Ayer v. Fletcher Allen Health Care and State of Vermont (July 5, 2004)

STATE OF VERMONT
DEPARTMENT OF LABOR & INDUSTRY

Mary Ayer	)	
	)	State File Nos. R-50842 and P-05806
v.	)	
	)	
Fletcher Allen Health Care	)	Phyllis Severance, Esq.
and State of Vermont	)	Arbitrator

ARBITRATION DECISION AND ORDER

Arbitration hearing held in Montpelier, Vermont on May 17, 2004

APPEARANCES:

Frank Talbott, Esq. for Fletcher Allen Health Care
John Riley, Esq. for State of Vermont

ISSUE PRESENTED:

Whether the claimant's entitlement to workers' compensation benefits payable as a result of her work-related knee injury constitutes an aggravation causally related to her employment for Fletcher Allen Health Care, a recurrence of an earlier knee injury causally related to her employment for the State of Vermont, or a flare-up for which responsibility should be shared.

JOINT EXHIBITS:

1. Joint Medical Record
2. Deposition of Mary Ayer taken March 13, 2002
3. Deposition of John Lawlis, III, M.D. taken May 6, 2002

FLETCHER ALLEN HEALTH CARE EXHIBITS:

1. Letter of September 6, 1999 from Mary Ayer to Vermont Department of Corrections
2. Agency of Human Services Employee Incident/Injury Report
3. Form 27 and attached documentation
4. Fletcher Allen Health Care Employee Report of Event

In addition to the above exhibits, judicial notice is taken of all forms filed with the Department of Labor & Industry in State File Nos. R-50842 and P-5806, including but not limited to First Report of Injury dated September 14, 1999 and First Report of Injury dated January 31, 2001.

FINDINGS OF FACT:

1. Mary Ayer began her employment for the State of Vermont Department of Corrections ("the State") on August 9, 1999. She was hired to be a Correctional Officer I. In conjunction with this employment she underwent Correctional Officer training at the Correctional Academy in Pittsford, Vermont.

2. The training involved strenuous physical activities. In particular, the self-defense training required Ms. Ayer and her fellow trainees to practice throwing one another to the ground. Ms. Ayer was thrown to the ground at least twenty times a day during this training activity.

3. On September 1, 1999 Ms. Ayer noted pain in her left knee after having participated in the self-defense training. By Friday, September 3rd, the pain had increased and the knee had become red and swollen. Ms. Ayer reported the injury on Monday, September 6th. The State filed a First Report of Injury, accepted the claim and paid benefits accordingly.

4. Ms. Ayer treated conservatively for her knee injury with Lise Kowalski, M.D.and Michael Sargent, M.D., who diagnosed patellofemoral pain syndrome and illiotibial band syndrome. She underwent physical therapy through mid-December 1999 and also engaged in an independent pool therapy program. Her symptoms gradually improved, although she continued to experience intermittent anterior knee pain. Dr. Sargent strongly encouraged her to continue with a home exercise strengthening program once her formal physical therapy concluded.

5. In October 1999 Dr. Sargent released Ms. Ayer to return to modified-duty work, with restrictions against squatting, heavy lifting and repetitive stair climbing. These restrictions precluded Ms. Ayer's return to the correctional officer training program. There is no evidence that the State offered suitable modified-duty work, opting instead to inform Ms. Ayer of her obligation to seek such work herself.

6. In November 1999 the State filed a Form 27 seeking to discontinue temporary disability benefits on the grounds that Ms. Ayer had failed to conduct a good faith search for suitable modified-duty employment within her restrictions. The Form 27 was approved on November 23, 1999 and temporary disability benefits were terminated accordingly.

7. Ms. Ayer was not determined to be at end medical result at this time, nor was the extent of her permanent impairment, if any, rated.

8. In January 2000 Ms. Ayer began a new job as a mental health technician at the Vermont State Hospital. Because of the hospital's layout, the job required considerable walking and repetitive stair climbing. As a result, Ms. Ayer's knee symptoms worsened.

9. Ms. Ayer again sought treatment for her knee in May 2000. Dr. Kowalski noted complaints of increased pain and some swelling. The diagnosis of patellofemoral syndrome remained unchanged. Dr. Kowalski encouraged Ms. Ayer to resume her home exercise strengthening program. Ms. Ayer also was prescribed celebrex and referred for another course of physical therapy. Modified-duty work restrictions against squatting, kneeling and repetitive stair climbing again were imposed.

10. In part because of her knee injury and in part because of unrelated health issues, Ms. Ayer took a leave of absence from her Vermont State Hospital job in May 2000. Ultimately she terminated her employment there altogether.

11. Neither the State nor Ms. Ayer filed a new claim for workers' compensation benefits relating to her treatment for knee pain in May 2000. The State paid the medical expenses incurred in May 2000 and thereafter as part of the original September 1999 injury and workers' compensation claim.

12. In July 2000 Ms. Ayer sought a second opinion with John Lawlis, III, M.D., an orthopedic surgeon. Dr. Lawlis concurred with the diagnosis of patellofemoral pain syndrome, which he later refined to patellofemoral arthrosis with lateral subluxation. He recommended that Ms. Ayer continue with celebrex and with the strengthening exercise program. Last, he imposed modified-duty work restrictions of sedentary activity only, with minimal standing and walking.

13. Ms. Ayer underwent additional physical therapy from May 2000 through August 2000. The notes for this period reflect that her knee pain was improving, but not completely resolved.

14. During the summer of 2000 Ms. Ayer worked on a part-time, per diem basis as a mental health technician for Central Vermont Hospital. On weekends, she also worked as a private duty nurse for individuals with traumatic brain injuries. Neither of these jobs required repetitive stair climbing or long-distance walking, and therefore neither had any impact on Ms. Ayer's knee symptoms.

15. In September 2000 Ms. Ayer traveled to Ireland for a two-month vacation. She described occasional difficulty with her knee related to the amount of walking or stair climbing she had done.

16. In November 2000 Ms. Ayer began part-time employment at Fletcher Allen Health Care ("FAHC") as a licensed nurse assistant. She underwent a one-month training program and began her shift work on December 1, 2000. She worked eight-hour shifts, two or three days per week.

17. At FAHC, Ms. Ayer was assigned to McClure 6, a post-surgical floor for patients with neurological and orthopedic injuries. The work was stressful and the pace was intense. There was little opportunity for sitting or rest breaks. Ms. Ayer was on her feet constantly, walking up and down the floor and attending to patients.

18. At the time she began working for FAHC, Ms. Ayer was not actively treating for her knee injury. Whatever intermittent symptoms she may have experienced were not so bothersome as to interfere with her daily living or work activities to any significant extent.

19. Within a month after beginning her shift work on McClure 6, Ms. Ayer started to experience increasing problems with her knee. The pain was gradual at first, but then worsened. The symptoms were essentially the same as they had been after both the original injury and the May 2000 exacerbation – pain and swelling around the anterior aspect of the knee.

20. On or about January 31, 2001 Ms. Ayer reported her increased knee pain to her supervisor, and a New First Report of Injury was filed. Ms. Ayer was referred to Doris Raymond, F.N.P.C., for evaluation. Ms. Raymond recommended physical therapy, a knee brace and celebrex. She imposed modified-duty restrictions of no prolonged standing or walking, limited stair climbing and no repetitive bending or squatting, and recommended a desk job that would allow for elevation of the knee if possible.

21. Ms. Ayer returned to Dr. Lawlis on February 13, 2001. Dr. Lawlis' diagnosis was unchanged from his July 2000 evaluation – patellofemoral pain syndrome (later refined to patellofemoral arthrosis) with lateral subluxation. He prescribed physical therapy, pool therapy and vioxx, and limited Ms. Ayer to sedentary work activities only.

22. Ms. Ayer continued to treat with Dr. Lawlis throughout the spring and summer of 2001. Dr. Lawlis emphasized that the key to treatment of Ms. Ayer's knee symptoms was to maximize her leg strength and decrease her weight. He doubted that surgery would be an appropriate solution, although he never completely discounted that option.

23. In September 2001 the Department issued an interim order of benefits against FAHC, requiring it to pay workers' compensation benefits to Ms. Ayer relating to her ongoing treatment and disability as of February 1, 2001.

24. Dr. Lawlis determined Ms. Ayer to be at end medical result on April 2, 2002.

25. Dr. Lawlis testified that his findings on examining Ms. Ayer's knee in February 2001 did not differ significantly from the findings on his original evaluation in July 2000. Ms. Ayer's symptoms were essentially the same, as was his diagnosis. In Dr. Lawlis' opinion, Ms. Ayer's work at FAHC did not cause her to suffer any further internal injury or additional damage to her knee.

26. On April 30, 2002 Thomas Turek, D.C. evaluated Ms. Ayer for the purpose of rating her permanent impairment. Dr. Turek determined that Ms. Ayer had sustained a 4% whole person impairment. He concluded that Ms. Ayer's work at FAHC did exacerbate her symptoms, but did not cause any further deterioration of her condition. For that reason, he determined that Ms. Ayer's permanent impairment was directly and solely the result of the original September 1999 injury.

27. Ms. Ayer testified in her deposition that the condition of her knee currently is the same as it was before she began working at FAHC. She continues to have days when the pain is uncomfortable and days when it is manageable. As she reported to Dr. Turek, the pain is fairly constant, but does worsen with activities such as stair climbing, driving, kneeling, squatting, and prolonged sitting or walking. She continues to limp intermittently.

CONCLUSIONS OF LAW:

1. As the party attempting to relieve itself from an interim order to pay benefits, FAHC bears the burden of proof in this matter. *Lewis v. Ethan Allen and Green Mountain Wood Products,* Opinion No. 41-00WC (December 20, 2000).

2. Although definitions of the terms "aggravation" and "recurrence" have long been established, they have proven difficult to apply in practice. An "aggravation" is defined as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." *Workers' Compensation Rule 2.1110.* A "recurrence" is "the return of symptoms following a temporary remission." *Workers' Compensation Rule 2.1312.*

3. The Vermont Supreme Court has addressed the aggravation/recurrence issue as follows:

> In workers' compensation cases involving successive injuries during different employments, the first employer remains liable for the full extent of benefits if the second injury is solely a "recurrence" of the first injury – i.e., if the second accident did not causally contribute to the claimant's disability. If, however, the second incident aggravated, accelerated or combined with a preexisting impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an "aggravation," and the second employer becomes solely responsible for the entire disability at that point.

Pacher v. Fairdale Farms, 166 Vt. 626 (1997).

4. The Department of Labor & Industry has identified five factors to be considered in determining whether to find an aggravation or a recurrence in a particular claim:

   (a) whether there has been a subsequent incident or work condition which destabilized a previously stable condition;

   (b) whether the claimant had stopped treating medically;

   (c) whether the claimant had successfully returned to work;

   (d) whether the claimant had reached an end medical result; and

   (e) whether the subsequent work contributed to the final disability.

   Trask v. Richburg Builders, Opinion No. 51-98WC (August 25, 1998). The greatest weight is given to the fifth factor, the causal contribution of the subsequent work to the ultimate disability. *Holland v. Okemo Mountain*, Opinion No. 65-98WC (November 5, 1998).

5. As in most aggravation/recurrence cases in which the *Trask* factors are applied, the result in the current claim is equivocal. The first and second factors weigh in favor of an aggravation. The third factor points either way, depending on whether Ms. Ayer's four-month stint at the Vermont State Hospital and/or her per diem and weekend work during the summer and fall of 2000 constitute a "successful" return to work or not. The fourth and fifth factors point to a recurrence.

6. Clearly Ms. Ayer would not have experienced difficulty performing the FAHC job but for her pre-existing knee injury. However, to continue to hold the State responsible, from now essentially until forever, for every time Ms. Ayer's symptoms flare up and require treatment, seems both unfair and impractical.

7. Luckily, the "flare-up" doctrine provides a third option. Under this doctrine, where the claimant suffers unrelated injuries during different employments, the employer at the time of each accident becomes responsible for the respective workers' compensation benefits. *Pacher v. Fairdale Farms*, 166 Vt. 626, 628 (1997). The second employer pays for whatever treatment is necessary to return the claimant to his or her baseline, after which the employer at the time of the original injury resumes responsibility for the underlying condition. *Cehic v. Mack Molding Co., Inc.*, Opinion No. 16-04WC (April 9, 2004).

8. The two injuries at issue in the *Pacher* case were deemed "unrelated" because they occurred as the result of two separate and distinct incidents. Similarly, in *Cehic*, the Department applied the flare-up doctrine in the context of an injury to the same body part occurring at two clearly distinct times as the result of two clearly distinct lifting incidents. It makes equal sense to apply the doctrine in situations such as the current one, where the flare-up occurs gradually rather than instantaneously. In both cases, the relationship of the underlying condition to the original work injury is clear, as is the relationship of the worsened symptoms to the subsequent employment.

9. Adding the flare-up doctrine to the traditional aggravation/recurrence mix allows responsibility for workers' compensation benefits to be allocated among successive employers fairly and rationally, as follows:

   (a) Where symptoms recur following a *temporary* remission, i.e. where the condition has not yet stabilized, or where the claimant has not yet reached an end medical result or stopped treating medically, or where he or she has not successfully returned to work, the claim should be viewed as a recurrence;

   (b) Where the subsequent work causes a *change in the underlying condition*, the claim should be viewed as an aggravation;

   (c) Where the condition has stabilized, but the subsequent work causes a *temporary increase in symptoms only*, with no corresponding worsening of the underlying condition, the claim should be viewed as a flare-up. *See Pacher v. Fairdale Farms & Eveready Battery Company,* Opinion No. 36-93WC (March 16, 1994), *citing Russell v. Paisley Maintenance Inc.*, Opinion No. 39-92WC (May 7, 1993).

10. Applying this analysis to the current claim produces a fair and rational result. FAHC rightfully should be held responsible for the medical treatment Ms. Ayer would not have required but for her work there, and for any periods of temporary disability that occurred as a result of her symptom flare-up. The State rightfully should be held responsible for the permanency attributable to the underlying condition, which has persisted since the original injury and was not worsened by the FAHC job.[1]

11. FAHC has sustained its burden of proof as to whether and when Ms. Ayer's knee injury returned to its baseline condition. Both Dr. Lawlis and Dr. Turek concluded that her FAHC employment caused her symptoms to worsen temporarily, but did not cause any change in the underlying condition of her knee. Dr. Turek specifically stated that all of the permanency he rated was directly and solely attributable to the original injury. Ms. Ayer's testimony also buttressed this conclusion.

12. This claim involved a legitimate dispute between carriers, properly submitted for determination under Workers' Compensation Rule 8.000. The aggravation/recurrence dispute is one upon which reasonable minds clearly may differ. There is no reason, therefore, to allocate arbitration costs on anything other than an equal basis.

[1] Neither employer provided any vocational rehabilitation benefits to Ms. Ayer, and it is unclear whether she would have been found entitled to them in any event. Thus there is no need to determine which employer would bear responsibility for them at this point.

Based on the foregoing, it is hereby **ORDERED**:

1. FAHC shall pay for all medical treatment relating to Ms. Ayer's left knee injury from January 31, 2001, the date she reported her injury to FAHC and resumed treatment for it, until April 2, 2002, the date Dr. Lawlis declared her to be at end medical result.

2. The State shall pay permanency benefits in accordance with Dr. Turek's 4% whole person impairment rating.

3. The arbitrator's fee, which will be submitted separately, and other costs of this arbitration shall be split evenly between the employers.

DATED at Williston, Vermont this 5th day of July 2004.

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Phyllis Severance, Esq.
Arbitrator