

D. G. v. J. A. McDonald, Inc.

(January 31, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

D. G.)	Opinion No. 04-06WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Liberty Mutual as Insurer)	For: Patricia A. McDonald
for J.A.McDonald, Inc.)	Commissioner
)	
)	State File No. U-52908

Pretrial conference held on June 27, 2005
Hearing held in Montpelier on November 15, 2005
Record closed on December 7, 2005

APPEARANCES:

Ronald A. Fox, Esq., for the Claimant
Eric N. Columber, Esq., for the Defendant

ISSUES:

1. Whether Claimant suffered a compensable work related injury on or about May 24, 2004 at J. A. McDonald, Inc.
2. If Claimant suffered a work related injury, the extent of benefits due.
3. Whether claimant is entitled to attorney fees and costs.

EXHIBITS:

Joint I: Medical Records on CD

Defendant A: First Report of Injury
Defendant B: Findlaw WC Overview
Defendant C: Claimant’s statement to adjuster
Defendant D: Dr. Backus’s CV
Defendant E: Dr. Backus’s IME Report

FINDINGS OF FACT:

1. Claimant was an employee and J.A. McDonald, Inc. his employer within the meaning of the Workers' Compensation Act on May 24, 2004. Liberty Mutual was the workers' compensation insurer at the time.
2. During his adult working life, most of Claimant's jobs have required manual labor. For 20 years he worked for the Northern Vermont Railroad before being laid off in 2000.
3. In 2001 Claimant began working for J.A. McDonald driving a cat truck and doing manual labor. That job included working on a rock crusher.
4. Claimant's work was seasonal. It began in the spring when the ground thawed and ended in the fall or winter when it froze. In the off-season, he collected unemployment, worked around his own house and did an occasional job for the employer.
5. Claimant is a poor historian. However, it is clear from records that he had back pain from doing manual work and from an underlying condition.
6. At some time in January of 2004, claimant helped move some track plates in the employer's yard. He felt his back tightening up afterwards.
7. Soon thereafter, claimant saw a chiropractor, Dr. Billig, and medical doctor, Dr. Elliot, for treatment of back pain. Tests revealed spondylolisthesis and spondylolysis. He also received treatment at the Dartmouth Spine Clinic in March of 2004.
8. When the ground thawed, claimant returned to work. He worked 50 hours a week and took aspirin for what back pain he had.
9. On May 24, 2004 Claimant was working on a rock crusher. While breaking down the machinery to get it ready to be moved to another job site, he climbed to the top of a machine to tie things down. He was standing on an 8-foot ladder cranking on a ratchet when the ratchet let go. He lost his balance, and then jumped off the ladder, landing first on his right foot, a foot that was badly injured a few years before in a work related accident. (hereinafter the "crusher incident"). He "did a roll" then got up. A truck driver observed the event.
10. Claimant returned to his task then crawled under the crusher to dig out accumulated rock.
11. When Claimant and coworkers stopped for coffee shortly afterwards, Claimant could hardly walk on his ankle. On return to the shop, someone filled out an accident form for the injured right ankle.
12. Later, Claimant went to the hospital with complaints of right ankle pain. He did not mention back pain. Palpation on physical examination did not reveal any back pain.

13. After the May 24th incident, Claimant stopped working for about a week on doctor's orders because of the ankle. When he returned to work, he was driving a loader and bucket loader instead of working the rock crusher so that he would not have to stand for long periods.
14. At the end of a week driving the loaders, Claimant told his supervisor that he could not work any more because of the pain and because of numbness in his left foot. The ankle injury was on the right.
15. On June 8, 2004 Claimant returned to the clinic where he had been treating before the May 24th crusher incident. At that visit Linda Brown noted a change in his symptoms from earlier visits in a patient who she noted minimizes symptoms. One significant change was pain in the left foot. Although he had had left leg pain before, it had never gone to his foot.
16. At a June 14, 2004 visit to Dr. Elliot, Claimant described having trouble walking and experiencing back pain after the May 24th crusher incident. Although palpation of the back did not provoke back pain, the left sided straight leg test was positive. Dr. Elliot took Claimant out of work.
17. An MRI revealed a herniated disc.
18. Claimant's wife did some internet research, prompting her to suggest that this is a workers' compensation claim.
19. Claimant underwent surgery for a herniated disc in August 2004.
20. Claimant's description of events and symptoms has not always been consistent. In general I find that he is a poor historian, not one who deliberately misrepresents the truth. However, the most persuasive facts are those from medical records developed at or near the time of crucial events, not Claimant's recollection at hearing.

Medical Expert Opinion

21. Dr. Victor Gennaro is an orthopedic surgeon with considerable experience with spine surgery. He performed an independent medical examination of the Claimant, reviewed medical records back to 2001, and reviewed the deposition transcript of Dr. Backus.
22. Dr. Gennaro agrees that the Claimant is a poor historian. From the records he concluded that Claimant had preexisting spondylolisthesis that was worsened by the May 24th crusher incident. He based that opinion on the following: Claimant's back was unstable before the incident at issue. A fall from 8 feet coupled with a twisting motion significantly stressed the area of instability, which in turn either caused the disc herniation or caused traction on the nerves down the leg. In either case, it was the reason Claimant needed the August 2004 surgery. Any left leg symptoms Claimant had before the crusher incident went only as far as his thigh. After that incident, the pain and numbness went to the left foot. Pain radiating to the foot indicates involvement of the L5-S1 nerve root, the site of Claimant's herniated disc. Before the crusher incident, claimant was able to work 50-hour weeks. Afterward, he could not work at all. Dr. Gennaro's opinion was not changed by the lack of symptoms at the time of the May 24 emergency department visit because back pain after such a fall is not necessarily immediate. It often develops after a few hours or days, as in this case. Dr. Gennaro considered the crusher incident to be an aggravating event, not the natural progression of an underlying condition.
23. Dr. Elliot's records before and after the crusher incident support Dr. Gennaro's opinion. Those records prove that before the incident Claimant was at times uncomfortable, but was doing all right. Pain did not limit him. He was able to work. After the incident, his condition dramatically changed.
24. Dr. Verne Backus, occupational medicine expert, performed an independent examination for the defense in this case. He reviewed all medical records and examined the Claimant. Claimant provided a history to Dr. Backus that included a long history of back pain, a specific incident in January of 2004 and the incident in May 2004.
25. In Dr. Backus's opinion, there is usually a sudden immediate inflammatory response to an injury, which did not occur in this case. Claimant did not complain of immediate back pain and the first physical examination revealed none.
26. Because Claimant had spondylolisthesis for years and because his pain was not immediate after the crusher incident, Dr. Backus concluded that the underlying condition, not the work related event, caused the disc herniation.

Attorney Fees and Costs

27. Claimant presented a copy of his contingency fee agreement with his attorney and evidence of necessary costs incurred totaling \$2,835.25.

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. It is well established that a work-related aggravation of a preexisting condition is compensable. *Jackson v. True Temper*, 151 Vt. 592 (1989).
4. As in many cases of this nature, the ultimate decision depends on the medical expert evidence presented and, necessarily, a choice between conflicting opinions. In these cases, this 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 (Aug. 4, 1997); *Gardner v. Grand Union* Op. No. 24-97WC (Aug. 22, 1997).
5. Neither Dr. Backus nor Dr. Genarro has treated the Claimant. Both provided objective support for opinions. Both performed comprehensive evaluations. The determining factor here is the second, the physicians' expertise. The subtle distinction turns on whether Claimant must have had immediate pain after the crusher incident for that incident to be the cause. Because Dr. Gennaro has orthopedic expertise and experience with similar cases, I accept his opinion as the more persuasive. That opinion is supported by the mechanism of injury—a fall of 8 feet with twisting, the preexisting weakness in Claimant's back and his treating physician's records. With it, Claimant has met the necessary burden of proving that the crusher incident aggravated his underlying condition and necessitated the need for his back surgery.

Benefits due

6. Pursuant to 21 V.S.A. § 642 Claimant is entitled to temporary total disability for a week after May 24, 2004 when he was taken out of work and from June 14, 2004 when Dr. Elliot again took him out of work until he reaches medical end result or successfully returns to work. See *Orvis v. Hutchins*, 123 Vt.18 (1962).
7. Claimant is also entitled to medical and hospital benefits for all treatment related to the work related injuries pursuant to 21 V.S.A. § 640 and permanent partial disability benefits if a future rating so warrants. 21 V.S.A. § 648.
8. Having prevailed in this case, Claimant is entitled to a discretionary award of reasonable attorney fees and mandatory award of necessary costs. 21 V.S.A. § 678(a). His request for a contingency fee award is a reasonable one, proportional to the degree of success and limited by WC Rule 10.1220. The costs listed were all necessary to the success in this claim.
9. Finally, claimant is entitled to statutory interest from the date each benefit would have been due until paid. 21 V.S.A. § 664.

Dated at Montpelier, Vermont this ____ day of January 2006.

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.