

J. H. v. City of Burlington Fire Department

(August 9, 2005)

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

| | | |
|-------------------------------------|---|---------------------------|
| J. H. |) | Opinion No. 40A-05WC |
| |) | |
| |) | By: Margaret A. Mangan |
| v. |) | Hearing Officer |
| |) | |
| League of Cities and Towns for City |) | |
| of Burlington Fire Department |) | For: Patricia A. McDonald |
| |) | Commissioner |
| |) | |
| |) | State File No. U-07194 |

AMENDED ORDER

By order dated July 12, 2005, the defendant was ordered to pay medical and surgical benefits for treatment of claims; temporary total benefits; permanent partial benefits; attorney fees and litigation costs; and statutory interest from the date each benefit was due. As a result of clerical error, temporary total disability benefits are amended and shall be paid for six weeks (June 23, 2003 through August 2, 2003). Also as a result of clerical error, permanent partial disability benefits are amended and shall be paid in the amount of 11% whole person impairment to the spine for 60.5 weeks, at a rate of \$915.00 per week for a total of \$55,357.50. Finally, the total litigation costs are amended to include the court reporter's bill for the transcript of the preservation testimony of Dr. Gennaro, which was not received by claimant until after the findings were due.

Therefore the Opinion of July 12, 2005 is amended to include an order that defendant pay claimant:

- 1) Temporary total benefits from June 23, 2003 for six weeks, for a total of \$5462.00;
- 2) Permanent partial disability benefits based on 11% whole person impairment of the spine, for a total of \$55,357.50; and
- 3) Litigation costs of \$2,119.98.

All other aspects of the original order remain unchanged.

Dated at Montpelier, Vermont this ____ day of August 2005.

Patricia A. McDonald
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.

**STATE OF VERMONT
DEPARTMENT OF LABOR**

| | | |
|--------------------|---|---------------------------|
| James Hendry |) | Opinion No. 40-05WC |
| |) | |
| |) | By: Margaret A. Mangan |
| v. |) | Hearing Officer |
| |) | |
| City of Burlington |) | For: Patricia A. McDonald |
| |) | Commissioner |
| |) | |
| |) | State File No. U-07194 |

Pretrial conference held on December 20, 2005

Hearing held on May 12, 2005

Record Closed on May 31, 2005

APPEARANCES:

Heidi S. Groff, Esq. for the Claimant

John T. Leddy, Esq., for the Defendant

ISSUES:

1. Was the Claimant's back injury a result of his work-related injury?
2. If so, to what benefits is the Claimant entitled?
3. Is Claimant entitled to attorney fees and costs?

CLAIM:

1. Temporary Total Disability Benefits pursuant to 21 V.S.A. § 642 for the period of seven weeks following the surgery while claimant was temporarily totally disabled.
2. Permanent Partial Benefits pursuant to 21 V.S.A. § 648 for a DRE cervical Category III for 11% permanent partial impairment to the spine.
3. Medical and hospital benefits pursuant to 21 V.S.A. § 640, specifically but not limited to the L4-5 discectomy of June 23, 2003, and all related medical treatment.
4. Attorney's fees and costs pursuant to 21 678(a) and Rule 10.
5. Interest on all benefits as they become due pursuant to 21 V.S.A. § 664.

EXHIBITS:

Joint Exhibits

1. Complete Copy of Claimant's Medical Records and Bills; and
2. Two For 25 Wage Statements

Claimant's Exhibits

1. Medical Bills Fee Schedule
2. Employee Earning Record from Burlington Fire Department
3. C.V. of Dr. Gennaro
4. C.V. of Dr. Gunther
5. Video preservation testimony of Dr. Gunther and Dr. Gennaro on CD and transcripts same

Defendant's Exhibits

1. C.V. of Dr. Boucher
2. IME report of Dr. Boucher, dated February 9, 2005
3. WC Claim of Claimant, dated January 10, 1985
4. WC Claim of Claimant, dated October 30, 1988
5. WC Claim of Claimant, dated July 26, 1989
6. WC Claim of Claimant, dated December 3, 1990
7. WC Claim of Claimant, dated December 13, 2002
8. WC Claim of Claimant, dated May 10, 2004
9. WC Claim of Claimant, dated September 1, 2004
10. WC Claim of Claimant, dated February 16, 2004
11. Job description of Captain, Burlington Fire Department
12. Job description of Firefighter III, Burlington Fire Department
13. Claimant's time records at the Burlington Fire Department from February 2, 2003 to March 19, 2003
14. Thomas Chittenden Health Center Medical Records
15. Updated subjective complaint record of Chiropractor Dr. Bradley Weiss, dated October 5, 2001
16. Dr. Bradley Weiss Chiropractic plan of treatment, dated January 9, 2002
17. Dr. Bradley Weiss Chiropractic plan of treatment, dated August 2, 2002
18. Health problem form history, records of Dr. Peter Gunther, dated August 13, 2002
19. Dr. Bradley Weiss Chiropractic plan of treatment, dated August 28, 2002
20. Dr Mark Bradley claimant's history, dated September 25, 2002
21. MRI radiology report, dated May 16, 2003
22. FAHC operative report, dated June 23, 2003
23. Deposition of Peter Gunther, M.D., dated March 30, 2005
24. Deposition of Victor Gennaro, D.O., dated May 5, 2005

FINDINGS OF FACT:

1. City of Burlington Fire Department (Burlington Fire Department) was an “employer” as defined by the Vermont Workers’ Compensation Act (Act) at all relevant times and James Hendry, claimant, was an “employee” as defined by the Act at all relevant times.
2. Claimant began working for the Burlington Fire Department in 1979 and retired as a Captain in 2004.
3. Claimant rose up the ranks in the Burlington Fire Department, progressing in the following order: Firefighter I, Firefighter II, Firefighter III, Senior Firefighter, Lieutenant, and finally, Captain.
4. Throughout claimant’s career as a firefighter, he engaged in activities such as intense lifting for short intervals of time; carrying and moving heavy equipment; demolition work; rescues; and training activities. As a Captain, claimant’s duties took on a more supervisory role, including: directing the work of all firefighters at the scene until relieved by a senior officer; supervising the service of tools and equipment; supervising and assisting in salvage operations; and training and drilling subordinates.
5. At all times when employed by the Burlington Fire Department, claimant was subject to periods of heavy lifting and leg or torso twisting.
6. Claimant enjoyed recreational activities, such as snowmobile riding and motorcycle riding. Claimant did not snowmobile or motorcycle in excess in any given year.
7. Claimant owned three horses, which were fed twice a day. Claimant helped stack hay and carry hay for the horses.
8. Claimant heated his house with firewood, which required the stacking and carrying of firewood at home.
9. Prior to his early 2003 back pain, claimant reported several incidents of back pain. Some were work-related, while others were not. For example, in 2001, claimant reported to his health care provider an injury of the lower back after carrying a refrigerator. Also in 2001 and 2002, claimant reported lower back pain aggravated by lifting of hay bales and firewood. Claimant frequently saw health care providers about the pain, but they never required any significant medical treatment.
10. Claimant never reported pain in his buttocks or legs prior to the 2003 back injury.
11. Claimant was not riding his snowmobile, motorcycle, or lifting hay in early 2003. The only heavy lifting he was doing was at work.

12. Between February 2, 2003 and February 14, 2003, claimant worked six 24-hour shifts at the Burlington Fire Department. Between March 1, 2003 and March 10, 2003, claimant worked an additional four 24-hour shifts. During the period of February 14, 2003 to March 1, 2003, claimant took some time off from work.
13. Claimant saw his doctor, Peter Gunther, MD on March 10, 2003, and reported pain in his back, buttocks, and leg. Claimant's pain had been present for approximately two weeks and he could not specify an incident or occurrence that caused his pain.
14. Dr. Gunther referred claimant to physical therapy, but claimant returned to Dr. Gunther on April 17, 2003 complaining of continued back and leg pain. Dr. Gunther ordered an MRI.
15. On May 16, 2003, the MRI revealed an L4-5 disc herniation on the left side.
16. On May 30, 2003, claimant was referred to Nancy Binter, MD, an orthopedic surgeon. Dr. Binter concluded that claimant was a good candidate for an L4-5 discectomy, a procedure she performed on June 23, 2003.
17. Claimant had filed eight workers' compensation claims while working at the Burlington Fire Department. In August of 1989, the Burlington Fire Department's carrier denied a workers' compensation claim because claimant could not specify an incident identifying the injury. All of the other work injuries, where claimant could identify a specific incident at work, were accepted claims.
18. Claimant did not pursue his 2003 back injury as a workers' compensation claim until after his doctors told him that the injury was work-related.
19. A Form 5, Employee's Notice of Injury and Claim for Compensation, was filed with the Department on May 10, 2004.
20. Claimant was a maximum wage earner. In 2003, the maximum compensation rate was \$887. After the July 1 adjustment, it was \$915.00.
21. Claimant has supported his claim for a contingency attorney fee award and necessary costs totaling \$1,845.73.

Expert Medical Opinions

22. Dr. Gunther is Board Certified in Internal Medicine and has been Board Certified and licensed in Vermont since 1985. He is currently a Clinical Associate Professor of Medicine, Division of General Internal Medicine, Department of Medicine, University of Vermont College of Medicine.
23. Dr. Gunther has been claimant's treating doctor since August of 2002, and was the first doctor to evaluate his 2003 complaint of back and leg pain.

24. Dr. Gunther opines that there is a clear and causal connection between claimant's disc herniation and his job with the Burlington Fire Department. It is Dr. Gunther's opinion that the MRI shows not only a herniated disc, but also a narrowing of the disc spaces and some degenerative changes that are consistent with chronic mechanical stressors of the low back.
25. It is Dr. Gunther's opinion that the chronic mechanical stressors are attributed to claimant's work as a firefighter.
26. Dr. Gunther bases his opinion, in part, on the work description provided to him by claimant. Dr. Gunther relies on claimant's description of his duties as Captain of the Burlington Fire Department and his previous duties as a firefighter. Dr. Gunther believes, based on claimant's description, that as Captain, he was the first one in and the last one out of a burning building.
27. Dr. Gunther opines that heavy lifting is a risk factor for degenerative disc disease.
28. It is Dr. Gunther's opinion that a single event did not create the acute injury, but instead, it is related to the degenerative disc disease.
29. Dr. Gennaro is a Board Certified Orthopedic Surgeon and has been certified since 1992. He is licensed to practice medicine in Vermont, New Hampshire, and Pennsylvania. Dr. Gennaro performs approximately twenty-five to thirty back surgeries per year.
30. At the request of claimant's counsel, Dr. Gennaro performed an independent medical examination (IME) on claimant on June 15, 2004.
31. Dr. Gennaro opines that the herniated disc in claimant's low back, more likely than not, is causally related to his work activity. He bases his conclusion on: the long history of heavy lifting on the job; the development of degenerative disc disease; and the absence of significant risk factors for degenerative disc disease, besides heavy lifting.
32. Dr. Gennaro opines that the significant risk factors for degenerative disc disease are smoking, obesity, excessive consumption of alcohol, heredity, and heavy lifting. He states that claimant's only significant risk factor for degenerative disc disease is heavy lifting.
33. It is Dr. Gennaro's opinion that the disc herniation is an end manifestation of disc degeneration.

34. Dr. Gennaro opines that acute disc herniations rarely occur without disc degeneration and the herniation is a result of years of activities that cause degeneration. It is his opinion that claimant's disc herniation did not require a specific event, but resulted from degenerative disc disease caused by years of heavy work.
35. Dr. Gennaro opines that claimant reached medical end result for the work-related injury and he assigned a permanency rating of 11% whole person impairment to the spine. When Dr. Gennaro examined claimant in June of 2004, claimant still had some residual weakness in his left foot, so he added a 1% rating to the baseline DRE Category III rating of 10-13%, which resulted in a 11% rating. This is the same conclusion that Dr. Binter reached on August 2, 2003.
36. Dr. Boucher is Board Certified by the American Board of Preventative Medicine, with a specialty in occupational medicine. Dr. Boucher performs independent medical reviews and IME's, as well as maintains a clinical practice in Maine. Dr. Boucher also devised medical fitness for duty protocols and evaluations for firefighters.
37. At the request of defense's counsel, Dr. Boucher performed an IME on claimant on February 9, 2005.
38. Dr. Boucher opines that no causal connection exists between the claimant's back injury and work. It is his opinion that the claimant's disc herniation is an acute injury of unknown etiology.
39. It is Dr. Boucher's opinion that evidence of disc degeneration does not exist, based on the radiologist's silence in the MRI report on the topic of disc degeneration and Dr. Binter's silence in her Operative Report on that subject.
40. Dr. Boucher opines that disc degeneration is a part of the natural aging process and disc herniations are not directly related to disc degeneration.
41. Dr. Boucher agrees with Dr. Gunther and Dr. Gennaro that the prior non-occupational activities did not cause the disc herniation.
42. Dr. Boucher opines that disc herniation usually occurs as a result of an acute event. In this case, he concluded that claimant's disc herniation is a result of an acute event from a non-occupational activity and not a cumulative problem from the years of work-related strain. He believes that the disc herniation occurred in the two weeks prior to the March 10, 2003 examination by Dr. Gunther, when claimant was not working for Burlington Fire Department.

43. Dr. Boucher, like Dr. Gennaro, opines that claimant warrants a baseline DRE Category III rating of 10-13%. However, unlike Dr. Gennaro, it is Dr. Boucher's opinion that claimant's condition has minimal affect on activities of daily living. Dr. Boucher gives claimant a 10% whole person impairment rating as a result of the 2003 disc herniation.
44. Dr. Boucher agrees that claimant's medical care has been consistent with the usual standards of care for claimant's condition.

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 (1962). 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. 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).
4. It is well established under Vermont workers' compensation law that a claimant can recover benefits for a gradual onset work-related injury. In such a case, the exact date an injury occurred need not be established. *Campbell v. Savelberg*, 139 Vt. 31 (1980); *John Demgard v. Rutland News, Inc.*, Opinion No. 32-00WC (2000).
5. Some work place injuries come about gradually from frequent stress on the body. *Campbell, supra*. Therefore, to be compensable, an injury need not be instantaneous. *Martell v. Dowlings, Inc.*, Opinion No. 15-04WC (March 30, 2004).

6. In cases such as this, with conflicting expert opinions, the Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the Claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (1997); *Gardner v. Grand Union*, Op. No. 24-97WC (1997). Claimant's experts have the advantage in each of the four criteria.

Causation

7. As a layperson, the claimant cannot be expected to have knowledge of a gradual onset work-related injury. *Seguin v. Ethan Allen*, Opinion No, 28-02WC (2002). Claimant did not file a workers' compensation claim until fourteen months after the injury. Claimant filed his claim after his medical care provider suggested that the injury was work-related and consultation with his attorney. Claimant had no reason to believe, especially considering his August 1989 denial of workers' compensation, that a gradual onset work-related injury could be considered compensable by workers' compensation. Therefore, the date of claimant's filing of a workers compensation claim does not preclude the current claims.
8. Dr. Gunther, who has treated the claimant for years, opines that the MRI shows a narrowing of the disc space and some degenerative changes. Dr. Gennaro, an experienced orthopedic surgeon who performs twenty-five to thirty back surgeries per year, opines that rarely does an acute disc herniation occur without disc degeneration. Clearly, this claimant suffers from degenerative disc disease.
9. The persuasive and objective medical evidence in the areas of primary care and orthopedics supports claimant's contention that his disc degeneration is directly attributable to his work activities. Dr. Gunther opines that the degenerative changes are consistent with chronic mechanical stressors of the low back. He then concludes that the chronic mechanical stressors are attributed to claimant's work as a firefighter. Likewise, Dr. Gennaro opines that claimant's degenerative disc is attributed to the heavy lifting performed over the years at work. Dr. Gennaro opines that the only regular heavy lifting that claimant did was at work.
10. Claimant's only significant risk factor for degenerative disc disease is heavy lifting. Dr. Gennaro looks at the significant risk factors for degenerative disc disease and concludes that claimant has none, except regular heavy lifting. Dr. Gunther also opines that claimant's only significant risk factor for degenerative disc disease is heavy lifting.

11. To reach their conclusions, Dr. Gunther and Dr. Gennaro rely on claimant's description of his occupational activities, medical history, and the job description provided by claimant's counsel. Although claimant's physical stress decreased when he became captain, he still participated in heavy lifting with torso twists, and this is after years of more frequent heavy lifting while working his way up the ranks of the fire department. Dr. Gennaro also notes firefighters are put in the heavy work category in the Dictionary of Occupational Titles. It is Dr. Gunther and Dr. Gennaro's opinion that the lifting of hay bales, the stacking of firewood, and other non-occupational activities are not a constant activity that leads to degenerative disc disease. These are activities of daily living and non-repetitive in comparison to twenty-five years of work-related heavy lifting. Furthermore, snowmobiling and motorcycle riding were not in excess and did not lead to degenerative disc disease.
12. Claimant's February 2003 herniated disc is a result of degenerative disc disease. Dr. Gunther and Dr. Gennaro both opine that the disc herniation is not a result of an acute event. It is Dr. Gunther and Dr. Gennaro's opinion that an acute event might result in the disc herniation, but the disc herniation is the end manifestation of degenerative disc disease.
13. Dr. Boucher disputes Dr. Gunther and Dr. Gennaro's conclusion, as he opines that claimant does not have degenerative disc disease and the disc herniation was caused by an acute event that is not related to his occupational activities. Although highly qualified, Dr. Boucher is not an orthopedic surgeon, and he does not perform the number of back surgeries per year as Dr. Gennaro. Dr. Gunther has seen claimant for a number of years and examined him several times before and after the disc herniation. Also, Dr. Gunther supports his conclusion of disc degeneration based on the objective evidence provided in the MRI. Claimant's verbal history gave Dr. Gunther and Dr. Gennaro relevant information to form their conclusions.
14. Claimant seeks Temporary Total Disability Benefits (TTD), and Permanent Partial Disability Benefits (PPD) for the work-related injury to his spine.
15. Under Vermont workers' compensation law, a claimant is entitled to temporary disability compensation until reaching a medical end result or successfully returning to work. See *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996).
16. Claimant's surgery took place on June 23, 2003, and on August 2, 2003, Dr. Binter determined that claimant reached medical end result. Therefore, claimant is entitled to TTD benefits for a period of six weeks at the rate of \$887.00 for the first week, and after the July 1 annual adjustment, \$915.00 for the next five weeks, see, 21 V.S.A. § 650(d), or a total of \$5462.00.

17. Under Vermont workers' compensation law, when a partial impairment is permanent, compensation shall be paid during the period of total disability, as provided for in 21 V.S.A. § 642, and at the termination of total disability, the employer shall pay the injured employee compensation pursuant to 21 V.S.A. § 648. Once maximum medical improvement is reached, the permanent disability is rated, based upon functional impairment of the body, in accordance with the whole person determinations as set out in the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. § 648(d); *Hepburn v. Concrete Professionals Inc./Traveler's Insurance Co.*, Opinion No. 16-03WC (2003).
18. Dr. Binter, Dr. Gennaro, and Dr. Boucher all opine that claimant's condition falls into DRE Lumbar Category III. Dr. Gennaro gave claimant an 11% whole person impairment because of the residual weakness in his left foot. This concurs with Dr. Binter's assessment of an 11% whole person disability. Therefore, an 11% whole person impairment rating shall be given to claimant.
19. Claimant is entitled to PPD in the amount of 11% whole person impairment to the spine for 60.5 weeks (11% x 550 weeks) at the rate of \$915.00 per week for a total of \$5,535.00. See WC Rule 11.2300.

Medical and Hospital Benefits

20. Pursuant to 21 V.S.A. § 640, claimant seeks medical and hospital benefits. Claimant is entitled to reasonable medical and hospital benefits relating to the L4-5 discectomy of June 23, 2003.

Attorney's Fees and Costs; Interest

21. As a prevailing claimant, James Hendry is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678 (a). Claimant is entitled to his request for a fee of legal services not to exceed 20% of the compensation awarded, or \$9,000.00, whichever is less. Claimant's litigation costs of \$1,845.73 were necessary for the success of the complex issues presented.
22. Finally, pursuant to 21 V.S.A. § 664, claimant is entitled to interest from the date each payment became due.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to pay claimant:

1. Medical and surgical benefits for treatment of claimant's March 2003 low back injury;
2. Temporary total benefits from June 23, 2003 for seven weeks;
3. Permanent partial disability benefits based on 11% whole person impairment of the spine;
4. Statutory interest from the date each benefit was due;
5. Litigation costs of \$1,845.73;
6. Attorney fees of 20% of the total award, or \$9,000, whichever is less.

Dated at Montpelier, Vermont this 12th day of July 2005.

Patricia A. McDonald
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.