

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Gary LaBarge

Opinion No. 58-04WC

v.

*By: Margaret A. Mangan
Hearing Officer*

Hannaford Brothers

*For: Laura Kilmer Collins
Commissioner*

State File No. R-05829

*Pretrial conference held on May 24, 2004
Hearing held in Montpelier on September 29, 2004
Record closed on October 29, 2004*

APPEARANCES:

*Christopher McVeigh, Esq. , for the Claimant
John W. Valente, Esq. , for the Defendant*

ISSUES:

Is claimant's thoracic spine condition and need for treatment causally related to his work related injury in September of 2000?

EXHIBITS:

Claimant's 1: Medical Records

FINDINGS OF FACT:

- 1. In 2000 claimant was an employee and Hannaford Brothers (Hannaford) his employer within the meaning of the Workers' Compensation Act (Act).*
- 2. Claimant had a history of low back and neck pain, with one inciting incident from July 1998 when he was hit from behind in a motor vehicle accident. Despite that history, he maintained a physically demanding job and recreational activities including snowmobiling, four wheeling, golfing, hunting and fishing. Between the years 2000 and 2003, claimant traveled about 300 to 400 miles per winter on his snowmobile, sometimes riding 40 to 50 miles a day.*

3. *Claimant worked in the Meat Department at Hannaford for more than a decade. In September of 2000, he managed that department, doing physically demanding work such as unloading and cutting meats, and handling crates weighing fifty to a hundred pounds.*
4. *On or about Thursday September 7, 2000 at the end of a shift, claimant was responding to a customer's call for service when he slipped on a wet spot on the floor. As his feet went out from under him, he broke the fall by catching himself on a display case.*
5. *Claimant completed his shift that day and worked the next day. By Saturday, however, he was not able to get out of bed because of back stiffness.*
6. *After a few days, on September 14, 2000, claimant visited Girhild Bjornson, M.D. with complaints of exquisite tenderness in the thoracic area of his back. Dr. Bjornson administered an injection with pain relief and steroid medication and sent him home with anti-inflammatory medication.*
7. *Four days later, claimant returned to Dr. Bjornson "beaming," because the medication had reduced the pain. Dr. Bjornson suggested that he consider less physically demanding work.*
8. *The CT scan at that time revealed no evidence of a fracture, spinal stenosis or gross disc herniation. However, it revealed degenerative disc disease.*
9. *An MRI is a more sensitive diagnostic tool for detecting a disc protrusion than a CT scan but none was done at that time.*
10. *Claimant stopped working at Hannaford in January 2001 and began working as a full time plumber in new residential homes. Although he has help with any heavy lifting, claimant's work involves bending and twisting. When he needs to take a boiler to a basement, he uses a dolly and has the assistance of another worker.*
11. *The next time claimant sought medical treatment for back pain was in October 2001, although there was no specific provocative incident. Notes from Dr. Bjornson's office indicate that the symptoms had persisted from the previous year.*

12. *An October 30, 2001 MRI revealed disc protrusions in the thoracic area of the spine. An EMG nerve conduction study was negative for radiculopathy.*
13. *Claimant started treating with Rayden C. Cody, M.D., a rehabilitation medicine expert. Dr. Cody concluded that claimant's MRI findings correlated with his symptomatology and was consistent with the work related event a year earlier.*
14. *Under Dr. Cody's direction, claimant participated in physical therapy for his back pain. He discharged claimant from treatment in April 2001 after physical therapy.*
15. *Dr. Cody concluded that the work related event from 2000 accounts for the claimant's symptoms based on his understanding that claimant's symptoms had continued unabated from that time and on the MRI that was positive for a disc bulge.*
16. *On May 28, 2003, Michael Kenosh, M.D., a physical medicine and rehabilitation medicine expert, evaluated the claimant with a history, physical examination and review of records. In his opinion, claimant had been treated appropriately for his work related injury and had reached medical end result within months afterwards. Because claimant continued to engage in his recreational activities and did not seek medical care for a year, Dr. Kenosh opined that the incident at Hannaford did not cause claimant's current condition.*
17. *Claimant submitted evidence that his attorney worked 55.4 hours pursuing this claim and incurred \$686.12 in necessary costs.*

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 (1962). 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 from 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).*
4. *In his case, as with all disputes with conflicting expert opinions, this Department examines the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. Miller v. Cornwall Orchards, Op. No. 20-97WC (Aug. 4, 1997); Gardner v. Grand Union Op. No. 24-97WC (Aug. 22, 1997).*

5. *Dr. Cody has the advantage as the treating physician, although he only saw claimant three times. Both he and Dr. Kenosh have expertise in the relevant area of rehabilitation. Both conducted thorough evaluations. On the third and most important criterion, which requires objective support, Dr. Kenosh has the crucial advantage that tips the scale in favor of his opinion. Despite claimant's testimony about persistent pain, he had not treated for back pain for one year before he saw Dr. Cody and participated in physical therapy. In the interim, he ended his job with Hannaford, began working full time as a plumber and continued his recreational activities.*
6. *It would be impermissible speculation to accept claimant's theory that the slip and near fall at Hannaford in the fall of 2000 account for his current back pain and need for medical care. On this record, therefore, claimant has failed to sustain the requisite burden of proof. See Burton 112 Vt. 17.*

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 29th day of December 2004.

*Laura Kilmer Collins
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.