

D. V. v. America's Gardening Resource

(April 12, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

D. V.

Opinion No. 15-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Royal & Sun Alliance as
Insurer for America's Gardening
Resource

For: Patricia A. McDonald
Commissioner

State File Nos. S-22194; T-19042

RULING ON CLAIMANT'S PARTIAL MOTION FOR SUMMARY JUDGMENT

Claimant, through his attorney, Joseph C. Galanes, moves for judgment as a matter of law on the fact of two job injuries, and entitlement to permanent partial disability, PPD benefits.

Pending before this Department is an April 21, 2006 hearing on the issue "whether Claimant's spondylolisthesis and surgical repair are compensable under the Workers' Compensation Act as causally related to Claimant's employment with America's Gardening Resource." Defendant's Final Disclosures dated February 23, 2006.

Claimant was an employee and Royal & SunAlliance his employer within the meaning of the Workers' Compensation Act at all times relevant to this action.

In this Department's file are Forms 1, 21 and 24 for a work related injury of June 7, 2002 at America's Gardening Resource, a hardware store, and its Insurer Royal and SunAlliance. (S-22194). The injury was described in the Form 1, as "Employee states he has pinched nerve down right leg/pain/cause is unknown." On the Form 21 the injury is described as a back injury. No denial of the claim was filed.

Also in the Department's file is a Form 1 for a low back injury on May 20, 2003. (T-19042) The only denial on that claim was filed in January 2005, denying payment for proposed back surgery as unrelated to the injury of May 20, 2003.

Defendant accepted the claim and paid all reasonable hospital charges related to the accident. Since Claimant did not miss any time from work, no agreements for TTD were signed.

Dr. Smith-Horn determined that Claimant was at medical end result of his injuries, with a 3% impairment from the June 2002 injury and 10% impairment from the May 2003 injury. Her report includes a description of loss of range of motion due to spondylolisthesis.

CONCLUSIONS OF LAW:

Under WC Rule 3.0900 the employer/carrier has “21 days from receiving notice or knowledge of an injury within which to determine whether any compensation is due.”

Since the defendant in this case did not file denials as required, it must accept the claims for the injuries in 2002 and 2003. This is not, however, an acceptance of spondylolisthesis and the proposed surgery or for PPD benefits, subject for the upcoming hearing on which Claimant has the burden of proof.

Therefore, part of Claimant’s motion for partial summary judgment is granted. Claimant suffered work related injuries to his back in 2002 and 2003.

Dated at Montpelier, Vermont this 12th day of April 2006.

Patricia A. McDonald
Commissioner

D. V. v. America's Gardening Resource

(October 9, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

D. V.

Opinion No. 43-06WC

v.

By: Margaret A. Mangan
Hearing Officer

America's Gardening Resource

For: Patricia Moulton Powden
Commissioner

State File No. S-22194; T-19042

Hearing held in Montpelier on April 21, 2006

Record closed on May 22, 2006

APPEARANCES:

Joseph C. Galanes, Esq., for the Claimant

Wesley M. Lawrence, Esq., for the Defendant

ISSUES:

Whether Claimant's spondylolisthesis and surgical repair are causally related to his work related injuries at America's Gardening Resource, and therefore compensable under the Vermont Workers' Compensation Act.

EXHIBITS:

Joint I: Medical records

Claimant 1: Medical Bills

Defendant A: C.V of Jerome Siegel, M.D.

Defendant B: Handwritten notes of Dr. Gennaro

FINDINGS OF FACT:

1. Claimant was an employee and America's Gardening Resource his employer within the meaning of the Vermont Employer's Liability and Workers' Compensation Act (Act) at all times relevant to this claim.

2. Claimant worked in production for Defendant building, packing and shipping gardening products, including prefabricated greenhouses, garden sheds and garden carts. His work included frequent bending, lifting, squatting and carrying. Frequent lifting was up to thirty pounds; occasionally he lifted a hundred pounds or more.
3. On Thursday June 6, 2002, while engaged in his regular heavy work, Claimant noticed back pain. He continued to work. The next day he also worked, but noticed pain with bending. Over the weekend, Claimant developed shooting leg pain unrelated to activity.
4. Ten days after the onset of back pain, Claimant sought medical care. He was diagnosed with radicular symptoms from the L5 nerve root in his lower back.
5. Claimant underwent a course of physical therapy and gradual return to work. By August 2002 he was back to work full time. He learned to be careful with what he did because some residual pain persisted.
6. In late May 2003, Claimant's back symptoms returned, with radiation to his left leg. On May 21, he consulted with his physician, reporting that symptoms had started two weeks earlier. He reported that it was common to lift at least 50 pounds frequently during a workday.
7. Claimant's pain persisted, although he continued to work and to consult with Dr. Warren Rinehart. Epidural steroid injections provided only limited relief.
8. It is undisputed that Claimant had Grade I spondylolisthesis at L5-S1 that predated any work related injury.
9. Dr. Rinehart referred Claimant to Dr. Elizabeth Ames, a spine surgeon. Physical therapy followed with gains in strength and trunk stability.
10. However, Claimant was given permanent work restrictions with no lifting over thirty pounds; no carrying over 40 pounds, no pushing over 150 pounds and no pulling over 200 pounds.
11. In March 2004, at the request of the insurance carrier, Claimant was evaluated by Dr. Melissa Smith-Horn who determined that he had reached medical end result. She assessed Claimant with a 3% impairment as a result of the June 2002 injury and 10% as a result of the May 2003 injury. Dr. Smith-Horn wrote clearly that the impairments were the result of the work related injuries.

12. Given persistent worsening symptoms, surgery was recommended in late 2004.
13. The carrier denied Claimant's request that it cover payment for the surgery although it had paid all benefits up to that recommendation.
14. On February 24, 2005, Claimant had the surgery for spinal stenosis and isthmic spondylolisthesis. Specific procedures Dr. Ames performed were: 1) Laminectomy, bilateral foraminotomy L5; 2) Posterior spinal on L5-S1; 3) Instrumentation to lumbar vertebra posterior segmented; 4) Iliac crest bone graft; 5) Local bone graft, lumbar spine. During surgery, Dr. Ames noted significant left sided nerve root compression and foraminal narrowing.
15. As a result of the surgery Claimant went out of work on January 11, 2005 in preparation for the procedure and returned full time on June 29, 2005.

Medical Opinions on Causation

16. Dr. Ames, Claimant's treating surgeon, opined that Claimant's back "condition was aggravated by the lifting done in his work place, particularly since his pain is radicular in nature and not mechanical back pain."
17. Dr. Backus, who is s Board Certified in Occupational Medicine and Independent Medical Examinations, explained that with spondylolisthesis that is stable, the disc segment retains the stability of that vertebral area. However, once the disc degenerates, that source of stability is lost, leading to a slipped disc, back and leg pain. Dr. Backus explained further that Claimant developed lumbar degenerative disc disease which combined with his preexisting spondylolisthesis to create instability and pain. However, he concluded that degenerative disc disease is not correlated with lifting and in this case was not traumatic. Therefore, he concluded that Claimant's work did not create the need for the surgery.
18. Dr. Victor Gennaro, Board Certified Orthopedic Surgeon, performs twenty-five to thirty back surgeries a year. He performed an independent medical examination for the Claimant. Dr. Gennaro agreed with Dr. Backus's description of the combined effects of spondylolisthesis and degenerative disc disease. However, he disagreed with Dr. Backus on the issue of causation. In Dr. Gennaro's opinion, heavy lifting and frequent bending accelerate the progression of degenerative disc disease. Claimant's symptoms, according to Dr. Gennaro, were caused by an aggravation of spondylolisthesis. Of the risk factors for degenerative disc disease: smoking, obesity, excessive consumption of alcohol, heredity and heavy lifting, Claimant has only the last. The most likely cause, therefore, was Claimant's work activities.

19. Dr. Gennaro assessed Claimant with a 20% permanent partial disability rating.
20. Dr. Jerome Siegel, Board Certified in Occupational and Internal Medicine, reviewed Claimant's medical records and examined him. Dr. Siegel found no anatomical worsening of Claimant's spondylolisthesis. He opined that the most likely cause of Claimant's leg symptoms was an underlying soft tissue problem, e.g. long standing tight hamstring muscles. Dr. Siegel opined that bending at the waist would not aggravate spondylolisthesis, although he conceded that heavy lifting could. He assumed erroneously that Claimant did no heavy lifting at work.
21. Claimant submitted evidence of his contingency fee with his attorney and an accounting of \$3,498.87 in necessary costs.

CONCLUSIONS OF LAW:

1. In her ruling on the Claimant's motion for summary judgment, the Commissioner held that the carrier had accepted claims for two work related injuries in the course of Claimant's employment, one in 2002 and the other in 2003. However, the question whether the spondylolisthesis and surgery were causally related to Claimant's work remained a disputed issue for hearing. See Opinion No. 15-06WC.
2. Therefore, in this action Claimant must prove the essential causal connection. See *Egbert v. Book Press*, 144 Vt. 367 (1984). Did heavy lifting at Claimant's work accelerate his degenerative joint disease that combined with his spondylolisthesis to stabilize the spine and require surgery?
3. Dr. Backus opined that Claimant's disc degenerated independent of any heavy lifting, bending and squatting. Dr. Siegel did not think that Claimant's work required heavy lifting, but conceded that heavy lifting is a causative mechanism.
4. The most persuasive medical opinion is from Dr. Gennaro: frequent heavy lifting and bending is a cause of degenerative disc disease. The opinion is based on years of experience working with injured workers; experience operating on vertebrae and common sense. It is a conclusion supported by the defendant's first consultant, Dr. Smith-Horn, and the surgeon who performed the operation at issue, Dr. Ames. It is an opinion consistent with other cases, see e.g. *J. H. v. City of Burlington*, Opinion No. 40-05WC (2005) and is accepted here as the most logical.
5. Therefore, Claimant is entitled to payment for the surgery pursuant to 21 V.S.A. § 640(a), and for temporary total disability payments pursuant to § 642 from January 11, 2005 to June 27, 2005. He is also entitled to permanent partial disability benefits based on Dr. Gennaro's 20% rating.
6. Claimant is also entitled to statutory interest on all payments from the date they were incurred until paid. 21 V.S.A. § 644.

7. Finally, Claimant is entitled to the necessary costs incurred totaling \$3,498.87 and attorney fees of the total award not to exceed \$9,000. 21 V.S.A. § 678(a); WC Rule 10.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, Claimant is awarded medical, temporary total and permanent partial benefits, interest, attorney fees and costs as specified above.

Dated at Montpelier, Vermont this 9th day of October 2006.

Patricia Moulton Powden
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.