STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Richard A. Rolfe	)	State File No. T-06553
	)	By: Margaret A. Mangan Hearing Officer
v.	)	
	)	For: Steve Janson Commissioner
Textron, Inc.	)	
	)	Opinion No. 08-00WC

Hearing held in Montpelier on October 1, 1999
Record closed on November 18, 1999

APPEARANCES:

Charles L. Powell, Esq. for the claimant
Andrew W. Goodger, Esq, for the employer

EXHIBITS:

Joint Exhibit I:	Medical Records and Bills
Claimant's Exhibit 1:	Calendar Summary of Claimant's Visits by Month to Dr. Waller
Claimant's Exhibit 2:	Statement of Claimant's Attorney's Costs
Defendant's Exhibit 1:	Medical records including the IME report of Dr. Wieneke

ISSUE:

Whether continuing chiropractic treatments provided to claimant, Richard Rolfe, from December 1997 to the present are reasonable and causally related to claimant's 1981 work injury.

CLAIMANT SEEKS:

1. Payment of Dr. Waller's bills, totaling $923 as of April 1999;
2. Payment of ongoing chiropractic care; and
3. Attorney's fees and costs.

STIPULATION OF UNCONTESTED FACTS:

1. On August 12, 1981, Jones & Lamson was an employer within the meaning of the Vermont Workers' Compensation Act and Rules.

2. Claimant, Richard Rolfe, was an employee of Jones & Lamson as defined in the Workers' Compensation Act.

3. Claimant worked for Jones & Lamson as a lens maker and was compensated at the rate of $5.85.

4. On August 12, 1981 claimant suffered a low back strain and disc herniation in the course of his employment for Jones & Lamson.

5. Claimant underwent two spinal surgeries, a discectomy and a lumbar spinal fusion.

6. Claimant was assessed with a 25% permanent impairment of the spine. An Agreement for Permanent Partial Disability Compensation was reached between claimant and Jones & Lamson and was approved by the Department on August 14, 1985.

7. At a point subsequent to claimant's work injury, Textron, Inc. acquired James & Lamson and paid the expense of ongoing medical care for the claimant.

8. From August 14, 1985 through December 12,1997, Jones & Lamson and Textron, Inc. paid the expense of ongoing medical care required by claimant.

9. On November 26, 1997, Maury Guzick, D.C., conducted an independent medical review of the claimant's medical records. He did not examine the claimant. Dr. Guzick concluded that the necessity of the medical treatment he was receiving had not been established and that such treatment was not related to his 1981 work-related injury.

10. Based on Dr. Guzick's opinion, the employer filed a Form 27 Notice of Intention to Discontinue Benefits as of December 12, 1997. This Department approved the Form 27 on December 9, 1997.

11. On or about August 25, 1998, Richard Rolfe, through counsel, filed a Form 6, Notice and Application for Hearing, seeking medical benefits under 21 V.S.A. § 640.

12. On or about November 10, 1998, at the request of the employer, claimant underwent an independent medical examination by Kuhrt Wieneke, Jr., M.D. Dr. Wieneke indicated that the chiropractic treatment claimant had been receiving was unrelated to his 1981 injury.

13. There are no objections to the admission into the record of the medical bills, records, and reports contained in the Medical Index.

14. There is no objection to the admission into the records of the November 26, 1997 letter report of Maury Guzick, D.C., or the November 10, 1998 letter report of Kuhrt Wieneke, Jr., M.D.

FINDINGS OF FACT:

1. Stipulations one through twelve are accepted as fact and the exhibits are admitted into evidence.

2. Official notice is taken of the Department's forms.

3. Claimant is 51 years old. He is married and has children. He holds a high school diploma. He worked for the company that became known as Textron from 1966 through 1985.

4. After his work-related injury in 1981, claimant continued to have back and leg pain. In 1983, he had two surgical procedures, a discectomy and a fusion from L4 to the sacrum.

5. In his August 6, 1984 note, Dr. Richard Saunders, the physician who had operated on claimant, recorded his impression of "failed back surgery with mild L5 residual." Two days later, in a letter to the carrier, Dr. Saunders wrote,

> His treatment would appear to be a failure; however there is an element of motivation in this man that will respect my recommendation that he return to work if given suitable opportunity and support.

6. Claimant testified that he had no back pain prior to his work injury in 1981. Since that injury, however, he has complained of low back and leg pain for which he sought chiropractic treatment. He also sought chiropractic treatment for shoulder, foot, finger, neck and knee pain. For example, in July of 1992 he received treatment from Dr. Waller for low back pain after he cut his lawn and cut wood. In August 1992 he returned once for treatment after a camping trip. That September and October, he received treatment for a tight shoulder. He had three chiropractic treatments in December 1992 for shoulder, rotator cuff and right foot complaints. In February 1993 claimant reported to Dr. Waller that he had dropped a large log on his foot and complained that his shoulder and neck were tight. At that time he told the chiropractor that his back was not "too bad." In June 1993 Dr. Waller treated him for sore lower back and shoulders after he had fallen the previous weekend. In July 1993, Dr. Waller attributed claimant's complaint of low back pain to an aggravation at his new job that required stooping. A month later, claimant returned to Dr. Waller with a complaint that his left shoulder was sore from cutting wood over the weekend.

7. While working for Allard, at the end of October 1993, claimant injured his right knee and, as a result, was out of work for three to four weeks. More than four years later, in April 1998, Dr. David Halsey surgically removed cartilage from that knee.

8. Claimant testified that after he left his employment at Textron, he moved on to work at a company in Springfield as a machinist. Next, he worked at Sullivan Tool in Claremont where he was a drill operator and a machinist drilling steel plates for an equipment manufacturer. After he left Sullivan Tool, claimant went to work at Belknap Mill Lumber in Cavendish where he was a planer operator and a loader operator and where he sawed wood and drove a truck. Next, he worked at Allard Lumber in Brattleboro. No evidence was produced to suggest that claimant's job changes were anything other than voluntary personal choices.

9. In the month following the knee injury, claimant had 11 chiropractic visits, more than twice as many as he had the previous month. During that time, he complained to Dr. Waller of knee pain and shoulder pain. He also complained of low back pain from

hunting. The costs for those visits are not at issue here.

10. In November 1993 claimant complained to Dr. Waller of low back pain after hunting. In January 1994 he returned for treatment after shoveling snow. In February 1994 he complained of shoulder and low back pain after shoveling off a roof.

11. After working at Allard Lumber for approximately one year as a loader operator, claimant left and began working at Smokeshire Furniture where he did assembly work, drilling, and sanding. Claimant testified that he considered his work "pretty physical." While at Smokeshire, claimant strained his right knee and was placed on light duty.

12. In May 1994 claimant treated with Dr. Waller for tightness in his lower back and shoulders after working outside over the weekend. In June he complained that his knee was acting up. In October he was bow hunting when his lower back became tender. In November he saw Dr. Waller twice with complaints that he was hurting because of so much hunting. In December 1994 he felt "twisted out" after hitting a deer.

13. In February 1995 Dr. Waller treated claimant for aching lower back and neck after working on his son's car. In July he returned for treatment of his left hip that had been sore from riding and driving during a trip he had taken. In October 1995 he sought chiropractic treatment for low back pain from climbing in and out of tree stands. In January 1996 Dr. Waller treated him for stiffness and tightness after plowing. In March 1996 claimant reported to Dr. Waller that he was building cabinetry, work that was hard on his lower back. In June 1996 he reported that bending and lifting at work aggravated his low back pain.

14. After claimant was laid off from work at Smokeshire, he went to work as a seasonal employee at Okemo as a Poma lift operator during the winter of 1996-97. During this same period of time, claimant worked for Roy's Cleaning as a subcontractor for the previous four years.

15. In October 1996 Dr. Waller treated claimant for a dull ache in his low back after splitting wood the previous weekend. In November he treated claimant again for low back tightness and discomfort after he had been hunting, walking and climbing over rocks and bending. In early December 1996 claimant reported to Dr. Waller that he had worked hard and aggravated his left low back. Two weeks later, he treated again for pain in his low back, hips and right shoulder after helping a friend pick up wood around his house.

16. Since early 1997 claimant has been self-employed in his property services business in which he estimates he works ten hours a day. That work involves lawn mowing, brush cutting, yard work, a lot of tractor work, wood chipping, snow removal, and "most anything to do with property services." He testified that he has help or uses a tractor for the heavy work. He also testified that variety of movement is the most beneficial to his back and left leg pain.

17. In March 1997 the claimant treated with Dr. Waller for tightness in his neck, shoulders and left hip after doing some plowing. In April the treatment was for low back and shoulder pain caused by raking. In May, he sought treatment for stiffness after doing

tractor work over the weekend. In June, Dr. Waller recorded claimant's comment that riding and cutting in his new business tended to irritate his lower back. In July, claimant complained of an irritated back after camping. In August, Dr. Waller treated him for shoulder and neck pain. In October, claimant reported to Dr. Waller that his low back was uncomfortable and tight from some challenging hiking related to hunting over the weekend.

18. Claimant testified that with activities of daily living and work activities, he experiences recurring high levels of pain. He explained that the location of the increased pain is the same as the location of baseline. Increased intensity of the pain causes him to lean and to experience very significant restriction, sleep dysfunction, and decreased ability to tolerate the pain. Nevertheless, the records indicate that the location of his pain was not limited to his lower back.

19. Claimant described the chiropractic intervention at issue as very successful in restoring him to a baseline of constant, but lower, permanent pain and greatly improved functional ability, actually eliminating the left leg pain for significant periods of time.

20. Claimant testified that he has sought only chiropractic intervention for his back and schedules visits as needed.

21. In 1992 claimant had 49 visits to the chiropractor; in 1993 (the year he injured his knee), 65 visits; in 1994, 69 visits; in 1995, 42 visits and in 1996, 74 visits.

22. In a letter to the carrier on March 16, 1995, Dr. Waller wrote, "Mr. Rolfe has a permanent back injury that has, and will continue to cause him pain and periods of dysfunction. He is seen at this clinic on an as needed basis. Thus he has been instructed to present for care only when he feels the onset of symptomatology and a need for care."

23. In an April 10, 1997 letter to the carrier, Dr. Waller wrote, "the incidents referred to in my progress notes represent irritations of the permanent low back injury that remains from his original injury and subsequent surgery. He has been instructed to present to this clinic only when he feels a need for care and a return of symptomatology."

24. Until December 1997, the carrier accepted confirmation from Dr. Waller and his predecessor, Dr. Tilton, that the chiropractic services were related to the injury.

25. In 1997 claimant had 48 visits to the chiropractor; in 1998, 18 visits; in 1999 through April, seven visits.

26. The carrier's December 1997 denial was based on a hand written, unsigned note prepared by Dr. Guzick. That note was later typed but not signed.

27. In his July 27, 1998 report, Dr. Waller wrote that claimant "has experienced chronic low back and dysfunction that is minimized by chiropractic care. When an intervertebral disc is removed and spinal vertebrae are fused, the normal biomechanics of the spine are permanently altered. Mr. Rolfe's occupation as well as outside interests are and always have been low back intensive and this heavy performance demand placed on a

biomechanically altered functionally compromised region produces recurrent symptomatology."

28. In his December 28, 1998 report, Dr. Waller directly addressed the issue of causation:

> Because of this, Mr. Rolfe is seen in this office on an as-needed basis. Since the fusion is a direct result of the 1981 injury and that same fusion is the underlying cause of the frequent, chronic dysfunction, it is my opinion that Mr. Rolfe's need for periodic care is, in fact, related to the 1981 injury. Because the fusion and subsequent degenerative changes present in Mr. Rolfe's lumbosacral spine are irreversible, I do not expect Mr. Rolfe's condition or his need for periodic care to change as long as he continues to function especially in a physically demanding occupation. Of note is that the occurrence of symptomatology seems to be directly proportional to his activity level and duration between visits for care, thus it is my opinion that Mr. Rolfe's recurring problems are attributable to the work injury of 1981.

29. At the hearing, Dr. Waller's expert status in chiropractic was accepted by stipulation. In addition, he testified that he graduated magna cum laude from the National College of Chiropractic.

30. Dr. Waller testified that he has a high degree of professional training and expertise in diagnosis and treatment of low back pain. He gained special expertise in his formal education, clinical practice, and continuing education. He treats patients with low back pain including chronic low back pain after fusion. Overall, a large portion of his chiropractic practice involves diagnosis and treatment of low back pain.

31. Dr. Kuhrt Wieneke examined the claimant and reviewed the records in this case. He opined that the chiropractic treatments the claimant had been receiving were unrelated to the 1981 injury because the claimant's spine had been fused into a solid mass in a surgical procedure, and was therefore not subject to chiropractic manipulation.

32. In contrast, Dr. Waller testified that the chiropractic treatment he has been providing to claimant included massage, ultrasound and heat, which he describes as palliative treatment. He agrees with Dr. Wieneke that the surgical fusion permanently altered claimant's anatomy. Because of the immobility created from the fusion, he explained, greater stress is placed on claimant's back above and below the fusion.

33. Dr. Waller also opined that the right knee injury was not a major contributing factor to claimant's back pain. He testified that it is not possible that claimant's current work activities contribute to his back pain. In his opinion, it is because of claimant's 1981 injury that almost all of claimant's activities affect that part of his body.

CONCLUSIONS OF LAW:

1. The principal issue in this case is whether claimant's discomfort following his knee injury and subsequent recreational and work activities should be characterized as a continuation of the work-related injury of 1981, that is a recurrence, or as intervening, non-work

related, aggravations, or new injuries.

2. Under 21 V.S.A. § 640 (a) the employer is obligated to provide a claimant with reasonable surgical, medical and nursing services incurred as a result of a work-related injury. Through a long line of cases, it is well established that even after a claimant has reached medical end result, palliative care is compensable if it is reasonable and related to the work injury. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 1996; *Smith v. Whetstone Log Homes*, Opinion No. 70-96WC (Nov. 25, 1996).

3. "Where … the injury and resultant disability are unquestioned, the burden of proof is on the employer who seeks to terminate compensation upon the grounds that the disability has ceased." *Merrill v. U.V.M.*, 133 Vt. 101, 105 (1974). Similarly, when the employer seeks to terminate coverage for medical benefits, it has the burden of proving that the treatment is not reasonable. In its effort to meet that burden in this case, the employer submitted a Form 27 with the report from Dr. Guzick. The Department did not reject that form.

4. The medical evidence establishes that on August 12, 1981 claimant suffered a work place injury of low back strain and significant disc herniation that resulted in two surgical procedures, one of which involved a fusion of the vertebrae L4 to the sacrum. He did not begin seeking chiropractic care until November of 1986, at which time he began seeing Richard Tilton, D.C. Those chiropractic treatments remain compensable unless an intervening event or events broke the legal causal link between the original injury and the current need for treatment. As the leading authority on this subject as explained:

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. More specifically, the progressive worsening remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause.

Larson's Workers' Compensation Law, at 10-1.

5. Since his work-related injury, claimant has successfully returned to work as demonstrated by his testimony at the hearing regarding his work history and the medical notes that describe his work activities. Claimant has also continued to participate in a full range of recreational activities. Dr. Waller's records clearly and contemporaneously have documented the discomfort and perceived need for chiropractic treatment for his back and shoulders after many of those vigorous recreational activities, including deer hunting, hiking and camping. Those same records describe as "heavy" the work claimant did years after he left Textron. Bending, stooping, riding and cutting were a few of the work-related activities that prompted him to seek chiropractic care.

6. If claimant's current work and recreational activities can be characterized as "aggravating" his low back problem or causing a "new injury" under Vermont's workers' compensation scheme, Textron will no longer be responsible for payment of claimant's chiropractic treatments. An aggravation is defined as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." *Workers'*

Compensation Rule 2(i). In the workers' compensation context, the term has a legal meaning distinct from its medical usage. *Griffin v. Blue Seal Feed, Inc*., Opinion No. 14-94WC (April 25, 1994). To determine whether it applies to a particular injurious event "requires close consideration of the medical evidence, but ultimately the determination is a legal one." *Id*.

7. In prior decisions, this Department has ruled that picking up a bag of groceries is a routine customary activity that does not cause an aggravation, *Verchereau v. Meals on Wheels*, No. 20- 88WC (Jan. 25, 1991), while picking up a fifty pound flower box does. *Quilliam v. Deringer*, No. 52-94WC (March 14, 1995). Similarly, lifting a 15 to 20 pound box of kindling was found to break the causal chain in *Drown v. Cabot Farmers Coop. Creamery*, Opinion No. 13-95WC (April 26, 1995). As stated in *McMillan v. Bertek, Inc.* (Jan. 29, 1996) these cases do not create a bright line, but they do provide guidance. For example, the *Quilliam* case had the added factor of a substantial period of time, in excess of ten years, between the original injury and the claimed compensable event.

8. In this case, sixteen years passed between the time claimant injured his back and when the carrier attempted to terminate payment for his chiropractic treatments. In that more than a decade and a half, claimant had more than a single event that resulted in his seeking chiropractic treatment. He chose work that even his chiropractor characterizes as back intensive. Furthermore, the chiropractic treatments at issue here were not limited to his back. Dr. Waller's treatment records are replete with documentation of shoulder, hip and knee discomfort related to claimant's recent work recreational activities.

9. Implicit in claimant's argument is the theory that claimant's work-related injury weakened his back in such a way that his later work and recreational activities resulted in pain that would not otherwise have occurred and required treatment he would not otherwise have needed. Indeed, a weakened condition caused by a work-related condition in some instances may render a subsequent incident compensable. *Larson's* cites as an example a compensable fall that resulted from wearing dark glasses claimant required because of a work-related injury. *Larson's*, § 10.06. In general, if a "second injury appears to have been purely accidental, and [there is] no substantial question of independent intervening cause based on the claimant's conduct …" it will be found compensable. *Id*., § 10.06[2].

10. However, in those cases where the injury does not arise in any way from the employment relationship, the chain of causation may be deemed broken by intentional or negligent claimant conduct. *Id*. § 10.06[3]. It follows that a claimant's intentional conduct resulting in the need for chiropractic treatment can break the causal chain unless that conduct falls into the category of routine activities described above.

11. Three factors in this case lead me to conclude that the causal link between claimant's need for treatment since 1997 and the primary injury in 1981 has been broken, although any one of these factors considered alone probably would not be sufficient to break the chain. First, claimant has received chiropractic treatments for complaints that have not been limited to his lower back. Second, a 16-year period since the primary injury suggests, although it does not prove, that causation is attenuated. Finally, claimant has voluntarily and consistently engaged in recreational and work activities that are low back

intensive.

12. Contrary to claimant's testimony, the medical records indicate that the location of claimant's pain was not constant. His primary injury did not cause discomfort in his shoulders, hip and knee that required chiropractic treatments. With regard to his low back problems, it is clear that hiking, hunting and other recreational activities prompted the claimant to seek chiropractic treatment.

13. Unlike the grocery-lifting incident in *Verchereau,* the knee injury and labor intensive work and recreational activities in this case cannot be characterized as normal routine activities of daily living. Even putting aside the testimony of Dr Wieneke, who acknowledges that he is not trained in chiropractic medicine, the medical records and testimony of Dr. Waller and the claimant have provided the defense with sufficient evidence to characterize as aggravations, a combination of factors that arose after claimant's 1981 injury.

14. Accordingly, his claim for continued chiropractic care must be denied.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, claimant's claim for payment for chiropractic treatment and attorney fees and costs is DENIED.

Dated at Montpelier, Vermont, this 16th day of May 2000.

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Steve Janson
Commissioner