

F. N. v. Montpelier School District

(December 20, 2006)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

F. N.

Opinion No. 52-06WC

v.

By: Margaret A. Mangan  
Hearing Officer

Montpelier School District

For: Patricia Moulton Powden  
Commissioner

State File No. U-52182

Hearing held on Montpelier on November 3, 2006

Record closed on November 13, 2006

**APPEARANCES:**

Richard Davis, Jr., Esq., for the Claimant

Jason R. Ferreira, Esq., for the Defendant Cambridge Integrated Services

Timothy Vincent, adjuster for Defendant VSBIT

**ISSUES:**

1. Whether the treatment proposed by Dr. Cody is medically necessary and causally related to Claimant's work-related low back injury.
2. If so, what carrier is responsible for this claim?

**EXHIBITS:**

I: Joint Exhibits

- A. Medical Records
- B. Deposition of Dr. Rayden Cody

II: Defense Exhibits:

- A. Curriculum vitae of Dr. John Johansson
- B. Affidavit dated July 25, 2006

III: Claimant's exhibit:

- A. Curriculum vitae of Dr. Rayden Cody

## **FINDINGS OF FACT:**

1. In March 2004 and April 2005 Claimant was an employee and the Montpelier School District his employer within the Vermont Workers' Compensation Act.
2. Cambridge Integrated Services provided workers' compensation insurance for the Montpelier School District between March 2004 and June 2004.
3. In July 2004, the Vermont School Board Insurance Trust (VSBIT) began providing workers' compensation insurance for the Montpelier School District.
4. Claimant began working as a custodian for the Montpelier schools in December 2001. His duties included dusting, mopping, cleaning floors, bathrooms, locker rooms, the auditorium and some classrooms. During the school year, he worked from midnight to 8:00 a.m., during the summer from 2:00 p.m. to 10:00 p.m.
5. About ten years before the incidents at issues here, Claimant hurt his back when he slipped at a bowling alley. In March of 1999 Dr. Christopher Merriam characterized Claimant's low back pain as chronic. At that time, Claimant complained of a worsening of symptoms with sharp pain in his low back. Dr. Merriam diagnosed Claimant's condition at the time as muscular, although he also noted that a CT scan revealed a disc bulge at L4-L5.
6. On March 22, 2004, Claimant was lifting a trash bag at work for the school district when he felt inguinal and back pain.
7. As a result of the lifting incident, Claimant had a hernia and low back pain. He sought medical care, was taken out of work and received physical therapy. In April 2004 Claimant had surgery to repair the inguinal hernia.
8. Claimant's initial attempt to return to work failed, but he was able to return to full duty in June 30, 2004 after he demonstrated in physical therapy that he could lift fifty pounds without difficulty.
9. On November 10, 2004, at the carrier's request, Claimant had an independent medical examination with Dr. Jonathan Fenton who determined that Claimant had not yet reached medical end result. At Dr. Fenton's recommendation, Claimant had SI joint injections.
10. In March 2005, Claimant was released medically for overtime work "as tolerated."

11. In April 2005, while Claimant was still treating with Dr. Fenton, he was working on a platform in a music room changing filters, a job that necessitated climbing a ladder. After changing a filter, Claimant was stepping from the platform to the ladder when he heard a snap in his back, and felt as though he was being stabbed. In addition, he had pain, numbness and weakness in his right lower extremity.
12. Claimant was again taken out of work and treated with physical therapy. He has not returned to work since.
13. Dr. Peterson, who recommended physical therapy, questioned whether there was a behavioral component to Claimant's back pain.
14. Records demonstrate physicians' concerns about Claimant's use of narcotics. For example, a June 2005 note by Dr. Ruth Crose referred to Claimant's history of mixed substance abuse and heavy alcohol use.
15. In May 2005, a physical therapist noted that Claimant had not been attending physical therapy consistently and questioned whether he would benefit from further therapy.
16. In August 2005, Dr. Peterson recommended a work hardening program with a behavioral component.
17. A September 26, 2005 MRI revealed minor dehydration at L3-4, L4-5 and L5-S1 and a slight bulge at L5-S1.
18. Claimant treated at the Vermont Center for Occupational Rehabilitation under the direction of Dr. John Johansson from November 21, 2005 until February 9, 2006.
19. During the five-week program, Claimant first underwent a behavioral medicine and pain management evaluation. He then had extensive physical therapy, pool therapy, training on body mechanics and posture and instruction on how to perform the work of custodian ergonomically. The physical therapy portion of the program was scheduled for three sessions each week for the five weeks. Claimant missed eight of the sessions. He also missed several of the behavioral medicine components.
20. On February 9, 2006, Dr. Johansson placed Claimant at medical end result with a 5% whole person rating and released him to work at medium duty work. In the final evaluation for the program Dr. Johansson noted that Claimant had "absence issues."
21. In March 2006, Dr. Merriam diagnosed Claimant's problem as likely ligamentous. He recommended aerobic exercises, stretching and physical therapy.
22. The school district offered to modify Claimant's job to make it consistent with a medium duty work capacity.

23. Claimant then returned to the Plainfield Health Center with significant complaints of pain and asked for another referral. On that referral he went to Dr. Rayden Cody at the Spine Institute of New England who is an expert in the field of interventional pain management.
24. The drug test Dr. Cody ordered was positive for several substances. Yet, Claimant denied any drug use.
25. Dr. Cody noted a high intensity zone in Claimant's MRI that he opined was the source of Claimant's pain. In Dr. Cody's opinion, its source was either disc or facet. On examination, he noted that Claimant's spinal flexion was worse than his extension, suggesting a disc source of the pain.
26. Dr. Cody recommended a bundle branch block (BBB) to determine whether the facet joint was the pain source. If the result proved positive, he would then recommend radio frequency ablation (RFA) to treat the pain. According to Dr. Cody, these procedures help a significant number of patients. Although they do not always work, "for the most part they don't cause damage..." explained Dr. Cody.
27. If the bundle branch block were negative, Dr. Cody would recommend a discogram to determine if the disc is the source for the pain. If so, he would recommend interdiscal electro thermal therapy, known by its acronym IDET.
28. Dr. Cody determined that Claimant's past narcotic use would not affect his opinion regarding the recommended procedures.
29. Dr. Jerry Tarver at Fletcher Allen Health Care Division of Pain Management agreed with the medial BBB followed by RFA or discogram followed by IDET.
30. The procedure recommended by Dr. Cody is qualitatively different from the pain management program Claimant underwent under Dr. Johansson's supervision.
31. Dr. Cody opined that the work related incident aggravated Claimant's preexisting disc desiccation condition (dehydration in the discs).
32. Dr. Johansson opined that the radiofrequency ablation would have a low likelihood of relieving Claimant's pain or improving his functional status. He attributes Claimant's pain to degenerative disc disease, not to facets.
33. Doctors Cody and Johansson agreed that the second work related incident aggravated his previous injury or caused a new injury. The opinions were based on the facts that Claimant was able to return to work full duty after the first injury, but not after the second; that he was able to continue with the physical activities after the first injury, but not after the second; and that he was on stronger pain medications after the second injury. Overall, he was worse off after the second injury.

34. In June 2006 Claimant was involved in a physical altercation. He was intoxicated at the time. Dr. Cody opined that the incident had no effect on his opinion.
35. Finally, Dr. Cody explained that Claimant is in considerable pain. He proposes to intervene regardless of a history of narcotic use.

### **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 (1963). 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. A medical treatment is compensable if it is reasonable and causally related to a work related injury. 21 V.S.A. § 640(a).
4. Defendants make much of the Claimant's narcotic use in urging the Commissioner to deny this claim. Ironically, that is one factor that supports the progressive steps outlined by Dr. Cody. He convincingly testified that Claimant is entitled to pain relief despite that history. If the treatment is successful, any prescriptions for the narcotics may be reduced or stopped completely. And, of course, such use certainly will be monitored during treatment.
5. Claimant needed further intervention for pain relief before the 2006 physical altercation. Therefore, that incident cannot operate to defeat this claim.
6. Accordingly, Claimant has proven that the treatment proposed by Dr. Cody is reasonable.
7. Next is the question whether Claimant's condition is an aggravation or recurrence, a dispute on which the most recent carrier, VSBIT, has the burden of proof because pursuant to 21 V.S.A. § 662(c), "the employer or insurer at the time of the most recent personal injury ...shall have the burden of proving another employer's or insurer's liability." *Farris v. Bryant Grinder*, 177 Vt. 456, 461 (2005).
8. "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. WC Rule 2.1110. "Recurrence" means the return of symptoms following a temporary remission. Rule 2.1312.; see also *Pacher v. Fairdale Farms* 166 Vt. 626, 629 (1997) (mem).

9. Facts this Department examines to determine if an aggravation occurred, with the greatest weight being given the final factor, are whether: 1) a subsequent incident or work condition destabilized a previously stable condition; 2) the claimant had stopped treating medically; 3) claimant had successfully returned to work; 4) claimant had reached an end medical result; and 5) the subsequent work contributed independently to the final disability. *Trask v. Richburg Builders*, Opinion No. 51-98WC (1998).
10. Most factors devolve toward aggravation in this case. Claimant's stable condition before the 2005 incident was destabilized when he moved from the platform to the ladder at the school and felt excruciating pain. Although he had not stopped treating medically, Claimant had successfully returned to full time, full duty work. Although he had not been placed at medical end result officially before the 2005 incident, his condition had reached a plateau. Finally, the 2005 incident contributed to the Claimant's final disability as each doctor clearly opined.
11. Therefore, VSBIT is the responsible carrier because Claimant suffered an aggravation under its watch.

**ORDER:**

Based on the foregoing findings of fact and conclusions of law, VSBIT is ORDERED to adjust this claim, including the payment for the diagnostic work and treatment proposed by Dr. Cody.

Dated at Montpelier, Vermont this 20<sup>th</sup> day of December 2006.

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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.