

STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File Nos. L-11944; 83-3704
	)	
Mark Lewis	)	By: Margaret A. Mangan
	)	
v.	)	Hearing Officer
	)	
Spates Construction	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 42-00WC

Hearing held in Montpelier, Vermont on June 6, 2000.  
Record closed on September 11, 2000.

**Appearances:**

Barbara A. Alsop, Esq. for Liberty Mutual.  
Andrew C. Boxer, Esq. for the Travelers.

**ISSUE:**

Whether claimant sustained a recurrence or aggravation of his previous Spates Construction Injury.

**EXHIBITS:**

Joint Exhibit I: Medical Records.

Liberty Exhibit A: Transcript of the deposition of Michael Benoit, M.D.

**STIPLUATION**

1. Travelers/Aetna was the workers' compensation insurer for Spates Construction from January 1, 1982 to January 1, 1983.
2. Liberty Mutual began insuring Spates Construction in 1990.

**FINDINGS OF FACT:**

1. Claimant Mark Lewis was employed by Spates Construction on August 25, 1982 when he fell from the roof of a building and fractured his left elbow. The fracture was to the radial head and involved some displacement and a depression. Aetna (now Travelers) was the insurer on the risk at the time of the injury.

2. Dr. James Maas treated claimant's fracture conservatively with a cast. After a period of time, the claimant returned to work for Spates. After his return to work the claimant received no additional indemnity payments or permanent partial disability benefits. He was never evaluated for permanency.
3. When the claimant last treated with Dr. Maas in November of 1982, the doctor told him that he was likely to have further difficulties with his elbow in ten to twenty years. At the time of that office visit, the claimant lacked full mobility in his elbow and was still experiencing intermittent mild pain. He was medically released to work and advised to "be as normal as possible."
4. The claimant's work for Spates involved erecting steel buildings. During the early 1980's he was a laborer with Spates. During his employment immediately after his recovery, the claimant's elbow was reasonably comfortable although he had occasional snapping. He testified that he was aware that his elbow was injured, but he described the feeling that was "aggravating," not painful.
5. During the summer of 1983 the claimant left Spates to work with his brother in a drywall business. During his work with his brother, the claimant continued to have clicking or snapping in his left elbow. In 1988 he began to notice a grinding sensation in that elbow.
6. Sometime between the onset of the grinding sensation and the claimant's return to work at Spates in 1990, he began to experience a catching in his left elbow. The feeling was different from the clicking, but did not lock his elbow. At this time, he also began to experience some pain in the elbow when he felt it catching.
7. Over the next few years, the catching in the claimant's elbow progressed to locking of the elbow. When this first started happening, he could unlock the elbow easily, but as time went on the locking persisted. In the fall of 1997, the elbow locked for three days.
8. The claimant described his initial work at Spates, his subsequent work with his brother and how the work at Spates changed when he returned there in 1990. In the early 1980's his work at Spates involved all phases of erecting steel buildings, including foundation work and roofing. He testified that he is right hand dominant and that his left hand was more for holding and balancing and less for heavy lifting and torquing.
9. It was while working with his brother that the claimant first noticed grinding in his elbow. At that time he was using his left arm more in his work, particularly with the "mud" used in drywalling.
10. When the claimant returned to Spates, he had enough seniority to avoid many of the jobs that would have put a strain on his elbow. He has become a supervisor, which entails much less physically demanding work. However, on occasion, he is required to perform the work he did back in the early 1980s.
11. The claimant noted that one of the activities that most irritated his elbow was talking on the telephone with his left elbow bent. He indicated that this became a problem from the

date of the injury in 1982 and that it was the activity most likely to cause a locking of his elbow up until the time of his surgery.

12. The locking incident that led to the claimant's disability for a period of three days occurred as he was reaching toward some scaffolding. The elbow was not under any load; the activity was simply stretching out of the arm.
13. The claimant returned to see Dr. Maas who referred him to Dr. Michel Benoit for probable arthroscopic evaluation and treatment of his elbow. The claimant understands that the referral was because Dr. Maas did not do elbow arthroscopies.
14. A March 3, 1998 CT scan revealed two large loose bodies and one smaller one in the elbow joint space, as well as significant evidence of degenerative changes and a healed fracture of the radial head. After a discussion with Dr. Benoit, the claimant agreed to surgery to have the radial head excised. The result of such a surgery is to shorten the radius in the lower arm.
15. Although the symptoms in the claimant's elbow largely resolved since the surgery, the claimant began to have pain in his wrist. The discomfort apparently was caused by the migration of the radius toward the gap in the elbow created by the excision of the radial head, resulting in a length discrepancy between the radius and ulna, the two lower arm bones. The claimant then had surgery for the partial removal of his ulna to repair the irregularity in his wrist. It is expected that he will need further surgery.
16. The claimant does not believe that work after the original incident affected his symptoms. He described the symptoms as increasing gradually over time and as being more evident in his daily activities as in his work.

#### Expert Opinions

17. Dr. Michel Benoit testified by deposition to his care and treatment of Mark Lewis. Initially, he ordered a CT scan with the expectation of determining the size and number of fragments that were visible on the x-ray. However, that scan revealed not only loose fragments, but also severe arthritis in the elbow from the original fracture. Dr. Benoit told the claimant that one way to treat the pain was to remove the radial head.
18. Dr. Benoit testified that the loose bodies most probably caused the locking in the claimant's elbow. He said that while it was not possible to say how the loose bodies were initially caused, the synovial fluid in the joint nourished them and caused them to grow. The loose bodies were either fragments of cartilage or bone from the original injury or breaking off of osteophytes that developed as a result of arthritis in the joint. There was no question that the loose bodies formed as a result of the damage done to the claimant's elbow in his fall from the roof on August 26, 1982.
19. Dr. Benoit was also able to draw some conclusions about the nature of the claimant's original injury based on the initial reports of Dr. Maas and the later migration of the radius after removal of the radial head. Covering the ulna and the radius is an interosseous membrane that keeps the bones in proper position and alignment. A tear in

that membrane from trauma allows the radial head to move up to the elbow. To Dr. Benoit, the pain the claimant had in the wrist at the time of the original injury indicates that he had torn that membrane. Furthermore, he found supporting evidence in Dr. Maas's note of October 1982 where he reported that the claimant continued to have significant pain his wrist. It was also significant to Dr. Benoit that Dr. Maas thought that the claimant was likely to have further trouble in 10 to 20 years, a clear indication that this was a serious injury to the elbow.

20. In Dr. Benoit's opinion, the claimant began to experience symptoms of arthritis at the time he would have projected them to begin, regardless of the activities he was doing. This conclusion is consistent with the claimant's testimony that normal day to day activities provoked symptoms in his elbow. Dr. Benoit found no objective data to support the theory that the type of work the claimant did actually affected the rate of change in an arthritic elbow. In Dr. Benoit's opinion, the loose bodies in the claimant's elbow may have led to the locking, but it was the arthritis that caused the pain and discomfort the claimant experienced.
21. Dr. Victor Gennaro performed a medical examination at the request of Travelers group. He opined that the heavy labor claimant performed over the years accelerated his arthritis and the growth of the loose bodies. He based that opinion on his years of experience as an orthopedic surgeon, his own experience as a manual laborer and general knowledge in the medical community, based on studies of the weight bearing joints of the lower extremities.
22. Dr. Gennaro agreed with Dr. Benoit's conclusion that an injured elbow such as the claimant's could be expected to show signs of arthritis in a five-year time frame. He also agreed that the evidence from Dr. Maas's original records confirmed an injury to the cartilage around the joint sufficient to expect the development of arthritis. He confirmed that the claimant's report of a grinding in his elbow beginning approximately six years after the injury was consistent with preliminary symptoms of arthritis in the elbow and that this was within a normal time frame.
23. Dr. Gennaro also testified that because of the size of the loose bodies removed from the claimant's elbow, it was clear that they had been growing in fluid in the elbow for a lengthy period of time, although he could not be precise about the time frame. Nevertheless, Dr. Gennaro was unwavering in his conclusion that it was heavy labor that hastened the claimant's arthritis, even though he was unaware that the claimant was performing substantially less heavy labor after 1990.

#### **CONCLUSIONS OF LAW:**

1. 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). 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).

2. As enunciated in *Trask v. Richburg Builders*, Opinion No. 51-98wc (Aug. 26, 1998), this Department asks a series of questions to determine which carrier is responsible in an aggravation-recurrence case: 1) Did a subsequent incident or work condition destabilize a previously stable condition? 2) Had the claimant reached a medical end result in his recovery while one carrier was on the risk before moving to work under another carrier? 3) Had the claimant stopped treating medically before his work moved from one carrier to another? 4) Had the claimant successfully returned to work? 5) Did the subsequent work, in this case the work for GMWP, contribute to the final disability?
3. It cannot be said that the claimant's subsequent work destabilized a previously stable condition because it is now clear that the arthritis had been developing for years from the stage set at the time of the initial injury. That condition continued to develop and symptoms appeared from activities wholly unrelated to work. Although the claimant did not seek medical intervention for several years, there is no evidence that he had reached a medical end result. In fact, the original carrier never had a permanency rating performed after the injury. And although the claimant had successfully returned to work, it is clear given the severity of the original injury that the arthritis would have occurred regardless of what the claimant was doing.
4. Dr. Benoit's testimony represents the more probable hypothesis in this case, that the claimant had a severe injury to his elbow that would almost undoubtedly lead to arthritis and that an accepted and not infrequent corollary is the growth of loose bodies in the joint. The claimant's testimony supports a finding that the changes that occurred in his elbow were gradual, seemingly unrelated to his work. It is also clear that Dr. Maas expected something similar to happen to the claimant based on his report to the claimant that he might expect additional problems ten to twenty years down the line. The claimant's progress confirms Dr. Mass's prognostication and makes a finding of recurrence more probable.
5. Based on the foregoing, the weight of the evidence supports a finding that the claimant's elbow and wrist problems are a continuation of his original injury without contribution from his work and that the Travelers should still be responsible for the claimant's medical care and other workers' compensation benefits.

**ORDER:**

Based on the Foregoing Findings of Fact and Conclusions of Law, Travelers Insurance is ORDERED to pay all benefits to Mark Lewis as a result of his claim against Spates Construction and to reimburse Liberty Mutual for any sums paid as a result of that claim.

Dated at Montpelier, Vermont this 28<sup>th</sup> day of December 2000.

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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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.