

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

JEFFREY DEJARNETTE)

File # D-22359

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By: Frank E. Talbott

Contract Hearing Officer

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v.)

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For: Barbara G. Ripley

Commissioner

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F.P. ELNICKI, INC.)

Opinion # 13-93WC

Hearing held June 25, and July 8, 1993.

APPEARANCES

Scott C. Smith, Esq. for the claimant

John S. Liccardi, Esq. for the defendant

Larry Miller, Esq. for C.G. McCullough Insurance Agency

Keith J. Kasper, Esq. for Liberty Mutual Insurance

ISSUES

1. Whether the claimant suffered a personal injury by accident arising out of and in the course of employment with F. P. Elnicki, Inc. on May 13, 1991;
2. Whether that injury was an aggravation or recurrence of a pre-existing condition.

THE CLAIM

1. Temporary total disability compensation under 21 V.S.A. § 642 from May 13, 1991 to January 10, 1992;
2. Medical and hospital benefits under 21 V.S.A. § 640;
3. Attorney fees and costs under 21 V.S.A. § 678(a).

STIPULATIONS

1. On May 13, 1991:
 - a. The claimant suffered a personal injury when he ruptured a lumbar disc.
 - b. The claimant's average weekly wage for the twelve weeks preceding the accident was \$424.75, resulting in a weekly compensation rate of \$283.16 (plus \$10.00 for each dependent). No Certificate of Dependency has been filed with the Department.
2. On May 28, 1991, the claimant filed a Notice of Injury and Claim for Compensation.
3. On July 10, 1991, the defendant notified the claimant that it was denying his claim for compensation because the claimant was not in the employ of the defendant on the date of the claimant's injury.
4. On July 1, 1991, the claimant's weekly compensation rate was increased under 21 V.S.A. §650(d) to \$299.87.
5. On July 19, 1991, the claimant filed a Notice and Application for Hearing.
6. Judicial notice may be taken of the following documents in the Department's file:

Form 5	:	Notice of Injury and Claim for Compensation
Form 25	:	Wage Statement
Form 6	:	Notice and Application for Hearing

FINDINGS

1. Stipulations one through six are true.
2. During the hearing the following exhibits were received in evidence:

Claimant's Exhibit 1	:	Medical record of Dr. Keller dated June 13, 1991
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Claimant's Exhibit 2 : Medical Bills of the Rutland Regional Medical Center

Claimant's Exhibit 3 : Rutland Regional Medical Center chart for an admission from June 13, 1991 to June 23, 1991

Claimant's Exhibit 4 : Records from the Mid-Vermont Orthopaedists, Inc., along with medical bills from May 22, 1991 to February 6, 1992

Claimant's Exhibit 5 : Vermont Sports Medicine Center records and physical therapy bills

Claimant's Exhibit 6 : Pharmacy bills

Claimant's Exhibit 7 : Pharmacy bills from Carpenter Pharmacy

Claimant's Exhibit 8 : Mid-Vermont Orthopaedists, Inc. records

Claimant's Exhibit 9 : Medical bill from Rutland Regional Medical Center

Claimant's Exhibit 10 : Statement from Rutland Regional Medical Center

Claimant's Exhibit 11 : Report from Annette Lynch, M.D. dated June 19, 1993

Claimant's Exhibit 12 : Statement of charges from Rutland Regional Medical Center totalling \$16,586.02

Claimant's Exhibit 13 : Weekly Time Records

Claimant's Exhibit 14 : Ledger of jobs

Claimant's Exhibit 15 : Additional Time Records

Claimant's Exhibit 16 : July 15, 1991 letter from
Rutland Regional Medical
Center to Jeffrey DeJarnette

Claimant's Exhibit 17 : Weekly Time Records for Joseph
Lafaso

Claimant's Exhibit 18 : Six pages of copies of Weekly
Logs and Hired Equipment Slips

Claimant's Exhibit 19 : Affidavit of Kevin Elnicki

Defendant's Exhibit A : Record of Pay and Earnings
dated May 15, 1991 through May
17, 1991

Defendant's Exhibit B : Farrells Job Foreman's Time
Record for the week ending May
10, 1991

Defendant's Exhibit C : Three copies of Hired
Equipment Slips dated May 6,
1991

Defendant's Exhibit D : Affidavit of Tara Dillingham
dated August 22, 1991

Defendant's Exhibit E : Kirbach Chiropractic Clinic
record

Defendant's Exhibit F : Patient Consultation record
dated May 28, 1991

Defendant's Exhibit G : Affidavit of Jeffrey
DeJarnette dated September 25,
1991

Defendant's Exhibit H : Deposition of Jeffrey
DeJarnette

Defendant's Exhibit I : Affidavit of Thomas Pelkey

Defendant's Exhibit J : Original Weekly Time Slips
from March 22 through May 3,
1991

- Defendant's Exhibit K : Foreman's Time Card dated March 15, 1991
- Defendant's Exhibit L : Hired Equipment Slips dated May 13, 1991
- Defendant's Exhibit M : Frank Elnicki Jr.'s Foreman's Superintendent Report for the week ending May 17th
- Defendant's Exhibit N : FUCCI contract - Gravel Material
- Defendant's Exhibit O : copy of Frank Paul Elnicki's Passport
- Defendant's Exhibit P : Affidavit of Steve Rogers dated January 28, 1993

3. After the hearing the Defendant F.P. Elnicki produced the following exhibits which were submitted in evidence and received by stipulation of the parties:

- Claimant's Exhibit 20 : Time Records of Andrew Gaiotti for the week ending May 17, 1991
- Claimant's Exhibit 21 : Letter from Attorney Liccardi saying that F.P. Elnicki cannot locate any weight slips from the pit in Shrewsbury for May 13, 1991

4. In essence, the claimant claims in this case that he was working for F.P. Elnicki on May 13, 1991, driving a dump truck, delivering gravel from a gravel pit in Shrewsbury, owned by a company related to the Defendant, to a lot development project on Crampton Avenue in the Rutland area. This job site is known as the Fucci job. Claimant testified that as he was driving a dump truck in the gravel pit, the truck hit a large pot hole, and the claimant's "seat bottomed out" causing severe pain in his back.

5. The Defendant, F.P. Elnicki, (referred to herein as the

Defendant, unless other defendants are specifically named) asserts that the claimant could not have injured himself in the manner he claims because the claimant had been laid off from working for F.P. Elnicki on the Friday before, i.e., May 10, 1991.

6. The testimony on behalf of the parties is in direct contradiction. The findings in this case come down to the issue of credibility -- which testimony is more credible.
7. The claimant's testimony did contain numerous contradictions. However, overall, his testimony did appear more credible. The claimant testified that the dump truck he was using on May 13, 1991, was one he borrowed from another employee. This other employee told the claimant that the truck was not needed by him because he was heading to Albany in a Cherry Picker to pick up some old metal. The Hired Equipment List of a co-employee named George Reed on May 13, 1991, shows that Mr. Reed drove a dump truck until approximately noon, then he changed trucks to pick up some old cars.
8. The defendant argued that the claimant could not have been driving a dump truck on that day because the company owns only 5 dump trucks, and from the records it produced at the hearing, three dump trucks were being used all day by other employees and the other two were out of commission, one being unregistered and the other being given an overhaul. Yet, after the hearing, additional Hired Equipment Lists for May 13, 1991 were produced showing that another employee was driving a fourth operable dump truck on the morning of May 13, 1991. This employee was George Reed, who stopped using this dump truck at approximately noon. The claimant said he borrowed the dump truck from either "George" or "Charles." The claimant did not know either co-employee very well and thought the two looked very much alike.
9. Defendant's contentions are further discredited by the contradiction in testimony as to when the claimant was discharged. Frank Elnicki, Sr. testified that he laid the claimant off in the afternoon after work on Friday, May 10, 1991, at the job site, by personally speaking with the claimant. Yet, Kevin Elnicki testified in an affidavit in evidence that the claimant was fired by Frank Elnicki, Sr.

over the telephone, when Mr. Elnicki, Sr., was in his office. Kevin Elnicki testified that he was present during this telephone conversation. Yet, Mr. Elnicki, Sr., testified that Kevin Elnicki was not present when he laid off the claimant.

10. Defendant further argued that the claimant could not have been delivering gravel on May 13, 1991, because all loads of gravel from the pit must be weighed on the scale, and there were no weight slips showing the claimant hauled any gravel from the pit on that day. At the hearing the Defendant promised to produce all of the weight slips for May 13, 1991, from the gravel pit to submit in evidence before the record closed. The company could find no weight slips for May 13, 1991, by any employee taking gravel from the pit on that day, even though hired equipment tickets do show that other employees were using dump trucks to haul gravel to the Fucci job site on the 13th. The lack of weight slips also bolsters the claimant's testimony that the scales at the gravel pit were closed on May 13th.
11. The Defendant's witnesses also testified, very strenuously, that the claimant was not hired as a truck driver and, therefore, never drove trucks. Yet independent witnesses, who had been customers of F.P. Elnicki, testified that they saw the claimant drive Roll-off trucks to their home. Furthermore, one Hired Equipment Slip does show that the claimant was driving a dump truck on at least that occasion. Other co-employees testified that they saw the claimant drive trucks for the defendant.
12. Finally, a co-employee, Steve Rogers, testified that he saw the claimant deliver gravel to the Fucci site on a day when he, Charlie Pritchard and Andrew Gaiotti were also delivering gravel. He could not say for certain whether it was May 13th. Yet he did testify that this was the only day on which the claimant was seen delivering gravel, and the witness was delivering gravel to the Fucci job site the next day. Defendant's record of gravel material delivered to the Fucci job site shows that May 13, 1991, was the first day of a concentrated effort to deliver a substantial amount of gravel to the site. Before May 13th, only one load of gravel had been delivered to the Fucci site. Starting on May 13 and continuing through May

20, 798 yards of gravel were delivered to the job site. The defendant's records also establish that on May 13th Charlie Pritchard, Steve Rogers and Andy Gaiotti were all delivering gravel to the Fucci job site.

13. Therefore, based upon the most credible evidence, the claimant was indeed driving a dump truck for F.P. Elnicki on May 13, 1991, delivering gravel from the Shrewsbury pit to the Fucci job site, when the dump truck hit a pothole, causing the claimant to jolt his back.
14. The claimant did have a preexisting disc herniation at L-5, S-1. The jolt to the claimant's back on May 13, 1991, caused a disc herniation at L-3/4. There is no evidence that between December, 1988 and May 13, 1991, the claimant sought any medical treatment for his pre-existing chronic lower back condition. The injury on May 13, 1991, caused the claimant to be disabled from work and the need for corrective back surgery. As such, the injury was an aggravation of a preexisting condition rather than a recurrence of a previous injury.
15. The defendant received treatment at the Rutland Regional Medical Center and Mid-Vermont Orthopaedists. He also received prescriptions filled at Wilcox Pharmacy, CVS/Pharmacy, and Carpenter's Pharmacy. The total amount of these medical expenses is \$20,473.67. These medical services and supplies are reasonable, necessary and causally related to the claimant's injury.
16. The claimant was temporarily totally disabled from May 13, 1991, to January 10, 1992. His total weekly compensation benefits for that period is \$10,318.51.

CONCLUSIONS

1. The claimant has the burden of proof in establishing all facts essential to his right to recover under the Workers' Compensation Statute. The claimant must show that he suffered an injury at a fixed time and place in an incident traceable to his employment. Goodwin v. Fairbanks, Morse & Co., 123 Vt. 161, 166; 184 A.2d 220 (1962). See also, King v. Snide, 144 Vt. 395, 399, 479 A.2d 752 (1984); Rothfarb v. Camp Awanee, Inc., 116 Vt.

172, 177, 71 A.2d 569 (1950).

2. If expert medical evidence establishes a causal connection between an aggravated or accelerated medical condition and a work-related injury, the aggravated or accelerated condition is compensable. Jackson v. True Temper Corp., 151 Vt. 592, 595, 563 A.2d 621 (1990); Campbell v. Savelberg, Inc., 139 Vt. 31, 35-36, 421 A.2d 1291 (1980); Marsigli Estate v. Granite City Auto, 124 Vt. 95, 103, 197 A.2d 799 (1964).
3. The claimant has requested attorney's fees. The Commissioner may award attorney's fees in her discretion pursuant to 21 V.S.A. § 678(a). The purpose of this provision is to discourage any unnecessary expense and unreasonable delay in the resolution of the workers' compensation claims. Morrisseau v. Legac, 123 Vt. 70, 79, 181 A.2d 53 (1962). Under Rule 10, Process and Procedure For Claims Under the Vermont Workers' Compensation and Occupational Disease Acts, evidence establishing the amount and reasonableness of attorney's fees requested shall be offered before the date upon which the proposed findings of fact and conclusions of law are filed. While this rule appears mandatory, failure to comply with the rule "may" result in a denial of an award for attorney's fees. Therefore, denial of attorney's fees for failure to file this evidence is discretionary with the Commissioner. In this case, the claimant has suffered a long delay in recovering his benefits due to the actions of the defendant. The claimant has struggled through an intervening bankruptcy filed by the defendant and has faced an unreasonable and apparently fictitious defense to his claims. Under these circumstances, attorney's fees will be awarded under Rule 10, upon submission of evidence of the amount of attorney's fees incurred by the claimant.

It is therefore ORDERED, that the defendant immediately pay to the claimant:

1. Temporary total disability compensation from May 13, 1991, to January 10, 1992, in the amount of \$10,318.51;
2. Medical and hospital benefits in the amount of

\$20,473.67. The Commissioner notes that the Rutland Regional Medical Center holds an approved lien in the amount of \$13,495.15.

3. All further and additional benefits under the Workers' Compensation Statute consistent with this Order.

DATED in Montpelier, Vermont this 2nd day of September, 1993.



Barbara G. Ripley
Commissioner