

COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala**

David Vigneaux,
Petitioner

v.

Docket No. CR-21-0413

Essex Regional Retirement Board,
Respondent

Appearance for Petitioner:

Michael C. Akashian, Esq.
Landman Akashian & Macklow, LLP
100 State Street, Suite 900
Boston, MA 02109-2403

Appearance for Respondent:

Christopher C. Collins, Esq.
Law Offices of Michael Sacco
P.O. Box 479
Southampton, MA 01703-0479

Administrative Magistrate:

Kenneth Bresler

SUMMARY OF DECISION

Because the petitioner did not suffer the injury that he specified in his application for accidental disability retirement benefits, the retirement board's denial of his application is affirmed.

DECISION

The petitioner, David Vigneaux, appeals the Essex Regional Retirement Board's denial of his application for accidental disability retirement benefits without having referred his application to a regional medical panel.

I held a hearing on April 18, 2023 by Webex, which I recorded and which was transcribed. Mr. Vigneaux testified, and called as witnesses Charles K. St. Cyr, Jason Sanborn, Myles Bradbury, and Jay Sinton, employees of the Salisbury Department of Public Works (DPW) (Sinton was also union steward); and James Ryan, chief aide to the manager of the Town of Salisbury.

I admitted 14 exhibits at the hearing and a fifteenth exhibit, which I had requested, after the hearing. Both parties submitted post-hearing briefs at the end of September 2023.

Findings of Fact

People

1. Mr. Vigneaux was a heavy equipment operator/laborer for the Salisbury DPW. (Ex. 1; Tr. 7)
2. Lisa DeMeo was DPW head. (Tr. 41, 76, 94)
3. Ray Cote was Mr. Vigneaux's supervisor. (Tr. 14)
4. Charles St. Cyr was Mr. Vigneaux's coworker. (Tr. 70)
5. James Ryan was Chief Aide to the Town Manager. (Ex. 4, p. 2; Tr. 88)
6. In other towns, the Chief Aide to the Town Manager is known as the Assistant Town Manager. (Tr. 89)
7. Among Mr. Ryan's duties are human resources. (Tr. 89)

Incident

8. On or before June 7, 2018, Mr. Vigneaux was shoveling as part of his DPW job. He felt numbness in his arm. (*E.g.*, Ex. 4, p. 1)

Documents (preceding application for accidental disability retirement)

Supervisor's accident report (August 14, 2018)

9. Mr. Ryan filled out the Supervisor's Report of Accident – Intake Form with information that Mr. Vigneaux provided. (Ex. 4, p. 1; Tr. 95) (This decision will call it the "supervisor's accident report.")

10. The supervisor's accident report reads: "Investigated by James Ryan" with a date of August 14, 2018. (Ex. 4, p. 1)

11. The supervisor's accident report is a form by MIAA (Ex. 4, p. 1), which was the town's insurer for workers' compensation. (Ex. 4, p. 2)

12. According to the supervisor's accident report, the injury was on June 7, 2018. (Ex. 4, p. 1)

13. The witness was supposedly Ray Cote. (Ex. 4, p. 1)¹

14. The injury was reported to "James Ryan/Human Resources." The report did not state who reported the injury (Ex. 4, p. 1); presumably, it was Mr. Vigneaux.

15. According to the supervisor's accident report, Mr. Vigneaux did not lose time from work. (Ex. 4, p. 1)

16. The "Description of Injury" was "Shoveling led to numbness in left forearm and hand." (Ex. 4, p. 1)

17. Mr. Ryan also wrote:

Employee was manually shoveling out a catch basin and during the shoveling, part of the employee's arm went numb.

(Ex. 4, p. 1)

¹ According to all other accounts, Mr. St. Cyr and not Mr. Cote was a witness.

18. After “Cause-Unsafe Act,” Mr. Ryan wrote, “Repeated shoveling motion.” (Ex. 4, p.

1)

19. After “Remarks,” Mr. Ryan wrote:

Employee reported injury late because he thought it wasn’t a big deal but then numbness in arm did not go away so treatment sought.

(Ex. 4, p. 1)

20. The supervisor’s accident report indicates that it was reviewed and signed by a supervisor, but the name and date are unclear.² The supervisor probably signed on August 14, 2018, the same date that Mr. Ryan signed. (Ex. 4; Tr. 99)

21. The evidence does not establish who submitted the supervisor’s accident report to where and when. (On August 14, 2018, Mr. Vigneaux had not applied for workers’ compensation.)

Application for workers’ compensation (January 27, 2019)

22. On January 27, 2019, Mr. Vigneaux applied for workers’ compensation. (Ex. 15)³

23. When asked to describe the injury, Mr. Vigneaux wrote, “Bicep tear, minor rotator cuff, numbness and swelling in hand.” (Ex. 15)⁴

24. When asked to briefly describe how the injury happened, Mr. Vigneaux wrote,

² Mr. Ryan testified, “I can try and look for the original, but I’d be willing to bet that that’s probably,” and he named a town official. (Tr. 99) Mr. Ryan’s triply hedged guess (“willing,” “bet,” and “probably”) does not establish who else signed the supervisor’s injury report. Nor does the petitioner’s post-hearing brief’s coming out and naming the town official who supposedly signed the supervisor’s injury report (Pet. Br., unnumbered page) establish who signed it. I have no further information that Mr. Ryan or anyone looked for the original.

³ The employer’s statement to accompany Mr. Vigneaux’s application for accidental disability retirement benefits incorrectly states that he applied for worker’s compensation on August 14, 2018. (Ex. 3, p. 8)

⁴ I retain this misspelling of “bicep” here and elsewhere, because it possibly shows that the same person filled out different forms or the same people conferred before one of them filled out a form.

“Shoveling out a trench damaging the bicept and hand.” (Ex. 15)

25. Witnesses were supposedly Mr. St. Cyr and Mr. Cote. (Ex. 15)

Injury report (February 6, 2019)

26. On February 6, 2019, Mr. Ryan prepared Employer’s First Report of Injury or Fatality. (Ex. 4, p. 2) (This decision will call it the “injury report.”)

27. Mr. Vigneaux gave information to Mr. Ryan in person to use in the injury report. (Tr. 47, 97)

28. The injury report is a form from the Department of Industrial Accidents (DIA). (Ex. 4, p. 2)

29. The injury report stated that the date of injury was June 7, 2018, and that Ray Cote, Foreman, was the person to whom the injury was reported on June 7, 2018. (Ex. 4, p. 2)

30. The brief description of the injury is: “Employee was in a trench digging out debris with a shovel and hurt his arm.” (Ex. 4, p. 2)

31. The injury codes on the injury report were 310/318 and 310/198, but the evidence does not explain the codes. (Ex. 4)

32. According to the injury report, “FIRST day of Total or Partial Incapacity to Earn Wages” was January 30, 2019. (Ex. 4, p. 2)

33. That line of the form usually meant the first day that an employee could not perform any more work, according to Mr. Ryan. (Tr. 100)

34. When the form asked for “Witness(es) to Injury,” Mr. Ryan listed Mr. St. Cyr.

35. The injury report form is from DIA and was probably submitted to DIA.⁵

⁵ What is apparently the docket for Mr. Vigneaux’s worker’s compensation case lists two First Reports of Injury (Ex. 5), although neither is dated February 6, 2019. (Ex. 4, p. 2).

36. The injury report was submitted to the insurer, according to the Insurer's Notification of Payment (Ex. 5, p. 6), although it is unclear how a report dated February 6, 2019 (Ex. 4, p. 2) could have been submitted to the insurer on January 30, 2019. (Ex. 5, p. 6)

37. Although the injury report is included in the same exhibit as the supervisor's accident report, the evidence did not establish any relationship between the two documents, such as that they were submitted to the same place at the same time.

Charles St. Cyr statement (March 18, 2019)

38. On March 18, 2019, Mr. St. Cyr signed a notarized statement (not an affidavit signed under the penalties of perjury). (Ex. 4, p. 3)

39. According to the statement, on June 7, 2018, when the work crew was digging up old barrel blocks, Mr. Vigneaux

started to complain about having no feeling in his hand, and pain in his shoulder and elbow. He kept working throughout the day, finishing the job. He then reported this incident to human resources the day of. To my knowledge, David went to the doctor['s [office] about this [injury] the next day.

(Ex. 4, p. 3)

40. Mr. St. Cyr testified that he signed the statement because Angelica, the office manager, asked him to. (Tr. 33)⁶

41. St. Cyr assumed that he signed the statement as part of Mr. Vigneaux's application for workers' compensation, but does not know for sure. (Tr. 73)

42. The evidence does not establish that anyone submitted the injury report to DIA.

43. The evidence does not establish who submitted Mr. St. Cyr's statement to where and when.

⁶ Mr. St. Cyr did not know Angelica's last name (Tr. 73) but I assume that it is Medina; Angelica Medina was the notary who notarized Mr. St. Cyr's statement.

44. Although Exhibit 4 comprises three documents, the evidence did not establish any relationship between the three documents, such as that they were submitted to the same place at the same time.

Notice of Injury (April 24, 2019)

45. On April 24, 2019, Mr. Ryan signed a Notice of Injury to the Essex Regional Retirement System. (Ex. 13) (This decision will call it the “injury notice.”)

46. The injury notice stated that “shoveling trench” was the cause of Mr. Vigneaux’s injury and that the injury was to his “bicept and hand.” (Ex. 13)

47. The injury notice listed Mr. St. Cyr and no one else as a witness. (Ex. 13)

48. Mr. Ryan filled in the injury notice with information from Mr. Vigneaux. (Tr. 101)

49. The evidence does not establish that the injury notice was submitted to the Essex Regional Retirement System, and if so, who submitted it and when.

Miscellaneous workers’ compensation documents (other than application)

50. On February 12, 2021, the workers’ compensation insurer for the Town of Salisbury filed a Notification of Withdrawal of Claim or Complaint. (Ex. 5) The evidence did not explain the context of the notification or its significance.

51. In January 2020, Mr. Vigneaux, the employee counsel, and the insurer counsel, signed an Agreement to Pay Compensation. (Ex. 5)

52. The Agreement to Pay Compensation states, “The employee injured his left elbow and shoulder after shoveling out a trench.” (Ex. 5)

53. On February 7, 2019, the insurer prepared the Insurer’s Notification of Payment. (Ex. 5)

54. The Insurer’s Notification of Payment stated three times in one box that Mr.

Vigneaux had sustained injury 2 to body part 310. (Ex. 5). The evidence did not explain the injury or body part codes or why the same box conveyed the same information three times.

Insurer's Notification of Termination (June 12, 2019)

55. On June 12, 2019, a claim representative signed the Insurer's Notification of Termination or Modification of Weekly Compensation During Payment Without Prejudice Period. (Ex. 14)

56. The box opposite "Termination" was marked with an X, as opposed to the box opposite "Modification." (Ex. 14)

57. The Insurer's Notification of Termination is a DIA form. (Ex. 14)

58. After "Specify grounds for termination..." the following boxes were checked:

No Personal Injury
No Disability
No Causal Relationship Between Personal Injury and Disability
Other (Specify) Employee's treating physician released the employee to full duty for work, regarding elbow injury, and he is at a medical end.

(Ex. 14)

59. The evidence did not explain the context or significance of Insurer's Notification of Termination or its relationship to the workers' compensation documents in Exhibit 5.

Independent medical examination for workers' compensation

60. On October 31, 2019, Dr. David C. Morley, Jr., an independent medical examiner, examined Mr. Vigneaux. He wrote in part that "on or about 06/07/2018," Mr. Vigneaux

was doing heavy shoveling and helped an associate lift a cast iron catch basin from a ditch....He noticed an onset of left upper extremity symptoms, includingnumbness....

In addition, he complained of left shoulder pain following the injury.

....

Because of left shoulder pain, he underwent left shoulder operative arthroscopy, as well as biceps tenodesis.⁷

(Ex. 6)

Application for accidental disability retirement benefits

61. On January 21, 2021, Mr. Vigneaux applied for accidental disability retirement benefits. (Ex. 1)

62. In his application, Mr. Vigneaux recounted that on June 7, 2018, he was jackhammering and hand digging out a collapsed catch basin.⁸ He went to throw a basin frame and grate, which weighed 200 pounds, out of the hole, which tore his rotator cuff, impinged a nerve in his arm, and tore his left bicep. (Ex. 1, p. 7)

63. When asked to state the medical conditions underlying his application, he answered, “Shoulder replacement, detached bicep, and impinged nerve on left side.” (Ex. 1, p. 4)

64. When asked what duties he was unable to perform because of his disability, he answered, “Heavy lifting, which affects all of my job duties. Carrying bricks, lifting cement, raking hot top, lifting trash barrels, and any repetitive work.” (Ex. 1, p. 4)

65. Mr. Vigneaux stated that he was last able to perform all the essential duties of his job on June 7, 2018. (Ex. 1, p. 4)

Treating physician’s statement

66. On January 12, 2021 (before Mr. Vigneaux signed his application), Dr. Ryan Churchill, an orthopedist, filled in a treating physician’s statement. (Ex. 2)

⁷ That is, the procedure on his bicep seemed unrelated to his work injuries, especially since Dr. Morley did not discuss Mr. Vigneaux’s bicep among his work injuries.

⁸ This is the first mention of jackhammering.

67. When asked for Mr. Vigneaux's medical diagnoses, Dr. Churchill wrote, "Left Glenohumeral osteoarthritis." (Ex. 2, p. 4) This is a shoulder condition. (E.g., Ex. 11, p. 179)

68. Dr. Churchill did not mention Mr. Vigneaux's bicep or pinched nerve. (Ex. 2, p. 4)

69. When asked the key tests or imaging to confirm diagnoses, Dr. Churchill wrote: "Radiographies to confirm glenohumeral arthritis." (Ex. 2, p. 4)

70. When asked when Mr. Vigneaux was last able to perform his essential duties, Dr. Churchill answered: December 31, 2018. (Ex. 2, p. 4) (Mr. Vigneaux answered: June 7, 2018. (Ex. 1, p. 4))

71. When asked what essential duties Mr. Vigneaux could not perform, Dr. Churchill wrote: "Manual lifting (repetitive) more than 20 pounds due to pain/lack of motion from glenohumeral arthritis...." (Ex. 2, p. 4)

72. When asked about surgical interventions and outcomes, Dr. Churchill wrote two entries:

Type of Surgery: Rotator Cuff Re...[illegible]...ment / 09/13/2019 / Biceps Tenodesis / cartilage loss noted at time of surgery / [illegible] Outcome: persistent pain and disability.

Type of Surgery: Glenohumeral debridement / 06/12/2020 / Cartilage loss and loose bodies noted. Failed [with] continued pain and decreased motion. Culture [illegible] biopsy negative.

(Ex. 2, p. 5)

73. The first entry about surgical interventions and outcomes was the first and only mention of Mr. Vigneaux's bicep in the treating physician's statement. The statement did not mention Mr. Vigneaux's having a pinched nerve.

74. When asked about permanency of Mr. Vigneaux's condition or injury, Dr. Churchill wrote: "Glenohumeral arthritis without surgical intervention will be expected to progress over

time.” (Ex. 2, p. 6)

75. When asked if the condition or injury could be expected to improve with reasonable treatment or rehabilitation, Dr. Churchill wrote: “Could improve with a total shoulder arthroplasty.” (Ex. 2, p. 6)

76. When asked his opinion about the event or onset of the condition that led to Mr. Vigneaux’s disability, Dr. Churchill wrote: “Patient’s accident likely accelerated degenerative process that had likely begun because of repetitive heavy lifting at work.” (Ex. 2, p. 6)

77. When asked what other life event/circumstance/condition in Mr. Vigneaux’s medical history may have contributed to or resulted in his claimed disability, Dr. Churchill wrote: “If patient had had prior injury to shoulder [that] could have contributed.” (Ex. 2, p. 6)

78. When asked whether it was

more likely that the disability was caused by the job-related personal injury...or the non-work related event or circumstance or condition,

Dr. Churchill answered: “Likely related to job injury plus heavy lifting required for job over > 30 years.” (Ex. 2, p. 6)

Employer’s statement

79. On June 2, 2021, Mr. Cote and Ms. DeMeo signed the employer’s statement to accompany Mr. Vigneaux’s application for accidental disability retirement benefits. They did so under the penalties of perjury. (Ex. 3, p. 9)

80. The basis of the disability was “Injury to shoulder while digging.” (Ex. 3, p. 2)

81. The description of the incident was:

Employee was using heavy machinery to dig out a catch basin trench but flooding began to occur so the employee had to leave the vehicle and began manually digging out the trench. While digging out the trench, the employee felt minor pain in his arm that would later get worse....

(Ex. 3, p. 5)

82. Mr. St. Cyr was listed as a witness. (Ex. 3, p. 5)

83. The record does not establish who prepared the employer's report and whether the preparer conferred with Mr. Vigneaux.

Medical records

84. Mr. Vigneaux was unaware of any inaccuracies in his medical records. (Tr. 41)

85. On June 8, 2018, the day after the supposed incident, Mr. Vigneaux conferred with Dr. Jonathan March. (Ex. 11, p. 1)

86. Dr. March wrote in a progress note that Mr. Vigneaux came "for numbness (left hand x 3 days)" and that the numbness started "two days ago." (Ex. 11, p. 1) That is, the numbness started on June 6, 2018, the day before the supposed accident or incident.

87. Mr. Vigneaux reported that he had "been doing lots of shoveling and mixing of concrete...in the last week[,] which has entailed significant repetitive motion of the wrist and elbow." (Ex. 11, p. 1)

88. Mr. Vigneaux "denie[d] any numbness in the forearm or up the arm..." (Ex. 11, p. 1)

89. Dr. March wrote: "The left shoulder and left elbow exams are both benign with full range of motion and no focal tenderness." (Ex. 11, p. 2)

90. Dr. March "explained to David that his symptoms are the result of repetitive use of his elbow and wrist." (Ex. 11, p. 2) If Mr. Vigneaux objected and noted that he had had an accident, Dr. March's progress note does not note the objection.

91. On July 20, 2018, Mr. Vigneaux again went to Dr. March, this time for "left forearm/hand pain and tingling." (Ex. 11, p. 4)

92. Dr. March noted that the ulnar impingement of Mr. Vigneaux's left upper arm was worsening. (Ex. 11, p. 5)

93. On July 30, 2018, Mr. Vigneaux conferred with Dr. Erycka Florie. (Ex. 11, p. 7)

94. She wrote that Mr. Vigneaux had reported that

he was doing vigorous digging by hand and he started feeling numbness and tingling in his left small and ring fingers.

(Ex. 11, p. 7)

95. On October 10, 2018, Mr. Vigneaux conferred with Dr. Papaiah Gopal. (Ex. 11, p. 12)

96. Dr. Gopal reported that Mr. Vigneaux "complain[ed] of numbness and tingling in the left little finger, onset is related to injury at work...." (Ex. 11, p. 12)

97. Mr. Vigneaux

also complains of left shoulder pain....According to the patient the left shoulder symptoms also started since the time of injury but probably did not report them at that time.

(Ex. 11, p. 12)⁹

98. On November 6, 2018, Mr. Vigneaux conferred with Dr. Jonathan R. Perryman." (Ex. 11, p. 14)

99. Dr. Perryman wrote:

He was digging a hole by hand and in the process developed numbness and tingling in his left upper extremity[,] as well as shoulder pain.

(Ex. 11, p. 14) *See also* Ex. 11, p. 54 (To Whom It May Concern letter by Perryman).

Essex Regional Retirement System's denial

100. On October 20, 2021, the Essex Regional Retirement System informed Mr.

⁹ This was the first mention of shoulder pain.

Vigneaux with a form and a letter that two days earlier, it had denied his application for accidental disability retirement benefits without having referred it to a medical panel. (Ex. 7)

101. The letter stated in part:

This letter is to inform you that at its October 18, 2021 meeting, the Essex Regional Retirement Board (“Board”), after considering all the medical and non-medical evidence pertaining to David Vigneaux’s Member’s Application for Disability Retirement (“Application”), voted to deny the Application without convening a regional medical panel. The basis of the Board’s denial is threefold.

First, as a factual matter, the Board found insufficient evidence that Mr. Vigneaux suffered an acute left shoulder injury on June 7, 2018. Specifically, Mr. Vigneaux did not report an injury to his left shoulder contemporaneous with its alleged occurrence, and the first time he mentioned possibly injuring his left shoulder was during an October 10, 2018 EMG test, more than four (4) months after the injury allegedly occurred.

Second, since Mr. Vigneaux did not sustain an injury within the two (2) year period immediately preceding his Application’s filing, and there is no record of injury within the statutory timeframe for filing, Mr. Vigneaux cannot satisfy M.G.L. c. 32, §§ 7(1) or 7(3)’s notice requirements.

Third, while the record reflects that Mr. Vigneaux complained of left shoulder pain prior to his January 30, 2019 work stoppage, it appears that he continued to work full duty without restriction until that date, which is the date he underwent a cubital tunnel release, and he never returned to work thereafter. Pursuant to *Vest v. Contributory Retirement Appeal Board*, 41 Mass. App. Ct. 194 (1996) and CRAB’s progeny, to prevail in any disability claim Mr. Vigneaux must prove that at the time he stopped working on January 30, 2019, he suffered from a permanent inability to perform his essential duties. Since Mr. Vigneaux was actually performing his duties without restriction until his January 30, 2019 surgery, and a physician never advised him to stop working due to any permanent left shoulder impairment, Mr. Vigneaux cannot satisfy *Vest*. Accordingly, since Mr. Vigneaux has not put forth a prima facie entitlement to an accidental disability retirement, the Board voted to deny his Application without convening a regional medical panel.

(Ex. 7) (footnote omitted) (paragraph breaks added).¹⁰

102. Mr. Vigneaux timely appealed. (Ex. 10)

¹⁰ According to the Essex Regional Retirement Board’s post-hearing brief, Mr. Vigneaux unsuccessfully moved for reconsideration, calling it a stipulated fact. (Resp. Br. 3) The record contains no information about such a motion.

Mr. Vigneaux's hearing testimony

On April 18, 2023, Mr. Vigneaux testified in part as follows:

Mr. Vigneaux: We have the jackhammer. We jackhammer the whole thing out. We go in there and, you know, we're digging, digging, digging. And as we're digging, the frame and grate that's on the top of the catch basin, they weigh about 200 , 200 - something pounds. And we're digging, digging, digging. Now we're down to the grate 'cause it collapsed. Now we try to throw it out of the hole. And when I threw it out of the hole, it kind of tweaked my shoulder and came back at me 'cause I didn't get it out of the hole completely. And, you know, it was just – it – it – I kind of caught it, and it just – my whole arm was going, like, numb. My fingers went numb. And I – I just, yeah, was –

Mr. Vigneaux's lawyer: Okay. So let's just go back a step.

(Tr. 13)

Mr. Vigneaux's lawyer: [C]an you just be more specific about what you were physically doing, the mechanism of what you were doing personally?

Mr. Vigneaux: I was grabbing hold of the one side of the catch basin frame....So I picked it up and the – put it out of the hole. And what it did, it didn't make it out of the hole all the way. It came back, I kind of caught it, and it just – my arm went – my whole arm went numb. My bicep was weird. My fingers were all tingly. That's why –

Q: Was Mr. St. Cyr on the street?

A: He was on the other end of the thing, on the end of – on the – at – at the end of the catch basin.

Q: So, again, the mechanism: you were both inside the hole. You're both trying to get the basin onto the street?

A: Yeah, it's a basin. It's all the barrel blocks. I mean, there's all these big, heavy blocks that had to get thrown out. It's just a – that – when we got it out, that's when I started noticing my arm's going numb.

(Tr. 15-16)

Q: So you indicated you started – you hurt – you felt something in your left upper extremity?

A: Mm- hmm.

Q: And how –

A: And it – it – and it went down to my fingers, which were numb, and my left side. I was like, “Oh”; thinking in the back of my head, “Not a big deal.” But – but when I – I think I may have stroke or something, you know? I – I didn’t know what was going on.

(Tr. 18)

Magistrate: Was it while you were shoveling or while you were throwing a basin frame?

Mr. Vigneaux: It started while I was shoveling. I was shoveling these heavy barrel blocks. And then I think, when just I grabbed that heavy frame, it just all came to play. It was like, “Something happened. Something happened.”

Magistrate: Okay. What is...the basin frame made out of?

Mr. Vigneaux: Cast iron.

Magistrate: Do you have an estimate how heavy it was?

Mr. Vigneaux: I’d say 200 pounds.

Magistrate: Were you and your coworker lifting it?

Mr. Vigneaux: Yes, sir.

Magistrate: And you’re trying to throw it outside the hole?

Mr. Vigneaux: Yes, Your Honor.

Magistrate: Did your pain start before or did it start when you were throwing it?

Mr. Vigneaux: It was a – it was more of a numbness, then it just – it just got worse and worse and worse. And I –

Magistrate: When –

Mr. Vigneaux: It – it was just –

Magistrate: When did –

Mr. Vigneaux: All this was just numb.

Magistrate: Okay. Well, let me back up. Did the numbness start when you were throwing the basin frame, or is it –

Mr. Vigneaux: All that pain – but I got – I had numbness afterwards.

Magistrate: The numbness was afterwards?

Mr. Vigneaux: Yeah.

Magistrate: When did the pain start, when you were throwing the basin frame?

Mr. Vigneaux: Kind of, like, when it came back – came back at me and I caught it. And it was just – it just – yeah.

Magistrate: It came back at you because it didn't –

Mr. Vigneaux: It didn't make it out of the hole.¹¹

Magistrate: Okay. And you were pushing it back to make sure it didn't –

Mr. Vigneaux: Well, I just tried not let it crash on my leg –

Magistrate: Yeah.

Mr. Vigneaux: – or something. It was just –

(Tr. 66-67) With that, Mr. Vigneaux's testimony dribbled out.

Mr. St. Cyr's testimony

102. Mr. St. Cyr testified at the hearing that he is sure that he heard Mr. Vigneaux's shoulder pop. (Tr. 74)

Discussion

I began the hearing believing that the ultimate issue was whether Mr. Vigneaux deserved to have his application referred to a regional medical panel. I assumed that Mr. Vigneaux had in fact been injured on the job; the details of how the injury happened initially did not seem like a major issue. (Tr. 14)

¹¹ Mr. St. Cyr testified differently: “[W]e eventually got it out...” (Tr. 72)

After hearing Mr. Vigneaux testify and delving into the exhibits, I came to doubt (1) that his application accurately alleged his injuries; and (2) his credibility. Mr. Vigneaux was not credible.

Accounts of the supposed accident

I examine the accounts of how Mr. Vigneaux supposedly came to be injured.

“[L]ots of shoveling and mixing of concrete...in the last week.” Progress note, Dr. March. (Ex. 11, p. 1) Numbness of the fingers of his left hand “which started two days ago” (Ex. 11, p. 1) – that is, one day before the supposed injury. “I explained to David that his symptoms are the result of repetitive use of his elbow and wrist.” (Ex. 11, p. 2) Date: **June 8, 2018**. Significantly, Mr. Vigneaux apparently did not object to Dr. March’s assessment by stating that he had been injured.

“[V]igorous digging by hand.” Progress note, Dr. Florie. (Ex. 11, p. 7) Date: **July 30, 2018**.

“Shoveling,” “Repeated shoveling motion,” and “Employee was manually shoveling out a catch basin and during the shoveling....” Supervisor’s accident report. (Ex. 4, p. 1) Date: **August 14, 2018**. Filled out by Mr. Ryan with information from Mr. Vigneaux. (Ex. 4, p. 1; Tr. 95)

“He was digging a hole by hand....” Progress report, Dr. Perryman. (Ex. 11, p. 14) Date: **November 6, 2018**.

“Shoveling out a trench....” Application for workers’ compensation. (Ex. 15) Date: **January 27, 2019**.

“Employee was in a trench digging out debris with a shovel....” Injury report. (Ex. 4, p. 2) Date: **February 6, 2019**. Filled out by Mr. Ryan with information from Mr. Vigneaux. (Ex. 4,

p. 2; Tr. 47, 97)

When the work crew was digging up old barrel blocks, Mr. Vigneaux “started to complain about having no feeling in his hand, and pain in his shoulder and elbow.” Charles St. Cyr statement. (Ex. 4, p. 3) Date: **March 18, 2019**. Filled out by Mr. St. Cyr, who had been present. (Tr. 73)

“[S]hovel trench.” Injury notice. (Ex. 13) Date: **April 24, 2019**. Filled out by Mr. Ryan with information from Mr. Vigneaux. (Ex. 13; Tr. 101)

“[W]as doing heavy shoveling and helped an associate lift a cast iron catch basin from a ditch.” Dr. Morley, IME, letter. (Ex. 6) Date: **October 31, 2019**.

“[A]fter shoveling out a trench.” Agreement to Pay Compensation. (Ex. 5) Date: **January 2020**.

“I was jack hammering and hand digging out a collapsed catch basin. I went to throw a basin frame and grate out of hole that weighed 200 pounds.” Application for accidental disability retirement benefits. (Ex. 1, p. 7) Date: **January 21, 2021**. Signed by Mr. Vigneaux.

“...while digging.” Employer’s statement. (Ex. 3, p. 2) “[M]anually digging out the trench. While digging out the trench...” (Ex. 3, p. 5) Date: **June 2, 2021**.

Hearing transcript, April 18, 2023:

Mr. Vigneaux: [W]e’re digging, digging, digging. Now we’re down to the grate ‘cause it collapsed. Now we try to throw it out of the hole. And when I threw it out of the hole, it kind of tweaked my shoulder and came back at me ‘cause I didn’t get it out of the hole completely.

(Tr. 13)

Mr. Vigneaux: I kind of caught it [the catch basin].

(Tr. 15-16)

This summary of the accounts of how Mr. Vigneaux supposedly came to be injured

reveals three problems.

One, on the day after Mr. Vigneaux supposedly injured himself on June 7, 2018, in one of the first accounts, if not the first account, he apparently did not report to Dr. March that a specific accident had injured him. Rather, Dr. March noted that Mr. Vigneaux had engaged in “lots of shoveling and mixing of concrete...in the last week.” (Ex. 11, p. 1) I do not doubt that on June 7, 2018, Mr. Vigneaux decided that he should consult with a doctor about numbness in his hand, which he did the next day. I do doubt that Mr. Vigneaux decided to consult with a doctor because he injured himself on June 7, 2018.

Two, from June 2018 until October 2019, Mr. Vigneaux mentioned only digging as the cause of his injury. On October 31, 2019, Mr. Vigneaux mentioned the catch basin for the first time. (Ex. 6) Since the catch basin figures in both his application for accidental disability retirement benefits and his hearing testimony, the fact that Mr. Vigneaux did not apparently mention the catch basin for almost 17 months undermines both his application and testimony (and thus his credibility).

Three, not only did Mr. Vigneaux testify at the hearing about the catch basin, a relatively new feature of his account of his injury, his testimony was so imprecise that I stepped in to clarify, which only revealed other internal inconsistencies and vagueness in his story, as if he had made up the story about the catch basin without settling on the details.

Magistrate: Was it while you were shoveling or while you were throwing a basin frame?

Mr. Vigneaux: It started while I was shoveling. I was shoveling these heavy barrel blocks. And then I think,¹² when just I grabbed that heavy frame, it just all came to play.¹³ It was

¹² A hedge word.

¹³ More vagueness.

like,¹⁴ “Something happened. Something happened.”¹⁵

....

Magistrate: And you’re trying to throw it outside the hole?

Mr. Vigneaux: Yes, Your Honor.

Magistrate: Did your pain start before or did it start when you were throwing it?

Mr. Vigneaux: It was a – it was more of a numbness¹⁶ then it just – it just got worse and worse and worse.¹⁷ And I –

Magistrate: When –

Mr. Vigneaux: It – it was just –

Magistrate: When did –

Mr. Vigneaux: All this was just numb.

Magistrate: Okay. Well, let me back up. Did the numbness start when you were throwing the basin frame, or is it –

Mr. Vigneaux: All that pain¹⁸ – but I got – I had numbness afterwards.

Magistrate: The numbness was afterwards?

Mr. Vigneaux: Yeah.

Magistrate: When did the pain start, when you were throwing the basin frame?

Mr. Vigneaux: Kind of, like,¹⁹ when it came back – came back at me and I caught it.²⁰

¹⁴ A hedge word.

¹⁵ More vagueness.

¹⁶ Mr. Vigneaux confirmed that the incident did not cause him pain.

¹⁷ Mr. Vigneaux did not answer my question.

¹⁸ Mr. Vigneaux changed his mind and decided to testify about pain, not numbness.

¹⁹ Two hedge words.

²⁰ Mr. Vigneaux has changed his story. He was not injured when he tried to throw the catch basin out of the hole, but rather when it slid toward him. This is the first and only time that Mr. Vigneaux related that the catch basin slid toward him.

And it was just – it just – yeah.²¹

Magistrate: It came back at you because it didn't –

Mr. Vigneaux: It didn't make it out of the hole.²²

Magistrate: Okay. And you were pushing it back to make sure it didn't –

Mr. Vigneaux: Well, I just tried not let it crash on my leg –

Magistrate: Yeah.

Mr. Vigneaux: – or something.²³ It was just –

(Tr. 66-67) With that, Mr. Vigneaux's testimony dribbled out, indicating that he had made up the story about the catch basin.

Nature of injury

Having examined the accounts of how Mr. Vigneaux supposedly came to be injured, I examine the nature of his injuries.

Numbness of the fingers of his left hand. "He denies any numbness in the forearm or up the arm...." Progress note, Dr. March. (Ex. 11, p. 1) Date: **June 8, 2018.**

"[L]eft forearm/ hand pain and tingling." Progress note, Dr. March. (Ex. 11, p. 4) Date: **July 20, 2018.**

"[N]umbness and tingling in his left small and ring fingers." Progress note, Dr. Florie. (Ex. 11, p. 7) Date: **July 30, 2018.**

"[N]umbness and tingling in the left little finger." Also "left shoulder pain." Progress note, Dr. Gopal. (Ex. 11, p. 12) Date: **October 10, 2018.**

²¹ With "just" (twice) and "yeah," Mr. Vigneaux seemed to have given up relating his story.

²² Mr. St. Cyr testified differently: "[W]e eventually got it out..." (Tr. 72)

²³ More vagueness.

“[N]umbness in left forearm and hand,” “part of...arm went numb,” and “numbness in arm.” Supervisor’s accident report. (Ex. 4, p. 1) Date: **August 14, 2018**. Filled out by Mr. Ryan with information from Mr. Vigneaux. (Ex. 4, p. 1; Tr. 95)

“[N]umbness and tingling in his left upper extremity[,] as well as shoulder pain.” Progress note, Dr. Perryman. (Ex. 11, p. 14) Date: **November 6, 2018**.

“Bicept tear, minor rotator cuff, numbness and swelling in hand.” Also “bicept and hand.” Application for workers’ compensation. (Ex. 15) Date: **January 27, 2019**.

“Employee...hurt his arm.” Injury report. (Ex. 4, p. 2) Date: **February 6, 2019**. Filled out by Mr. Ryan with information from Mr. Vigneaux. (Ex. 4, p. 2; Tr. 47, 97)

“[N]o feeling in his hand, and pain in his shoulder and elbow.” Charles St. Cyr statement. (Ex. 4, p. 3) Date: **March 18, 2019**.

“[B]icept and hand.” Injury notice. (Ex. 13) Date: **April 24, 2019**. Filled out by Mr. Ryan with information from Mr. Vigneaux. (Ex. 13; Tr. 101)

“[L]eft upper extremity symptoms, including....numbness” and left shoulder pain. Dr. Morley, IME, letter. (Ex. 5) Date: **October 31, 2019**.

Left elbow and shoulder. Agreement to Pay Compensation. (Ex. 5) Date: **January 2020**.

Left glenohumeral osteoarthritis. Treating physician’s statement. (Ex. 2, p. 4) Date: **January 12, 2021**.

“Torn Rotator Cuff, Impinged Nerve in arm, and Torn Bicep on left side.” Application for accidental disability retirement benefits. (Ex. 1, p. 7) Date: **January 21, 2021**. Signed by Mr. Vigneaux.

“Injury to shoulder...” Employer’s statement. (Ex. 3, p. 2) Date: **June 2, 2021**.

Hearing transcript. Date: **April 18, 2023**. Vigneaux’s testimony.

[I]t kind of tweaked my shoulder....[M]y whole arm was going, like, numb. My fingers went numb.

(Tr. 13)

[M]y arm went – my whole arm went numb. My bicep was weird. My fingers were all tingly.

[M]y arm's going numb.

(Tr. 15-16)

[I]t went down to my fingers, which were numb, and my left side.

(Tr. 18)

Vigneaux's lawyer: [T]hen it looks like, in October [2018], you started experiencing the shoulder pain, also, the shoulder numbness or biceps tendon numbness?

Vigneaux: Yeah, something wasn't right. I could – something wasn't right. Right.

(Tr. 21)

The first mention of Mr. Vigneaux's shoulder pain in the record was October 10, 2018.

(Ex. 11, p. 12) I do not doubt that Mr. Vigneaux experienced shoulder pain; in fact, he underwent surgery for it. (Ex. 2, p. 5) I do doubt that Mr. Vigneaux injured his shoulder on June 7, 2018, four months before he apparently mentioned shoulder pain to a doctor.

The independent medical examiner who examined Mr. Vigneaux for workers' compensation mentioned that Mr. Vigneaux's work had caused numbness and shoulder pain, but not a problem with his bicep. The doctor mentioned that Mr. Vigneaux had had a procedure on his bicep seemingly as an aside to his shoulder procedure. (Ex. 6) I doubt that Mr. Vigneaux injured his bicep on June 7, 2018, six weeks shy of a year before he apparently mentioned to a doctor that work had injured his bicep.

Workers' compensation: What Mr. Vigneaux received it for

The details of Mr. Vigneaux's workers' compensation are unclear. It is unclear whether Mr. Vigneaux applied for workers' compensation for his bicep, shoulder, and hand, or his bicep and hand. (Ex. 15) On January 23, 2020, parties apparently agreed that Mr. Vigneaux would receive \$872.95 per week for an injury to his left elbow and shoulder. (Ex. 5) Mr. Vigneaux argues that Exhibit 5 is dispositive that he received workers' compensation for those body parts. (Pet. Br., unnumbered page) However, the document does not speak for itself and other evidence did not adequately provide its context.

Another reason that Exhibit 5 is not dispositive is that on June 12, 2019, a claim representative signed the Insurer's Notification of Termination or Modification of Weekly Compensation During Payment Without Prejudice Period. (Ex. 14) It indicates that Mr. Vigneaux's workers' compensation was terminated because he had not been injured, he had not been disabled, any injury and any disability were not causally related, or a combination of all three. The document further indicates that a medical doctor had cleared him to return to work. Again, the document does not speak for itself, other evidence did not provide context, and its significance went unexplained during the hearing and in post-hearing briefs.

Not only are the details of Mr. Vigneaux's workers' compensation unclear, and not only did the significance of this document to Mr. Vigneaux's workers' compensation go unexplained and unargued, but the document's significance to Mr. Vigneaux's application for accidental disability retirement benefits went unexplained and unargued. The Town of Salisbury's insurer found that Mr. Vigneaux had not been injured, he had not been disabled, any injury and any disability were not causally related, or a combination of all three.

Mr. Vigneaux's testimony about the chronology of his workers' compensation case is

unclear, not authoritative because he lacks credibility, and not authoritative because his lawyer elicited the chronology with leading questions. (Tr. 29-32) Furthermore, his lawyer tried to establish the chronology through the workers' compensation docket sheet (Ex. 5), which does not speak for itself. (Tr. 31) Similarly, Mr. Vigneaux's testimony about what he received workers' compensation for is not authoritative because he lacks credibility and because his lawyer elicited his testimony with leading questions. (Tr. 60-63) *See* Tr. 56 (Mr. Vigneaux testified under cross-examination about what he received workers' compensation for).

In sum, Mr. Vigneaux did not establish the chronology of his worker' compensation case or this important detail: what he received workers' compensation for.

Accidental disability retirement benefits: What Mr. Vigneaux applied for

The medical conditions underlying Mr. Vigneaux's application for accidental disability retirement benefits were his need for a shoulder replacement, his detached bicep, and his impinged nerve on left side. (Ex. 1, p. 4) When asked for Mr. Vigneaux's medical diagnoses, his treating physician wrote about his shoulder condition. (Ex. 2, p. 4)

The condition(s) on an application for accidental disability retirement benefits must match the condition(s) on a treating physician's statement. *David Whooley v. Middlesex County Retirement System*, CR-19-0530 (DALA 2021). With the submission of the treating physician's statement about Mr. Vigneaux's shoulder only, Mr. Vigneaux's application became an application based on his shoulder only.

However, Mr. Vigneaux did not sustain a shoulder injury on June 7, 2018. (He also did not sustain a bicep injury on June 7, 2018. He experienced numbness on June 7, 2018, but it started the day before. It was not due to an injury "at some definite place and at some definite

time,” G.L. c. 32, § 7(1).) Therefore, the Essex Regional Retirement Board cannot grant him accidental disability retirement benefits as a matter of law. 840 CMR 10.09(2).

When did Mr. Vigneaux become disabled?

Mr. Vigneaux stated that he was last able to perform all the essential duties of his job on June 7, 2018. (Ex. 1, p. 4) The treating physician stated that Mr. Vigneaux was last able to perform his essential duties on December 31, 2018. (Ex. 2, p. 4) The injury report, which was prepared with information from Mr. Vigneaux, stated that his first day of total or partial incapacity to earn wages was January 30, 2019. (Ex. 4, p. 2)

Mr. Vigneaux has not acknowledged that he has provided conflicting information or tried to clarify it. At least two problems exist. One, Mr. Vigneaux’s application for accidental disability retirement benefits does not match the treating physician’s statement. *Whooley*. Two, his theory of disability has become a moving target. *Matthew Tinlin v. Weymouth Retirement Board*, CR-13-361 (DALA 2015). Neither the Essex Regional Retirement Board nor DALA should be required to figure out on what date Mr. Vigneaux became disabled. This is his case to make, *Bagley v. Contributory Retirement Appeal Board*, 397 Mass. 255, 258 (1986), not his case for someone else to make for him.

Mr. St. Cyr’s credibility

I found Mr. St. Cyr’s testimony not credible. He testified that he is sure that he heard Mr. Vigneaux’s shoulder pop on June 7, 2018. (Tr. 74) Mr. Vigneaux did not testify that his shoulder popped. He apparently did not tell any doctor or Mr. Ryan that his shoulder popped.

Other issues

This appeal presents a morass of issues and this decision is long enough. It is not necessary to analyze the other issues and lengthen this decision. Mr. Vigneaux is not entitled to a

medical panel or accidental disability retirement benefits.

Conclusion and Order

The Essex Regional Retirement Board's denial of Mr. Vigneaux's application for accidental retirement benefits is affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/

Kenneth Bresler
Administrative Magistrate

Dated: February 16, 2024