

Fenlason v. Dayco, Inc.

(05/10/04)

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

Dwayne Fenlason ) Opinion No. 18-04WC  
)  
)  
v. ) By: Margaret A. Mangan  
) Hearing Officer  
)  
Dayco, Inc. ) For: Michael S. Bertrand  
) Commissioner  
)  
) State File No. K-06040

Hearing held in Montpelier on  
May 13, May 14, August 26, August 27 and September 2, 2003

Record closed on December 15, 2003

**APPEARANCES:**

Charles L. Powell, Esq., for the Claimant  
Corina N. Schaffner, Esq., for the Defendant

**ISSUES:**

1. Did claimant's psychological injury arise out of and in the course of his employment with Dayco?
2. Did he suffer an aggravation and or intervening event subsequent to his injury at Dayco?
3. Did the claimant made material misrepresentations so as to preclude him from any further benefits?
4. Is the use of methadone in claimant's case reasonable and medically necessary?

**EXHIBITS:**

Joint Exhibit I: Medical records Volumes I and II  
Joint Exhibit II: Claims file Volumes I and II  
Joint Exhibit III: Vocational Rehabilitation Records

*Joint Exhibit IV: Supplemental Medical Records*

*Claimant's 1: Crawford File Documents*  
*Claimant's 2: Curriculum vitae of Steven Mann, Ph.D.*  
*Claimant's 3: Curriculum vitae of Gilbert Fanciullo, M.D.*  
*Claimant's 4: Curriculum vitae of Michael Fanizzi, M.D.*  
*Claimant's 5: Curriculum vitae of Dennis Coombs, M.D.*

*Defendant's A: Kimball Union Academy Job Application (2 pages)*  
*Defendant's B: Videotape*  
*Defendant's C: New Hampshire Notice of Injury 2/10/95*  
*Defendant's D: New Hampshire Notice of Injury 6/28/95*  
*Defendant's E: Recorded Statement*  
*Defendant's F: Curriculum vitae of Christopher Brigham, M.D.*  
*Defendant's G: Curriculum vitae of James Rosen, Ph.D.*

***FINDINGS OF FACT:***

- 1. The exhibits are admitted into evidence and notice is taken of all department forms filed in this matter.*
- 2. Claimant, who is in his mid 30s, has worked primarily in manual labor jobs. He left high school after three years.*
- 3. On September 20, 1996, claimant was working at Dayco when he lifted a piece of plywood and injured his low back.*
- 4. Two months later, claimant reported to Dr. Rudolph that he was still in severe pain. The examination was essentially normal. Dr. Rudolph diagnosed a soft tissue strain, then suggested gradual re-entry into the work force with reconditioning and further time to let the acute symptoms subside.*
- 5. By November 6<sup>th</sup>, claimant was released to return to three hours of work per day.*
- 6. Physical therapy followed.*
- 7. In early February 1997, Dr. Rudolph ordered tests that led to the diagnosis of L5 spondylolisthesis and a degenerative prolapsed disk at L4-5. A spinal fusion was performed on April 8, 1997. At the 8 week follow up he was noted as fairly comfortable with only a few intermittent episodes of tingling in his legs.*

8. *In July of 1997 claimant was still complaining of pain, although x-rays showed no change in the fusion.*
9. *Postoperatively, claimant had physical therapy, was referred to a pain clinic and received nerve blocks. His complaints of pain continued. In December of 1997 Dr. Coombs described him as an anxious guy with anger and fatigue as well as a neuropathic component to his pain.*
10. *One year after the spinal fusion surgery, claimant's range of motion was normal. He was at medical end result with an impairment rating between 11% and 7% and had a medium work capacity.*
11. *In May of 1998 claimant was working at Sears, 25 hours a week doing manual clean up work and maintenance. He reported pain in his back and a burning sensation in both legs in the last two hours of the workday.*
12. *In August of 1998 claimant sought care for a mass he discovered behind his left knee. The cyst was drained.*
13. *In November of 1998 claimant began working at Kimball Union Academy part-time. He was a housekeeper/custodian hired at \$7.00 per hour. Two months later, his pay was increased to \$8.00 and he was working overtime.*
14. *Also in November of 1998 claimant saw Dr. Lord who opined that he was at medical end result, although he continued to have pain.*
15. *In December 1998 Dr. Coombs noted that claimant had tingling and burning over his left hip. He took some time off from work, but returned to Kimball Union on a half time basis.*
16. *By January 27, 1999, claimant told Dr. Coombs that he had a 90% reduction in his hip pain, but was concerned about the left leg pain from the cyst in that area and his low back pain. At that time, he was working full-time.*
17. *On March 4, 1999, Dr. Coombs noted that claimant was about to lose his job at Kimball Union, despite working overtime, because they had chosen not to keep him as a permanent employee. Around that time, he was working on building and*

18. *Claimant had lumbar medial branch blocks on March 15, 2002. Afterwards, he telephoned to report that he had no relief and was actually worse.*
19. *At an April 1999 visit to Dr. Abdu, the doctor noted that claimant was healthy looking and in no distress. The neurological examination was negative, although he still had some low back pain on extension.*
20. *While working at Kimball Union, claimant rode his motorcycle to work at least once and sometimes took his all terrain vehicle, which he sometimes used at work.*
21. *At Kimball Union graduation in May 1999, claimant set up and took down 1,200 chairs and took down the ice rink. On May 26<sup>th</sup>, he reported to Dr. Coombs that the graduation work caused burning pain in his hip and low back pain that kept him out of work for two days.*
22. *On July 12, 1999, claimant discontinued the chiropractic treatments he had been receiving.*
23. *After a wind storm in early July of 1999, claimant had a large clean up job to do at Kimball Union, which involved using a chain saw, lifting wood, throwing logs into the back of a truck and cleaning the fields.*
24. *On July 15, 1999, claimant sought medical help for a strained lower back. Dr. Coombs then restricted him to light duty with no lifting or straining of the low back for two weeks, and weight restrictions afterwards.*
25. *Later that July, claimant was transferred from buildings and grounds to housekeeping.*
26. *At an examination on July 21, 1999, it was noted that claimant's old pain had returned. He had trigger points along the spine at the L3 and L5-S1 levels and "exquisite" pain in the right hip, the earlier donor site. In Dr. Coombs's opinion, any*

27. *In a letter to Dr. Fanizzi, Dr. Coombs noted that with the chain saw work at Kimball Union, claimant's "whole syndrome has recreated itself." He prescribed medications he had earlier stopped prescribing. Further, he asked Dr. Fanizi to assess whether claimant had significant depression that had an impact on his reports of pain and whether he could assess the risks and opportunities with spinal cord stimulation.*
28. *Dr. Coombs kept claimant out of work until July 23, 1999. Afterwards, he was at light duty for two weeks with a 15 pound lifting restriction. He did not return to the same level of work he had been doing before the July clean up/chainsaw incident.*
29. *On July 21, 1999 claimant saw Dr. Fanizzi on a referral to provide a psychological evaluation on claimant's candidacy for a spinal cord stimulator.*
30. *Claimant was released to return to work at light duty eight hours a day, five days a week with a two-hour overtime limitation, beginning on October 14, 1999. On that day, claimant sought care for left ankle pain and increased pain in his left knee.*
31. *Concerned that a nerve could be involved, Dr. Coombs referred claimant to Dr. Kimberly Harbaugh, a neurosurgeon, for an evaluation of his knee and ankle pain. The doctor determined that the cause was the popliteal cyst that was compressing a nerve behind the knee.*
32. *In November 1999 claimant was referred to Dr. Steven Mann who opined that he was significantly depressed and suffered from somatization. He placed claimant in a behavioral modification program.*
33. *Surgery on the knee cyst was performed on December 22, 1999.*
34. *Claimant returned to work at Kimball Union on January 24, 2000 and was told not to overexert himself. Within a week, he*

35. *The pain in claimant's knee persisted, despite the surgery, which made standing difficult. In February 2000 Dr. Coombs imposed additional restrictions.*
36. *Claimant's knee problems are unrelated to any work related injury. In Dr. Coombs opinion, the left knee pain was the "final nail" and "last straw" in terms of disability.*
37. *In January of 2000 claimant began a pain program in Rutland with Dr. Mann, who noted that he was battling knee and back pain.*
38. *Because of the work restrictions, Kimball Union changed claimant's work status from full time to part time in February of 2000. Sometime in April, claimant ended his work at Kimball Union.*
39. *Claimant's work in the pain program with Dr. Mann continued.*
40. *On June 1, 2000, claimant started a new job with a new employer. That job lasted for about three weeks.*
41. *Claimant is unwilling to accept any diagnosis that suggests a psychological component, even mild depression due to his pain, which Dr. Fanizzi diagnosed.*
42. *On September 22, 2000 claimant awoke with excruciating back pain. He went to the emergency department at Dartmouth for treatment.*
43. *Doctors were adjusting claimant's medications and discussing spinal cord stimulator with him in the fall of 2000.*
44. *Claimant returned to Dr. Coombs in October of 2000 for management of his prescription medications, then telephoned him in December with the report of sleeping fourteen hours a day having symptoms he could not deal with, such as left leg burning from the knee to ankle with any significant exercise.*

45. *When claimant visited Dr. Coombs in March of 2001 with the complaint of a right hand rash, Dr. Coombs noted that he had "a callous across his hand that may be from gloves he wears for snowmobiling. Just the fact that he is able to do this strongly suggests that perhaps his back has been better lately...."*
46. *In June 2001, claimant reported to Dr. Fanizzi that he was trying to do chores around the house, but was "almost back to where he started with the level of pain."*
47. *In July 2001 claimant visited Dr. Harbaugh to discuss a spinal cord stimulator. Areas of pain were: the right hip graft site, low back, and a burning pain in the left lower leg.*
48. *In August 2001 Dr. Fanciuillo determined that claimant was not a good candidate for a spinal cord stimulator.*
49. *Defense investigators observed the claimant's house and truck and took surveillance videotapes on several occasions from January to April 2002. The tapes show claimant getting in and out of his truck, walking into a store, crossing a parking lot, taking a trash bag from his house and shaking out mats. No abnormal movements or obvious signs of discomfort are evident. However, the tapes are not inconsistent with the claimant's testimony about his abilities.*
50. *After learning about the surveillance, claimant complained to his physicians of the insurance company's depravity.*
51. *In June 2002 claimant underwent radiofrequency facet treatment at Dartmouth for worsening left leg pain below the knee.*
52. *Since the Kimball Union clean up injury, claimant has not been able to go to the NASCAR races he always enjoyed.*
53. *In November of 2002 claimant began treating with Dr. Fanciuillo at Dartmouth for treatment of his pain. Because Dr. Fanciuillo thought that a spinal cord stimulator had little chance of success, he recommended medication therapy, specifically methadone.*

### Past History

54. *Prior to any injury at issue here, claimant had three workers' compensation claims in New Hampshire. The one closest to the events at issue occurred in July 1995 when claimant injured his lower back while working for a furniture company. There is nothing to indicate that claimant received disability checks for any of those claims. It is not clear who completed the forms for those claims. Although claimant's deposition testimony that he had no prior claims was clearly in error, I cannot find that it was a willful false statement.*

### Expert Opinions

55. *On June 29, 2000, Dr. Fanizzi wrote that claimant's "depression is a direct result of his inability to work and is also a result of his chronic work related pain."*

56. *On July 17, 2000, Dartmouth Psychiatric Associates diagnosed anxiety and an adjustment disorder. In the record for that visit are notes reflecting claimant's report that he was working on putting a pool in his backyard, was maintaining his house, cars and lawn. Also noted is that he was caring for his children.*

57. *A Functional Capacity Evaluation done at Dartmouth resulted in the conclusion that claimant had a sedentary to light physical demand level for a job.*

58. *On July 31, 2000, Dr. Kenosh determined that claimant had reached medical end result with a 10% whole person impairment.*

59. *Dr. Mann determined that claimant had reached medical end result for his psychological condition and, based on the AMA Guides and Colorado system of ratings, had a 17% permanent partial impairment. Fundamental to this assessment is the extent to which an injury affects one's activities of daily living.*

60. *In Dr. Brigham's opinion, the appropriate AMA Guides chapter for rating this claimant's impairment for pain is the chapter on pain, not the chapter on psychological conditions used by Dr. Mann. Therefore, Dr. Brigham added 3% to*

61. *Dr. Mann and Dr. Fanizzi agree that claimant's depression worsened from 1999 to 2000, with increased pain while working at Kimball Union and the worsening of his left knee cyst.*
62. *On October 29, 2001, Dr. Rosen evaluated claimant's psychological condition at the request of the insurance carrier. Claimant drove two hours by himself for that appointment, without difficulty. He had no signs of discomfort during a two-hour timed interview, during which he was friendly and open. To Dr. Rosen, claimant described a typical day, full of various activities that he did around the house by pacing himself. Pain came on unpredictably.*
63. *Claimant reported to Dr. Rosen that he worked on his son's bikes and that they went four wheeling or on walks together. Pain kept him from physically playing with his son, but generally claimant felt good about being a father. Problems with his stepson prompted claimant to report that life was too hectic to deal with those problems and a job.*
64. *In Dr. Rosen's opinion, claimant may have an adjustment disorder with depressed mood, but he does not have major depression. In support of that conclusion, he noted that claimant does not have persistent depressed moods, that he maintained interests and enjoyment of life. Limits on his energy are due to pain, not mood. Claimant has neither concentration nor memory difficulties. The MMPI supported Dr. Rosen's opinion. Dr. Mann opined that the MMPI, as used by Dr. Rosen, lacked validity for a chronic pain patient.*
65. *Dr. Fanizzi later wrote that claimant often said he was fine when he was not, in order to look good, which could account for what he told Dr. Rosen.*
66. *On November 19, 2001, Dr. Mann critiqued Dr. Rosen's evaluation as flawed. In Dr. Mann's opinion, there is a direct causal effect of the claimant's pain and his mood.*
67. *When Dr. Mann saw the claimant on February 25, 2002, claimant had arrived with his girlfriend who had driven him to*

68. *Dr. Mann observed that claimant walked slowly with slight stiffness in his gait.*
69. *Testing by Dr. Mann revealed that claimant has a somatoform disorder. However, based on history, his diagnosis was major depressive disorder.*
70. *Based on his interview with the claimant and his girlfriend, Dr. Mann concluded that claimant was severely limited in his activities of daily living. Dr. Fanizzi discussed this case with Dr. Mann and concurred in the conclusion about limited daily activities. One example was claimant's inability to complete laundry unless his partner placed the laundry basket next to the washer and dryer.*
71. *Dr. Mann and Dr. Fanizzi agreed that claimant's naiveté and lack of insight would keep him from acknowledging depression.*
72. *Dr. Fanizzi opined that but for the 1996 injury, claimant would not have the depression he now has, but he also acknowledged that the events at Kimball Union and the knee cyst contributed to and/or accelerated the development of his depression.*
73. *Dr. Coombs opined that claimant's pain recreated itself after the Kimball Union incident.*
74. *Dr. Brigham and Dr. Rosen opined, based on medical records and surveillance videotapes and surveillance reports, that claimant was not honest with his physicians. They thought claimant exaggerated his physical and psychological complaints. Further, Dr. Brigham rejected the plan that methadone be prescribed for this claimant because of his untruthfulness.*

## **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 (1963). 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).*

### Aggravation -Recurrence

3. *The dispositive question in this case is whether claimant's current condition is a recurrence for which Dayco is responsible or an aggravation, which relieves Dayco of further liability.*
4. *"Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. WC Rule 2.110; "Recurrence" means the return of symptoms following a temporary remission." WC Rule 2.1312; see also Pacher v. Fairdale Farms 166 Vt. 626, 629 (1997) (mem). Factors this Department examines to determine if an aggravation occurred, with the greatest weight being given the final factor, are whether: 1) a subsequent incident or work condition destabilized a previously stable condition; 2) the claimant had stopped treating medically; 3) claimant had successfully returned to work; 4) claimant had reached an end medical result; and 5) the subsequent work contributed independently to the final disability. Trask v. Richburg Builders, Opinion No. 51-98WC (1998).*
5. *In January 1999 claimant successfully returned to work at Kimball Union Academy. He earned the same salary as he had before the Dayco injury. Work at Kimball Union was heavy, involving lifting, mulching, weeding and other general landscaping chores. He did the work well. Then, in July 1999 his condition destabilized after he used a chainsaw and cleaned up after the storm.*

6. *In the fall of 1999, symptoms related to his knee cyst made performing even light duty work difficult. In fact, claimant has not returned to full time full duty work since the chain saw/clean up incident at Kimball Union. Clearly, the work at Kimball Union combined with the knee cyst to create a disability far greater than what claimant had prior to the Kimball Union injury. Under Pacher, therefore, the subsequent events aggravated claimant's pain condition, relieving Dayco of liability.*
7. *Similarly, symptoms increased and the diagnosis of depression became clear after the Kimball Union work and worsening of claimant's knee cyst and after it became obvious to the claimant that he could no longer do the building and grounds work.*
8. *The clear legal principle that the "aggravation or acceleration of a preexisting condition by an employment accident is compensable..." Jackson v. True Temper, 151 Vt. 592, 595 (1989), puts liability on the employer where the aggravation or acceleration occurred, not on an earlier employer. As such, Dayco as the original employer is not liable for the claimant's depression or his pain condition.*
9. *Because the crucial causal link has been broken, it is not necessary to address the question of fraud or the reasonableness of the methadone treatment.*

**ORDER:**

*Therefore, based on the foregoing Findings of Fact and Conclusions of Law:*

*These claims against Dayco for benefits associated with the treatment of claimant's pain and depression are DENIED.*

*Dated at Montpelier, Vermont this 10<sup>th</sup> day of May 2004.*

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*Michael S. Bertrand  
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.*