

D. F. v. Valley Floors, Inc.

(June 8, 2009)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

D. F.

Opinion No. 18-09WC

v.

By: Phyllis Phillips  
Hearing Officer

J.P. Isabelle, Law Clerk

Valley Floors, Inc.

For: Patricia Moulton Powden  
Commissioner

State File No. Y-02506

**RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant moves for summary judgment on the grounds that Claimant suffered a non-work-related aggravation of his condition, such that it no longer is responsible for further workers' compensation benefits.

Summary judgment is appropriate when "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, after giving the benefit of all reasonable doubts and inferences to the opposing party." *State v. Delaney*, 157 Vt. 247, 252 (1991). After reviewing the evidence in the light most favorable to the non-moving party, factual questions remain as to whether Claimant's injury was an aggravation or a recurrence. Therefore, summary judgment is improper.

Claimant suffered a compensable work-related low back injury in 2004, for which he underwent surgery with Dr. Abdu, an orthopedic surgeon. He hurt his back again at work in 2006 but did not undergo additional surgery. In March 2007 Claimant reached an end medical result, and was rated with a 20% permanent impairment. His doctor advised him that nothing further could be done to improve his back and that he should expect it to worsen over time.

In February 2008 Claimant began working for Wal-Mart. In March, during a trip to retrieve the mail at his home, he slipped briefly on the ice, but regained his balance and did not fall. Later that evening, Claimant's back began to bother him. He stayed home from work for the next two days to rest it, but his pain did not resolve.

Claimant did not seek medical treatment until approximately three weeks later. On April 21<sup>st</sup>, he saw his primary care physician, who referred him back to Dr. Abdu. Dr. Abdu examined Claimant on May 29<sup>th</sup>, and recommended surgery, which he performed on June 11<sup>th</sup>.

Defendant argues that Claimant's March 2008 slip at home resulted in a non-work-related aggravation, thus severing the causal link back to the original compensable injury. On those grounds, Defendant asserts that it is no longer responsible for Claimant's medical treatment and/or disability. Claimant counters that the March incident had no effect on his underlying condition and therefore is not an intervening cause sufficient to justify releasing Defendant from further workers' compensation liability.

An aggravation is an "acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." *Workers' Compensation Rule 2.1110*. A recurrence is "the return of symptoms following a temporary remission." *Workers' Compensation Rule 2.1312*.

The Department typically considers five factors in differentiating between an aggravation and a recurrence: (1) whether there is a subsequent incident or work condition which destabilized a previously stable condition; (2) whether the claimant had stopped treating medically; (3) whether the claimant had successfully returned to work; (4) whether the claimant had reached an end medical result; and (5) whether the subsequent work contributed independently to the final disability." *Trask v. Richburg Builders*, Op. No. 51-98WC (August 25, 1998). The critical question is whether the subsequent incident combined with the pre-existing impairment to produce a disability greater than what otherwise would have occurred. *Farris v. Bryant Grinder*, 177 Vt. 456, 458 (2005), citing *Pacher v. Fairdale Farms*, 166 Vt. 626, 627 (1997).

Defendant points to the fact that Claimant had reached an end medical result in March 2007, a year prior to his slip on the ice at home, and had not sought any medical treatment during the intervening period as evidence that the March 2008 slip constituted an aggravation. It is true that Claimant did not treat with any physician during this time, although he did self-treat with rest, ibuprofen and a TENS unit. It also is true, as Defendant argues, that Claimant had successfully returned to work at the time of the March 2008 position, although not in the same job or for the same employer.

What is critical, however, is that all of the expert medical opinions produced to date are to the effect that the March 2008 incident did not destabilize his condition. Specifically, after the second surgery Dr. Abdu concluded that "there is no evidence of any subsequent injury or trauma . . . [that] contributed to Mr. Farley's [injury]." Dr. Bucksbaum concurred, stating that "the described mechanism of injury of the March 2008 event [was] insufficient by itself to have resulted in the subsequently identified . . . disc herniation." Dr. Gennaro agreed with this assessment as well.

Defendant has not offered any testimony to counter these expert opinions. Thus, it has presented no evidence to show that the March 2008 incident severed the causal link between Claimant's original 2004 injury and his current condition. Giving the benefit of the doubt to the non-moving party, as is required in ruling on a motion for summary judgment, genuine issues of material fact still exist that preclude me from ruling in Defendant's favor.

**ORDER:**

Defendant's Motion for Summary Judgment is hereby **DENIED**.

**DATED** at Montpelier, Vermont this 8<sup>th</sup> day of June 2009.

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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.