

Joseph Rivers v. University of Vermont

(February 10, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Joseph Rivers

Opinion No. 05-09WC

v.

By: Jane Gomez-Dimotsis, Esq.
Hearing Officer

University of Vermont

For: Patricia Moulton Powden
Commissioner

State File No. P-16044

OPINION AND ORDER

Hearing held in Montpelier on March 18, 2008

Record closed on May 2, 2008

APPEARANCES:

Frank Talbott, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant's low back condition causally related to his January 27, 2000 work injury?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit A: Workers' Compensation Incident Checklist

Claimant's Exhibit B: Facsimile from Debbie Tamayo to Nancy Bogue, February 4, 2000

Claimant's Exhibit C: Two-page memo (undated) from Jeanne Deslauriers, RN

Claimant's Exhibit D: Letter from Dave Rogers to Thomas Gustafson, February 3, 2000

Claimant's Exhibit E: Undated letter from Dave Rogers

Defendant's Exhibit 1: Deposition of H. James Forbes, MD, taken on March 10, 2008

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642

Permanent partial disability benefits pursuant to 21 V.S.A. §648

Medical benefits pursuant to 21 V.S.A. §640

Interest, attorney's fees and costs pursuant to 21 V.S.A. §§664 and 678(a)

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.

Claimant's Employment Background and Prior Medical History

3. Claimant began working at Defendant's athletic facility in 1995. His responsibilities were varied, but primarily revolved around the Gutterson Field House ice rink. Among other tasks, Claimant operated and maintained the Zamboni. During the six months per year that the ice rink was active, Claimant typically worked 60 hours weekly; during the off-season, he worked 40 hours per week.
4. In addition to his work for Defendant, in 1996 Claimant began working part-time for another local ice rink. By 1997 Claimant was working 7 days, as much as 70 hours per week.
5. Claimant also cared for his wife, who suffered from multiple sclerosis. On a daily basis Claimant had to assist her with multiple transfers, lifting her, for example, from bed to wheelchair or from wheelchair to bath, and then back again as well. Claimant regularly performed these tasks for his wife until the couple separated in 2002.
6. Claimant's prior medical history was significant for both knee and back pain. Claimant suffered from osteoarthritis in his knees, for which ultimately he underwent a total knee replacement in 2003. As for his back, Claimant had fractured his third and fourth lumbar vertebrae in 1977. Medical records document that he suffered from "chronic low back pain" at least as early as 1998. Claimant occasionally took pain medications for these symptoms, but did not actively treat for them otherwise. At one point Dr. Gunther, his primary care physician, recommended a book, "Care for Your Back," to help Claimant deal with his low back pain, which Dr. Gunther attributed largely to "body mechanics."

The Work Injury

7. On January 27, 2000 Claimant was exiting the field house when a large amount of snow slid off the roof, hit the door and propelled Claimant some distance back into the building. Claimant landed on his buttocks, back and knee. The force of the impact caused his neck to snap back.
8. Claimant reported the incident to his supervisor and, a few days later, sought medical treatment with his primary care provider.

9. Claimant testified that his symptoms immediately after the incident included low back and neck pain as well as headaches. The early medical records documented these symptoms, but focused primarily on neck pain as the most troublesome complaint. For example, Claimant's primary care provider, Dr. Gunther, described the injury as "whiplash." Dr. Tverras, the chiropractor who treated Claimant in early February 2000, reported subjective complaints of "moderate to severe neck, shoulder and lower back pain," but specifically diagnosed only a "cervical-thoracic strain/sprain." Likewise, the physical therapist who treated Claimant in February and March 2000 noted some complaints of low back pain, but categorized the diagnosis as "cervical strain."
10. Defendant accepted Claimant's injury, which it described as a "pinched nerve neck," as compensable and paid workers' compensation benefits accordingly.
11. Following the January 2000 incident, Claimant was totally disabled from working until mid-March 2000, when he returned to work part-time. By the end of that month, Claimant had returned to work full-time.

Claimant's Medical Treatment

12. Claimant testified that although his early treatment after the January 2000 incident focused on his neck injury, his low back pain also was troublesome. He stated that he was surprised that none of his treatment providers suggested x-rays of his back.
13. After he returned to work, Claimant treated informally for his low back pain with Defendant's athletic trainers, to whom he had access by virtue of his job. Claimant acknowledged that he occasionally had visited the athletic trainers for heat treatments prior to January 2000, but had not done so regularly. After the January 2000 incident, however, he visited the training room on a daily basis for heat, ice and electrical stimulation treatments. Both Claimant's supervisor and the Athletic Room Trainer corroborated this testimony.
14. Claimant did not seek formal treatment for his low back complaints until September 2000, when he presented again to Dr. Gunther. Claimant testified that he did so because his symptoms had failed to abate despite his efforts to treat them informally with Defendant's athletic trainers. Dr. Gunther's office note reflects a slightly different situation, however. It states that Claimant's back had "stiffened up recently" and was "much worse." Dr. Gunther made no reference to the January 2000 incident as the precipitating event for Claimant's complaints of low back pain, and instead mentioned that Claimant had been lifting his wife more of late. He diagnosed degenerative joint disease with chronic low back pain "from activity."

15. In December 2000 Dr. Gunther reported for the first time that Claimant was experiencing radicular symptoms, including pain radiating into his groin and difficulty sitting. An MRI revealed multi-level degenerative disc disease, with some foraminal narrowing at various levels. In an effort to treat Claimant's symptoms conservatively, Dr. Gunther referred him for physical therapy. Dr. Gunther also referred Claimant for further evaluation with Dr. Davignon, an orthopedist, who in turn referred Claimant for a neurological evaluation with Dr. Ciongoli. Interestingly, both doctors' reports focused on Claimant's neck pain as the area of his primary complaints, not his low back pain. As to the latter, both doctors mentioned Claimant's lifting activities in the context of caring for his wife, but neither mentioned the January 2000 work accident as a contributing factor or relevant event.
16. Also in December 2000 Claimant began to pursue workers' compensation benefits for his low back complaints, alleging that they were causally related to the January 2000 work accident. In March 2001 Defendant formally denied its responsibility for any such benefits.
17. Aside from the course of physical therapy prescribed by Dr. Gunther, Claimant did not treat formally for his low back pain from early 2001 until 2004. During that time, he continued to receive informal treatments from Defendant's athletic trainers on a regular basis. He also continued to work his customary long hours, as much as 7 days a week and 70 hours weekly between his job for Defendant and his job at the other local ice rink. Until 2002, when Claimant and his wife separated, he continued to lift and transfer her many times daily.
18. Claimant's medical records reflect that his low back pain never abated during this period, but did seem to wax and wane at times. In 2002 Dr. Gunther reported that Claimant's back pain was "doing much better." In 2004, however, he reported that it was "still troubling."
19. By 2005 Claimant's low back pain was radiating down his leg and into his right foot. A repeat MRI again revealed multi-level degenerative disc disease, but this time with severe foraminal narrowing at L5-S1 and compression of the L5 nerve root. These findings document that Claimant's degenerative disc disease had progressed significantly from the time of his earlier MRI in December 2000.
20. In October 2005 Claimant underwent surgery for an unrelated medical problem. He filed for long-term disability benefits, citing both that problem and his chronic low back pain as precluding him from continuing to work. Claimant has not worked since.
21. In an effort to treat Claimant's worsening symptoms of radiating low back pain, in September 2005 Dr. Gunther referred him to Dr. Musman, an anesthesiologist and pain management specialist. From September 2005 until March 2008 Dr. Musman treated Claimant with a variety of injections and other interventional procedures in an attempt to reduce nerve inflammation and control Claimant's pain. None of these procedures resulted in long-term pain relief.

22. Ultimately Claimant underwent two surgeries, both at the L5-S1 level, to address his low back pain, the first in June 2007 and more recently in January 2008. As of the date of the formal hearing, he had not yet been released to return to work and had not been declared at end medical result.

Expert Medical Opinions

23. All of the physicians who have evaluated and/or treated Claimant's low back pain agree that he suffered from degenerative disc disease that most likely predated the January 2000 work incident. Disagreement exists, however, as to the extent, if any, to which that incident aggravated or accelerated the progression of the disease to the point where it required medical treatment and became disabling.
24. Dr. Gunther believes that the January 2000 work incident did in fact aggravate Claimant's pre-existing degenerative disc disease. In his opinion, the incident caused more than a mere muscle strain or soft tissue injury. Dr. Gunther testified that although Claimant had suffered from chronic low back pain previously, it had been a stable condition, and had never interfered with either work or other daily activities. After the January 2000 incident, Dr. Gunther testified, the condition became unstable, with increased symptoms that required daily attention from Defendant's athletic trainers. These symptoms ultimately progressed to the point where they interfered with previously manageable activities and precluded Claimant from continuing to work.
25. Dr. Gunther acknowledged that he did not examine Claimant's low back after the January 2000 incident and that his medical records do not even reflect any complaints of low back pain until some months later. Dr. Gunther admitted that it was "unusual" for him not to have mentioned Claimant's complaints of low back pain in his office notes. The omission is particularly troublesome given Dr. Gunther's training, which included a residency under the tutelage of Dr. Rowland Hazard at the Spine Institute of New England. As part of that training, Dr. Gunther assisted in developing a spine injury protocol for primary care providers that encompassed techniques for taking a relevant history from patients complaining of low back pain, conducting a thorough physical examination and making appropriate specialist referrals.
26. Dr. Musman, the pain management specialist who treated Claimant from 2005 until 2008, shared Dr. Gunther's opinion as to causation. Dr. Musman testified that the January 2000 event was definitely a contributing factor in the development of Claimant's radicular symptoms and ultimately his need for surgery.
27. Dr. Musman admitted that his opinion was based primarily on Claimant's recollection of how his symptoms had progressed rather than on his own personal examinations. He further admitted that there likely was a strong genetic component to Claimant's degenerative disc disease, particularly given that it existed at multiple levels in Claimant's spine. Last, Dr. Musman acknowledged that the natural progression of degenerative disc disease can be affected by lifting and twisting activities, such as those that Claimant performed while caring for his wife.

28. Dr. Forbes, an orthopedic surgeon, performed a medical records review and testified on Defendant's behalf. In Dr. Forbes' opinion, the January 2000 incident had no effect whatsoever on the natural progression of Claimant's pre-existing degenerative disc disease. Central to Dr. Forbes' opinion was the fact that Dr. Gunther's office notes did not reflect any complaints of low back pain immediately after the January 2000 incident, and that whatever pain complaints were documented by Claimant's other early treatment providers did not even rise to the level of necessitating x-rays. Dr. Forbes noted that the natural progression of degenerative disc disease is such that with or without trauma it gradually worsens and produces more symptoms over time. Thus, he attributed Claimant's ultimate disability in 2005 and need for surgery thereafter entirely to the underlying disc disease and not at all to the January 2000 work incident.

CONCLUSIONS OF LAW:

Statute of Limitations

1. As a preliminary matter, Defendant argues that Claimant's claim for workers' compensation benefits for his lower back complaints is time-barred because he failed to pursue it within the applicable limitations period, six years from the date of injury. 21 V.S.A. §660(a).¹ This argument lacks merit. Claimant's injury occurred in January 2000 and he initiated his claim for benefits related to his lower back pain in early 2001. Defendant denied the claim in March 2001. Claimant retained counsel in 2006, and filed a Notice and Application for Hearing in October 2006. All of these actions occurred within the six-year limitations period provided by statute. Claimant's claim is not time-barred.

Compensability

2. In workers' compensation cases the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
3. At issue in this claim is whether Claimant's January 2000 work accident aggravated or accelerated the progression of his pre-existing degenerative disc disease so as to entitle him to workers' compensation benefits. Vermont law is clear that "the aggravation or acceleration of a pre-existing condition by an employment accident is compensable." *Stannard v. Stannard*, 175 Vt. 549 (2003), citing *Jackson v. True Temper Corp.*, 151 Vt. 592, 595 (1989).

¹ The statute since has been amended to reduce the limitations period to three years, but that amendment does not apply to the current claim.

4. As the Vermont Supreme Court stated in *Stannard*, when considering a progressively degenerative disease, “where ‘the disease, if left to itself, and apart from any injury, would, in time, have inevitably caused a complete disability,’ the causation test becomes whether, due to a work injury or the work environment, ‘the disability came upon the claimant earlier than otherwise would have occurred.’” *Stannard, supra* at ¶11, quoting *Jackson, supra* at 596.
5. The question in the current case, therefore, is whether Claimant’s degenerative disc disease would not have progressed to the point of first becoming disabling in 2005 and subsequently requiring surgery were it not for the January 2000 work accident. Credible medical evidence is required to make this determination. *Lapan v. Berno’s, Inc.*, 137 Vt. 393 (1979).
6. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert’s opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).
7. With a five-year delay between the allegedly accelerating event and the resulting disability, it is difficult to draw the required causal connection. Neither Dr. Gunther’s testimony nor Dr. Musman’s is sufficiently convincing. The basis for Dr. Gunther’s conclusions – that Claimant’s symptoms increased after the January 2000 accident, required daily attention and interfered with previously manageable activities – is not even reflected in his own office notes. This is an oversight I cannot reconcile with either his training or the thoroughness of his notes in other areas.
8. As for Dr. Musman, his opinion suffers from too much reliance on Claimant’s own recollections as to causation. Dr. Musman testified that he believed the January 2000 accident to be a contributing factor in the progression of Claimant’s degenerative disc disease primarily because Claimant himself had emphasized the event when reporting his history. Again, however, Dr. Gunther’s contemporaneous medical records do not substantiate Claimant’s recollections. As the critical component of Dr. Musman’s opinion, therefore, they are shaky at best.
9. Even though Dr. Forbes’ opinion was based solely on a medical records review rather than a physical examination, I find it to be the least speculative and therefore the most credible. The medical records tell the story here, and Dr. Forbes’ reliance on them strengthens rather than weakens his opinion.
10. I conclude, therefore, that Claimant has failed to sustain his burden of proving that the January 2000 work incident aggravated or accelerated his pre-existing degenerative disc disease such that his disability came on earlier than otherwise would have occurred. For that reason, his claim for benefits must fail.

ORDER:

Based on the foregoing findings and conclusions, Claimant's claim for workers' compensation benefits is hereby **DENIED**.

DATED at Montpelier, Vermont this 10th day of February 2009.

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.