

Meril Badger v. BWP Distributors, Inc. and Maynard's Auto Supply, Inc. (March 25, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Meril Badger

Opinion No. 05-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

BWP Distributors, Inc.
and Maynard's Auto Supply, Inc.

For: Anne M. Noonan
Commissioner

State File Nos. AA-62692 and U-15282

OPINION AND ORDER

Hearing held in Montpelier, Vermont on November 18, 2010
Record closed on December 29, 2010

APPEARANCES:

Beth Robinson, Esq., for Claimant
Wesley Lawrence, Esq., for Defendant BWP Distributors, Inc.
Jeff Spencer, Esq., for Defendant Maynard's Auto Supply, Inc.

ISSUES PRESENTED:

1. Is Claimant's current lumbar spine condition causally related to either his May 14, 2009 work-related injury or to his April 15, 2004 work-related injury?
2. If yes, to what workers' compensation benefits is he entitled and which employer is responsible?
3. Is Claimant's current cervical spine condition causally related to either his May 14, 2009 work-related injury or to his April 15, 2004 work-related injury?
4. If yes, to what workers' compensation benefits is he entitled and which employer is responsible?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum vitae*, Mark Bucksbaum, M.D.

Defendant Maynard's Exhibit A: *Curriculum vitae*, Amin Sabra, M.D.

Defendant BWP Exhibit A: Dr. Levy reports

Defendant BWP Exhibit B: Dr. Bucksbaum report and deposition transcripts

Defendant BWP Exhibit C: Form 15 and accompanying letters

Defendant BWP Exhibit D: Form 22, June 24, 1999

Defendant BWP Exhibit E: Letter from Attorney Robinson, September 26, 2000

Defendant BWP Exhibit F: Vocational Rehabilitation Discontinuance Report

Defendant BWP Exhibit G: Peg Mangan file memo, January 8, 2001

Defendant BWP Exhibit H: Joint medical exhibit (CD-rom format)

Defendant BWP Exhibit I: Meril Badger deposition, Jan. 19, 2000 and Feb. 9, 2001

Defendant BWP Exhibit J: Brenda Badger deposition, February 9, 2001

Defendant BWP Exhibit K: Dr. Lefkoe deposition, Jan. 15, 2001 and May 9, 2001

Defendant BWP Exhibit L: Dr. Zimmerman deposition, February 8, 2001

Defendant BWP Exhibit M: Dr. Laub deposition, May 3, 2001

Defendant BWP Exhibit N: Various Social Security notices

Defendant BWP Exhibit O: *Curriculum vitae*, Richard Levy, M.D.

Defendant BWP Exhibit P: Work search records

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642

Permanent partial disability benefits pursuant to 21 V.S.A. §648

Medical benefits pursuant to 21 V.S.A. §640

Vocational rehabilitation benefits pursuant to 21 V.S.A. §641

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendants were his employers as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's files relating to this claim.
3. Claimant was 62 years old at the time of the formal hearing. He began working on his family farm at an early age. When he was 13, his father died, and he assumed greater responsibility for running the farm. He quit school at age 16 so that he could help his mother support his siblings. Aside from farming, Claimant's work history includes carpentry, logging and construction.

4. Claimant has suffered three work-related injuries to his lumbar and/or cervical spine, each of which bears some relevance to his current claim. The first injury occurred in 1997, while Claimant was working for Engelberth Construction Co. The second injury occurred in 2004, while Claimant was working for Defendant Maynard's Auto Supply, Inc. ("Maynard's"). The third occurred in 2009, while Claimant was working for Defendant BWP Distributors, Inc. ("BWP").

The 1997 Engelberth Construction Injury

5. On September 20, 1997 Claimant was working at a construction site at Middlebury College. His activities on that day included maneuvering heavy rafters from the ground up to workers on the building's second story. To do so, Claimant would stand each rafter on end and push it up the side of the building as far as he could reach. Then he would rest the rafter momentarily on the front of his hardhat and reposition his hands so that he could push the beam high enough for the second story workers to reach. Claimant repeated this process many times until the task was completed.
6. Following this activity, Claimant complained of pain in his left wrist, numbness and tingling in his arms and hands, tremors in his right forearm, headaches and pain in the back of his neck. Much later, he reported having experienced low back pain as well associated with this injury, though the contemporaneous medical records make no mention of such symptoms.
7. Initially Claimant's treatment focused on his bilateral hand symptoms. He was diagnosed with bilateral carpal tunnel syndrome, and later with a ligament injury as well in his left wrist. After two surgeries, his upper extremity symptoms still persisted, leading his treatment providers to suspect that they might be cervical in origin. This was consistent with what Claimant himself had felt from the beginning.
8. Claimant's employer disputed the compensability of any cervical spine injury or symptoms as not causally related to his September 1997 work activities. A July 1998 cervical spine MRI revealed mild to moderate degenerative disc disease, which Claimant's treating physician, Dr. Lefkoe, determined had been aggravated by lifting the heavy rafters overhead and balancing them on his forehead. Engelberth's independent medical evaluator, Dr. White, disagreed that any such causal relationship existed, however. With Dr. White's opinion as support, in 1999 Engelberth compensated Claimant for a 35% whole person permanent impairment referable to his bilateral wrist injuries, but refused to pay any permanency related to his other complaints.

9. For two years thereafter Claimant continued to pursue his claim for additional workers' compensation benefits causally related to the September 1997 injury. He continued to experience and treat for pain in his neck and shoulders, headaches and diffuse facial numbness. As he was unable to resume carpentry or construction work, Claimant was determined eligible for vocational rehabilitation services, but aside from a brief stint at a local dairy farm his return to work efforts were unsuccessful.¹ Ultimately Claimant asserted a claim for permanent total disability.
10. Claimant's medical expert at the time, Dr. Bucksbaum, supported the alleged causal relationship between his September 1997 work activities and his ongoing symptoms. Dr. Bucksbaum is board certified in physical medicine and rehabilitation. He is also a biomechanical engineer.
11. According to Dr. Bucksbaum, the vertical forces produced when Claimant rested the heavy rafters on his hardhat while maneuvering them overhead likely caused a C5 disc herniation with cervical radiculopathy, resulting in the constellation of symptoms in his neck and upper extremities from which he continued to suffer at least as of Dr. Bucksbaum's evaluation in July 2000. I find credible this explanation for Claimant's condition.
12. Of note, Dr. Bucksbaum was unable to determine to the required degree of medical certainty whether Claimant's complaints of low back pain were in any way related to his work activities. Nor was he willing to conclude that Claimant was permanently and totally disabled. Based solely on his physical capabilities, and without considering any possible psychological disability, Dr. Bucksbaum concluded that Claimant had a sedentary work capacity. This was consistent with an earlier functional capacities evaluation, which had documented Claimant's significantly limited tolerance for sitting, standing and walking.
13. Dr. Bucksbaum determined that Claimant had reached an end medical result for the injuries he sustained as a result of his September 1997 work activities by July 2000.
14. Claimant's claim for additional workers' compensation benefits causally related to his September 1997 work injury did not proceed to formal hearing, but rather was settled on a Form 15 basis in June 2001. By the terms of the settlement, Claimant received \$70,000 as full and final compensation for his "alleged bilateral wrist, neck, low back and leg injuries and any and all alleged physical or psychological or psychiatric sequelae which was or could have been asserted."

¹ The dairy farm job proved unsuitable for two reasons. First, the strenuous nature of the work exceeded Claimant's functional limitations. Second, and of more immediate concern at the time, the chemical solutions used in the milking parlor caused him to develop contact dermatitis, which was resistant to all treatment efforts short of total avoidance.

The 2004 Maynard's Injury

15. In December 2001 Claimant began working for Defendant Maynard's as an auto parts delivery person. His duties included loading and unloading parts and making deliveries throughout the day. In the winter, he also shoveled around the trucks and cleaned them of ice and snow. Although the functional requirements of this job well exceeded the sedentary work capacity with which Claimant had been rated following his 1997 injury, he developed strategies to enable him to complete assigned tasks nonetheless. Claimant testified credibly that he experienced chronic neck and, to a lesser extent, low back pain both before and after he began working at Maynard's, but as he described it, "To keep my job, I had to do what I had to do."
16. Aside from one instance of acute neck pain in November 2002, Claimant did not seek medical treatment for either cervical or low back pain from mid-December 2000 until April 16, 2004.
17. On April 15, 2004 Claimant was exiting Maynard's with an armful of parts when he stepped in a hole between the cement walkway and the curb, stumbled and fell. Claimant bruised his knee, sprained his right wrist and fractured his left rib. The latter injury is evidence of the force with which he struck the pavement when he fell.
18. Claimant missed only two weeks of work as a consequence of this injury, but upon his return he began to experience low back pain with radiating symptoms down his legs. Claimant credibly described these symptoms as being far worse than the chronic pain he had been experiencing previously.
19. In the months and years that followed, the medical records document a course of treatment focused primarily on Claimant's low back pain. MRI studies documented degenerative changes throughout his lumbar spine. Due to his morbid obesity, Claimant was determined not to be a good surgical candidate. Instead, for the most part treatment efforts consisted of various trials of narcotic pain medications, including Percocet, morphine, oxycodone and fentanyl skin patches. Despite his persistent low back pain and radicular symptoms, Claimant continued to work, often for more than 40 hours per week. Claimant testified credibly that it was not easy for him to do so, and that it got more difficult over time, but that he still managed to push through.
20. At Maynard's request, Claimant underwent an independent medical examination with Dr. Johansson, an osteopath, in December 2004. Dr. Johansson previously had evaluated Claimant in conjunction with his 1997 injury, and had overseen his participation in a multidisciplinary pain management program in 2000.
21. This time Dr. Johansson diagnosed lumbar degenerative disc disease with spinal stenosis (narrowing) at the L4-5 level. He determined that Claimant had reached an end medical result "for this work-related injury," and rated him with a 6% whole person permanent impairment. Dr. Johansson also determined that Claimant's narcotic pain medication regimen was medically necessary, appropriate and causally related to the April 2004 work injury.

22. Maynard's accepted the compensability of Claimant's injuries, including his low back pain and radicular symptoms, as causally related to the April 2004 fall at work. Indeed, it specifically referenced "degenerative disc disease" as the accepted injury in the Agreement for Permanent Partial Disability Compensation (Form 22), which the Department approved in June 2005. Maynard's subsequently paid permanency benefits for that injury in accordance with Dr. Johansson's 6% impairment rating.
23. From 2004 until December 2009, Maynard's also paid for Claimant's pain medications. On two occasions, first in July 2006 and again in January 2009, Maynard's requested Dr. Johansson's opinion as to whether the medications continued to be reasonable, necessary and causally related to the April 2004 injury. After reevaluating Claimant on both occasions, Dr. Johansson asserted that they were. Notably, on both evaluations Dr. Johansson observed that Claimant's low back pain was worsening. Nevertheless, he continued to work as much as 60 hours per week.
24. The medical records do not document any treatment for neck pain or other cervical spine-related symptoms causally related to Claimant's April 2004 fall at work. I find that while Maynard's accepted the compensability of Claimant's lumbar spine condition as causally related to that incident, it did not accept the compensability of his cervical condition.
25. In April 2009 Claimant returned to Dr. Johansson, complaining of spasms in his lower back and burning pain into his legs. Concerned that his symptoms were indicative of a new or worsening condition, Dr. Johansson ordered an updated lumbar spine MRI. In addition, he recommended that Claimant limit his work hours to 40 per week.

The May 2009 BWP Injury

26. On May 14, 2009 Claimant was delivering a 55-gallon drum of oil to a farmer. As he bent down to stand the barrel on end, he felt something "let go" in both his lower back and his neck. Later that day Claimant presented to the hospital emergency room, complaining of neck pain radiating into both shoulders and low back pain radiating down both legs.
27. Defendant BWP, doing business as CarQuest, was Claimant's employer at the time of this incident, having purchased the business from Maynard's some time previously. It accepted the compensability of Claimant's low back and neck injury and began paying workers' compensation benefits accordingly.
28. Claimant has treated conservatively for the May 2009 injury. Unfortunately, treatment efforts have been largely unsuccessful at controlling pain and restoring function. The pain has affected his recreational activities, his sex life and perhaps most significantly, his ability to work. Whereas prior to the May 2009 injury Claimant was able to work at least full time, albeit in pain, since the injury he has been unable to resume his previous job duties. In addition, although Claimant had been taking pain medications since his 2004 injury, after May 2009 he required even stronger drugs, in increasing dosages. Even those have been largely ineffective.

29. Claimant testified that he is in “three times more pain now” than he was before May 2009. The neck pain makes it difficult for him to hold his head up. The low back pain is, in his words, “intense.” I find this testimony credible in all respects.
30. MRI studies done since the May 2009 incident have failed to reveal a specific cause for Claimant’s worsened symptoms. In accordance with Dr. Johansson’s prior referral, *see* Finding of Fact No. 25 *supra*, Claimant underwent a lumbar spine MRI on May 18, 2009; upon reviewing the results Dr. Johansson declared that it reflected no significant change from previous studies. Claimant underwent additional diagnostic studies in June 2009 (cervical spine MRI), April 2010 (cervical and lumbar spine x-rays), May 2010 (cervical spine MRI) and September and October 2010 (lumbar spine MRIs). Although some of these studies are of questionable quality, none reveal evidence of any acute disc herniation attributable to the May 2009 injury. All document degenerative disc disease at the same levels as had been revealed by previous studies.
31. In July 2009 Dr. Johansson reevaluated Claimant. His handwritten office note is difficult to decipher. It appears he was aware of the fact that Claimant had suffered a new injury in May 2009. Dr. Johansson suggested various changes to Claimant’s pain medications, but had no other treatment recommendations. He declared Claimant to be at end medical result, with a sedentary-to-light work capacity. Based on Claimant’s description of his job duties, I find that his work at BWP exceeded this restricted capacity.
32. With Dr. Johansson’s end medical result determination as support, BWP terminated Claimant’s temporary disability benefits effective July 25, 2009. For its part, Maynard’s continued to pay for the medical costs associated with Claimant’s April 2004 injury until December 2009, when it too sought to discontinue benefits, on the grounds that treatment now was causally related to the May 2009 incident, for which BWP was responsible.
33. Despite these determinations, Claimant continued to treat for both low back and cervical pain. He began a course of physical therapy in July 2009, but had to discontinue it when BWP refused to authorize or pay for further sessions. He underwent a series of medial branch blocks and cervical epidural steroid injections in January, February and March 2010, but these were ineffective. Last, he presented for numerous evaluations with Dr. Horgan, a neurosurgeon, between April and October 2010. For a variety of reasons, including his morbid obesity, the nature of his pain complaints and what the doctor referred to as “his ongoing issues of workers’ compensation,” Dr. Horgan concluded that surgery was not in Claimant’s best interests at this time.
34. With these treatments and evaluations in mind, I find that Dr. Johansson’s July 2009 end medical result determination was premature.
35. Claimant continued to use narcotic medications for pain relief until October 2010, when a routine drug screen revealed evidence of possible misuse. This was a second violation of Claimant’s narcotics contract, which prompted his primary care physician to discontinue his prescriptions. Claimant denied having misused or redirected his medications, and I find the explanations he provided for both violations to be credible.

36. Most recently, in November 2010 Claimant underwent a consultation with a nutritionist. The purpose of the visit was to discuss how Claimant might lose sufficient weight to make either lumbar and/or cervical surgery a more viable treatment option. At the hearing, however, Claimant testified that he was not interested in changing his dietary or exercise habits, and therefore it appears that neither weight loss nor surgery are likely to occur. No other treatment options have been proposed.
37. Claimant described himself as a proud man who has lost confidence due to his inability to work. He has been receiving unemployment compensation since the summer of 2009, and has been searching for suitable work within his capabilities. Since July 2010 Claimant also has been receiving social security retirement benefits.

Expert Medical Opinions

38. Three expert medical witnesses provided testimony as to the causal relationship, if any, between Claimant's current neck and low back conditions and his various work-related incidents. Dr. Bucksbaum testified on Claimant's behalf, Dr. Levy on BWP's behalf and Dr. Sabra on Maynard's behalf.

(a) Dr. Bucksbaum

39. As noted above, *see* Findings of Fact No. 11 *supra*, Dr. Bucksbaum first evaluated Claimant in 2000, in conjunction with his 1997 injury. At the request of Claimant's attorney, he reevaluated Claimant in January 2010 and reached the following conclusions, all to the required reasonable degree of medical certainty:
- The May 2009 lifting incident at BWP caused exacerbations of the underlying degenerative disease in Claimant's lumbar and cervical spine, resulting in increased pain and greater difficulty performing daily living activities.
 - Claimant had reached an end medical result for the May 2009 injury to his lumbar spine as of the date of Dr. Bucksbaum's evaluation (January 12, 2010). Notwithstanding this determination, he should continue to be followed for management of his narcotic pain medications.
 - The permanent impairment referable to Claimant's lumbar spine is now 15% whole person. Of this, 6% previously was rated and paid in accordance with Dr. Johansson's December 2004 rating, *see* Finding of Fact No. 21 *supra*, leaving an additional 9% whole person impairment attributable to the May 2009 injury.
 - Claimant had not yet reached an end medical result for his cervical spine injury as of the date of Dr. Bucksbaum's examination, because further diagnostic and treatment evaluations were still pending at the time. *See* Finding of Fact No. 33, *supra*.
 - All treatment provided since the May 2009 injury has been reasonable, necessary and causally related to that incident.

40. In his formal hearing testimony, Dr. Bucksbaum further expanded on the basis for his conclusions. In his opinion, test results can be misleading and must always be interpreted in the context of what the patient is exhibiting. Here, the fact that Claimant's pain, and corresponding treatment, "sharply escalated" after the April 2004 fall at Maynard's, then escalated even more after the May 2009 lifting incident at BWP, provides compelling evidence of exacerbation. This is true even notwithstanding that Claimant's MRI studies documented only pre-existing degenerative spine disease but no acute changes following either of these intervening events. I find this explanation for Dr. Bucksbaum's opinions to be credible.

(b) Dr. Levy

41. Dr. Levy evaluated Claimant at BWP's request in April 2010. Dr. Levy is a board-certified neurologist. Both degenerative spine disorders and traumatic spine injuries are very common in his practice.

42. Dr. Levy concluded, to a reasonable degree of medical certainty, that at best Claimant suffered only a transient flare-up of his chronic low back and cervical pain as a result of the May 2009 incident. He based this conclusion primarily on a comparative analysis of Claimant's various MRI studies, which failed to reveal a traumatic cause for his degenerative disc disease to have progressed.

43. Dr. Levy estimated that any symptoms causally related to the May 2009 incident likely resolved within six to eight weeks, at which point Claimant would have returned to his pre-injury baseline. Any treatment thereafter would be causally related to his pre-existing condition. According to Dr. Levy, Claimant did not suffer any permanent impairment referable to the May 2009 incident.

44. Notwithstanding Dr. Levy's estimate, I find that in fact Claimant's symptoms did not return to their baseline level within six to eight weeks following the May 2009 incident, but rather continued to worsen. Similarly, Claimant did not return either to his baseline level of function, which had included full-time work at BWP, or to his baseline level of narcotic pain medications.

(c) Dr. Sabra

45. Dr. Sabra evaluated Claimant at Maynard's request in September 2010. Dr. Sabra is board certified in psychiatry and neurology. His current practice focuses primarily on patients with neurological diseases.

46. Dr. Sabra's causation analysis was similar to Dr. Levy's. Finding no evidence on Claimant's MRI studies of any acute disc herniation in either the lumbar or the cervical spine after the May 2009 incident, Dr. Sabra characterized Claimant's symptoms immediately thereafter as a flare-up of his chronic underlying degenerative disc disease. As to the cause of the underlying disease, Dr. Sabra discounted the effect of Claimant's April 2004 injury almost entirely, and instead attributed it back to his September 1997 work activities.

47. I find that neither the medical record nor Claimant's credible testimony support Dr. Sabra's characterization of the April 2004 and May 2009 injuries as only temporary flare-ups of his underlying degenerative disease. To the contrary, I find that Claimant's condition never returned to baseline but instead worsened significantly after each incident. This is evidenced by his increased reliance on narcotic pain medications and, particularly after May 2009, his decreased ability to function.
48. Dr. Sabra acknowledged that MRI studies do not detect soft tissue injuries. He admitted, furthermore, that while such injuries usually get better with time, that is not always the case.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. Once a claim has been accepted and benefits have been paid, the party seeking to discontinue bears the burden of proving that it is proper to do so. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974).
3. Here, Defendant BWP accepted as compensable injuries to Claimant's low back and neck as a consequence of the May 2009 incident. It bears the burden of proving that Claimant's current disability and/or need for medical treatment are no longer causally related to those injuries. BWP asserts that the injuries it accepted amounted at most to a temporary flare-up of preexisting conditions attributable to Claimant's work activities in 1997 and/or 2004.
4. For its part, Defendant Maynard's accepted as compensable an injury to Claimant's low back as a consequence of the April 2004 incident. Thereafter, it paid permanency benefits attributable to Claimant's "degenerative disc disease" in accordance with Dr. Johansson's 6% whole person impairment rating. It now must justify its decision to terminate Claimant's medical benefits effective December 2009. Maynard's asserts that any ongoing treatment is causally related either to the May 2009 incident and/or to Claimant's September 1997 work activities.

5. Thus, both defendants seek to avoid responsibility for further workers' compensation benefits, either by pointing the finger at the other or by attributing Claimant's current symptoms back to his 1997 injury. To determine which, if either of them, is liable I must consider whether Claimant's current condition represents a recurrence, an aggravation or a flare-up.²
6. 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 – that is, if the second accident does not causally contribute to the claimant's disability. *Pacher v. Fairdale Farms*, 166 Vt. 626, 627 (1997). If, however, the second incident aggravates, accelerates or combines with a preexisting impairment or injury to produce a disability greater than would have resulted from the second injury alone, then in that case the second incident is an "aggravation," and the second employer becomes solely responsible for the entire disability at that point. *Id.* at 627-628.
7. Beyond either a recurrence or an aggravation, there is a third category as well – the "flare-up." In a flare-up, a distinct new injury worsens a preexisting condition, but only temporarily, following which the condition returns to its baseline. *Cehic v. Mack Molding, Inc.*, 2006 VT 12, ¶10. The finding of a distinct new injury precludes a conclusion that it is a recurrence. *Id.* The finding of a return to baseline precludes a conclusion of aggravation "because the injury, once resolved, did not 'causally contribute' to any increased disability." *Id.*, quoting *Pacher, supra*.
8. Both of the defendants here submitted expert medical evidence characterizing Claimant's May 2009 injury as a flare-up. From the medical records and formal hearing testimony, however, I am not persuaded that Claimant has ever – even now – returned to his pre-May 2009 baseline. Yet this is an essential component for categorizing any injury as a flare-up.
9. I note, furthermore, that Dr. Bucksbaum rated Claimant with an additional permanent impairment causally related to the May 2009 injury. I am persuaded by this that the May 2009 injury in fact did "causally contribute" to Claimant's increased disability. The facts do not support a conclusion that the May 2009 incident caused a flare-up, therefore. If anything, an aggravation resulted.
10. Claimant relies on Dr. Bucksbaum's expert medical opinion in support of his claim that the May 2009 incident properly should be categorized as an aggravation. Notwithstanding the fact that Claimant's MRI studies failed to reveal a traumatic cause for his underlying degenerative disc disease to have progressed, Dr. Bucksbaum concluded that the preexisting condition was exacerbated as a result of the injuries Claimant suffered in that incident. In reaching this conclusion, Dr. Bucksbaum emphasized the fact that Claimant's pain, need for treatment and functional limitations all "sharply escalated" after the May 2009 injury.

² Having settled his 1997 claim on a Form 15 (full and final) basis, if Claimant's current condition is determined to be causally related to his September 1997 work activities he will be precluded from receiving additional benefits.

11. Where a claimant's preexisting condition is a progressively degenerative disease, the test for determining work-related causation is whether, "due to a work injury or the work environment 'the disability came upon the claimant earlier than otherwise would have occurred.'" *Stannard v. Stannard Co., Inc.*, 175 Vt. 549, 552 (2003), citing *Jackson v. True Temper*, 151 Vt. 592, 596 (1989). While exacerbated symptoms alone may not be enough to establish causation, nevertheless "the acceleration rule must be looked at in relation to the overall condition of the body, particularly as it relates to [a claimant's] ability to work and function." *Id.*, citing with approval *City of Burlington v. Davis*, 160 Vt. 183, 186 (1993) (Dooley, J., dissenting).
12. Dr. Bucksbaum's analysis is persuasive, particularly in the context of the current claim. That the May 2009 incident caused Claimant's degenerative disc disease to accelerate is established not by MRI studies, but by its clear impact on his pain and ability to function. This is not a case where, as in *Stannard*, the underlying disease already had advanced to the point that medically, it could not be accelerated any further. This is a case where the underlying disease, though admittedly troublesome, had not progressed so far as to preclude Claimant from working altogether until the May 2009 injury disabled him.
13. I conclude that the May 2009 injury constituted an aggravation of the preexisting conditions in Claimant's lumbar and cervical spine, such that Defendant BWP is now liable for the entire resulting disability.
14. It remains to determine the benefits to which Claimant is entitled. As a preliminary matter, Defendant BWP argues that because Claimant accepted a settlement of his claim for permanent total disability benefits following his 1997 injury he should be estopped from asserting any further disability now. Essentially, BWP argues that there can be no greater disability than permanent total disability, and therefore Claimant cannot possibly be entitled to additional indemnity benefits.
15. The fact is, however, that Claimant was never adjudicated to be permanently and totally disabled. The settlement covered a variety of disputed issues, and nowhere is it indicated that the employer specifically acquiesced to a finding of permanent total disability. Under these circumstances, there is no basis for concluding that Claimant is now estopped from seeking additional indemnity benefits.
16. As to the lumbar spine, I accept as persuasive Dr. Bucksbaum's determination that Claimant reached an end medical result on January 12, 2010. I also accept as credible Dr. Bucksbaum's determination that the permanent impairment referable to Claimant's lumbar spine now totals 15% whole person. Claimant having already been paid compensation for the 6% impairment attributable to the April 2004 injury, I conclude that Defendant BWP is obligated to pay compensation for the remaining 9% impairment attributable to the May 2009 injury. *See* 21 V.S.A. §648(d).

17. As to the cervical spine, I conclude that Claimant reached an end medical result on October 22, 2010. By that date, Claimant had undergone all of the additional diagnostic tests and evaluations that Dr. Bucksbaum had anticipated earlier, and Dr. Horgan had finally determined that he was not an appropriate candidate for either lumbar or cervical spine surgery.
18. I conclude that Defendant BWP is obligated to pay temporary total disability benefits from July 25, 2009 through October 22, 2010. Whether Claimant will be required to repay unemployment compensation benefits covering the same period is not an issue within my jurisdiction.
19. Last, I conclude that Defendant BWP is obligated to pay for all reasonable and necessary medical benefits causally related to the May 2009 aggravation of Claimant's preexisting lumbar and cervical spine conditions.
20. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$3,397.20 and attorney fees totaling \$23,087.25, in accordance with Workers' Compensation Rule 10. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded against Defendant BWP. As for attorney fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded against Defendant BWP as well.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant BWP is hereby **ORDERED** to pay:

1. Temporary total disability benefits from July 25, 2009 through October 22, 2010;
2. Permanent partial disability benefits as compensation for a 9% whole person impairment referable to the lumbar spine;
3. Interest on the above amounts in accordance with 21 V.S.A. §664;
4. Medical benefits in accordance with Conclusion of Law No. 18 above;
5. Costs totaling \$3,397.20 and attorney fees totaling \$23,087.25.

DATED at Montpelier, Vermont this 25th day of March 2011.

Anne M. Noonan
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.