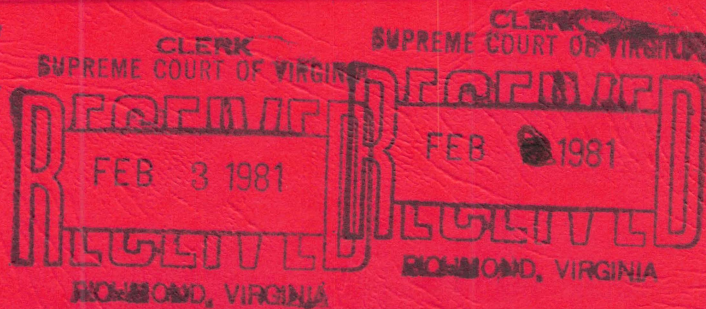


222 VA 30



Dave G. Bergmann,

Appellant,

v.

L & W Drywall, Employer and
Selected Risks Insurance Company, Carrier,

Appellees.

Record No. 801 267.

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

DAVE G. BERGMANN,

Appellant,

v.

L & W DRYWALL, Employer,
and

SELECTED RISKS INSURANCE COMPANY, Insurer,

Appellee.

A P P E N D I X

John H. Klein
Breit, Rutter and Montagna
415 St. Paul's Blvd.
720 Atlantic National Bank Bldg.
Norfolk, VA 23510

804 622-5000

Attorneys for Appellant.

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VIRGINIA: IN THE INDUSTRIAL COMMISSION

DAVE G. BERGMANN, Claimant

v.

Opinion by TALTON,
Deputy Commissioner

L & W DRYWALL, Employer

SELECTED RISKS INSURANCE COMPANY, Insurer. Dated: Jan. 30, 1980

Hearing before Deputy Commissioner TALTON in Norfolk,
Virginia, on December 18, 1979.

This case is before us on the application of the employee, by counsel, filed with the Commission on November 9, 1979, on ground of change in condition requesting reinstatement of weekly compensation benefits. Payments were previously suspended effective April 15, 1979, due to the inability of the insurance carrier to locate the claimant.

The claimant testified at the hearing that he notified the U.S. Postal Authorities on every occasion that he moved to a different residence. The record established and a finding is made that the claimant was again in contact with and accessible to the insurance carrier as of November 6, 1979.

An award shall enter accordingly.

A W A R D

An award is hereby entered on behalf of the claimant at the rate of \$187.00 per week for total incapacity beginning November 6, 1979, and continuing thereafter in accordance with law.

From the above compensation the sum of \$300.00 shall be deducted and paid to John H. Klein, Esq. for legal services provided to the employee.

The case is ordered removed from the hearing docket.

VIRGINIA
IN THE INDUSTRIAL COMMISSION

DAVE G. BERGMANN, Claimant

APR 15 1980

v. Claim No. 613-870

Opinion by JAMES
Commissioner

L & W DRYWALL, Employer
SELECTED RISKS INSURANCE COMPANY, Insurer

John H. Klein
Attorney at Law
415 St. Paul's Boulevard
Norfolk, Virginia 23510
for the Claimant.

Robert G. Winters
Attorney at Law
906 One Main Plaza East
P. O. Box 3315
Norfolk, Virginia 23514
for the Defendant.

REVIEW before the full Commission at Richmond, Virginia on April 2, 1980 at the request of the Carrier due to the award of the hearing Commissioner reinstating payments which had been suspended at a prior hearing due to the disappearance of the employee.

The chronology is stated in the Opinion of January 30, 1980. By letter dated November 6, 1979 claimant's counsel notified the Carrier and the Commission that the employee was available and requested that the case be reopened with a hearing on the merits followed by a motion to review the award on change in condition.

After the hearing on December 18, 1979 an award was entered on January 30, 1980 reinstating payments under the award of March 12, 1979 effective November 6, 1979. No medical evidence of the employee's continuing disability was submitted by either side.

The full Commission is of the opinion that the employee's disappearance has prevented the Carrier from exercising its right of providing medical care and follow up as to disability and that the employee should not be allowed to take advantage of a situation which he has created.

Accordingly, the opinion and award of January 30, 1980 is vacated and set aside with the case being remanded to the hearing docket for the receiving of medical evidence as to the employee's work capacity and the availability of selective work if such is necessary after the medical examination. The Carrier shall immediately make arrangements for an examination by the treating physician advising the employee and his counsel as well as the Commission of the arrangements.

VIRGINIA:
IN THE INDUSTRIAL COMMISSION

DAVE G. BERGMANN, Claimant

JUL 14 1980

v. Claim No. 613-870

Opinion by JOYNER,
Chairman

L & W DRYWALL, Employer
SELECTED RISKS INSURANCE COMPANY, Insurer

John H. Klein, Esquire
720 Atlantic National Bank Building
415 St. Pauls Boulevard
Norfolk, Virginia 23510
for the Claimant.

Robert G. Winters, Esquire
P.O. Box 3315
Norfolk, Virginia 23514
for the Defendants.

REVIEW before the Full Commission at Richmond, Virginia.

This claim is again before the Full Commission for review of the opinion of January 30, 1980, together with certain additional medical evidence taken on May 22, 1980, pursuant to remand by the Full Commission by Opinion dated April 15, 1980.

The additional evidence consists of the medical report of Dr. Ira M. Cantin, Orthopaedist, of May 30, 1980, and Dr. Raymond G. Troiano, Urologist, of June 18, 1980.

The claimant initially suffered back injury by industrial accident on October 21, 1978, for which compensation for temporary total disability was awarded from that time until April 15, 1979. Compensation was then suspended by opinion dated August 3, 1979, upon the ground that the employer could not locate the claimant for the purpose of medical examinations nor to offer selective employment if such was indicated. The claimant subsequently contacted the employer and, at the same time

moved the Commission to restore the case to the hearing docket for the purpose of determining his entitlement to compensation benefits at that time.

The claim was next heard on December 18, 1979, and by opinion dated January 30, 1980, it was found that the claimant, having again made himself available for medical examination and treatment, was entitled to a continuation of compensation. That award was appealed to the Full Commission and remanded for the taking of the additional medical evidence indicated above.

The medical report of Dr. Ira M. Cantin of May 30, 1980, indicates that :

"... From the orthopedic standpoint, I certainly feel that this patient should have no further symptoms referable to a lumbar strain. . . This patient has made an uneventful recovery and should have no permanent disability or any disability at all at this time that could be attributed to a lumbosacral strain. . ."
[Note: Dr. Cantin examined the claimant on May 29, 1980.]

Dr. Troiano, by report dated June 18, 1980, notes that the claimant suffered in part from post-infectious neuritis and that his disability resulted from a combination of physical maladies of which only the lumbar strain was related to his employment.

The Commission has previously held that where the claimant's disability is related to two causes, one of which is compensable and the other of which is not, the compensation may not be awarded.

Southall v. Eldridge Reams, Inc., 198 Va. 545, 95 S.E. 2d 145; *Virginia Electric and Power Co. v. Quann*, 197 Va. 9, 87 S.E. 2d 624. (1956) see 196 64

Upon this finding, the Full Commission, upon review, is of the opinion that the evidence fails to establish a case for which compensation for total or partial disability may be awarded. For this reason, the opinion of January 30, 1980, is reversed and set aside and the claim dismissed.

PRACTICE LIMITED TO ORTHOPEDIC SURGERY

PHONE 1-1780

May 30, 1980

OFFICES
SUITE 101
241 KEMPVILLE ROAD
NORFOLK, VA 23502

106 DE PAUL MEDICAL BLDG

704 MEDICAL TOWER BLDG

DR JOHN A VANN
DR GLENN S TAYLOR, JR.
DR W CLARKE POLE
DR IRAM CANTIN
DR DAVID H YOUNG
DR LOUIS H JORDAN
DR JAMES P DEVEREUX
DR STEPHEN H MCCOY

Selected Risks Company
P. O. Box 13325
Richmond, Virginia 23225

// Re: Dave G. Bergmann
L&W Drywall
D/A 10/21/78

11613-57

Gentlemen:

Dave Bergmann was seen by me on May 29, 1980. I have read the notes from Dr. Troiano, and will comment on them later.

This patient's history is very much the same as Dr. Troiano stated, that is, he complains of weakness and pain in his back and both legs and states that he is unable to work.

Physical examination again is about the same that Dr. Troiano found, except for the redness in the legs which has now disappeared and the legs appear normal. I must agree with Dr. Troiano, in that the patient has a multitude of subjective complaints with very few objective findings.

From the orthopedic standpoint, I certainly feel that this patient should have no further symptoms referable to a lumbosacral strain, since that was allegedly sustained on October 21, 1978. I certainly would not expect any symptoms from this at this time.

In regard to Dr. Troiano's notes regarding a rheumatology work up and a dermatological consultation, I certainly think they would be in order to rule out any problems other than orthopedic. Again, let me stress that I feel from the orthopedic standpoint, this patient has made an uneventful recovery and should have no permanent disability or any disability at all at this time that could be attributed to a lumbosacral sprain.

In answer to the question regarding any follow up care, I would assume from Dr. Troiano's notes, that he wanted further investigation, but for reasons not made clear other than economic, I do not know why these were not carried out.

If I can be of any further assistance in this matter, please do not hesitate to contact me.

Yours truly,


Ira M. Cantin, M. D.

BEACH NEUROLOGY, INC.

1100 FIRST COLONIAL ROAD
SUITE 104
VIRGINIA BEACH, VIRGINIA 23454
TELEPHONE (804) 481-1444

June 18, 1980

ERT A. NASH, M. D.
MOND G. TRIAND, M. D.

DIPLOMATES AMERICAN BOARD OF
PSYCHIATRY AND NEUROLOGY

John H. Klein
Breit, Rutter & Montagna
Counsellors at Law and Proctors in Admiralty
720 Atlantic National Bank Building
415 Saint Paul's Boulevard
Norfolk, Virginia 23510

RE: DAVE G. BERGMANN

Dear Mr. Klein:

With respect to your correspondence of June 12, 1980, regarding the case of Dave G. Bergmann, I am writing now to provide you with the information that you require. I have not been in the office until so that I hope that you will not receive this report too late for it to be of help. Briefly, Mr. Bergmann was first seen by me on October 26, 1978 at the General Hospital of Virginia Beach Emergency Room complaining of back pain and leg weakness which he felt was related to an injury suffered at work within the week prior to him going to the Emergency Room. I admitted him to the hospital and evaluated him because of neurologic findings that he had upon my initial evaluation it was my feeling that although he did suffer an injury at work, he was also suffering from a probable mild atypical post infectious neuritis with some superimposed lumbosacral strain. I followed him as an outpatient for a while because of these problems and because of continued complaints and I felt that his disability was because of a combination of problems. I felt that there was no way to really distinguish what part of his disability was because of his back injury and what part was because of his post infectious polyneuritis but that I felt both were contributing to the problems produced by the other and that both were contributing to his disability. I saw Mr. Bergmann in June of 1979 and did not see him again then until November of 1979 when he came in for continued problems. I felt that he needed continued neurologic follow up but that he had not kept some appointments which I think were basically because of financial reasons. In any event, his follow up has been sporadic with him coming in again for the first time since November on June 5, 1980. At this point, I still feel that he needs to have a fairly complete neurologic re-evaluation to make sure he does not have an ongoing neurological problem, but I would not think that this would be totally related to his back injury but rather an extension of an underlying neurologic problem. I do think, however that both problems are contributing to him continuing to have back pain and therefore, both problems are contributing significantly to a disability with respect to his job as a drywall hanger. Therefore, as you stated in your letter if he did have an injury in his accident at work which contributes to his disability

June 18, 1980

Page Two

RE: DAVE G. BERGMANN

even if it is contributing to a pre-existing problem, he should qualify for Workman's Compensation benefits. Hopefully by the time you receive this letter, we will have had the opportunity to speak. I will enclose a copy of my most recent office notes. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in cursive script that reads "Raymond G. Troiano". The signature is written in dark ink and is positioned above the printed name.

Raymond G. Troiano, M.D.

RGT/pcm

Enclosure

DAVE BERGMANN

11-13-79: OFFICE FU NOTE:

Mr. Bergmann comes in today not really any better than he was when I saw him in June. Because of no payment being received on his account, we had previously terminated care to him, however, he does not have a doctor, does not have a job, does not have any money according to him and does not even have a place to live regularly, and I feel he does have a neurologic problem that needs following up so we decided that we would continue care and work out payment as best as possible. In any event, since last seeing him, Mr. Bergmann still complains of backaching and tightness which at times radiates down his legs. It is more on a sacroiliac area now than in his lumbosacral area. He also complains that his legs are not as strong as they should be and he thinks that he is worse. He complains recently of "locking" of his knees and ankles. He says that they also shake. This locking seems to be described by him as a tightening and cramping sensation of his muscles which does not relax for at least 10 to 15 minutes. He rubs them, hits them, and even soaks them in hot water to no avail. Over the last few days, he has developed some burning painful, red areas over both tibia, but he says he did not hit his legs on anything and does not know why they are there. He has no sensory symptoms. He has no bowel

or bladder problems and has had no trouble with sexual functioning. His upper extremities and his cranial nerve are asymptomatic. He still has aching in thighs and in his legs and he still has pain throughout his back and legs. He has not worked at all other than helping out a friend with a tavern that this friend owns. He was going to get into the insurance business with this friend, but this friend then left the insurance business. He apparently has found a lawyer and will be trying to get the insurance company to pay for more of his medical and hospital bills. Apparently even the hospital has even taken him to court for his hospital bills. In any event, he has been without income since the insurance company cut him off in March.

EXAM: Today reveals intact cranial nerves and upper extremities. Lower extremities show brisk deep tendon reflexes and downgoing toes. There is a question whether these reflexes are brisker than in the upper extremities. Certainly, from re-reading my notes, these reflexes are more brisk than they were when I first saw him when I admitted him into the hospital last October, although I do not think they are pathologically so presently. Abdominal reflexes are present bilaterally. I could not access the present of cremasteric reflexes. Sensation is intact to light touch, pin prick, position sense and vibration sense in both lower extremities. His lower extremities below the knees appear to be slightly more thin than I last appreciated, but I cannot be certain of this. Straight leg raising produces

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grunts and groans but no definite radicular symptoms. He is quite histrionic during the examination, deep breathing, grunting, groaning, and moaning. It seems that anywhere you touch his lower extremities below the knees, he is somewhat tender. Motor examination is difficult to access because of lack of full effort on the part of the patient. He gives away when testing Iliopsoas and Quadriceps muscles and definitely has given away when testing gastrocnemius and anterior tibial muscles. When testing extensor hallucis longus and digitorum brevis, there appears to be little function in these muscles although I do not know whether he is actively trying to contract them or not. He says that his toes are clumsy and he cannot wiggle them, but whether this is on a functional basis or a true neurologic basis, I cannot determine presently. I cannot get him to move his toes enough for me to even see whether there is any decrease in the mass of the extensor digitorum brevis muscles on either side. If there is any weakness, it tends to be a little worse on the right than on the left. One thing that concerns me about the functional nature of his leg weakness, however, is the fact that when he walks, he walks without a foot drop, although he walks with stiff ankles and stiff knees. He can even hop on each leg at least once. He can get up on his toes momentarily and can even get up on his heel slightly.

He can step up on a stool leading with either leg without a problem and seems to rise from a chair without much difficulty except moaning and groaning and the pain which he complains of that is stiffness. I see no evidence for paraspinous back muscle spasm, although he groans and says that he is stiff when he bends over. There does appear to be some tenderness over both sacroillian joints. Over both pre-tibial areas there is some circumscribed erythema more on the left than right which he claims is quite tender to touch and says burns. It is warmer than the surrounding skin. I feel no nodules, see no specific skin lesions other than the erythema, although on the right this may be surrounded by a slight degree of pale yellow ecchymosis as if it were a healing bruise although the erythema looks more acute.

IMP: this patient's previous problems were thought by me to be a post infectious polyneuritis also with an acute lumbosacral strain which was resolving quite slowly. I felt that there was functional overlay almost from the beginning. Today, I still feel there is functional overlay, but I am concerned that he is not neurologically nor systemically normal. I do not know what this erythema on this pre-tibula areas represent, but this could represent erythema nodosum and maybe this is related to a connective tissue disorder. Maybe even the pain he is feeling in his back is related to this perhaps from some sacroillitis. Overall, this may be related to the generalized muscle aches and pains, arthralgias, stiffness, and neurologic

Page 5

problems he experienced. I cannot really determine whether there has been a recurrence of his post infectious neuritis although his reflexes are still as active as previously so I doubt that this is the case. His neurologic examination certainly is impaired by his functional overlay. He does appear to be significantly depressed as well. In reviewing his records, I initially saw that I was going to get repeat convalescent phase titers on CMV and Ebstein Barr viruses at the suggestion of Dr. Smith in January and initially I didn't see them, but now I see that they are unchanged, from previously. Also his last CBC which I see, still shows a slight lymphocytosis with several atypical lymphocytes, but that again was done in January. Overall, however I am not certain exactly what is going on with this patient. I tend to feel that I do not want to call a lot of his present complaints simply related to functional overlay and I am concerned about him.

PLAN: Ideally, I think I would want to evaluate him fairly completely again. I would probably want to repeat his nerve conduction studies and maybe his ENG. I would want to repeat blood studies including a CBC with differentials, Sed rate, and do a collagen vascular workup once again. When he was hospitalized last fall this was done and was unremarkable. I might even want to repeat some of his viral titers. In addition, I think I would want to repeat his lumbar puncture to make sure that the protein is not still elevated. I do not think he would

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need to have a repeat myelogram. I would certainly want him to have a rheumatology consultation with Dr. Dunnigton, maybe even a Dermatology consultation and possibly even an Orthopedic consultation. I suppose all of these things would best be done in the hospital for efficiency, but that would just run up a hospital bill that he could not pay for. The hospital may not even accept him for admission unless he was willing to pay part of his hospital costs before even being admitted. We would do some of this as an outpatient as well, but I do not know if the laboratory would run the tests on him without being guaranteed payment. I suppose I could get Dr. Dunnigton to see him first and see if he feels any workup is actually needed, but I will have to talk to him about this patient first, and inform him of the problems everybody has had with him. In the meantime, I have started him on a course of using ace bandages or elastic stockings for his legs and keeping off his legs as much as possible. I have also told him to soak his legs in warm water three times a day for 15 to 20 minutes. I have given him a prescription for Valium, 10mg #75 po t.i.d. PRN muscle spasm with no refills, for its muscle relaxant effects. I have also told him to take 2 aspirin with meals and 2 before he goes to bed for its anti-inflammatory effect. I told him to wash the lesions on his legs and see how they progress. I would like him to call me in about 10-12 days and let me know how he is doing. He will call the day after Thanksgiving to let me know. In the meantime, I will be seeing what we could do about trying to

arrange for further workup, although the economic problems related to this man are quite substantial and may impair what we want to do for him. I suppose we should just take one thing at a time and only do things as indicated according to each individual procedure, or consultation. Therefore, I guess I would start off first by asking for a rheumatology consultation and then going further from there if needed. Maybe if we can settle the question about a systemic problem like a connective tissue disorder once and for all, this will help narrow down what we might have to do. The reason that I think of this now is because of this skin abnormality in his pre-tibularius. I have never really seen a good case of erythema nodosum, but this could be it, although I do not feel any nodules and this does not appear to be nodular in nature which apparently erythema nodosum is. I just need someone more experienced with this type of problem and its associated diseases to help out. Because of his other complains, I decided that maybe Dr. Dunnington and his rheumatology experience would be better than just sending him to a Dermatologist for evaluation of the skin problem. We could always do the repeat neurologic studies as an outpatient here in the office without any problem, but I am still concerned whether we will be able to get the appropriate lab work done if needed. I will just have to look into this with the hospital and with any consultants who I might refer him to, discussing his case first with them.

6-5-80: OFFICE FU:

This patient comes in stating that his legs are a little stronger. He still has back pains and muscles spasms in his calves with cramping. He says that his feet turn out and his toes spread when he gets a cramp. Only Valium seems to help that. He is having pains in both legs and pin in his sacroiliac joints. He has had occasionally burning with urination and occasional burning eyes, but he thought this was related to pollen. Generally, he is a little bit better, but still cannot work, run swim, etc. He has had no bladder or bowel problems. About two weeks ago, he had a recurrence of the blueish-red bruise-like areas on his left shin. He took alot of aspirin and they went away, but he has had pain in his left shin since.

EXAM: Today reveals reflexes are slightly more active in his lower exremities than in his upper extremities, probably insignificantly so. There is no spontaneous clonus and both toes are upgoing. Rotation of movement of his joints seem okay, although at times, his ankles seem that they might have a little bit of hellcord contractures. This is probably not present, however. Strength evaluation of his lower extremities is impaired by the fact that he has giveaway weakness. There appears to be some distal weakness of dorsi flexors and toe extensors. Sensation is intact to all modalities. There appears to be a little tenderness in both sacroiliac joints. Straightleg raising is positive with pain in the hip and sacroiliac joints area bilaterally. He can walk and does so without foot drop and he can walk

on his toes. He can get up on his heels, but he has a little bit of difficulty and says there is a little weakness there, however, I cannot determine the extent of this.

IMP: I still wonder about a systemic disorder, like perhaps, Reiter's Syndrome, as he has had an episode of urethritis as well as some back pain in the sacroiliac joint areas, other joint pains. Also there has been some skin changes over his tibia. I do not know whether this is a typical sign of this, however, I am concerned about this. I therefore think that he needs a rheumatology consultation. As for his other problems, he may still be having trouble from his chronic lumbarsacral strain due to the fact that he has pains elsewhere, or he may still have some weakness from his residual post-infectious neuropathy in the form of anterior compartment muscle weakness. His findings, however, are confused by some functional overlay and generally, I cannot sort out everything clearly. Overall, however, it is my impression that he had a lumbosacral strain and a post-infectious polyneuropathy, both which improved, but both of which contributed to the prolongation of symptoms of each. He may have some residual from each, but he also may have a superimposed connective tissue problem as well.

PLAN: I think that he should have a rheumatology consultation and then possibly a repeat neurologic evaluation, but we will wait until he gets things settled with respect to the insurance company so that there will be funds available to pay for this as he has no money himself. If this is not possible, we will try and go through Voc-Rehab or through the hospital Hil-Burton Bund. In the interim, I have given him a prescription for Clinoril, 150mg #0. 1 po bid with food with no refills and he will call me in two weeks and let me know how he is doing and if he is better on the Clinoril, we will refill it. He was also given a prescription for Valium, 10mg, #75, 1 po tid prn with two refills. I will see him on a prn basis and he will call me in two weeks and also call me once his court case is settled so that we will have the way cleared to work him up as need be without him worrying about the finances.