Robert Gadwah v. Ethan Allen (October 20, 2011)

STATE OF VERMONT
DEPARTMENT OF LABOR

Robert Gadwah	Opinion No. 33-11WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
Ethan Allen	For: Anne M. Noonan Commissioner
	State File No. P-09814

OPINION AND ORDER

Hearing held in Montpelier, Vermont on April 1, 2011
Record closed on June 22, 2011

APPEARANCES:

William Skiff, Esq., for Claimant
Wesley Lawrence, Esq., for Defendant

ISSUE:

Was Claimant's January 2009 fusion revision surgery causally related to his 1999 work injury?

EXHIBITS

Joint Exhibit I:	Medical records
Claimant's Exhibit A:	New Hampshire Department of Labor decision, *Gadwah v. Weir Tree Farms,* Case #63734
Claimant's Exhibit B:	*Curriculum vitae,* Andrew Forrest, M.D.
Defendant's Exhibit 1A:	Letter to Attorneys Skiff and Lawrence, July 28, 2009
Defendant's Exhibit 1B:	Letter to Attorneys Fox and Seeley, February 23, 2008
Defendant's Exhibit 1C:	Letter from Claimant, June 4, 2007
Defendant's Exhibit 1D:	Letter to Attorney Lawrence, March 18, 2010
Defendant's Exhibit 2	Functional Capacity Evaluation, June 19, 2002
Defendant's Exhibit 3:	Functional Capacity Evaluation, February 9, 2005
Defendant's Exhibit 4:	Correspondence from Dr. Levy, April 25, 2010 and June 9, 2009
Defendant's Exhibit 5:	Letters to Claimant, February 29 and October 16, 2008
Defendant's Exhibit 6:	Weir Tree Farms website information
Defendant's Exhibit 7:	Weir Tree Farms payroll records
Defendant's Exhibit 8:	Social Security File, March 2011 (CD)
Defendant's Exhibit 9:	Formal Hearing Audio Transcript, March 2011 (CD)

Defendant's Exhibit 10: Medical records (CD)
Defendant's Exhibit 11: Deposition of Claimant, April 16, 2010

CLAIM:

All workers' compensation benefits to which Claimant proves his entitlement as a consequence of his January 29, 2009 surgery;

Interest, costs and attorneys 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 Defendant was his employer as those terms are defined in Vermont Compensation Act.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.

3. Claimant has worked at manual labor for his entire life. He completed the ninth grade in school. By his own characterization, he does not read or write very well. Any correspondence between Claimant and others related to this claim was written by his wife but signed by Claimant.

Claimant's 1999 Work Injury, Subsequent Medical Course and 2001 Fusion Surgery

4. Claimant worked at Defendant's Beecher Falls plant from 1989 until approximately 2002. His duties there consisted of pulling boards and piling lumber. The work required constant lifting and twisting.

5. On October 12, 1999 Claimant injured his lower back at work. Defendant accepted the injury as compensable and began paying workers' compensation benefits accordingly.

6. Claimant was diagnosed with herniated discs at both L4-5 and L5-S1. Initially he treated conservatively for his injury. His symptoms, which included both low back pain and pain radiating down his legs, failed to abate. In February 2000 his treating orthopedic surgeon, Dr. Howard, surgically removed the herniated disc material at both levels.

6. Claimant's symptoms failed to resolve with surgery. He continued to complain of low back pain radiating down both legs, with swelling and muscle spasms as well. Diagnostic imaging studies in March 2001 revealed recurrent disc herniations at L4-5 and L5-S1. As treatment, Dr. Howard recommended a two-level disc fusion.

7. Claimant underwent Dr. Howard's disc fusion surgery on May 17, 2001. Defendant acknowledged that the treatment was reasonable, necessary and causally related to Claimant's 1999 work injury, and therefore paid workers' compensation benefits accordingly.

8. Unfortunately, Claimant never achieved complete relief of his symptoms following the May 2001 fusion surgery. In fact, as he credibly testified, both his low back and leg pain continued as before. Claimant managed his pain as best he could, with prescription pain medications and soaking baths. He also reduced his activity level, particularly as to recreational pursuits that he had enjoyed previously, such as hunting, fishing and snowmobiling.

9. The medical records corroborate at least some of Claimant's ongoing complaints during this period, though perhaps not the same level of activity restrictions. To the contrary, functional capacity evaluations in both 2002 and 2005 determined that Claimant was capable of performing full time work at a heavy physical demand level.

10. Claimant worked at a variety of jobs following the 2001 fusion surgery, none for any extended period of time. He worked as a dishwasher at a local restaurant, on a roofing job and at a rock-crushing machine. He also did mowing and other small jobs around the house. Claimant was never pain-free during this time and often worked less than full time. He acknowledged that he sometimes downplayed his symptoms to Dr. Howard, however, so that Dr. Howard would release him to work without restrictions. As Claimant described it, "I took my pills and went to work." I find this testimony to be credible in all respects.

11. Claimant's wife fully corroborated Claimant's testimony, both as to his ongoing symptoms and as to his desire to keep working nevertheless. She often accompanied Claimant on his medical appointments, and testified that Dr. Howard's notations to the contrary, Claimant was never "one hundred percent" or "pain free." I find this testimony to be credible.

12. At Defendant's request, in December 2002 Claimant underwent an independent medical examination with Dr. Gennaro. Dr. Gennaro determined that Claimant had achieved a "good result" from fusion surgery and was now at end medical result. He rated Claimant with a 23 percent whole person permanent impairment referable to his 1999 work injury.

13. Notwithstanding Dr. Gennaro's end medical result determination, Dr. Howard had been questioning for some time whether Claimant's fusion was in fact solid. Periodic x-rays from July 2001 through October 2003 indicated that it was not. As early as March 2003 Dr. Howard postulated that Claimant's ongoing symptoms might be due to a non-union, and that he might require additional surgery to further stabilize his lumbar spine.

14. Claimant did not treat for his low back symptoms from April 2005 until May 2006. He testified that his pain complaints were unchanged during this period. To his mind, Dr. Howard appeared to be offering little in terms of treatment. Rather than continuing with periodic office visits, Claimant chose instead to self-treat with pain medications and hot baths.

15. Claimant returned to Dr. Howard in early May 2006, once again complaining of swelling in his lower back. As before, x-rays indicated that his fusion was not solid, with slight motion evident particularly at the L4-5 level.

Claimant's Employment at Weir Tree Farms and Renewed Treatment Thereafter

16. In June 2006 Claimant began working at Weir Tree Farms in Colebrook, New Hampshire. Claimant had been born and raised nearby, and both he and his parents were friends of the Weir family. Claimant's job duties at the tree farm included spreading fertilizer and trimming, cutting and boxing trees. Claimant worked through the 2006 holiday season, averaging close to 40 hours weekly. His employment terminated on January 6, 2007.

17. Claimant testified that his work at the tree farm did not change the frequency or severity of the pain in his lower back and legs in any way. Although his duties required bending and lifting, he had a helper to assist him and was able to sit down and rest when necessary. Nor did Claimant recall any specific aggravating incident related to his employment there. I find this testimony to be credible.

18. Shortly after his job at the tree farm ended, on January 17, 2007 Claimant returned to Dr. Howard. Dr. Howard's office note reflects that "without incident" Claimant's symptoms, consisting of low back pain with radicular symptoms into his legs, had worsened over the past few weeks. X-rays of his lumbar spine were again indicative of a non-union at L4-5. As he had in the past, Dr. Howard again suspected that Claimant's symptoms might be attributable to a failed fusion at that level.

19. A subsequent MRI study confirmed that this was in fact the case. In addition, the MRI revealed a new disc herniation at L2-3. There is no credible medical evidence linking this more recent disc herniation in any way either to Claimant's 1999 work injury and/or to his 2001 fusion surgery. To the contrary, the medical evidence establishes that the L2-3 herniation was caused either by Claimant's work activities at Weir Tree Farms or by naturally occurring degenerative disc disease.

20. At Dr. Howard's recommendation, initially Claimant treated conservatively for his worsened symptoms. Defendant resisted paying for the treatment, however, on the grounds that Claimant's condition was referable to his work at Weir Tree Farms and therefore not its responsibility. In order to clarify this issue, at Defendant's request Claimant underwent an independent medical examination with Dr. Davignon in May 2007. Dr. Davignon previously had examined Claimant in December 2006, also at Defendant's request.

21. In the context of his December 2006 evaluation Dr. Davignon had concluded that all of the treatment Claimant had received up to that point was reasonable, necessary and causally related to his 1999 work injury. As for further treatment, Dr. Davignon had suggested that if concern remained as to whether or not Claimant's fusion was solid, additional diagnostic imaging studies would not be unreasonable.

22. This time, Dr. Davignon acknowledged the possibility that Claimant's new L2-3 disc herniation might be attributable to his tree farm work. It was equally plausible, however, that his condition "could also be caused by an aggravation of his prior [1999] injury and subsequent surgical intervention." In raising this possibility, Dr. Davignon specifically observed that Claimant had never been asymptomatic since the time of his 2001 fusion surgery.

23. Despite conservative treatment, Claimant's symptoms continued to worsen. Having lost faith in Dr. Howard, in September 2008 Claimant sought a surgical consult with another orthopedic surgeon instead, Dr. Brummett. Once again, diagnostic imaging studies revealed non-union of the 2001 fusion, particularly at the L4-5 level, as well as the more recent disc herniation at L2-3. Dr. Brummett recommended surgery as treatment for both conditions.

24. Claimant underwent Dr. Brummett's surgery on January 26, 2009. As the operative record reflects, the surgery encompassed two separate procedures – (a) decompressing the L2-3 nerve root structures; and (b) revising the non-union at L4-5 to provide further stabilization in that area. It is not apparent from either the operative record itself or from Dr. Brummett's office notes that he considered either procedure to be of any higher priority than the other.

25. Since Dr. Brummett's surgery Claimant's symptoms have improved significantly. He still experiences some leg weakness, but his pain level is dramatically reduced. Where he used to take soaking baths and pain medications daily, now he does so only once or twice monthly. His activity level has increased as well.

The New Hampshire Workers' Compensation Claim

26. Defendant having denied responsibility for Claimant's renewed treatment after May 2007 on the grounds that he had suffered a new injury at Weir Tree Farms, at some point thereafter Claimant filed a workers' compensation claim against that employer in New Hampshire. He did so at the advice of his then-attorney, even though he continued to doubt that his symptoms were in any way attributable to his work there. Claimant testified to that effect at the formal hearing before the New Hampshire Department of Labor. Evidence also was presented by Dr. Sobel, an orthopedic surgeon, who reached the same conclusion after reviewing Claimant's medical records.

27. After considering the evidence, in February 2010 the New Hampshire Department of Labor upheld the denial of Claimant's claim against Weir Tree Farms on the grounds that he had failed to sustain his burden of proving any work-related injury during his employment there.

Expert Medical Opinions

28. Both Claimant and Defendant presented expert medical opinions as to the causal relationship, if any, between Claimant's January 2009 surgery and either his 1999 work injury or his Weir Tree Farms employment. Dr. Forrest concluded that the 2009 surgery was necessitated at least in part by Claimant's 1999 injury and the failed fusion that followed. Dr. Levy concluded that the 2009 surgery would not have occurred but for Claimant's L2-3 disc herniation, a condition that was in no way related to his 1999 injury.

(a) Dr. Forrest

29. Dr. Forrest is board certified in physical medicine and rehabilitation. He performed an independent medical examination, consisting of both a physical examination and a medical records review, in October 2008.

30. To a reasonable degree of medical certainty, Dr. Forrest concluded that Claimant was suffering from two separate conditions in his lumbar spine. One, the L2-3 disc herniation, did not become evident until 2007 and most likely was caused by Claimant's work at Weir Tree Farms. In Dr. Forrest's opinion, therefore, any surgery directed at that level would be the responsibility of that employer.

31. As for the failed fusion at L4-5 and/or L5-S1, Dr. Forrest concluded that any surgery directed at revising the non-union at those levels would be Defendant's sole responsibility. In reaching this conclusion, Dr. Forrest noted first, that diagnostic imaging studies had indicated motion at those levels before Claimant's tree farm employment even began. Second, Claimant had complained of back and leg pain consistently since his original 2001 fusion. More likely than not, therefore, the dysfunction at both L4-5 and L5-S1 was attributable solely to Claimant's 1999 injury, and not at all to his work at the tree farm. This analysis is amply supported by the medical records and I find it to be credible in all respects.

32. Dr. Forrest reiterated his opinions in October 2009, after reviewing the medical records relating to Dr. Brummett's January 2009 surgery. In particular, Dr. Forrest concluded that the portion of Dr. Brummett's surgery that related specifically to the non-union revision at L4-5, that is, "the L4-5 posterior arthrodesis, L4-5 posterior instrumentation [and] L4-5 local autologous bone grafting," were all attributable to Claimant's 1999 work injury.

(b) *Dr. Levy*

33. Dr. Levy is a board certified neurologist. He conducted a medical records review, but did not personally examine Claimant. Based on his review, Dr. Levy concluded that the primary purpose of Dr. Brummett's January 2009 surgery had been to address Claimant's L2-3 disc herniation, not to revise his failed fusion. Noting that two functional capacity evaluations had rated Claimant as capable of heavy work after his 2001 fusion, and finding no definitive evidence of ongoing symptoms attributable to it, Dr. Levy reasoned that the fact that the fusion had failed was clinically irrelevant.

34. I can find no support in the medical records for Dr. Levy's assertion that Dr. Brummett's intent at the time of the January 2009 surgery was to treat Claimant's L2-3 disc herniation, and that the non-union revision procedure was merely incidental to that. As for Dr. Levy's claim that the failed fusion was clinically irrelevant, I find more credible Dr. Forrest's assertion, as supported by the medical records, that following the 2001 fusion Claimant continued consistently to complain of symptoms attributable to his 1999 injury but still uncorrected by that surgery. It is clear both from this evidence and from Claimant's own credible testimony that the failed fusion was in fact clinically relevant.

CONCLUSIONS OF LAW:

1. Defendant frames this claim as an aggravation/recurrence dispute, or alternatively, as one involving an intervening cause. It asserts that Claimant's January 2009 surgery was necessitated not by his failed L4-5 fusion but rather by his L2-3 disc herniation, a condition that resulted either from his work at Weir Tree Farms from June through December 2006 or from naturally occurring degenerative disc disease.

2. Vermont's workers' compensation rules define an aggravation as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." Workers' Compensation Rule 2.1110. A recurrence is defined as "the return of symptoms following a temporary remission." Workers' Compensation Rule 2.1312.

3. In *Trask v. Richburg Builders*, Opinion No. 51-98WC (August 25, 1998), the Commissioner identified five factors that typically will support a finding of aggravation, thus severing the causal connection back to an earlier injury:

   (1) Whether there has been a subsequent incident or work condition which destabilized a previously stable condition;

   (2) Whether the claimant had stopped treating medically;

   (3) Whether the claimant had successfully returned to work;

   (4) Whether the claimant had reached an end medical result; and

   (5) Whether the subsequent incident or work condition contributed independently to the final disability.

   In accordance with the Vermont Supreme Court's holding in *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997), the fifth factor – whether the subsequent incident or work condition contributed independently to cause the final disability – is accorded the greatest weight. *Id.*

4. There is no question here but that Claimant was declared to have reached an end medical result for his 1999 work injury in December 2002, some months after his May 2001 fusion surgery. There also is little question but that Claimant was able to return to work thereafter, even notwithstanding his ongoing symptoms. And although Claimant continued to see Dr. Howard regularly for some time after his 2001 surgery, for the most part the medical records document only ongoing complaints, but no meaningful treatment to address them until January 2007. Arguably, therefore, these factors all point to an aggravation or new injury for which Defendant might not be responsible.

5. The first *Trask* factor points away from any aggravation. Clearly there is no evidence of any specific new incident that might account for Claimant's worsened symptoms in January 2007. Nor is there any evidence that Claimant's work at Weir Tree Farms, which admittedly involved some amount of bending and lifting, in any way destabilized the condition for which Defendant was responsible, that is, the prior fusions at L4-5 and L5-S1. Not even Defendant's expert, Dr. Levy, so concluded.

6. The key to this dispute rests with the fifth factor, that is, whether Claimant's work at Weir Tree Farms contributed independently to cause his need for surgery in January 2009. With Dr. Levy's opinion as support, Defendant argues that the true intent of Claimant's 2009 surgery was to address his L2-3 disc herniation, a condition that even Claimant's expert acknowledges was not causally related either to his 1999 injury or to his 2001 fusion.

7. 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 (September 17, 2003).

8. With strong reliance on the third factor, I conclude that Dr. Levy's opinion as to the medical reasoning behind Claimant's January 2009 surgery is not credible. I simply can find no support in the record for his assumption that Dr. Brummett's surgical motivation was any more to address Claimant's L2-3 disc herniation than it was to correct his failed fusion at L4-5. In fact, I conclude that the opposite is more likely true. Claimant consistently had complained of symptoms at the L4-5 and L5-S1 levels both before and after his 2001 fusion, and certainly well before his tree farm employment even began. His wife credibly corroborated these complaints, and they were documented in the medical records as well. There is no reason to believe that Dr. Brummett would not have found these symptoms alone to be worthy of surgical intervention, even without the new herniation at L2-3.

9. I accept as more credible Dr. Forrest's opinion that the purpose of Claimant's January 2009 surgery was to address two conditions concurrently, neither one of higher priority than the other. To the extent that one of those conditions – the failed L4-5 fusion – was causally related to Claimant's 1999 injury, Defendant bears responsibility for both the medical charges and any resulting disability attributable thereto.[1]

10. I conclude that Claimant has sustained his burden of proving that his 2009 non-union revision surgery was causally related to his 1999 injury, and not to any subsequent aggravation or intervening event.

11. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorneys fees. In accordance with 21 V.S.A. §678(e) Claimant shall have 30 days from the date of this opinion to submit his claim.

[1] To the extent that the costs associated specifically with the surgical treatment of Claimant's L2-3 disc herniation reasonably can be separated out from those attributable to revising the non-union at L4-5, I acknowledge that Defendant bears no responsibility for them.

ORDER:

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

1. All workers' compensation benefits to which Claimant proves his entitlement as causally related to the January 2009 surgical revision of his failed L4-5 fusion; and

2. Costs and attorneys fees in amounts to be determined in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 20th day of October 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.