

D. R. v. State of Vermont, AOT and Young's Farm Equipment (November 13, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

D. R.

Opinion No. 46-08WC

v.

By: Jane Gomez-Dimotsis, Esq.
Hearing Officer

State of Vermont Agency of
Transportation/Young's
Farm Equipment

For: Patricia Moulton Powden
Commissioner

State File No. X-05484

OPINION AND ORDER

Hearing held in Montpelier on February 4, 2008

Record closed on August 27, 2008

APPEARANCES:

Ron Fox, Esq., for Claimant

Andrew Boxer, Esq., for State of Vermont Agency of Transportation

John Paul Faignant, Esq., for Young's Farm Equipment

ISSUES:

Is Claimant entitled to workers' compensation benefits causally related to the symptoms he experienced in March 2006 and thereafter, and if so, which employer is responsible for payment?

EXHIBITS:

Joint Exhibit I: Joint Medical Exhibit

Claimant's Exhibit 1: First Report of Injury and letter dated March 23, 2002, State File #12365

Claimant's Exhibit 2: Sumner Page written statement

Claimant's Exhibit 3: Steve Ingalls written statement

Claimant's Exhibit 4: Dennis Reid time sheets, 3/19/06 – 4/29/06

Defendant Young's Farm Equipment Exhibit 1: Time records supplemented with David Young affidavit, February 7, 2008

CLAIM:

Temporary disability benefits from March 31, 2006 forward pursuant to 21 V.S.A. §§642, 646

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

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

Attorney's fees and costs pursuant to 21 V.S.A. §678(a)

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendants were employers as those terms are defined in Vermont's Workers' Compensation Act.
2. There are two employers potentially involved in this case. Claimant was injured in 1988 while employed by Young's Farm Equipment (Young's). In 1998 and thereafter Claimant worked for the State of Vermont Agency of Transportation (AOT).
3. Judicial notice is taken of all forms contained in the Department's files relating to these claims.
4. On September 28, 1988 Claimant injured his ankle, lower back and hip area when a large tire fell on him. Defendant Young's accepted the injuries as compensable and paid benefits accordingly.
5. Immediately following this incident Claimant treated with a chiropractor, who told him to go home and take it easy. Claimant's time records document that he missed no time from work after this incident. He recalled that his ankle healed quickly and that he had few if any problems with his back. During the ensuing twelve years, with the exception of some occasional cervical pain Claimant's back did not trouble him significantly.
6. X-rays taken in 1988 documented Grade I spondylolisthesis in Claimant's spine. Spondylolisthesis refers to the anterior displacement or slippage of the vertebral column in relation to the vertebrae below.
7. On July 8, 1997 Claimant underwent an employment physical for another employer, in which his back exam was noted to be normal.
8. Claimant began working as a mechanic for Defendant AOT in October 1998 and remains employed there today. His job duties require heavy lifting and other strenuous physical activities. In the winter months Claimant drives a snow plow as well.
9. Since he began working for Defendant AOT Claimant has received medical treatment for various incidents of low back pain. The first of these occurred in March 2000. Claimant's back began to "act up" when he was building a "material's pusher" for use under guard rails. Claimant treated for this lumbar pain with Dr. Richard Ashcroft, a chiropractor, and also with Dr. Stephen Rosmus, his primary care provider. He did not lose any time from work as a consequence of this incident of back pain.
10. On January 6, 2002 Claimant was exiting his truck after loading some material into it when he felt the immediate onset of low back and left leg pain. Claimant reported his injury to Defendant AOT, which accepted his claim as compensable. As he had following the March 2000 injury, Claimant treated with Dr. Ashcroft. He also underwent a course of physical therapy, from which he was discharged in April 2002. Claimant was not rated for any permanent impairment and did not receive any permanency benefits.

11. For the next several years Claimant participated in physical therapy and did home exercises to maintain his back so that he could work. Although Dr. Ashcroft did discuss back surgery with Claimant at this time of his 2002 injury, Claimant chose to live with his condition and continue to work. Dr. Ashcroft encouraged Claimant to back off heavy lifting and “bull work.”
12. Claimant tried to avoid the heaviest types of work. His regular job duties often required him to lift in excess of thirty pounds, which he does not consider heavy. However, because of the limited equipment available in Defendant AOT’s garage, Claimant occasionally had to lift in excess of eighty pounds.
13. Claimant also had been a volunteer firefighter for more than twenty years prior to and during his employment with Defendant AOT. However, after his injury in 2002 he limited his firefighting activities so as to avoid interior firefighting and other very strenuous duties.
14. In early 2006 Claimant developed pneumonia. He missed some work during this time but returned to work when he was well. Claimant has no recollection of hurting his back during this time but did have back discomfort when he coughed. There is a note in his medical file that states “increased pain secondary to spondylolisthesis.”
15. On Thursday, March 30, 2006 Claimant began servicing a wood chipper at work. The machine stood approximately 8 or 9 feet tall. Claimant determined that both sets of blades needed to be sharpened. To access the blades Claimant had to stand on a set of wooden steps and then bend and twist in awkward positions. The job was strenuous. It took many hours over the course of two days to complete. By Friday morning, March 31st, when Claimant finally completed the job, he was experiencing severe low back pain, so intense he thought he was going to pass out. He advised a co-worker that he was not feeling well and went home early.
16. By the following Monday, April 3, 2006, Claimant was feeling a great deal of low back pain, and pain in his legs as well. The pains he felt were different from any he had experienced during prior episodes of back pain. He was light-headed and his skin was so sensitive it felt as if it was “on fire.” Claimant did not immediately associate his symptoms with the previous week’s work on the wood chipper, however. Thus, he did not report any work-related injury to his supervisor. He did not work at all the following week, but the time off was coded as sick time.
17. Claimant initially treated with Dr. Rosmus, who diagnosed arthritis and prescribed pain medications.
18. After taking a week off, Claimant returned to work. On April 13, 2006 he was moving inventory for most of the day. By the end of the day, his pain levels increased to the point where he sought treatment at the Emergency Room. Once again, he described a wide range of symptoms that he reported having experienced over the past two and a half weeks. These included not only aches and joint pains but also extremely tender, sensitive skin and light-headedness. Claimant underwent a number of blood tests, but the Emergency Room physician could not determine the cause of his discomfort.

19. On April 17, 2006 Claimant treated with Dr. Ashcroft. Dr. Ashcroft immediately associated Claimant's symptom complex with his back and determined that the instigating cause had been the work Claimant did servicing the wood chipper on March 30th and 31st. Upon realizing the connection, Claimant called his supervisor and reported his condition as work-related.
20. After conservative efforts to address Claimant's symptoms failed, on August 1, 2006 he underwent spinal surgery. Following the surgery Claimant felt immediate relief of all his symptoms, including both the pain and the skin sensitivity and tingling he had been experiencing. He returned to work with restrictions in September 2006 and was released to full-duty work in February 2007.

Expert medical opinions

21. Both Dr. Ashcroft and Dr. Rosmus believe that the work Claimant did servicing the wood chipper on March 30th and 31st, 2006 caused an exacerbation of his pre-existing spondylolisthesis, with symptoms that included severe pain and a "burning sensation" radiating into his legs.
22. At Defendant AOT's request Dr. Verne Backus, an expert in orthopedics, conducted an independent medical evaluation on October 26, 2006. Dr. Backus' initial diagnosis was Grade I spondylolisthesis, genetic rather than traumatic in origin. At the hearing, however, Dr. Backus changed his opinion and stated instead that Claimant's spondylolisthesis was causally related to the 1988 injury he suffered while employed by Defendant Young. According to Dr. Backus, the 1988 injury likely caused a fracture of the pars interarticularis, which in turn caused a slippage of the L5 vertebrae and eventually precipitated Claimant's spondylolisthesis. Dr. Backus testified that because spondylolisthesis is relatively rare as a congenital condition, occurring in less than 8% of the population, a traumatic cause, such as the 1988 injury, was more plausible.
23. As for Claimant's work activities for Defendant AOT, Dr. Backus testified that films of Claimant's spine taken in 1988, 2002 and 2006 showed no increase in the grade of slippage but only degenerative changes consistent with the natural progression of the disease. Dr. Backus concluded, therefore, that there was no evidence that Claimant's work for Defendant AOT caused his underlying condition to worsen in any respect.
24. At Claimant's request Dr. Victor Gennaro, an orthopedic surgeon, conducted an independent medical evaluation on February 26, 2007. His opinion as to causation stands in sharp contrast to Dr. Backus'. Dr. Gennaro specifically discounted Claimant's 1988 injury as the cause of his 2006 symptoms. Rather, he concluded that the years of heavy lifting, pulling and strenuous activity associated with Claimant's work for Defendant AOT aggravated and accelerated his pre-existing spondylolisthesis to the point where he required surgery.
25. Dr. Gennaro also disagreed with Dr. Backus as to the appropriate grade of slippage now evident on Claimant's radiographic films. In Dr. Gennaro's opinion, Claimant's spondylolisthesis has advanced from Grade I in 1998 to Grade I-II in 2006.

26. Dr. Gennaro determined that Claimant was at an end medical result as of the date of his examination, with a 20% whole person permanent impairment. Dr. Backus testified at hearing that this rating was straightforward and appropriate.
27. Last, at Defendant Young's request Dr. Joseph Corbett, a neurologist, reviewed Claimant's medical records. Dr. Corbett concluded that Claimant had had spondylolisthesis since adolescence and that the 1988 injury at Defendant Young's caused a "flare-up." Dr. Corbett further opined that Claimant's job duties for Defendant AOT caused his condition to worsen in 2006 to the point where surgery became necessary.

CONCLUSIONS OF LAW:

1. The disputed issue in this claim is medical causation. Both Claimant and Defendant Young assert that Claimant's work for Defendant AOT aggravated and accelerated his pre-existing spondylolisthesis. Defendant AOT contends that the spondylolisthesis was caused initially by the injury Claimant suffered while working for Defendant Young's in 1988 and thereafter naturally progressed to the point where surgery became necessary.
2. 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).
3. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003). With these factors in mind, the key question is which expert medical opinion is the most credible? *Bonenfant v. Price Chopper*, Opinion No. 13-07WC (May 8, 2007).
4. Applying these factors to the expert opinions propounded here, I find that Dr. Gennaro's is the most persuasive. The more credible testimony establishes that Claimant most likely had spondylolisthesis as an adolescent, and that he briefly exacerbated that condition as a result of the 1988 work injury at Defendant Young's. Thereafter, Claimant treated for only occasional back pain and was able to work at strenuous employment for many years. The heavy work Claimant did for Defendant AOT finally took its toll, however, culminating in the March 31, 2006 wood chipper incident. Ultimately, Claimant required surgery and has incurred a permanent impairment.

5. “When considering a progressively degenerative disease . . . the causation test becomes 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*, 2003 VT 52, ¶11, quoting *Jackson v. True Temper Corp.*, 151 Vt. 592, 596 (1989). The more credible medical evidence confirms that this is what occurred here as a result of Claimant’s work for Defendant AOT.
6. It is notable that Dr. Gennaro’s opinion adequately accounts for the heavy work Claimant did for Defendant AOT, while Dr. Backus’ opinion does not. Dr. Backus essentially ignored the impact that Claimant’s heavy work for Defendant AOT likely would have on a person with pre-existing spondylolisthesis. Examining all of the facts in their entirety, his opinion is rendered less credible as a result.
7. That Claimant’s work for Defendant AOT caused more than just exacerbated symptoms but a worsening of his underlying condition as well, *see Stannard, id.*, is amply supported by Dr. Gennaro’s conclusion that Claimant’s spondylolisthesis advanced from Grade I in 1988 to Grade I-II in 2006. Again, I find Dr. Gennaro’s opinion in this regard more persuasive than Dr. Backus’.
8. I conclude, therefore, that Defendant AOT is the responsible employer for the workers’ compensation benefits to which Claimant is entitled as a result of the worsening of his condition in 2006. These include payment of all reasonably necessary medical costs and permanency benefits in accordance with Dr. Gennaro’s 20% whole person impairment rating.
9. As for temporary disability benefits, the evidence establishes that Claimant reached an end medical result on February 26, 2007. It is unclear, however, for exactly what period(s) of time Claimant was totally disabled after March 31, 2006. Under the statute, Defendant AOT’s responsibility is limited only to those periods prior to February 26, 2007 during which Claimant was unable to work as a consequence of his injury.
10. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$2,856.67 and attorney’s fees totaling \$10,179.00. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these are awarded. As for attorney’s fees, these lie within the Commissioner’s discretion. I find that it is appropriate to award these as well.

ORDER:

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

1. Temporary disability benefits in accordance with Conclusion of Law 9 above pursuant to 21 V.S.A. §642;
2. Permanent partial disability benefits in accordance with a 20% whole person impairment referable to the spine pursuant to 21 V.S.A. §648;
3. Medical benefits covering all reasonably necessary medical services and supplies causally related to the aggravation of Claimant's spondylolisthesis after March 31, 2006 pursuant to 21 V.S.A. §640;
4. Interest on the above amounts pursuant to 21 V.S.A. §664; and
5. Costs in the amount of \$2,856.67 and attorney's fees totaling \$10,179.00 pursuant to 21 V.S.A. §678.

DATED at Montpelier, Vermont this 13th day of November 2008.

Patricia Moulton Powden
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.