitness accounts, states that he did.

10. Claimant was reluctant to go to the hospital after what one coworker described as a "wicked blow to the head." He sat in his car where his son who also worked at the plant found him, completely out of character, crying. Eventually, his son and others convinced claimant to go to the hospital where Philip Pariseau transported him in a company van.

11. Claimant does not remember the actual fall, nor does he remember clearly the time period following the fall, including that emergency room visit. In fact it is not clear who provided the medical history. The emergency room note documents the slip and fall on the ice where the claimant struck his head, back and right chest wall. It goes on to state that the claimant was dizzy, but that he had not lost consciousness. Claimant complained of pain in his left forehead, neck and shoulders, his upper back and chest wall. A small contusion was noted in the left frontal area of his head. Otherwise, the examination of the head was normal. And the neurological examination was normal.

12. The entire ER visit lasted 13 minutes.

13. The doctor diagnosed contusion and possible mild concussion, prescribed rest and cleared claimant to return to work the following Monday.

14. Philip Pariseau then drove the claimant home, where his wife expressed surprise that they were home so soon. Claimant was pale, sweaty and dizzy. He complained of a headache and held his head.

15. Claimant's wife arranged for the claimant to see a therapist who recommended that he remain out of work for a week. The employer paid medical benefits for the emergency department visit and temporary total benefits for the week he was out of work.

16. Claimant returned to work on Monday, January 25, 1999. He was still sore and had headaches, but resumed his normal life.

17. About a month after the fall the claimant's son Denis noticed that he could not get his father to help him on home renovation projects the way he used to.

18. Gradually the claimant developed nonspecific symptoms including depression, dizziness, anxiety, agoraphobia, paranoia, loss of appetite and loss of concentration.

19. Co-workers did not notice any changes in the claimant's personality, unsurprising given his propensity to keep to himself and to maintain privacy with personal health issues.

20. On April 1, 1999 Walter Noyes received a complaint that the claimant was working slowly, thereby slowing down the line. Noyes instructed Wendell Case, claimant's immediate supervisor, to speak to him. Mr. Case noted that the wipers—those whose work followed the claimant's—had only two pieces of furniture to work on, when they normally would have had six to seven pieces. Mr. Case went into the claimant's spraying booth and told him to speed up. Claimant said that all he could do was 128% and that he was going home. He then walked out of the spraying booth, took off his spraying clothes, left the plant and went home. On his way out, in response to a question from Virginia Riendeau, claimant responded that Wendell said he was too slow. Claimant was pale and upset. Such behavior, regardless of how dissatisfied he may have been, was completely out of character for this man.

21. When he arrived home midday to a surprised wife, he complained that his supervisors were monsters and that everything was unfair.

22. On April 5, 1999 the claimant saw Dr. Soucy for what the doctor determined was an "acute breakdown at work." Among other complaints about work, Dr. Soucy noted that coworkers' calling him "the old man" troubled him. And he identified the onset as "last fall."

23. The early diagnosis of the claimant's psychological condition was depression from his job situation, a diagnosis that was distinct from any injury in the January fall.

24. At a visit on April 30, 1999 claimant told Dr. Soucy that he thought his problems began after his fall at work. Dr. Soucy ordered a CT scan of the head, which was performed in May 1999 and interpreted as negative, showing "no evidence of intracranial mass or lesion." Dr. Soucy ruled out an embolic stoke with such a CT result.

25. By June of 1999 Dr. Soucy started to suspect a post-concussive disorder relating back to the parking lot fall in January. He referred claimant to Dr. Towle.

26. Dr. Parker Towle has been engaged in a clinical neurology practice on a continuous basis for the past 42 years. On average he is responsible for diagnosing and treating two to three patients per week who have suffered stroke or traumatic brain injuries. On a daily basis he interprets CT scan and MRI films and reports.

27. Dr. Dale Childs is the radiologist who interpreted the MRI scan of March 2000, which showed an abnormality in the frontal area of the brain. In his conclusions, Dr. Childs wrote: "In the appropriate setting, the left frontal change could be posttraumatic and is nonspecific."

28. Also in March of 2000 Dr. Towle determined that the MRI report suggested a contusion or bruise in the right frontal region of the brain. Such a lesion is consistent with either brain trauma or a stroke.

29. A neuropsychiatric evaluation of the claimant by Dr. Douglas Ikelheimer and Dr. Thomas

McAllister led the conclusion that the claimant met the "criteria for major depressive disorder and personality change secondary to traumatic brain injury."

30. Results from subsequent ENG and MRI testing led the examiners to suspect trauma as a possibility for the claimant's symptoms.

31. Dr. Towle notified the claimant that the MRI suggested a bruise in the right frontal area of the brain.

32. In an opinion expressed in an October 9, 2000 letter, Dr. Towle concluded that the claimant suffered a brain injury resulting from the January 1999 fall in the Ethan Allen parking lot. That opinion is based on the history of trauma and the location of the lesion, which he opined would be atypical for a stroke.

33. The mechanisms of traumatic brain injury are often uncertain and commonly variable due to the variety of potential transmission or forces to the skull cavity during a traumatic event. It is not unusual for a bruise of the brain to occur in locations other than the location of impact from trauma. Not uncommonly, the severity of a brain injury may seem out of proportion to the trauma that caused it, which initially may have produced little or no loss of consciousness.

34. Dr. Robert Levine, a practicing neurologist from Cambridge, Massachusetts, with impressive Ivy League credentials, has treated hearing disorders at Massachusetts Eye and Ear Infirmary and has a Harvard academic appointment. His clinical practice is about 20% of his professional time with the remainder spent in research and independent medical examinations.

35. Dr. Levine reviewed the claimant's medical records as well as the CT and MRI films. Based on his review, he concluded the lesion in the claimant's brain is unrelated to trauma. Contrary to the opinion offered by Dr. Towle, he opined that the location is more likely the site for an embolus than a traumatic lesion. He found it significant that the lesion was on the opposite side from the emergency room description of a small contusion in the left frontal area. He did not believe that the site is one that would have been caused by a contrecoup phenomenon (where the a brain is injured on the side directly opposite from the trauma). Next, he thought that trauma would have resulted in a blood byproduct, which was not present on the scan he reviewed. Finally, he concluded that the lesion is present on the May 11, 1999 CT scan, although neither Dr. Howell nor Dr. Towle observed a lesion on that scan. At the hearing, Dr. Levine conceded that his theory of the blood byproduct is not definitive given the type of scan that was done and that the presence of a lesion on CT scan in May of 1999, four months after the parking lot fall, does not support his theory that the lesion is unrelated to trauma.

36. Dr. Levine's remaining grounds in support of his conclusion are contradicted by the opinions of Dr. Towle and Dr. Childs, each of whom reviewed the MRI films and concluded that the specific location of the lesion was not atypical for a contusion. Specifically, Dr. Towle opined that it is not unusual for a lesion from a brain contusion to occur at a site distant from the area of original trauma. Dr. Childs concluded that in the appropriate setting, the lesion could certainly represent traumatic brain injury.

37. Dr. Drukteinis is a board certified psychiatrist. In his opinion a change in mental symptoms occurring gradually over time is not typical of a brain injury, for which a more acute, immediate action would be expected.

38. In his opinion, absent actual brain injury, major depressive disorder unrelated to a traumatic brain injury is a more likely explanation of the claimant's complaints. He also opined that depression is a common result of traumatic brain injury and that depression can gradually worsen over time as a secondary complication of a traumatic brain injury. Although some post-concussion syndrome patients improve within a year, that is not true for all such patients.

39. Dr. Drukteinis concluded that the claimant's symptoms are consistent with major depressive disorder resulting from stress in the workplace, including but not limited to an incentive program introduced into the workplace in 1997, and his having to take pressure in the workplace due to the presence of various family members working at the factory.

40. Claimant submitted evidence of his contingency fee agreement with his attorneys, an affidavit in support of an award of attorney fees, and evidence of 360.3 attorney hours and $3,560.25 in costs expended in 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). Although the employer accepted the claim for the fall in the parking lot, it never accepted a claim for a posttraumatic head injury. In fact, the Form 21 signed by the parties does not include a head injury. Consequently, I must reject the claimant's argument that the burden is on the defendant to prove the propriety of a discontinuance under *Merrill v. U.V.M.*, 133 Vt. 101 (1974).

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).

3. It is understandable that the defense would have challenged the compensability of this claim given the claimant's walking off the job and the initial medical records that focused solely on the claimant's psychological condition as if it were separate and apart from the January 1999 head injury. Only after follow-up care and reflection did his physician draw a causal link between the claimant's head injury and his subsequent psychological condition.

4. The medical evidence as a whole leads to the conclusion that the changes on MRI could signify either a stroke or trauma, each equally likely. Had the symptoms that drove the claimant out of his job been presented sooner in time to the parking lot fall, the balance would weigh in the claimant's favor, with trauma being the more probable cause. However, this claimant returned to work a week after the fall. He worked for two months, then presented with symptoms that more strongly supported stress than posttraumatic brain injury.

5. The opinions of his physicians suggest a possibility that it was trauma that injured the claimant's brain. Unfortunately, such a conclusion falls short of the standard of probability needed to sustain the burden of proof. See, *Burton*, 112 Vt. 17 (1941).

6. Furthermore, there is insufficient evidence for a mental-mental claim under *Bedini v. Frost* 165 Vt. 167 (1996). Claimant has not proven that his stresses at work were of a significantly greater dimension than the daily stresses encountered by all employees.

ORDER:

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

Dated at Montpelier, Vermont this 5th day of December 2001.

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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.