

Gregory de Chantal v. Sears Holding Corp.

(February 28, 2013)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Gregory de Chantal

Opinion No. 08-13WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

Sears Holding Corp.

For: Anne M. Noonan  
Commissioner

State File No. DD-51137

**OPINION AND ORDER**

Hearing held in Montpelier on September 28, 2012

Record closed on December 26, 2012

**APPEARANCES:**

Heidi Groff, Esq., for Claimant

J. Christopher Callahan, Esq., for Defendant

**ISSUES PRESENTED:**

1. Did Claimant suffer a work-related lower back injury on or about July 19, 2011?
2. If yes, to what workers' compensation benefits is Claimant entitled as a consequence of that injury?

**EXHIBITS:**

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum vitae*, Verne Backus, M.D., M.P.H.

Claimant's Exhibit 2: Wage verification

Claimant's Exhibit 3: Certificate of Dependency (Form 10/10s)

Claimant's Exhibit 4: First Report of Injury (Form 1)

**CLAIM:**

Temporary total disability benefits beginning on July 21, 2011 and continuing, pursuant to 21 V.S.A. §642

Permanent partial disability benefits in amounts to be determined, pursuant to 21 V.S.A. §648

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

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

## **FINDINGS OF FACT:**

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his 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.
3. Claimant was the assistant store manager of Defendant's automotive shop. His duties included clerical functions (preparing employee work schedules, checking receipts, etc.), sales and hands-on automotive repair work for customers.

### *Claimant's July 2011 Injury and Subsequent Course of Treatment*

4. On Tuesday, July 19, 2011 Claimant assigned himself to work on a difficult automotive repair job. The work was labor intensive, and required him to bend over the hood of the vehicle for a sustained period of time in order to reach and remove various engine parts. After several hours of doing so, Claimant straightened up to stretch and felt a painful twinge or pop in his lower back. He continued working on the vehicle and left for the day at around 4:30 or 5:00 PM.
5. Claimant had had episodes of lower back pain in the past, which he typically treated with a combination of ibuprofen, rest and topical analgesics such as Tiger Balm or Bengay. In fact, on the Friday before the incident in question, his first day back to work after a week-long vacation, Claimant had mentioned to a co-worker that his lower back was sore. Claimant credibly testified that with ibuprofen, the soreness quickly resolved and he was able to work his full shifts throughout the weekend.
6. On two other occasions in the past, once in 2008 or 2009 and once in December 2010, Claimant had sought chiropractic treatment for episodes of lower back pain. Both episodes had resolved quickly.
7. On the day following the incident in question, Wednesday, July 20, 2011, Claimant awoke with some back stiffness. On his way to work he stopped at a store and purchased some Tiger Balm, which he applied to his lower back. Claimant credibly testified that while his back remained stiff, because he spent most of the day doing paperwork in his office it was manageable.
8. The next day, Thursday, July 21, 2011, was a scheduled day off. Claimant credibly testified that he awoke at around 9:00 AM when the telephone rang, but when he tried to get out of bed to answer the phone, he was unable to do so. His lower back was painful and he had no strength in his right leg. This was a new symptom, one that he had never experienced in any of his prior episodes of lower back pain.

9. Claimant commenced chiropractic treatment that day. Shortly thereafter, he reported his injury to Defendant. Claimant credibly testified that the reason he had delayed reporting the injury until then was because he assumed his back pain would resolve as quickly as it had on prior occasions, with ibuprofen, Tiger Balm and rest on his day off.
10. Over the course of the next several months, Claimant treated on a regular and frequent basis, as much as two or three times per week, with Dr. Keefe, his chiropractor. In addition, he underwent two courses of physical therapy and a series of lumbar epidural steroid injections. None of these treatments yielded effective symptom relief. Unlike his prior episodes of lower back pain, this time Claimant suffered as well from pain, numbness and tingling down his right leg and into his foot. These symptoms were consistent with an August 2011 MRI study, which confirmed a right-sided L5-S1 disc herniation with nerve root impingement. The MRI study also revealed osteoarthritis and degenerative disc disease at multiple levels in Claimant's lumbar spine. These latter conditions most likely pre-existed the July 19<sup>th</sup> incident at work.
11. Because his symptoms had failed to respond to extensive conservative treatment, in March 2012 Claimant underwent a neurosurgical consult with Dr. Barnum. In April 2012 Dr. Barnum surgically decompressed the affected nerve root. Since the surgery, Claimant's symptoms have almost completely resolved. As of September 2012 he was still engaged in physical therapy, but was anticipating being released to return to work in October.

Expert Medical Opinion

12. At the request of his attorney, in May 2012 Claimant underwent an independent medical examination with Dr. Backus, a board certified specialist in occupational and environmental medicine. Dr. Backus personally examined Claimant, and also reviewed his pertinent medical records.
13. To a reasonable degree of medical certainty, Dr. Backus concluded that Claimant likely suffered a lower back strain as a result of his work activities on July 19, 2011. This caused inflammation in and around the L5 nerve root. With some preexisting degenerative disc disease already present in the area, the inflamed nerve root became pinched, causing it to become even more inflamed. Ultimately the body reacted to the inflammation by causing the muscles around it to spasm. In what Dr. Backus described as a "classic presentation," this was the manner in which Claimant's symptoms progressed from feeling a "twinge" or pop while engaged in a vehicle repair job at work on July 19<sup>th</sup> to being unable to get out of bed on July 21<sup>st</sup>. I find this analysis credible in all respects.

14. Dr. Backus acknowledged the possibility that the progression of Claimant's symptoms might actually have begun on Friday, July 15<sup>th</sup>, the day he complained to his co-worker of soreness in his lower back following the prior week's vacation. However, in Dr. Backus' opinion it was far more likely that Claimant's work activities on July 19<sup>th</sup>, which involved a specific task, a sustained posture likely to cause low back strain, and then immediate and acute symptoms, triggered the chain of events that led him to seek treatment. For this reason, Dr. Backus concluded that Claimant's lower back pain and associated radicular symptoms were work-related. I find this reasoning persuasive.
15. Dr. Backus determined that Claimant had not yet reached an end medical result as of the time of his May 2012 evaluation. Once he does so, Dr. Backus anticipates that under the *AMA Guides to the Evaluation of Permanent Impairment (5<sup>th</sup> ed.)*, his permanent impairment likely will fall in the 10-13 percent range.
16. I find from the medical evidence that Claimant was temporarily totally disabled as of July 21, 2011. Claimant's average weekly wage for the 26 weeks preceding his injury was \$800.47. This yields an initial weekly compensation rate of \$533.91, updated to \$544.59 as of July 1, 2012.

#### **CONCLUSIONS OF LAW:**

1. 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).
2. The disputed issue here is whether Claimant's work activities on July 19, 2011 caused the disabling lower back injury for which he ultimately underwent surgery in April 2012. With Dr. Backus' expert opinion as support, Claimant asserts that the required causal link has been established. In response, Defendant contends that Dr. Backus's opinion was based on an erroneous assumption, that is, that Claimant's preexisting lumbar spine disease had been asymptomatic prior to July 19, 2011 when in fact it was not. As a result, Defendant argues, Dr. Backus' causation opinion is fatally flawed and must be rejected.

3. I cannot accept Defendant's argument, for two reasons. First, contrary to Defendant's assertion, Dr. Backus did consider whether Claimant's symptoms might have been more directly related to the lower back soreness he complained of on Friday, July 15<sup>th</sup> than they were to his work activities on July 19<sup>th</sup>, *see* Finding of Fact No. 14, *supra*. However, he rejected that scenario in favor of the one he found more probable – that Claimant's work on that day caused him to suffer a lower back strain, which in turn caused his L5 nerve root to become inflamed and, ultimately, impinged. His reasoning in this regard was clear, thorough and analytically sound.
4. Second, Defendant's analysis ignores the fact that the symptoms Claimant suffered after July 19<sup>th</sup> were markedly different from those he had experienced during any prior episode of lower back pain, including the soreness he reported on July 15<sup>th</sup>. The radicular pain, numbness and weakness he reported in the days after the July 19<sup>th</sup> episode indicated a significant worsening of the preexisting degeneration in his lumbar spine. True, such symptoms might have occurred even if he had not been doing the work that he did on that day. However, the test for work-related causation is not what might have occurred; rather, it is what likely occurred to a reasonable degree of medical certainty. *Burton, supra*.
5. Through Dr. Backus' expert testimony, Claimant has presented a credible chain of causation from the preexisting structural degeneration in his lumbar spine to specifically aggravating work activities, and then new, disabling symptoms that ultimately required surgical correction to resolve. I conclude that he has sustained his burden of proving that the injury he suffered, and the resulting disability and medical treatment that followed, are compensable.
6. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$3,605.58 and attorney fees based on a contingent fee of 20 percent of the recovery, not to exceed \$9,000.00, in accordance with Workers' Compensation Rule 10.1220. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded. As for attorney fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded as well.

**ORDER:**

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Temporary total disability benefits pursuant to 21 V.S.A. §642, commencing on July 21, 2011 and continuing until appropriately discontinued in accordance with 21 V.S.A. §643 and Workers' Compensation Rule 18.0000;
2. Interest on the above amounts as calculated pursuant to 21 V.S.A. §664;
3. Medical benefits covering all reasonable medical services and supplies causally related to treatment of Claimant's lumbar spine condition since July 19, 2011, in accordance with 21 V.S.A. §640;
4. Permanent partial disability benefits in amounts to be determined, pursuant to 21 V.S.A. §648; and
5. Costs totaling \$3,605.58 and attorney fees based on a contingent fee of 20 percent of the recovery not to exceed \$9,000.00, in accordance with 21 V.S.A. §678 and Workers' Compensation Rule 10.1220.

**DATED** at Montpelier, Vermont this 28<sup>th</sup> day of February 2013.

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Anne M. Noonan  
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.