

T. J. v. Fyles Brothers, Inc.

(December 13, 2006)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

T. J.

Opinion No. 50-06WC

v.

By: Margaret A. Mangan  
Hearing Officer

Fyles Brothers, Inc.

For: Patricia Moulton Powden  
Commissioner

State File No. T-09491

**RULING ON DEFENDANT MASSAMONT INSURANCE COMPANY'S MOTION  
FOR SUMMARY JUDGMENT AND DEFENDANT GUARANTY FUND'S CROSS  
MOTION FOR SUMMARY JUDGMENT**

Defendant Massamont Insurance Company (Massamont) moves for summary judgment, asserting that no genuine issue of material fact exists that would demonstrate a causal connection between the Claimant's August 17, 2003 injury, and the Claimant's December 20, 2005 surgery.

Defendant Guaranty Fund (Guaranty Fund) enters a Cross Motion for summary judgment. Guaranty Fund first argues that there is no genuine issue of material fact to show a causal connection between the Claimant's May 30, 2002 injury and the Claimant's December 20, 2005 surgery. This Defendant also asserts that the December 2005 surgery was not a reasonable method of treatment for the Claimant's condition.

**BACKGROUND:**

1. On May 30, 2002, the Claimant suffered a work related injury while working for his employer, Fyles Brothers, Inc. The insurer on the risk for this injury is the Guaranty Fund.
2. On August 22, 2002, an MRI showed a left paracentral disc herniation of the L5-S1 level, left lateral recess narrowing and a likely impingement upon the left S1 nerve root.
3. As a result of this injury, the Claimant experienced pain, dysesthesias and weakness in his back and lower limbs.
4. On September 20, 2002, Dr. Martin Krag performed a disc herniation excision on the Claimant. This procedure resulted in approximately 50% symptom improvement compared to the pre-operative symptoms.
5. The Claimant was able to gradually return to work full time after the September 20, 2002 surgery.

6. A March 21, 2003 EMG showed an L-5/ S-1 radiculopathy with reinervation.
7. On April 17, 2003, the Claimant and Dr. Krag discussed having a recurrent L-5/ S1 partial discectomy or discectomy plus fusion. That same day, the Claimant decided to have the surgery.
8. On or about August 17, 2003, the pain in the Claimant's back worsened after loading a truckload of pallets. Massamont Insurance was at risk at the time of this incident.
9. On August 25, 2003, Dr. Krag determined that the August 17, 2003 incident caused a "flare-up" of the Claimant's baseline symptoms. Dr. Krag's notes indicate that the Claimant was to proceed with a gradual return to activities.
10. After one week, the Claimant's back improved to the point where he could return to work.
11. From June 2004 through September 2004, the Claimant was out of work due to an unrelated medical condition.
12. On July 11, 2005, Dr. Krag noted that the Claimant had few brief "flare-ups" of symptoms at his job during the winter of 2004. These episodes were all fairly minor and resolved after a brief duration. Dr. Krag also noted that the Claimant had a gradual increase in soreness due to increased physical activity and a severe "flare-up" on June 20, 2005.
13. Dr. Krag's July 11, 2005 note characterizes Claimant's symptoms as low back pain, lower limb pain and dysethesias. He then notes, "these [symptoms] are a result of the 5/30/02 injury which resulted in disc herniation, which has resulted in the changes leading to the current situation."
14. The Claimant is taken out of work retroactively from June 20, 2005 through August 22, 2005.
15. Because the Claimant's symptoms continued without relief, Dr. Krag performed the surgery discussed in April 2003.
16. After examining the Claimant's medical records, Defendant Guardian Fund's medical expert Dr. Kenosh wrote that he was not convinced that the changes seen on MRIs after the 2002 discectomy are related to anything other than postoperative changes or changes due to the normal aging process. Dr. Kenosh also found that the December 20, 2005 surgery was not medically necessary.
17. In a February 2, 2006 letter to the Department, Dr. Krag wrote that the May 30, 2002 injury caused a left L5-S1 disk herniation and related symptoms, and the resulting degeneration lead to the fusion surgery on December 20, 2002.

## DISCUSSION:

Summary judgment will be granted if the moving party can show that there is no genuine issue as to any material fact, and that any party is entitled to judgment as a matter of law. V.R.C.P. 56. (c)(3); *Robertson v. Mylan Laboratories, Inc.* 176 Vt. 356, 362 (2004) (citing *White v. Quechee Lakes Landowners' Ass'n*, 170 Vt. 25, 28 (1999)). The facts are viewed in the light most favorable to the opposing party. *State v. G.S. Blodgett Co.*, 163 Vt. 175, 180 (1995)(citing *Hodgdon v. Mt. Mansfield Co.*, 160 Vt. 150, 158-59 (1992)). However, to survive the summary judgment motion, the nonmoving party must respond with specific facts that raise a genuine issue of material fact. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

“[W]here both parties have moved for summary judgment, each is entitled to the benefits of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists when the opposing party's motion is being judged.” *Payne v. Mount Mansfield Co.*, Opinion No. 47SJ-02WC (2002) (citing *Toy, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990)).

### Causation

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-- i.e., if the second accident did not causally contribute to the claimant's disability. *Pacher v. Fairdale Farms*, 166 Vt. 626, 627(1997). (citing *Mendoza v. Omaha Meat Processors*, 225 Neb. 771(1987); *In re Dundon*, 86 Or.App.(1987)). If, however, the second incident aggravated, accelerated, or combined with a preexisting impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an “aggravation,” and the second employer becomes solely responsible for the entire disability at that point. *Id.* at 627-28. (citing *Port of Portland v. Director, Office of Workers Compensation Programs*, 932 F.2d 836 (9th Cir.1991); *In re Dundon*, 739 P.2d at 1070; see *Jackson v. True Temper Corp.*, 151 Vt. 592, 595-96 (1989)*Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31, 35-36 (1980)).

In workers' compensation cases, where the causal connection between an accident and an injury is obscure and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).

Even after giving Defendant Guaranty Fund the benefit of all reasonable doubts and inferences, there remains no genuine issue of material fact to support a causal connection between the August 2003 back injury suffered by the Claimant and the December 20, 2005 back surgery for the following reasons. First, Dr. Krag, the surgeon who performed the 2005 fusion surgery, has repeatedly stated that the May 30, 2002 injury created the need for that surgery. In fact, he recommended that the Claimant have the procedure *before* the August 2003 injury occurred. As such, it is difficult to understand how further discovery could produce specific facts indicating how the August 2003 injury created the need for a surgery recommended four months earlier. *See A.E. v. Harvey Industries, Inc.*, Opinion No. 25-06WC (2006). Second, even if the Department were to accept Dr. Kenosh's opinion that the 2005 surgery was not medically necessary, this still does not create a genuine issue of material fact that could show a causal connection between the August 2003 injury and the 2005 surgery.

However, a genuine issue of material fact exists with respect to the existence of a causal link between the May 2002 injury and the December 2005 surgery. First, the Claimant's medical records consistently list the 2002 injury as the source of the Claimant's resultant back problems, including any "flare ups" including the August 2003 injury at issue. Second, Dr. Krag states that the degenerative changes suffered by the Claimant were a result of the 2002 injury, rather than the normal aging process or the prior back surgery as suggested by Dr. Kenosh. The level of complexity involved in this dispute creates a genuine issue requiring additional discovery and an opportunity to present medical evidence to the fact finder for a determination.

#### Reasonableness

In determining what is reasonable pursuant to 21 V.S.A. § 640(a), the decisive factor is not what the claimant desires or what he believes to be most helpful. Rather, it is what is shown by competent expert evidence to be reasonable to relieve the claimant's symptoms and maintain his functional abilities. *W.P. Madonna Corp.*, Opinion No. 18-06WC (2006). (citing *Quinn v. Emery World Wide*, Opinion No. 29-00WC (2000)).

A genuine issue of material fact exists regarding the reasonableness of the 2005 surgery. Guaranty Fund's medical expert has stated that the surgery was not medically necessary. By contrast, the Claimant's surgeon maintains that that the procedure was reasonable and appropriate treatment for the Claimant's condition. Consequently, this complex medical dispute also raises a genuine issue of material fact to be determined by the fact finder.

**CONCLUSION:**

The Defendant Massamont has successfully shown that no genuine issue of material fact exists to show a causal connection between the August 2003 injury and the December 2005 fusion surgery; therefore, the Defendant's motion for summary judgment is GRANTED.

The Defendant Guaranty Fund failed to meet its burden of proof under V.R.C.P. 56(c); therefore, its motion for summary judgment is DENIED.

Dated at Montpelier, Vermont this 13<sup>th</sup> day of December 2006.

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Patricia Moulton Powden  
Commissioner