STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-15774
Wayne Whitmore	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Commercial Union and Peerless	)	For: R. Tasha Wallis
Insurance, Insurers for Bob Dean's Auto	)	Commissioner
	)	
	)	Opinion No. 18-02WC

Hearing held in Manchester, Vermont on December 11, 2001
Record closed on January 11, 2002

APPEARANCES:

Patrick Biggam, Esq. for the claimant
Harold E. Eaton, Esq. for Peerless
J. Christopher Callahan, Esq. for Commercial Union.

ISSUES:

1. Did the claimant suffer an injury that arose out and in the course of his employment with Bob Dean's Auto?

2. If this is a compensable claim, was it an aggravation or a recurrence?

EXHIBITS:

I: Transcript of deposition of Jose E. Peraza, M.D.
II: Transcript of deposition of Kathryn A. Zug, M.D.
II: Medical Records

FINDINGS OF FACT:

1. From 1967 to 1998, except for two years when the claimant was in the military, claimant was an "employee" and Bob Dean's Auto his "employer" as those terms are defined in the Workers' Compensation Act and Rules.

2. Peerless Insurance provided workers' compensation coverage to Bob Dean's from October 1, 1992 to October 20, 1996. Then Commercial Union covered the employer from October 20, 1996 to October 20, 1998. Commercial Union has been providing interim benefits to the claimant.

3. Bob Dean's is a local service station. Claimant's work there included repairing tires, changing oil, tuning up cars and pumping gas. He stopped that work in 1998.

4. Back in 1975, as noted in the Gifford Family Health Center notes, claimant developed poison ivy on his foot that spread and became infected. He was treated with penicillin ("PenVee"), but had a reaction to the drug and then was treated for the drug reaction with Neutropen and Benadryl.

5. In 1982 claimant was diagnosed with contact dermatitis from poison ivy. He was treated with a steroid (Prednisone) and Benadryl.

6. Claimant first noticed a rash on both arms and hands in July of 1994, which his physician at first believed was poison ivy. Despite treatment, his skin broke down and was sore, prompting treatment with a topical cream. Then after some time away from work on vacation, the rash cleared completely, only to return when he went back to work. Patch testing showed a severe reaction to hand cleansing cream.

7. By the fall of 1994 the claimant's rash cleared up. Then, claimant went from October 1994 through May 1995 without seeking care for a rash on his arms and hands, although he was seen in April 1995 for what was diagnosed as dermatitis around the mouth from using Blistex on the lips.

8. In May 1995 the claimant returned to Dr. Gadway's office (now the Gifford Family Health Center) where it was noted he had a recurrent rash involving the forearms that was "probable contact dermatitis." Claimant was advised to take an in-depth look at what he was exposed to at work and to see a dermatologist.

9. Jose Peraza, M.D., a Board Certified dermatologist, examined and patch tested the claimant in June and July 1995. He noted that the claimant's rash had a sharp cut-off at the sleeve line. The claimant's trunk and face were clear of the rash. Because the claimant was on Lotensin for high blood pressure, Dr. Peraza sought to rule out the possibility of a drug-induced rash. He therefore consulted with the claimant's primary care physician who changed the blood pressure medication. That change was made in June.

10. Patch tests showed a positive reaction to mercaptobenzothiazole (mercaptos), which Dr. Peraza noted in his deposition is an additive in adhesives, oils, cleansers, auto cooling systems, antifreeze, and greases, generally materials to which the claimant was exposed at work.

11. When Dr. Peraza saw the claimant again in September of 1995 and noted no more rash, he assumed the Lotensin had been the causative mechanism.

12. Claimant's skin problems had cleared reasonably well with medication. Although he had occasional problems, claimant was able to treat the condition with medicated cream. And he noted that the condition cleared up when he went on vacation and was away from work.

13. Claimant continued to work full-time, full duty. A February 1996 note from Dr. Gadway's Office for an unrelated problem included the history of multiple allergies.

14. He was not seen by his doctors for skin problems on his hands and arms between 1995 and 1998.

15. An allergic reaction to an allergen occurs within hours or a few days of one's exposure to it.

16. In January 1998 claimant noticed that his hands had worsened to the point where they would bleed if he opened them. The hands were painful, cracked, and red with fissures, splits and thickening. Petroleum products were the suspected cause.

17. In February 1998 Dr. Peraza diagnosed severe bilateral palmer dermatitis, involving a "definite aggravation by his work." At that time, claimant also had signs of dermatitis in the axillae (armpits) and lower abdomen. Dr. Peraza advised the claimant to consider a new occupation. He was taken out of work on February 1, 1998.

18. It took four weeks after the claimant left his job for his hands to clear up.

19. Next, claimant saw Kathryn Zug, M.D., a dermatologist at Dartmouth Hitchcock Medical Center (DHMC), for a second opinion. After the first visit, she diagnosed probable allergic contact dermatitis from mercapto, which she indicated would be an occupationally relevant allergen. She also noted that the claimant was photosensitive, meaning that he had skin reaction to sun exposure, which could have been caused by his blood pressure medication. She recommended a change in medication.

20. Patch tests revealed 1) a strong reaction to mercaptobenzothiazole and mercapto mix, 2) a Benzocaine reaction; and 3) a PABA reaction. Dr. Zug explained that the mercapto is a rubber ingredient found in tires, rubber hoses and perhaps anti-freeze. She concluded that the reaction on the claimant's hands, which she attributed to mercaptos, was related to his work. However, she also concluded that the Benzocaine and PABA reactions had other causes.

21. Dr. Zug has described a multifactorial cause of the claimant's skin condition. She opined that the lesions on his hand and arms were work-related based on the history that revealed clearing when the claimant was not working and the patch test that was strongly positive for mercaptos. On the other hand, she explained that work could not account for skin problems on the claimant's abdomen and axillae or for his photosensitivity.

22. Dr. Zug agreed with Dr. Peraza that it would have been difficult or impossible for the claimant to have continued to work in an environment that gave him difficulty. Furthermore, she opined that subsequent exposures constituted a new assault to his immune system.

23. Dr. Zug saw the claimant again in September of 1999, this time to do an IME at Commercial Union's request. She noted that claimant had a series of skin eruptions since March of 1998 including swelling on his upper back and neck after being in a restaurant kitchen, a rash that developed on his back and chest after he sat in a chair at an insurance office, redness and itching on his abdomen after he spilled gasoline on his shirt, rash on legs, arms and neck after driving in a car, and a body itch after visiting a modular home. All of these itches and rashes responded to a topical cream. Dr. Zug explained that a quarter to a third of people with contact dermatitis continue to have some problems even while avoiding the allergens.

24. Since the claimant left his work environment, his hands have been clear. He has not altered his home environment. The only change was his removal from the work site at Bob Dean's Auto.

25. On March 9, 2000 claimant was evaluated at the Yale University Occupational and Environmental Medicine Program, where Carrie Redlich, M.D., M.P.H, diagnosed occupational dermatitis. On examination he was noted to have a rash on his neck, extensive scarring of his hands and forearms, and a rash on his waistline.

26. After the examination and review of the claimant's history and patch test results, Dr. Redlich concluded that his contact dermatitis was work-related. She explained that dermatitis can persist after one has left the workplace, especially when one has become sensitized to a substance such as mercaptobenzothiazole.

27. In June 2000, at Peerless's request, Eric Cohen, M.D., dermatologist at New York University, evaluated the claimant. He also did patch testing. His examination revealed "hyperpigmented patches on the claimant's lower face, neck and V distribution of his upper chest. The arms had sharply demarcated hyperpigmented plaques abruptly cut off at the mid upper arms." He also had redness on his legs and lower back.

28. Dr. Cohen's testing revealed the claimant to be allergic to many items, including benzocaine and rubber accelerator and to have photodermatitis. Dr. Cohen found the distribution and history of claimant's eruptions to be inconsistent with an occupational dermatitis due to exposure to mercaptos. He could not causally link chemicals claimant was exposed to in the workplace to claimant's skin problems. In his report, Dr. Cohen also stated, "while mercaptobenzothiazole may be present in the products he is exposed to in work, similar exposure patterns would occur outside of work." He agreed with Dr. Zug that the photodermatitis was not work-related.

29. On February 26, 2001 Dr. Redlich at the Occupational and Environmental Medicine Clinic at Yale responded to Dr. Cohen's report, specifically his theory that the claimant's dermatitis cannot be work-related because it extend beyond the original site of exposure. She explained that such a pattern can be explained by the phenomenon known as Autoeczematization, where a rash spreads beyond the areas of initial contact with the causative agent. She also emphasized that "Mercaptobenzothiazole and Mercapto Mix are know sensitizers found in rubber products and that mechanics are among the occupational groups most at risk from being sensitized to these agents and subsequently coming down with allergic contact dermatitis."

30. Dr. Cohen rejected the Autoeczematization theory posited by Dr. Redlich because there was no suggestion of persistent fungal or bacterial infection in any reports and because the claimant had been avoiding known exposures since he left his job in 1998.

31. Dr. Redlich determined that the claimant has a 40% whole person permanent impairment as a result of his skin condition.

32. Claimant supports his claim for legal fees with an itemized statement from his attorney delineating 112.3 hours worked on this case and $1,802.50 incurred in costs.

EXPERT OPINIONS:

33. There is unanimity in opinion that claimant has a predisposition to allergies and history of sensitivity. With the exception of Dr. Cohen, every doctor involved in this case is of the opinion that claimant's work caused or contributed to his contact dermatitis. Notation of the causal connection dates back to a note from Dr. Gadway in 1995 when he advised the claimant to look at what he was exposed to at work. Claimant reacted strongly to the skin test for mercaptos, which are found more in industrial settings and garages than in other places this claimant frequented. Claimant's rashes began on his hands and arms, the areas exposed during his workday. The rashes cleared when he was on vacation. And since the claimant left work, he no longer has rashes on his hands and arms, although he has some degree of rash in other areas of his body. Doctors Peraza and Zug, both dermatologists, concluded that the lesions on the claimant's hands and arms are work-related, although they also acknowledge that there is a non-industrial component to the claimant's allergies, as evinced by the photosensitivity. They noted that the more one is exposed to the source of contact dermatitis, the more sensitive one becomes. Dr. Redlich, an occupational and environmental medicine physician, agreed that there is a causal connection to work.

34. When Dr. Cohen saw the claimant in 2000, claimant had scars on his hands and arms, but no evidence of contact dermatitis in those areas. Therefore, claimant's contact dermatitis in those in fact had improved, since he left his job, despite Dr. Cohen's conclusion to the contrary. That he had a rash in other areas of his body can be explained by another source of allergy or by the Autoeczematization. Dr. Cohen has not explained how the rash on the hands and arms vanished when the claimant left his job, if that job had no relationship to it.

35. Claimant exposure to mercaptos at Bob Dean's Auto combined with his predisposition to allergies to cause contact dermatitis.

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).

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. 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). "If expert medical evidence establishes a causal connection between the results of the injury incurred in performance of the work for which the employee was hired, and an aggravation or acceleration of the existing disease, the award must stand." *Marsigli Estate v. Granite City Auto Sales*, 124 Vt. 95, 103 (1964) (citation omitted).

4. In keeping with the law of aggravation and acceleration enunciated in *Marsigli,* it is not necessary for the claimant to prove that work was the sole cause of his dermatitis as long as he proves that it was a cause. And this he has done.

5. The development of dermatitis on this hands and arms, resolution of symptoms when he was on vacation, strong positive skin testing to mercaptos and the presence of mercaptos in a garage workplace are all facts supporting the claimant's medical opinions that work caused his contact dermatitis. Therefore, he has met his burden of proving that this injury arose out of and in the course of his employment at Bob Dean's.

Aggravation, Recurrence or Last Injurious Exposure?

6. The next issue for decision is whether the claimant suffered a recurrence of an injury for which Peerless would be liable or an aggravation or last injurious exposure for which Commercial Union would be liable.

> 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, 628 (1997) (mem) (citations omitted).

7. Although the facts in *Pacher* involved distinctly separate employers, the principles enunciated in the opinion logically apply to separate injuries or exposures under separate insurers for the same employer, as found in this present case.

8. Where separate injuries or exposures all causally contribute to the total disability "so that it becomes difficult or impossible to allocate liability among several employers" the last employer is liable under the last injurious exposure rule. Id.

9. In the traditional aggravation/recurrence analysis that dovetails with the *Pacher* definitions, this Department has considered five questions. An affirmative answer to each supports aggravation, a negative answer suggests a recurrence: 1) Was there a subsequent incident or work condition which destabilized a previously stable condition? 2) Had the claimant stopped treating medically? 3) Had the claimant successfully returned to work? 4) Had he reached a medical end result? 5) Did the subsequent work contribute independently to a final disability? *Trask v. Richburg Builders*, Opinion No. 51-98WC (Aug. 25, 1998).

10. Claimant had skin difficulties in 1994 and 1995, which resolved with a change in medications in 1995. Then, for almost three years, from 1995 to 1998, he went without treatment for the dermatitis. His reaction in 1998 to allergens was caused by something to which he was exposed within a few days prior to February of 1998. The first *Trask* factor, therefore, supports aggravation.

11. Claimant had not received any medical treatment for his skin problems for almost three years, from 1995 to 1995, another finding in support of aggravation under the second *Trask* criterion. At no time before 1998 did the claimant miss time from work because of the contact dermatitis, a factor that support an aggravation under the third *Trask* criterion. The fourth factor supports recurrence because there is no indication that the claimant had reached a medical end result at any time before 1998. Finally, it is clear that the work claimant did in 1998 caused a more widespread and worsened condition than anything claimant had experienced in the past. Therefore, the final factor also supports aggravation.

12. On balance, the facts support a finding of aggravation for which Commercial Union is responsible. And, even if the last injurious exposure rule were applicable, Commercial Union would be liable.

13. Therefore, Commercial Union must adjust this claim.

14. Under 21 V.S.A.§ 678(a), a prevailing claimant is entitled to reasonable attorneys fees as a matter of discretion and necessary costs as a matter of law. As the prevailing claimant in this contested case involving complex medical issues and lengthy discovery, the claimant is entitled to fees based on the hours worked and the necessary costs as listed in his submission.

ORDER:

THEREFORE, based on the Foregoing Findings of Fact and Conclusions of Law, Commercial Union is ORDERED to Adjust this claim and to pay the claimant $7,861 in attorney fees (112.3 hours x $70.00) and $1,802.50 in costs.

Dated at Montpelier, Vermont this 2nd day of April 2002.

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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.