Francis v. Pepsi-Cola/L.E. Farrell Co and Meineke Discount Mufflers (November 4, 2004)

STATE OF VERMONT
DEPARTMENT OF LABOR & INDUSTRY

Steven Francis	)	
	)	State File Nos. E-3662, R-2597, M-24963
v.	)	
	)	
Pepsi-Cola/L.E. Farrell Co.	)	Phyllis Severance-Phillips, Esq.
and Meineke Discount Mufflers	)	Arbitrator

ARBITRATION DECISION AND ORDER

APPEARANCES:

Jennifer Moore, Esq., for Pepsi-Cola/L.E. Farrell Co.
Nicole Reuschel-Vincent, Esq. for Meineke Discount Mufflers

ISSUE PRESENTED:

Whether the claimant's chronic low back pain and need for ongoing treatment constitutes an aggravation causally related to his work at Meineke Discount Mufflers or a recurrence of a low back injury for which Pepsi-Cola/L.E. Farrell Co. should remain responsible.

JOINT EXHIBITS:

Joint Medical Record

PEPSI-COLA/L.E. FARRELL CO. EXHIBITS:

1. Deposition of Steven Francis, taken June 24, 2004
2. Deposition of Dr. James Cummings, taken May 4, 2004
3. Deposition of Dr. Victor Gennaro, taken May 18, 2004
4. Deposition of Dr. John Johansson, taken July 14, 2004

MEINEKE DISCOUNT MUFFLERS EXHIBITS:

1. First Report of Injury, dated 11/16/87
2. First Report of Injury, dated 9/5/91
3. Agreement for Permanent Partial Disability Compensation, with supporting medical records, approved 10/8/92
4. Peerless Insurance injury report, dated 3/18/98
5. First Report of Injury, dated 1/21/98
6. First Report of Injury, dated 6/17/99
7. "Feature List" for loss date 6/11/99
8. "Activity Log/Diary" from 6/21/99 through 7/24/02
9. Peerless Insurance injury report, dated 8/15/00
10. First Report of Injury, dated 8/7/00

FINDINGS OF FACT:

1. In 1987, Steven Francis was employed as a driver for Pepsi-Cola/L.E. Farrell Co. On November 13, 1987 he was pulling a case of empty bottles on a handcart up some stairs, when he slipped and fell down hard on his backside.

2. Mr. Francis suffered a low back strain. He treated conservatively and lost minimal time from work. By December 8, 1987 his condition was "fully resolved." He was released to full-duty work with no scheduled medical follow-up.

3. Commercial Union was the workers' compensation carrier on the risk at the time of this initial injury, and presumably paid all workers' compensation benefits owing at the time.

4. From December 1987 until July 1991 Mr. Francis sought no medical treatment for low back pain, although he continued to experience symptoms. His pain gradually worsened to the point where he again sought treatment. On July 2, 1991 he was examined by Dr. Dorothy Ford, who recommended the SPINE intensive rehabilitation program.

5. Royal & Sun Alliance (RSA) was the workers' compensation carrier on the risk at the time Mr. Francis resumed treatment in July 1991. It assumed responsibility for Mr. Francis' ongoing treatment pursuant to the Department's order under 21 V.S.A. §662(c).

6. Mr. Francis' symptoms persisted despite additional conservative treatment. Ultimately, he was diagnosed with a bilateral pars defect at L5, Grade I spondylolisthesis and L5-S1 left disc herniation. Surgery was recommended. Mr. Francis underwent a spinal fusion at L5-S1 in February 1992.

7. Mr. Francis recovered well from fusion surgery, although he continued to experience some pain, stiffness and aching in his low back. He was declared at end medical result in August 1992. He received permanent partial disability benefits in accordance with an impairment rating of 28.75% of the spine.

8. Mr. Francis returned to full duty employment at Pepsi-Cola/L.E. Farrell Co. in October 1992. He continued to work there for approximately six months thereafter, at which point his employment terminated.

9. From 1993 until 1997 Mr. Francis was self-employed in the dry-wall business. He continued to experience low back pain during this time, but sought medical treatment on only a few occasions and missed little time from work. For the most part, he self-managed his pain with ibuprofen and learned to avoid the activities that aggravated it, such as bowling or rough-housing with his children.

10. In October 1997 Mr. Francis began working as a mechanic at Meineke Discount Mufflers ("Meineke"). The work is strenuous and involves lifting and bending, sometimes in awkward positions.

11. Peerless Insurance Company has been the workers' compensation insurance carrier for Meineke Discount Mufflers at all times relevant to this claim.

12. Mr. Francis has treated for three incidents of work-related low back pain since he began working at Meineke. The first incident occurred in January 1998, when he was lifting a seat from a vehicle. The second incident occurred in June 1999, when he bent to pick up a tire. The third incident occurred in August 2000, when he bent forward slightly in order to walk under a car on a lift.

13. Mr. Francis treated conservatively for each of these incidents, and missed only minimal time from work. Following the January 1998 incident, he underwent a course of physical therapy, and then a home exercise and gym program. After the June 1999 incident, he again participated in a course of physical therapy, and again followed that with a home exercise regimen. After the August 2000 incident, Mr. Francis underwent physical therapy and work hardening.

14. In each of the above instances, Mr. Francis' pain abated, but never fully resolved. As had been the case since his fusion, his low back continued to be vulnerable to improper motions brought about by seemingly innocuous activities such as rolling over in bed.

15. One such incident occurred in January 2000, when Mr. Francis awoke with severe low back pain. The pain was intense enough to compel him to seek emergency treatment at Fletcher Allen Health Care. He received pain medications and missed three days from work.

16. A similar incident occurred in June 2001. Mr. Francis awoke with low back pain, which worsened when he turned his head at work. Again he treated at the emergency room at Fletcher Allen Health Care, and again received pain medications for symptomatic relief.

17. Mr. Francis has treated on a fairly regular basis for episodes of low back pain since June 1999. As noted above, some of these episodes were at least temporally related to work-related events – bending to pick up the tire in June 1999, or bending to walk under the lift in August 2000, for example. Others were brought about by merely moving – rolling over in bed, for example, or turning his head a certain way.

18. The medical records document that both the frequency and severity of Mr. Francis' low back pain episodes gradually have increased since 1999. This is particularly true when compared with the time frame from 1992 to 1998. The records document only two instances of treatment for low back pain during that period – once in 1993 and once in 1996. Mr. Francis appeared to recover from each such incident with minimal treatment. As has been the case since his fusion surgery, his pain never fully abated, but did not appear to be as troublesome on an ongoing basis as it became in 1999.

19. Mr. Francis corroborated this analysis in his deposition. He testified that his chronic low back pain never fully dissipated after his fusion surgery, but rated his baseline pain level for the first few years afterwards as a 3 out of 10. Currently, however, he rates it somewhat higher, a 4 or a 6 out of 10.

20. In February 2001 Mr. Francis underwent an MRI, which showed that his fusion was solid. Mr. Francis underwent a repeat MRI in September 2003, which again established that the fusion was solid and that no new disc herniation had occurred.

21. In August 2001 Mr. Francis began treating with Dr. James Cummings, an osteopath. Dr. Cummings' assessment was that Mr. Francis was suffering primarily from the permanent consequences of the 1992 fusion surgery. Both his age and his occupation have played a role as well.

22. According to Dr. Cummings, a well-known complication of fusion is that it places additional stress on the joints above and below the fused joint. This causes those areas to deteriorate more rapidly and creates what some practitioners refer to as "creeping fusion syndrome."

23. Dr. Cummings believes that the incidents of low back pain that Mr. Francis has suffered since he began working at Meineke represent the normal progression of creeping fusion syndrome. Both the frequency of these incidents and the severity of the low back pain they have triggered have slowly increased over time. Mr. Francis' work at Meineke has played a role in accelerating this process, but the primary culprit in Dr. Cummings' opinion is the fact of the fusion itself.

24. Dr. Cummings' treatment plan since August 2001 has involved a combination of injection therapy and osteopathic manipulation. The goal of this treatment is to gradually reduce the ongoing instability in the areas above and below the fused joint. In this way, hopefully Mr. Francis will experience fewer flare-ups of low back pain, and the progression of his creeping fusion syndrome will decelerate.

25. Dr. Cummings declared Mr. Francis to be at end medical result from the August 2000 incident at Meineke in April 2002. He relates Mr. Francis' need for ongoing treatment since that date primarily to the permanent consequences of his fusion surgery and the chronic low back pain it generates. Dr. Cummings expects that Mr. Francis will need some degree of maintenance care for the rest of his life.

26. In addition to Dr. Cummings, both of the practitioners retained by Peerless as independent medical evaluators have concluded that the primary cause of Mr. Francis' current symptoms and need for treatment is the creeping fusion syndrome caused by his 1992 fusion surgery. Dr. Fenton examined Mr. Francis in July 2001, and in fact was responsible for his initial referral to Dr. Cummings. Dr. Johansson examined Mr. Francis in July 2002 for the purpose of determining the extent of his permanent partial impairment. Dr. Johansson found no additional permanency beyond what had been rated and paid in 1992.

27. Dr. Johansson's analysis of Mr. Francis' current condition is instructive. In his deposition, he testified that Mr. Francis' fusion is "stable," in the sense that it has remained solid and there is no evidence of any new herniation or other pathology in the joint. However, because of the added stress that the fusion has caused to the joints above and below, Mr. Francis' symptoms gradually have worsened. In this sense, therefore, Mr. Francis' condition is no longer "stable." The joints above and below the fusion have deteriorated over time, and will continue to do so in the future.

28. The independent medical evaluator retained by RSA, Dr. Gennaro, examined Mr. Francis in March 2004. Dr. Gennaro concluded that Mr. Francis has suffered soft tissue injuries and ligamentous sprains and strains in his low back as a result of his work at Meineke.

29. Dr. Gennaro does not believe that the joints immediately above or below Mr. Francis' fusion are necessarily prone to additional stress. In that sense, therefore, he does not believe that so-called "creeping fusion syndrome" is to blame for Mr. Francis' chronic low back pain.

30. Dr. Gennaro bases this opinion primarily on the fact that the flare-ups Mr. Francis experienced between 1992, when he underwent the fusion, and 1998, when the first incident of low back pain occurred at Meineke, were relatively minor and resolved with minimal treatment. In contrast, the episodes of low back pain Mr. Francis has experienced since 1998 have required more treatment and caused more severe pain, a distinction Dr. Gennaro finds to be materially significant.

31. Although Dr. Gennaro disagrees with the label "creeping fusion syndrome," he appears to be in agreement with Drs. Cummings, Fenton and Johansson that either the original 1987 injury and/or the 1992 fusion created a condition whereby Mr. Francis' back became more vulnerable to pain-causing incidents than it otherwise would have been. Drs. Cummings, Fenton and Johansson believe the root of the problem is added stress to the joints above and below the fused joint. Dr. Gennaro points both to the lumbar inflexibility caused by the original injury and to the mass of dense scar tissue that formed in the area as a result of the fusion surgery as the culprits. In either case, the conclusion is the same – Mr. Francis' low back is more susceptible to strains, ligamentous injuries and pain now than it would have been had he not sustained the original injury and resulting fusion surgery.

32. All four doctors agree, furthermore, that Mr. Francis' work at Meineke, and particularly the lifting, bending and awkward positions it entails, has either caused or aggravated flare-ups of low back pain. These flare-ups have occurred with greater frequency and severity than would have been the case were Mr. Francis working in a less strenuous job.

33. Dr. Gennaro believes that Mr. Francis should not have returned to work in such strenuous employment after his fusion surgery. He testified in his deposition that he would have "pushed for" vocational rehabilitation in 1992.

34. Mr. Francis' most recent episode of low back pain occurred in April 2004, when he experienced sudden low back pain after coughing at work. He treated with Dr. Cummings, who performed a series of injections in his low back, some of which already had been scheduled as part of his ongoing maintenance treatment program.

CONCLUSIONS OF LAW:

1. This is a classic aggravation/recurrence claim. Is Mr. Francis' chronic low back pain and need for ongoing treatment an aggravation causally related to his employment at Meineke, such that Peerless should pay whatever workers' compensation benefits are determined to be due? Is it a recurrence causally related to his 1992 fusion surgery, such that RSA should be responsible? Is it a flare-up, and if so, which carrier should pay what benefits?

2. Workers' compensation practitioners are intimately familiar with the terms, their definitions and the tests applied to decipher their application in appropriate circumstances. It has become hornbook law, recited as follows:

3. An "aggravation" is "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.*

4. The Vermont Supreme Court also has addressed the aggravation/recurrence issue:

5. "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).

6. And then, of course, there are the *Trask* factors, used by the Department of Labor & Industry to determine whether to find an aggravation or a recurrence in a particular claim:

7. whether there has been a subsequent incident or work condition which destabilized a previously stable condition;

   whether the claimant had stopped treating medically;

   whether the claimant had successfully returned to work;

   whether the claimant had reached an end medical result; and

   whether the subsequent work contributed to the final disability.

Trask v. Richburg Builders, Opinion No. 51-98WC (August 25, 1998).

Last, the flare-up doctrine must be added to the mix:

8. 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).

9. In the end, one is left with a hodge-podge of definitions, factors, doctrines and pronouncements. Theoretically, all make sense; philosophically all are consistent with one another. Unfortunately, as a practical matter all lead to results that are so dependent on particular, case-specific facts that they are almost impossible to harmonize.

One way to synchronize the various principles is as follows:

10. 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;

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

12. 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.

13. Applying this three-prong analysis to the current claim requires close scrutiny of the facts. Most importantly, it requires that the "underlying condition" that is at issue be appropriately identified and defined. The "underlying condition" in this claim is not the fusion itself, but rather the creeping fusion syndrome it precipitated.

14. As Dr. Johansson explained in his deposition, the very nature of fusion surgery itself is to create an inherently unstable condition in the joints above and below. "Stability" in the fusion context, therefore, means a condition of slow and steady deterioration that causes more frequent episodes of increasingly severe low back pain as time goes on.

15. Has the "underlying condition" – that is, the "creeping fusion syndrome" – been caused, accelerated or aggravated by Mr. Francis' work at Meineke? Given the very low threshold required by Vermont law for such a finding, the answer must be yes. The law requires only that the work "contribute" to the ultimate disability. There is no requirement that it be the primary contributing factor, or even a significant or substantial one.

16. Drs. Fenton, Cummings, Johansson and Gennaro all agree that both the 1992 fusion and Mr. Francis' work at Meineke have played a role in accelerating the deteriorating condition of his low back. They may disagree as to the specific physiologic and anatomic processes at work, and also as to the relative contributions of each factor, but given the legal standard, their disagreement is irrelevant. Mr. Francis' work at Meineke has contributed, and therefore an aggravation must be found.

17. This conclusion fits with the progression of Mr. Francis' low back pain as both the medical evidence and Mr. Francis' own deposition testimony establishes it. Episodes of low back pain that were fairly infrequent and relatively minor in terms of severity prior to his Meineke employment have become far more frequent and significantly more severe since that time.

18. Peerless argues that the August 2000 bending incident at Meineke should be viewed as a flare-up, for which Mr. Francis reached an end medical result in April 2002. All treatment since that time, it argues, is causally related to the 1992 fusion surgery and its sequelae, for which RSA should be responsible.

19. In his deposition, Dr. Cummings cogently described the practical impossibility of applying this type of analysis to Mr. Francis' situation. He testified that Mr. Francis' most recent "flare-up" occurred in April 2004, when he experienced the sudden onset of low back pain after coughing at work. Dr. Cummings treated him with injections, some of which *already had been scheduled* as part of his ongoing maintenance treatment program, a program designed to reduce the instability in Mr. Francis' low back causally related to his 1992 fusion. Dr. Cummings expressed rightful frustration when he asked which party should bear responsibility for which injections under these circumstances. Should it be Peerless, because the cough occurred while Mr. Francis was working at Meineke? Or should it be RSA, because the instability in Mr. Francis' low back requires ongoing treatment as a result of the 1992 fusion?

20. Dr. Cummings' dilemma cannot be ignored. Applying the flare-up doctrine in this claim would cloud it with uncertainty as to who should pay for each medical treatment, each bill, each missed day of work. To ignore this practical reality would be irresponsible.

21. Having concluded that Mr. Francis' current condition – creeping fusion syndrome – is an aggravation, Peerless bears responsibility for whatever ongoing treatment is determined to be both reasonable and causally related.[1]

22. Responsibility for whatever vocational rehabilitation benefits Mr. Francis might be due, however, is a different matter. As early as 1992, Dr. Ford suggested that Mr. Francis might need vocational rehabilitation as an alternative to returning to strenuous physical work. Dr. Gennaro testified to the same effect, declaring that he would have "pushed [Mr. Francis] for" vocational rehabilitation in 1992 in the hopes of securing more appropriate, lighter duty employment for him. With that in mind, should Mr. Francis be determined eligible for vocational rehabilitation services, it is only fair that RSA should bear responsibility, as the carrier on the risk in 1992.

23. 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. Indeed, counsel for both parties are to be commended for their organized recitation of the facts and concise legal arguments. This was an extremely difficult claim to decide, one in which the shortcomings of Vermont's aggravation/recurrence law are all too apparent.

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

1. Meineke Discount Mufflers and/or its' workers' compensation insurance carrier shall pay for all reasonably necessary and causally related medical treatment necessitated by Mr. Francis' creeping fusion syndrome;

2. Royal & Sun Alliance shall pay for whatever vocational rehabilitation benefits Mr. Francis is determined to be entitled to;

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

DATED **at Williston, Vermont this 4th day of November 2004.**

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Phyllis Severance-Phillips, Esq.
Arbitrator

[1] The question whether Mr. Francis' ongoing treatment with Dr. Cummings is either reasonable or causally related to his work at Meineke is not at issue in this proceeding.