

N. B. v. One Beacon Insurance Company; Vermont Guaranty Fund; Ace USA; Cardinal Comp; Eastern Casualty (January 26, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

N. B.)	Opinion No. 06-06WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
One Beacon Insurance Company;)	
Vermont Guaranty Fund; Ace USA;)	
Cardinal Comp; Eastern Casualty)	For: Patricia A. McDonald
)	Commissioner
)	
)	State File No. U-12362

RULING ON DEFENSE MOTION FOR UNOPPOSED SUMMARY JUDGMENT

APPEARANCES:

William B. Skiff, II, Esq., for the Claimant
J. Christopher Callahan, Esq., for the Defendant One Beacon Insurance Company
William J. Blake, Esq., for the Defendant Vermont Guaranty Fund
John Davis Buckley, Esq., for the Defendant Ace USA
John W. Valente, Esq., for the Defendant Cardinal Comp
Richard J. Windish, Esq., for the Defendant Eastern Casualty

ISSUE:

Whether Claimant's 1999 shoulder injury and subsequent progression of preexisting ulnar neuropathy/bilateral cubital tunnel syndrome arose out of work that occurred during One Beacon Insurance Company's (One Beacon) risk.

UNCONTESTED FACTS:

1. One Beacon underwrote a policy through American Employers Insurance Company that insured Paquin Motors from May 1, 1997 to January 1, 1999.
2. One Beacon did not insure Paquin Motors after January 1, 1999.
3. The carrier on the risk from January 1, 1999 to January 1, 2000 was Indemnity Insurance of North America - Connecticut General – ACE.

4. Claimant is making claim for an aggravation or recurrence of an injury to his right shoulder and for an aggravation or recurrence of his ulnar neuropathy/bilateral cubital tunnel syndrome.
5. Claimant's expert, Dr. Vernon Backus, is unable to relate the progression of Claimant's ulnar neuropathy/bilateral cubital tunnel syndrome to a specific time when Paquin Motors employed Claimant.
6. Dr. Backus is able to relate the accelerated progression of the Claimant's ulnar neuropathy/bilateral cubital tunnel syndrome to the shoulder injury reported to have occurred in September or October of 1999.
7. The first indication that Claimant had a shoulder injury identified by the medical records is an October 28, 1999 record from Dr. Robert N. Beattie.
8. A December 1, 1999 medical record from Dr. Beattie indicates that Claimant's injury began approximately two months prior to that visit; Claimant's deposition is consistent with these dates.

CONCLUSIONS OF LAW:

1. Defendant One Beacon urges this department to rule as a matter of law that Claimant's 1999 shoulder injury and subsequent, accelerated progression of preexisting ulnar neuropathy arose after Defendant was off the risk. No other party in the case has opposed this motion.
2. Summary judgment is appropriate where there is no dispute of material fact and a party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3); *Robertson v. Mylan Laboratories, Inc.* 176 Vt. 356, 362 (2004) (citing *White v. Quechee Lakes Landowners' Ass'n*, 170 Vt. 25, 28 (1999)). When evaluating the merits of a motion for summary judgment, the moving party has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. *Miller v. Town of West Windsor*, 167 Vt. 588, 589 (1997). Any allegations to the contrary must be supported by specific facts sufficient to create a genuine issue of material fact. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).
3. There are three factors to support Defendant One Beacon's argument for summary judgment in its favor. First, Claimant has offered no facts in support of the claim that his 1999 shoulder injury and subsequent progression of preexisting ulnar neuropathy arose out of work that occurred during One Beacon's risk. Second, Claimant testified the onset of his right shoulder problems began in either September or October of 1999 and this testimony is consistent with his medical records; this date falls some nine or ten months after One Beacon was off the risk. Lastly, Dr. Backus' testimony regarding the progression of Claimant's preexisting ulnar neuropathy as work related in general did not reference a specific time

period, however the physician was able to identify a causal relationship between the 1999 shoulder injury and the accelerated progression of the ulnar neuropathy in his independent medical examination. This statement has not been contradicted by the Claimant in a response to this motion for summary judgment. Moreover, this decision is consistent with the most recent case law on point, *Haskins v. Merrill Gas Co., Inc.*, Op. No. 46SJ-02WC (November 13, 2002) (claimant's inability to prove that injury occurred while carrier was on the risk entitled the carrier to summary judgment), because the Claimant in this case has failed to prove his injury occurred while Defendant One Beacon was on the risk.

4. In sum, while giving the Claimant the benefit of all reasonable doubts and inferences, the Defendant is entitled to summary judgment as to the entirety of Claimant's case because there is no genuine issue of material fact and the Claimant has failed to show as a matter of law that his injuries occurred when One Beacon was on the risk.

ORDER:

Accordingly, the Defendant's motion for summary judgment is GRANTED.

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.