

R. F. v. Fleming Oil

(December 27, 2007)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

R. F.

Opinion No. 35-07WC

v.

By: Jane Gomez-Dimotsis  
Hearing Officer

Fleming Oil

For: Patricia Moulton Powden  
Commissioner

State File No. U-51056

**OPINION AND ORDER**

Hearing held in Montpelier on May 11 and 14, 2006

Record closed on June 15, 2007

**APPEARANCES:**

Thomas C. Bixby, Esq. for the Claimant

Richard J. Windish, Esq. for the Defendant

**ISSUES:**

1. Did the Claimant suffer a compensable neck or cervical or lumbar spine injury while in the employment of Fleming Oil and in the course of his employment?
2. Did Claimant suffer a compensable work related psychological condition caused by his work related injuries?
3. If so, what benefits is he entitled to?
4. If Claimant suffered a compensable work related injury while employed at Fleming Oil, was it later aggravated requiring additional treatment?

## **EXHIBITS:**

### **Claimant's Exhibit's**

Claimant's 1:	Claimant's personnel file
Claimant's 2:	Peerless Insurance Company's workers' compensation report completed by Claimant on January 4, 2004
Claimant's 3:	Peerless Insurance Company's workers' compensation status report completed by Claimant on January 14, 2004
Claimant's 4:	DOL Form 1 dated 2/12/04
Claimant's 5:	DOL form dated 12/3/03 handwritten
Claimant's 6:	DOL form 12/3/03 typed
Claimant's 7:	DOL Form 25 wage statement
Claimant's 12A:	Additional Medical Records from PT Services of Brattleboro
Claimant's 13:	Claimant's Social Security File
Claimant's 14:	DOL Form 22 approved 4/25/06
Claimant's 17:	Dr. Kernan's medical file

### **Defendant's Exhibit's**

Defendant's 1:	Medical Records Exhibit
Defendant's 2:	Deposition Transcript of Claimant (partial)
Defendant's 3:	Deposition Transcript of Glenn St. John
Defendant's 4:	Curriculum Vitae of Dr. Steven Mann
Defendant's 5:	Excerpt from DSM IV re: Post Traumatic Stress Disorder
Defendant's 7:	Intake Form of Claimant from Dr. Kernan's Office

## **FINDINGS OF FACT:**

1. Claimant was an employee of Fleming Oil in December of 2003 within the meaning of the Workers' Compensation Act. The Defendant was an Employer within the meaning of the Vermont Workers' Compensation Act. At that time, the Claimant was manager of a gas station/convenience store owned by Fleming Oil in Brattleboro, Vermont. His work duties included managing inventory, cash, gas pumps, and car wash facilities and other employees. The job encompassed many duties including physical labor as well as supervisory duties.
2. On December 3, 2003, Claimant suffered a fall outside the gas station after being summoned outside by a customer of the car wash. He slipped and fell on ice.
3. Claimant was born in Brattleboro, Vermont in 1958. He attended Brattleboro High School. During high school he worked part-time for Fleming Oil. Defendant knew Rick Fleming, the present owner of Fleming Oil, in high school. After high school, the Claimant became an oil technician for Fleming Oil. Later, he also worked in the Human Resource Department for Fleming Oil. As an adult, he played basketball in the same league as Rick Fleming.

4. Prior to Claimant's injuries at Fleming Oil, he was very active. He played basketball, skied, played softball, ran track, coached soccer, canoed and hiked.
5. Claimant was a good employee. He had won a bonus for his work as store manager. He had no disciplinary problems nor did he have any previous work related injuries. He seemed to get along well at work and with family.
6. On December 3, 2003, Claimant fell forward on the ice and landed on his elbows and knees. He reported the injury to his employer who advised him to go to Brattleboro Memorial Hospital. Claimant, instead, chose to seek treatment with his primary physician, Dr. Thomas Lewis.
7. Claimant saw Dr. Thomas Lewis on December 4, 2003, reporting that he had fallen forward on the ice. He complained of both left elbow and knee pain with aching shoulders. Upon examination, Dr. Lewis found that the Defendant had a tender olecranon but no visible swelling or bruises. He found that Defendant's left knee had pain but full flexion and extension. He diagnosed Claimant with a contusion to his elbow and knee advising bed rest. Dr. Lewis did note that Claimant was tight in his neck and upper back shoulder muscles which were tender when palpated.
8. Claimant believes he may have been knocked unconscious for a brief period after the fall. There is no record of a contusion or abrasion to Claimant's head. Since there were no witnesses to the fall, it is unclear whether Claimant was knocked unconscious or not. However, Dr. Lewis did later make a notation that Claimant had some short term memory problems.
9. An x-ray taken at Brattleboro Memorial Hospital on December 8, 2003 showed small bone spurs in the Claimant's lateral epicondyle. On the 16<sup>th</sup> of December, the Claimant began treating with Dr. A. Douglas Lilly, an orthopedic surgeon, who diagnosed him with a sprain and crack to his left olecranon. Claimant was placed in a well padded long arm cast.
10. Claimant was initially taken out of work completely until December 23, 2003 by Dr. Lilly. Dr. Lilly also placed Claimant on light duty with a "no lifting" restriction on December 19, 2003. Dr. Lilly clarified his conflicting orders to allow Claimant to return to work with no use of his left arm, no lifting over five pounds and light duty work only.
11. Claimant again saw Dr. Lilly on January 12, 2004. The lifting restriction was continued and he was scheduled for a follow-up visit in three weeks. The Claimant's diagnosis was a "crack fracture left olecranon" with tendonitis of the left elbow.
12. Claimant's cast was removed by Dr. Lilly on January 28 or 29<sup>th</sup> of 2004. The medical plan was for physical therapy, continued work restrictions and the use of an ACE wrap. Dr. Lilly made another follow-up appointment for Claimant in one month's time. Dr. Lilly continued the work restrictions of no lifting and no repetitive motion.

13. On February 12, 2004, Claimant fell again. This fall was similar to the first in that he fell on the ice while working at the gas station/convenience store. This time he landed on the posterior aspect of his left elbow and his left or back side. Dr. Lilly saw the Claimant and diagnosed him with a left elbow fracture and put him in another well padded long arm cast. He advised the Claimant to stay out of work for two weeks and scheduled him for another appointment in two weeks. He also ordered physical therapy and a “tens unit” for Claimant to use in his therapy.
14. On February 26, 2004, the Claimant’s cast was removed by Dr. Lilly who found the Claimant’s left elbow to be “within normal limits.” He did, however, continue to keep the Claimant out of work and recommended a new round of physical therapy.
15. Claimant again saw Dr. Lilly on March 18<sup>th</sup>, 2004. Claimant was told to continue physical therapy and return to work in another month. Dr. Lilly, on this visit, advised the Claimant that the healing progress would, in his opinion, be slow.
16. On April 15, 2004, Claimant saw Dr. Lilly and complained of limited motion of his left arm. He also complained of severe pain. Dr. Lilly could not diagnose the source of the pain but ordered Claimant to stay out of work until he saw Dr. Edward Orrechio. Claimant was referred to Dr. Orrechio for a neurological examination.
17. Dr. Lilly later changed the work order so that Claimant could return to work but without any significant use of his left arm. He also imposed restrictions that the Claimant not lift over five pounds and not do any repetitive motions.
18. Claimant returned to work on April 26, 2004.
19. Dr. Edward Orrechio is a certified neurologist and a Board Diplomate in Clinical Neurophysiology. Dr. Orrechio’s neurological EMG on April 30, 2004 of the Claimant was normal. However, Dr. Orrechio wrote he suspected an injury to Claimant’s cervical spine because of a positive Spurling sign which he described as a possible herniated disk or nerve root compression that might be contributing to weakness and numbness in the Claimant’s hand. Dr. Orrechio ordered a neck x-ray and an MRI to evaluate Claimant’s neck and cervical spine. Dr. Orrechio believed this problem was separate from the left arm issue. Dr. Orrechio noted Claimant’s continued neck pain and prescribed Celexa and Clonazepam.
20. On May 5, 2004, the Claimant told his physical therapist that his neck was very sore, it was “awful” at work and he was depressed. He complained that he was not receiving help at work lifting heavy shipments.
21. On May 6, 2004, an MRI revealed a small bulging disc at C5-6 without significant impingement of the spinal cord or neural foramen. The study also showed large right-sided bone spurs at C3-4. A cervical x-ray showed a narrowed disc space at C6-7.

22. Dr. Lilly saw the Claimant again on May 13, 2004. Dr. Lilly noted at that visit that Claimant's work activities were increasing and his range of motion was improving. He advised the Claimant to continue with physical therapy and referred him to the Cheshire Pain Clinic for an evaluation of a possible "reflex sympathetic dystrophy type problem". Dr. Lilly noted that it was unknown if Claimant's neck injury occurred in the accident of December 3, 2003 or not. He noted the MRI showed a minor bulge at level C5-6 with osteophytes at level C3-4. He continued the prescription for anti-inflammatory medication.
23. Claimant told his physical therapist on May 21, 2004 that his neck, elbow and wrist hurt since he had the accidents at work. He said he was "going to sign off on that everything is fine to get everyone off my back." [Sic]. Claimant stated he was "sick of the hassle around the whole situation."
24. Claimant left his job at Fleming Oil around the end of June. He also stopped physical therapy due to the stress he was feeling. Claimant stated in his resignation letter that he was leaving because "the store is just to much w/change and employer always not happy, after talking with George/me/my last day 29<sup>th</sup> of June, this make me feel very sorry to write this note". [sic] Claimant credibly testified that he was no longer able to physically do the job required at Fleming Oil as manager of the store and that the new supervisor, George, was not happy with him. He was, as previously noted, often required to unload shipments without help which exceeded his lifting limitations.
25. On June 29, 2004, Claimant had a medical examination by Dr. Donald Kinley. Claimant told Dr. Kinley that he had injured his neck in the two falls at work. He denied any prior neck injury history. Dr. Kinley diagnosed Claimant with a left shoulder injury, left elbow injury and wrist injury along with possible cervical strain. Dr. Kinley opined that the Claimant's cervical strain should improve in about a year post-injury.
26. Shortly after his employment with Fleming Oil, Claimant worked for Fireside True Value as the paint department manager for approximately one year. He left Fireside True Value in May of 2005 due to his inability to function because of severe pain he alleges was the result of his two injuries at Fleming Oil.
27. Claimant testified that he had been accommodated at Fireside True Value for his limitations due to alleged injuries at Fleming Oil. Claimant testified that he had been in constant pain since he had the accidents at Fleming Oil. He left leg dragged and he also starting having severe back pain during the last months he was at Fireside. Claimant was not re-injured while at Fireside True Value. *See, Ronald Ferris, Jr. v. Fleming Oil Company, Inc. v Fireside True Value*, Ruling on Motion for Summary Judgment (January 16, 2007).
28. Toward the end of his employment with Fireside True Value, Claimant began to miss work due to complaints of pain. During the last months he worked at Fireside True Value, Claimant began to walk hunched over and dragged one leg. The owner of Fireside True Value, Glenn St. John, corroborated Claimant appeared to have problems with pain in the last months of his employment. When first hired, however, Mr. St. John did not notice Claimant's pain symptoms.

29. In November of 2004, while still employed at Fireside True Value, Claimant began treating with Dr. Jennifer Kernan, a neurological surgeon. Claimant advised her he had been experiencing pain in his neck, left arm, left elbow and back, all of which had persisted since the time of his falls at Fleming Oil.
30. In January of 2005, Dr. Orrechio saw the Claimant again and noted that he had a lot of paraspinal spasm and he prescribed Zanaflex. He also noted that Claimant had diffuse myofascial pain that was paraspinal and involved his thorax. He did NCS and EMG testing prior to this diagnosis.
31. Dr. Kernan noted a rather “profound facet hypertrophy” at C3-4 and recommended conservative treatment. Dr. Kernan believed Claimant had the ability to continue to work full time. Claimant did continue to work until the following May of 2005.
32. On February 8, 2005, Dr. Kernan noted that although the Claimant’s physical therapist has the impression the Claimant is improving Claimant states he is “still quite miserable”. Dr. Kernan reviewed updated diagnostic tests which were normal, but referred Claimant for a diagnostic nerve root block.
33. Claimant underwent the nerve root block at Dartmouth Hitchcock Medical Center on May 3, 2005. Afterward he appeared at Dr. Kernan’s office staggering and stating he could not control his legs. Dr. Kernan referred Claimant to the Emergency Room but he did not go there.
34. Claimant returned to see Dr. Kernan on May 17, 2005, stating that the nerve block removed his pain for six hours but then it returned. Dr. Kernan suspected that the fall at Fleming Oil could have predisposed Claimant to a disc herniation and he may have been a bit more likely to develop additional spinal issues. She ordered an urgent MRI.
35. Claimant had an MRI on May 18, 2005. The test showed a massive herniation at L4-5, with free floating fragments. Dr. Kernan wrote that she suspected that Claimant had suffered a torn annulus at the time of his falls. She recommended a discectomy.
36. Claimant underwent a discectomy on May 26, 2005. Dr. Kernan believed the procedure to be a technical success. When the Claimant saw her in June of 2005 he was walking a quarter mile and no longer taking pain medication. Dr. Kernan recommended physical therapy for Claimant’s treatment.
37. In July of 2005 Claimant received notice that his back injury was not compensable.
38. Claimant saw Dr. Kernan again on September 13, 2005. At this visit the Claimant was doing very poorly. He cried throughout the appointment and complained of physical and financial problems. He also complained of pain throughout his entire body. Dr. Kernan believed the Claimant was displaying significant “functional overlay” which was due to the stress of the trauma of his falls, the loss of his job and severe financial burdens. She advised him to address the psychological issues which were compounding his ability to recover.

39. On October 11, 2005, the Claimant saw Dr. Thomas Lewis for the on-going pain in his neck and arms and right leg. Dr. Lewis noted "ongoing severe pain syndrome post falls." He prescribed Lexapro for depression and Advil for pain. Claimant was also told to continue using his prescription for Clonazepam and to start using Cymbalta.
40. Claimant saw Defendant's physician, Dr. Jon Thatcher, an orthopedic surgeon, on October 12, 2005 for a permanent impairment rating for Claimant's neck, elbow and wrist. Dr. Thatcher noted that the MRI had shown degenerative facets and osteophytes in Claimant's mid-cervical region. At that time Dr. Thatcher determined pursuant to the AMA Guides that the injury to the cervical spine translated to an 8% impairment to the whole person. He also determined the Claimant had 10% impairment to his left upper extremity or a total of 14 % for the whole person. (The insurance company did not find that the neck injury was causally related to the work injury after learning that the Claimant's had a neck injury thirty years prior to this claim.)
41. On November 1, 2005, Dr. Kernan noted that she had little else to offer Claimant noting that he had not followed up on her recommendation for psychological help.
42. Claimant returned to see Dr. Kernan on February 7, 2006 complaining of horrible pain throughout his body. She found upon exam "there are significant positive Waddell signs and symptom magnification. His walking is observed to change within the clinic and without, and is somewhat inconsistent in the course of his visit. He claims to be unable to move his feet, though he is clearly walking, so true assessment of any neurologic deficits is impossible." Dr. Kernan recommended repeat imaging studies to explain why he was having bizarre symptoms.
43. Claimant was upset by Dr. Kernan's findings and she wrote a letter of apology to him defending her findings.
44. Claimant had new MRI studies done in June, 2006. He saw Dr. Kernan to review these findings on June 20, 2006. The MRI showed no evidence of neural compression in the cervical spine, although the osteophytes continued to be present. There was no evidence of a residual or recurrent disc herniation. Following the May 5, 2005 surgery, with regard to the cervical spine, Dr. Kernan noted that the MRI did not explain his presentation of numbness in his hands. Dr. Kernan advised against cervical surgery due to pain he was still experiencing after the previous surgery.
45. Claimant underwent a diagnostic EMG on June 26, 2006 at Dr. Kernan's suggestion. The results were normal. Dr. Kernan then ordered another MRI. The MRI on December 13, 2006, showed a recurrence of his disc herniation that was quite different from his last MRI on June 13, 2006. Dr. Kernan still advised against surgery since the Claimant failed to recover from his last surgery which was technically successful.
46. Dr. Kernan did not have the Claimant's prior medical records for any neck or low back injuries. She did not have or review Dr. Lilly's records. Dr. Kernan did not speak to other providers for the Claimant.

47. Dr. Kernan believed to a degree of medical certainty the Claimant's cervical injury was related to his accidents at Fleming Oil. The basis for her belief that his low back problems were causally related to his work at Fleming Oil were to some extent based on Claimant's statements to her. However, she also based her opinion on her examination of the Claimant, her surgical findings as well as her medical expertise. Claimant did not disclose to Dr. Kernan any prior medical history related to his back.
48. Defendant argues that Dr. Kernan's opinion is undercut by the failure of the Claimant to tell her about prior injuries. The injuries he suffered previously, however, had been completely resolved years before the falls at Fleming Oil. In Claimant's credible testimony he viewed the prior back problems as minor in comparison to what he was experiencing in 2006. It is clear that Claimant was unable to make any connection between what he was currently undergoing and his past medical history. In part, Claimant suffers a lack of insight or understanding regarding his physical condition as well as a possible loss of memory previously noted by Dr. Lilly.
49. Claimant has maintained to medical professionals that he did not have a history of neck and back pain. The medical records, however, demonstrate that Claimant hurt his neck in 1975 when wrestling with his brother. However, this occurred almost thirty years prior to his injuries at Fleming Oil. Claimant had previously experienced some back pain which was treated with no lingering pain. Claimant also had some back related pain during the period surrounding the death of his first wife. In 1998 he also had mild irritation of his sciatic nerve in his left leg with a minor disc problem which was resolved by stretching exercises. Dr. Lilly saw him for both of these complaints and ordered conservative treatment. However, Claimant continued to enjoy all sports, including playing in an industrial league basketball team up until his work injury. Therefore, it is not unreasonable that he would not recall minor injuries during a deposition held for his work related claims. Any prior problems were minor compared with Claimant's current condition.
50. The Claimant had a history of sporadic treatments by the late Dr. Marcy Jones, a friend of his and a chiropractor in Brattleboro from 1984 through 1995. Claimant received treatments for both his lumbar and cervical spine in the early to mid-1990s. The first visit the Claimant made to his friend was when he was 25 years old and was treated for a week for back pain from playing basketball. He was ordered to use ice on his back pain. Dr. Jones did not see the Claimant again until 1992 when he had some back pain from overuse of his back muscles. Although Dr. Jones diagnosed Claimant with lumbar sacral disc disease in 1992, Dr. Jones determined later that Claimant's back hurt due to stress. In 1995, Dr. Jones related Claimant's back pain to the cancer treatment and death of Claimant's wife. Dr. Jones prescribed ice treatments and orthotic shoes. There was a problem due to Claimant using the orthotic pads on the wrong feet. Later, Claimant saw Dr. Jones when his back hurt after kneeling and picking strawberries. Claimant was frightened by a dragon fly that landed on his leg and jumped out of the berry patch and experienced some back pain. Dr. Jones last visit with Plaintiff was in 1995, approximately eight years prior to his work related injury.



51. Claimant did admit to current physicians that through the years he had some pain due to chopping wood or various sports related issues in his back. However, based on Claimant's credible testimony, his demeanor and all of the facts and circumstances, the Defendant's argument that Claimant was deliberately telling falsehoods must fail. Claimant appeared to believe he was in excellent health prior to his falls at Fleming Oil, demonstrated by his continued participation in physically demanding sports activities.
52. Claimant's neck and elbow injuries were initially accepted as compensable. However, the insurance carrier withdrew its acceptance of the cervical spine component for compensability on July 28, 2006. A settlement was reached regarding permanency of the elbow component of the claim by a Form 22 in June of 2006. All medical and indemnity benefits related to the claim have been paid. Therefore, the only existing issues in the instant case are the neck and spine and psychological claims.
53. Claimant saw Dr. Stephen Mann, a psychologist, for an Independent Medical Examination on behalf of Defendant. Dr. Mann was provided and reviewed the Claimant's entire medical record and all deposition transcripts. Dr. Mann administered a battery of psychological tests to the Claimant. Dr. Mann testified that based on the tests, that he considers objective, that Claimant's scores were remarkable for physical symptoms and affective, character and psychosocial scales. Dr. Mann noted that Claimant's somatic pattern responses were "extremely disturbed." Claimant had highly elevated scores for hypochondriasis, depression, hysteria, paranoia and schizophrenia scales. Dr. Mann testified that the elevated scores on these tests indicated the presence of an affective disorder and a thought disorder. In addition, Dr. Mann believed that the scores indicated a long-standing pattern of maladjustment that is characteristic of people with severe personality disorders.
54. Dr. Mann diagnosed Claimant with an undifferentiated somatoform disorder (severe/chronic) with conversion disorder traits; with a secondary diagnosis of major depressive disorder. Dr. Mann believes these disorders predate the injuries that were suffered by the Claimant at Fleming Oil.
55. The Claimant argues that Dr. Mann's tests have no validity since the tests were taken in a busy waiting room and the Claimant had a lack of concentration as well as uncertainty regarding the meaning of some of the questions. Claimant was tested by Vermont Disability Determination Services on December 5, 2005. Sandra Campbell, Psy. D. completed the evaluation of Complaint. She found he had apparent memory and concentration problems. At that time she diagnosed Claimant with major depressive disorder with both panic and anxiety disorders.

56. Vickie Wilkes, APRN, a clinical psychological nurse, began treating the Claimant in 2006. She initially diagnosed the Claimant with depression but changed her diagnosis to PTSD (Post Traumatic Stress Disorder), all causally related to Claimant's injuries from his employment at Fleming Oil and the loss of his employment and income. She also notes the loss of his first wife as a stressor. The Claimant did suffer anxiety surrounding the loss of his first wife and was prescribed medication for anxiety. However, he functioned well in his position as store manager and was involved in sports and remarried. Ms. Wilkes has seen the Claimant about a dozen times. She has not read depositions in this case or reviewed all of Claimant's medical records. Ms. Wilkes believes the trauma that the Claimant suffered has to do with his claims for workers' compensation. Ms. Wilkes does not believe that Claimant deliberately exaggerates his symptoms. She also did not find Dr. Mann's conclusions consistent with her own.
57. Damon Kindopp, a certified physical therapist, also treated the Claimant. Mr. Kindopp has been practicing physical therapy for over ten years. He sees 40 or 50 patients per week. It is his opinion that the injury to Claimant's elbow which occurred when he fell created mechanical and physical problems that have affected Claimant's spine. Mr. Kindopp believes the injuries suffered by the Claimant at work created a dysfunction in his pelvis and lumbar spine that precipitated disc problems. Mr. Kindopp also opines that the Claimant has had to hold his physical body differently after his injury which has resulted in back pain.
58. Damon Kindopp has treated the Claimant for neck problems as early as March of 2004. Mr. Kindopp believes, to a degree of medical certainty, that the Claimant's physical pain is caused from the injuries from his falls at Fleming Oil. This opinion is based on his experience, his education and his treatment of the Claimant. Mr. Kindopp does not believe that Claimant consciously exaggerates his symptoms.
59. Dr. Peter Upton, a board certified neurologist, performed record reviews and an Independent Medical Examination on the Claimant for the Defendant. Dr. Upton no longer practices full time but is partially retired. Dr. Upton reviewed all of the medical records in the case and read deposition transcripts of the Claimant, Dr. Kernan, Glenn St. John, an owner of Fireside True Value and Damon Kindopp.
60. Dr. Upton testified that there was no evidence of a causal relationship between the work related falls and the Claimant's lumbar and cervical pain. Dr. Upton believes that any pain from a herniation or lumbar tear would have been immediate. Dr. Upton did not ascribe to Dr. Kernan's theory regarding Claimant's injuries as predisposing him to a disc herniation.
61. Dr. Upton believes that the Claimant was engaging in symptom magnification. This opinion is different from defendant's other examiner, Dr. Mann, who believes that the Claimant has somatoform disorder or conversion disorder. Dr. Mann did not find any deliberate symptom magnification.

62. Rick Fleming, owner of Fleming Oil, testified that he was unaware of any physical problems that Claimant experienced prior to his falls at Fleming Oil. He stated that Claimant had no prior injuries during his work with Fleming Oil and had no disciplinary problems. He had been given a bonus for his work as store manager. He corroborated that prior to the Claimant's work related injuries they had both played basketball in a league.
63. Claimant requests that he be awarded Temporary Total Benefits for his neck and back injuries until medical end results are reached. He asks that the benefits begin in May of 2005 when he left Fireside True Value due to pain. He has not been able to work since that time due to pain and depression. Claimant asks that the case be viewed as a "physical/mental" claim. Claimant also requests that all his medical treatments related to his work injuries be compensated. When medical end is reached, Claimant requests permanent partial benefits as well as attorney's fees and costs.

### **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, Morse Co.*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
2. In the instant case, Defendant does not dispute that the Claimant was injured in two separate, nearly identical slip and fall accidents involving the icy surface surrounding the car wash at his employment. In both accidents, Claimant suffered an elbow injury (for which permanency has been paid) and alleges a neck and back injury as well as a major depressive disorder. Defendant disputes the causal relationship of all claims.
3. For a claim to be compensable, there must be created in the mind of the trier of fact something more than a mere possibility, surmise or suspicion that the incidents complained of were the cause of the injury and the inference from the facts proven must be more than probable hypothesis. *Burton v. Holden and Martin Lumber Co.*, 112 Vt. 393 (1941).
4. Where the causal connection between an accident and an injury is obscure, and a lay-person would have no well grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
5. In the instant case, the treating medical experts disagree with the Defendant's Medical Examiners. When evaluating between conflicting medical opinions, this Department must weigh several factors: 1) whether the medical expert has had a treating physician relationship with the claimant; 2) the professional education and experience of the expert; 3) the nature of the evaluation performed, including whether the expert had all the medical records in making the assessment; and 4) the objective basis underlying the opinion. See *Yee v. IBM*, Op. No. 38-00WC (2000).

6. It is also true that the employer takes the employee as is, and is responsible under the Workers' Compensation Act for an injury that disables one person and not another. *Paton v. State of Vermont Department of Corrections*, Op. No. 4-04 WC (2000).
7. In the instant case, the Claimant's current treating physicians and medical providers all believe that he is suffering from pain in his neck and spine as well as psychological problems caused by the accidents and resulting pain and lack of work. They only differ in their diagnosis. They all believe that what Claimant is suffering was causally related to the falls that occurred while in the employment of Fleming Oil, the loss of that employment and the depression he suffers related to these losses. Vicki Wilkes, his therapist, believes the Claimant to have Post Traumatic Stress Disorder. Damon Kindopp, his physical therapist, believes Claimant's neck and back problems are natural sequela from his falls. Dr. Kernan, a treating doctor and neurosurgeon, diagnosed the Claimant with lumbar and cervical spine problems related to the falls at work and some psychological issues. Dr. Donald Kinley diagnosed Claimant with a left shoulder injury. Dr. Lilly diagnosed Claimant with "reflex sympathetic dystrophy". Dr. Orrechio, a certified neurologist diagnosed an injury to the Claimant's cervical spine and suspected a possible herniated disc. Claimant had surgery for the herniated disc following this diagnosis and testing. Later testing shows a reherniation of a disc but surgery is not recommended. Dr. Sandra Campbell diagnosed the Claimant with panic and anxiety disorders as well as a major depressive disorder.
8. Dr. Upton who saw Claimant for an Independent Medical Examiner requested by the Defendant, described Claimant's problems as symptom magnification. Dr. Mann, a psychological expert, diagnosed the Claimant with somatoform disorder or conversion issues but believed these problems predated the falls at work. Dr. Mann did not believe Claimant deliberately exaggerated his symptoms.
9. Dr. Mann believes after reviewing prior medical records that the Claimant suffered from this disorder prior to his falls at work. However, this opinion ignores the undisputed facts that prior to the injuries suffered by the Claimant at work that he was able to work fulltime in a responsible position for which he was given a bonus, he played sports regularly and he was able to function within his family and the community. He was able to date and remarry after his wife's death. Although past medical records support episodes of depression and some corresponding pain symptoms, particularly in the time period surrounding the death of his first wife, he was still able to work, exercise and function in the family and community. It was not until he had the injuries at work and suffered pain he became severely depressed and his symptoms began to increase. It should also be noted, however, that he was diagnosed and operated on for a herniated disc. Therefore, even if Claimant was predisposed to depression and conversion disorders, he did have objective physical injuries requiring surgery. Also, his mental condition was clearly aggravated by the injuries and the loss of his employment.
10. I find that Claimant's treating medical providers are more credible on the question of the claimant's condition. It is particularly noteworthy that they all agree that the Claimant is suffering and that they do not believe he is consciously exaggerating his symptoms.

11. When filing a “physical/mental” claim, the burden is on the Claimant to establish a causal connection between the work-related physical injuries and the mental condition. *A.B. v. State v. State of VT, Dept. of Corrections*, Opinion No. 90-06WC (post traumatic stress disorder due to light duty assignment after injury, not physical injury itself, therefore not compensable.) In the instant case, however, it was the physical injury, according to Claimant’s treating physicians, who have been found credible, that resulted in pain and loss of function, which created the psychological conditions.
12. Also, unlike other cases, although a psychological condition may have pre-existed the injuries in this case due to the fact that Claimant had suffered depression in the past, his actual psychological condition worsened, not just his psychological symptoms. He went from a predisposition of depression to a diagnosis of post traumatic stress disorder, anxiety and panic disorder, severe depression and somatoform or conversion disorder. See, *Stannard v Stannard*, 175 Vt. 549 (2003).
13. The Defendant asks that the Claimant be found to have made fraudulent statements regarding his past medical history and to have all benefits denied on this basis. The Claimant is found to be a poor historian without intention to deliberately fail to disclose his prior medical information. Therefore, Claimant’s claim will not be denied based on this issue.
14. The primary injury has been shown to have arisen out of and in the course of employment; therefore, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause which can be attributed to Claimant’s own deliberate conduct. The progressive worsening of or complication of a work-connected injury remains compensable unless produced by an intervening cause. *Slayton v. Consolidated Memorials*, Op. No. 49-06 (2007). Claimant’s physical injuries and predisposition to depression, anxiety and somatoform disorder are natural consequences that flowed from his employment injuries. There were no intervening causes.
15. The Claimant has produced credible expert testimony that his disabling injuries and depression were caused by his work related falls.
16. Claimant had complained of neck and back pain since the early history of this claim. Although the primary medical concern was originally the Claimant’s elbow, his neck and back were noted to be “tight” and tender from the beginning. There is also objective evidence that the Claimant had a bulging disc that a credible treating expert opined was the result of Claimant’s work related falls in December, 2003 and February 2004.
17. Interest will not be awarded on additional TTD, PPD or medical benefits. There was a bona fide dispute between credible medical experts regarding the degrees and areas of impairment as well as medical end result. The claim was complicated and medical information obtained was delayed due in part to Claimant’s poor memory or his unintentional failure to relate past medical history.

18. The claimant, having prevailed, would normally be entitled to an award of costs as a matter of law and attorney's fees as a matter of discretion. The claimant has not complied with the terms of Rule 10 of the Workers' Compensation and Occupational Disease Rules. Claimant may recover attorneys' fees and costs if he submits them within thirty days from the date this opinion is issued and they are found to be reasonable and necessary in compliance with workers' compensation rules.

**ORDER:**

THEREFORE, based on the foregoing findings of fact and conclusions of law, it is hereby ordered that Defendant is ORDERED to adjust this claim including the payment of:

1. Past temporary total disability benefits from the date the benefits ceased until medical end result is reached or until the Claimant returns to work, whichever is earlier, for Claimant's neck and back injuries and psychological problems related to these injuries minus benefits paid for Claimant's elbow;
2. Permanency for Claimant's neck and cervical and lumbar spine injuries if applicable as well as his psychological problems when he is at medical end result or returns to work;
3. Medical Benefits for treatment of the neck; spine and psychological issues until medical end or a return to work;
4. Attorney's fees and costs which are found reasonable and necessary if received 30 days from the date this decision is issued.

DATED at Montpelier, Vermont this 27<sup>th</sup> day of December 2007.

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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.