

**STATE OF VERMONT
DEPARTMENT OF LABOR**

M. P.)	Opinion No. 05-06WC
)	
v.)	
)	
State of Vermont)	
)	State File No. U-16486
)	

Pretrial conference held on June 27, 2005
Hearing held in Montpelier on November 10, 2005
Record Closed on December 5, 2005

APPEARANCES:

Heidi S. Groff, Esq., for the Claimant
Jason R. Ferreira, Esq., for the Defendant

ISSUE:

Whether Claimant's low back and leg pain, and subsequent surgery for a disc herniation, are causally related to a March 4, 2004 work injury.

EXHIBITS:

Joint:

- I: Medical Records
- II: Discovery Deposition of Dr. Richard Pinckney
- III: Preservation Deposition of Dr. Richard Pinckney

Claimant:

- 1. First Report of Injury
- 2. Email message from JoAnn McKee to Claimant dated 4/13/04
- 3. Risk Management Claim Questionnaire completed by Claimant
- 4. Manila Envelope dated 4/7/04
- 5. Dr. Jonathan Fenton's CV

Defendant:

- A. Dr. Verne Backus's CV
- B. Telephonic Report from Risk Management of 5/7/04

FINDINGS OF FACT:

1. Claimant was an employee and the State of Vermont his employer within the meaning of the Workers' Compensation Act in 1997.
2. From 1997 through 2005 Claimant worked as an Assistant Attorney General doing civil litigation.
3. Before March of 2004, Claimant had no significant back or leg pain.
4. In the afternoon of March 4, 2004, Claimant was working in the Attorney General's Office moving paper copies from a large litigation file from a file cabinet to his litigation bag to take home.
5. Sitting in his chair at work, Claimant lifted a large stack of papers from his desk with both hands, sandwiching them so he could turn them as a unit, bend over his brief case, and slide the papers into the bag vertically. In the process he felt a sharp twinge in his back.
6. Claimant stood up immediately. The pain dissipated.
7. When claimant awoke the next day, Friday, March 5th, he felt a cramp like pain in his right buttock that moved down his right leg to the calf. Although he went to work, the pain worsened to a point where he called his doctor for an appointment.
8. At that time, Claimant did not report a work related injury because he did not think it was a "big deal."
9. On Monday, March 8th, Claimant saw Dr. Repp because his primary care physician, Dr. Pinckney, was not available that morning. The record for that visit notes that Claimant had "low back pain radiating down to his right foot. Initially noted 'twinge' with lifting boxes then increased pain over past several days...."
10. By the time of a visit on March 31st, Dr. Pinkney noted both that Claimant had a work-related injury and that he suspected a disc herniation.

11. The seriousness of his condition became clear to the Claimant. He realized that he might need surgery and would miss time from work. And, he realized that his initial impression that the twinge he felt was no “big deal” was mistaken. Therefore, on April 7th, he contacted JoAnn McKee, personnel administrator, to report the injury as work related and to complete a First Report of Injury.
12. An April 14, 2004 MRI revealed that Claimant had a central and right-sided disc herniation at the L4-5 level. An epidural injection administered about 10 days later gave him no relief.
13. Because he received medical advice that his long commute to work could seriously damage his back, Claimant stopped working at the end of April.
14. On May 18, 2005 claimant saw neurosurgeon Dr. Nancy Binter who clearly documented his history of bending awkwardly at his desk to pick up a large stack of folders. She recommended an L4-5 discectomy, surgery she performed on June 7, 2004.
15. Dr. Binter released Claimant to work with restrictions on August 9, 2004.
16. The surgery relieved the pain down Claimant’s leg.

Medical Opinions

17. Dr. Richard Pinckney, Claimant’s treating internist, has treated hundreds of patients with occupational injuries. He opined that Claimant suffered a work-related injury while lifting and twisting at work in early March 2004. He based that opinion on a consistent history and the mechanism of injury involving lifting, twisting and a twinge. In his opinion, it is not unusual that Claimant had no pain until the next day because it takes time for the body to develop inflammation that causes pain or other symptoms.
18. Dr. Jonathan Fenton is a physician Board Certified in Physical Medicine and Rehabilitation who performed an independent medical examination for the Claimant and reviewed his medical records. In this opinion Claimant’s disc herniation was caused by the incident at work on March 4, 2004. At the time he felt a twinge in his back, he was in a sitting position, flexed forward, bent to the side and was turning, overall a non-physiologic motion for the spine that dramatically compressed his disc. In all likelihood, the twinge was damage to the ligaments. It is not unusual that claimant felt fine when he stood up, only to have pain the next day because it takes time for the body to mount a significant inflammatory response that leads to symptoms of back and leg pain. In his opinion, the MRI findings perfectly matched the symptoms and signs Claimant had.

19. The surgery Dr. Binter performed was reasonable treatment for his herniated disc. Typical out of work recovery would be up to twelve weeks.
20. Dr. Fenton determined that Claimant has since reached a medical end result for his injury with a DRE Category III lumbar spine impairment of 10%.
21. Dr. Verne Backus, Occupational and Environmental Medicine expert, performed an evaluation of the Claimant and his records for the defense in this case. At the time of his initial medical opinion, he had three pages of records: the MRI report, patient instruction sheet and work capabilities form. He did not have records from the Claimant's treating internist, the hospital, neurosurgeon or physical therapist. Based on the few records he had, Dr. Backus opined that there is no casual relationship between Claimant's work and his disc herniation. The key basis for the opinion was his understanding that Claimant did not develop significant symptoms until two days after the incident when he would expect immediate pain if Claimant had herniated a disc at work. Dr. Backus also noted the Claimant himself did not associate the work event with the back pain until sometime after the event and that moving heavy files was not an unusual activity. Additionally, Dr. Backus noted that the MRI revealed degenerative changes in Claimant's lumbar spine in addition to the herniated disc. He explained that it is not unusual for those in their 50s to have some form of disc herniation without any trauma.
22. When Dr. Backus reviewed all the medical records at a later time, his opinion regarding causation did not change.

Fees and costs

23. Claimant submitted a copy of his contingency fee agreement with his attorney and evidence that he incurred necessary costs of \$3,599.38.

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 (1997); *Gardner v. Grand Union* Op. No. 24-97WC (1997).
5. The opinion of Claimant's treating internist, Dr. Pinkney, together with the one from Dr. Fenton have the advantage with most of the criteria listed over the opinion from Dr. Backus. Dr. Pickney had an established relationship with the Claimant. All physicians have experience with occupational injuries. Dr. Fenton's opinion is the most objective, based on a solid understanding of the mechanism of injury and its connection to a disc herniation. Finally, the opinions of Dr. Fenton and Dr. Pinkney are the most comprehensive, based on the thorough review of records and Claimant's work. As in *D. G. v. J. A. McDonald, Inc.*, Op. No. 04-06WC (2006), I am unconvinced, as Dr. Backus posits, that the pain after a herniation must be immediate. In fact it is often a delayed response to inflammation. Lacking that fundamental premise, the defense fails.
6. Having prevailed, Claimant is entitled to "reasonable surgical medical and nursing services" related to his herniated disc pursuant to 21 V.S.A. § 640(a); temporary total disability benefits pursuant to § 642 while disabled from that injury until he reached medical end result; permanent partial disability benefits of 10% whole person pursuant to § 648 and Dr. Fenton's assessment; interest at the statutory rate from the date each payment was due until paid pursuant to § 664; attorney fees of 20% of the total award not to exceed \$9,000 and costs of \$3,599.38 pursuant to § 678(a).

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, Risk Management is ORDERED to adjust this claim by paying benefits listed above, including Medical, Temporary Total and Permanent Partial benefits, interest, attorney fees and costs.

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

Margaret A. Mangan¹
Hearing Officer

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.

¹ Commissioner Patricia A. McDonald recused herself from this case.