**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

| | |
|---|---|
| Glenn Ashley | Opinion No. 27-11WC |
| v. | By: Jane Woodruff, Esq.<br>Hearing Officer |
| R.E. Michel Co. | For: Anne M. Noonan<br>Commissioner |
| | State File Nos. AA-51728; W-02517 |

## RULING ON DEFENSE MOTIONS FOR SUMMARY JUDGMENT

**APPEARANCES:**

William Skiff, Esq., for Claimant
Robert Cain, Esq., for Defendant U.S. Fire Insurance Co.
David Berman, Esq., for Defendant PMA Insurance Co.
Tammy Denton, Esq., for Defendant N.H. Insurance Co.

**ISSUE PRESENTED:**

Do genuine issues of material fact exist as to whether Claimant suffered any compensable work-related injuries during the periods of coverage provided by either PMA Insurance or N.H. Insurance Co.?

**FINDINGS OF FACT:**

For the purposes of these motions, the following facts are not disputed:

1. Claimant worked for many years at Vermont Paint Company. When he left that job in 2003, he complained of back pain. Claimant next worked for R.E. Michel Co., where he remained until August 5, 2008.

2. On August 24, 2004 Claimant suffered a low back injury while lifting an oil tank onto a cart. Defendant U.S. Fire Insurance Co. (U.S. Fire), R.E. Michel's insurance carrier at the time, accepted the claim (State File No. W-2517) as compensable and paid workers' compensation benefits accordingly.

3. From December 31, 2004 until December 30, 2007 Defendant PMA Insurance Co. (PMA) insured R.E. Michel. During this coverage period, on February 18, 2005 Claimant suffered a work-related injury to his cervical spine. Defendant PMA accepted this injury (State File No. W-58278**)** as compensable and paid workers' compensation benefits accordingly.

4. N.H. Insurance Co. insured R.E. Michel from December 31, 2007 through August 5, 2008, Claimant's last day of work for R.E. Michel. On that day, Claimant presented to his primary care physician, Dr. King, complaining of low back pain. Dr. King diagnosed degenerative changes in Claimant's lumbar spine, which she attributed to two work-related activities – riding in the R.E. Michel truck, which continuously jostled his back, and lifting.

5. After leaving R.E. Michel's employment in August 2008, Claimant filed a third workers' compensation claim (State File No.AA-51728**)**. Claimant alleges that over time he suffered a gradual onset injury causally related to his work for R.E. Michel. He does not allege any specific date of onset.

6. As treatment for his low back pain, in July 2009 Claimant underwent a two-level (L3-5) lumbar fusion surgery with Dr. Braun, an orthopedic surgeon. The surgery was unsuccessful, and Claimant did not achieve a solid fusion. Dr. Braun performed revision surgery in April 2010 to repair the fusion.

*Independent Medical Examinations*

7. At Defendant U.S. Fire's request, in November 2004 Claimant underwent an independent medical examination with Dr. Johansson, an osteopath. The purpose of Dr. Johansson's examination was to determine the extent of Claimant's August 2004 lifting injury. Dr. Johansson concluded that Claimant had experienced an acute exacerbation of his pre-existing lumbar degenerative disc disease as a result of that injury.

8. Since filing his August 2008 workers' compensation claim, Claimant has undergone the following independent medical examinations:

- Dr. Johansson re-evaluated Claimant in September 2008, this time at the request of N.H. Insurance. Although it is unclear whether he did so to the required degree of medical certainty, Dr. Johansson identified the following factors as contributing in equal measure to Claimant's condition as of August 2008:

  (a) Claimant's work activities at R.E. Michel, especially sitting for long periods of time during the year prior to leaving that job in August 2008;

  (b) Claimant's pre-existing degenerative disc disease; and

  (c) The combination of Claimant's smoking, his failure to complete work hardening after his 2004 injury and his failure to maintain a home exercise program.

- Dr. Wieneke, a board certified orthopedic surgeon, evaluated Claimant in February 2009 at the request of Defendant N.H. Insurance. He concluded that Claimant's medical condition as of August 2008 was neither caused nor aggravated by his work activities during the time that R.E. Michel employed him. Rather, Dr. Wieneke attributed all of Claimant's current symptoms to his chronic, progressive degenerative disc disease.

- Dr. Bucksbaum, a board certified physiatrist, evaluated Claimant in October 2009 at the request of Claimant's attorney. He concluded that Claimant's August 2004 work injury (which occurred while Defendant U.S. Fire was on the risk) destabilized his pre-existing degenerative disc disease and accelerated his need for the fusion surgeries he underwent in 2009 and 2010.

- Dr. Glassman, also a board certified physiatrist, evaluated Claimant in November 2010 at the request of Defendant U.S. Fire. As Dr. Wieneke had, he concluded that there was no causal link between Claimant's work at R.E. Michel and his current complaints.

- Most recently, Dr. Genarro, an orthopedic surgeon, evaluated Claimant at the request of Defendant U.S. Fire in July 2011. Dr. Gennaro's report is not yet available.

9. At the time the pending summary judgment motions were filed, Dr. Bucksbaum's deposition, which was scheduled for July 15, 2011, had not yet occurred. Dr. Gennaro's independent medical examination was scheduled for the same day, and as noted above, his report has yet to be produced.

**DISCUSSION:**

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The nonmoving party is entitled to all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 242 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of facts offered by either party or the likelihood that one party or another might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115 at ¶15.

2. Defendants PMA and N.H. Insurance both seek summary judgment in their favor. Both assert that even viewed in the light most favorable to the non-moving parties, the medical evidence is insufficient to establish any work-related connection between Claimant's condition after August 2008 and his work activities during their respective policy periods. Rather, both assert that the symptoms that led to Claimant's 2009 and 2010 fusion surgeries are attributable solely to the natural progression of his pre-existing degenerative disc disease.[1]

3. Claimant and Defendant U.S. Fire oppose both summary judgment motions. U.S. Fire cites to Dr. Johansson's opinion as evidence that Claimant's work activities during the final three and a half years of his employment for R.E. Michel, when first Defendant PMA and then Defendant N.H. Insurance provided coverage, contributed to his medical condition after August 2008. Claimant cites as well to Dr. King's findings as raising factual issues regarding the effect of Claimant's work activities, particularly lifting and driving, on his condition. On these grounds, both argue that summary judgment in favor of either PMA or N.H. Insurance is inappropriate.

4. Alternatively, both Claimant and Defendant U.S. Fire assert that because material facts may yet be discovered through pending discovery, it would be premature to order summary judgment in any party's favor at this point in the proceedings. Both identify Dr. Bucksbaum's recent deposition, which did not occur until after the pending motions were filed, and Dr. Gennaro's recent independent medical examination, the report of which has not yet been produced, as involving information that is likely to lead to the discovery of additional material facts relevant to the disputed issues in this claim.

[1] Should its own motion be denied, N.H. Insurance also asserts that genuine issues of material fact exist as to whether either the cervical injury that Claimant suffered during PMA's policy period and/or his work activities during that time contributed to his condition after August 2008, such that PMA's motion for summary judgment must be denied as well.

5. Under V.R.C.P. 56(c), summary judgment is mandated where, *after adequate time for discovery,* a party fails to make a sufficient showing to establish all the essential elements of its case. *Doe v. Doe*, 172 Vt. 533 (2001); *Poplaski v. Lamphere,* 152 Vt. 251, 254-255 (1989) (emphasis added).

6. I concur with Claimant's and Defendant U.S.Fire's assertion that there has not yet been adequate time for discovery to be completed, and that therefore summary judgment is premature.

7. Even considering the evidence as currently presented, furthermore, sufficient factual issues exist so as to preclude summary judgment in favor of either Defendant PMA or Defendant N.H. Insurance. Both Dr. Johansson's opinion and Dr. King's findings point to Claimant's work activities during these defendants' policy periods as factors contributing to his disability after August 2008. Whether either of these expert's opinions will be sufficiently credible to overcome those posited by Drs. Wieneke, Glassman and/or Bucksbaum is an issue for hearing, not summary judgment.

**ORDER:**

The Motions for Summary Judgment filed by Defendants PMA Insurance Co. and N.H. Insurance Co. are hereby **DENIED**.

Dated at Montpelier, Vermont, this _____ day of September 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.