

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Douglas Cain

Opinion No. 12-13WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

New Penn Motor Express, Inc.

For: Anne M. Noonan  
Commissioner

State File No. DD-57222

**OPINION AND ORDER**

Hearing held in Montpelier on December 19, 2012

Record closed on January 28, 2013

**APPEARANCES:**

Patrick Biggam, Esq., for Claimant

Keith Kasper, Esq., for Defendant

**ISSUE PRESENTED:**

Did Claimant's July 19, 2011 work-related injury cause and/or aggravate his cervical myelopathy, thus necessitating surgery?

**EXHIBITS:**

Joint Exhibit I: Medical records

Joint Exhibit II: Stipulation

Claimant's Exhibit 1: Photograph of motorcycle

Claimant's Exhibit 2: Deposition of Paul Penar, M.D., December 10, 2012 (with attached *curriculum vitae*)

Defendant's Exhibit A: *Curriculum vitae*, Verne Backus, M.D., M.P.H.

**CLAIM:**

All workers' compensation benefits to which Claimant proves his entitlement as a consequence of his cervical myelopathy and resulting surgery

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

## **STIPULATED FACTS:**

The parties have stipulated to the following facts:

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. On July 19, 2011 Claimant suffered a personal injury by accident arising out of and in the course of his employment for Defendant. Claimant reported the accident to his employer, and continued to work for a period of time thereafter.
4. On August 13, 2011 Claimant presented to the Fletcher Allen Health Care Emergency Department with complaints of severe upper and lower extremity weakness and balance issues. He was diagnosed with cervical myelopathy, a condition caused in his case by a herniated cervical disc impinging upon his spinal cord. Claimant underwent surgery the following day with Dr. Penar, a neurosurgeon, who performed a C3-4 discectomy and fusion.
5. Claimant has not returned to work since his cervical surgery.
6. Claimant had a prior compensable work injury to his lower back, which resulted from a fall on December 14, 2010 (State File No. CC-56141). He underwent an L5-S1 laminectomy on January 17, 2011. Ongoing problems necessitated a second surgery, which Claimant underwent on April 25, 2012. Following this second surgery he suffered a stroke, and is currently unable to work.
7. Defendant commenced paying temporary total disability benefits following Claimant's April 25, 2012 lower back surgery, as this surgery was causally related to his compensable December 14, 2010 injury.
8. Claimant's average weekly wage as of July 19, 2011 was \$1,151.72, which results in an initial compensation rate of \$767.81. As of July 19, 2011 Claimant had one dependent.
9. Claimant seeks a determination from the commissioner that his July 19, 2011 work-related injury either caused or aggravated his cervical condition, which resulted in the August 14, 2011 cervical discectomy and fusion and subsequent disability.
10. If Claimant is successful in his claim, the parties stipulate that he is entitled to the following benefits: (a) 36.57 weeks of temporary total disability benefits; (b) reasonable and necessary medical benefits related to treatment of his cervical myelopathy, commencing on August 13, 2011 and thereafter, in accordance with Workers' Compensation Rule 40; (c) an award of costs and attorney fees; and (d) permanent partial disability benefits in an amount to be determined.

## **FINDINGS OF FACT:**

In addition to the above stipulated facts, I find the following:

11. Claimant worked for Defendant as a short-haul general freight truck driver. His typical routes were regional – from Defendant’s Williston, Vermont facility to Albany, New York and/or Boston, Massachusetts, for example. As of July 19, 2011 Claimant was 60 years old.
12. On Tuesday, July 19, 2011 Claimant was at Defendant’s Williston terminal, preparing his truck for a trip to Springfield, Mass. After hooking his trailer to the tractor, he squatted down and crept underneath the truck to make sure that the locking pin was securely in place. He then turned around and, still in a squatting position, began moving out from under the trailer. As he did so, he hit his head forcefully on the underside of the trailer. The impact drove his neck backwards and dropped him to his knees.
13. Claimant felt dazed. He took a moment to compose himself, then crawled out from under the truck and proceeded inside the office to report the injury to Defendant’s dispatcher. A co-worker gave him a band-aid to apply to the top of his head, which was scraped and bleeding. Other than that, Claimant felt no immediate effects from the accident. He headed out in his truck and completed his run to Springfield and back.
14. When he got home that evening, Claimant told his wife that he had “whacked his head really good.” She applied Neosporin to the scrape and changed the band-aid. Neither of them thought much of the event.
15. Claimant worked his regular shifts for the next several days without incident. Then, as he was making a run to Albany on the following Tuesday evening (July 26<sup>th</sup>), his left leg became numb and “picky,” as if it had fallen asleep. He stopped, got out and walked around his truck for a few minutes. The feeling went away and he continued on his run.
16. The following night, Claimant was again en route to Albany when the numb and “picky” sensations returned, this time in both legs, from his waist to his feet. As he had the previous evening, Claimant stopped, got out and walked around. This time the sensations persisted somewhat longer, about ten minutes. When they were gone, he resumed driving and completed his run.
17. The next incident occurred two days later, on Friday, July 29<sup>th</sup>. Claimant was preparing to embark the next day on a long-planned motorcycle trip to South Dakota with two of his friends. He was at the bank, signing travelers’ checks. As he did so, both of his arms began to feel heavy and weak. His hands felt numb and unresponsive, to the point where he had a difficult time holding the pen and completing the task. Again, after walking around for a bit, the symptoms dissipated.

18. On Saturday morning, July 30<sup>th</sup>, Claimant and his friends embarked on their motorcycle trip. Claimant was driving a Harley Davidson Super E, a smooth-riding motorcycle equipped with adjustable shock absorbers and a custom seat. Approximately two hours into the ride, he began to feel the numb and “picky” sensations in his legs again, from his waist down to his feet. He stopped and walked around for a few minutes, and as they had on the prior occasions, after a few minutes the feeling went away.
19. Claimant and his friends traveled as far as Buffalo, New York on their first day of travel. Because one of his friends had blown a tire, they were forced to remain there for two days. On Monday afternoon, August 1<sup>st</sup>, they headed out again. Traveling by way of Interstate 90, and sleeping in hotels at night, they arrived at their South Dakota destination on Wednesday, August 3<sup>rd</sup>. During this time, Claimant had not experienced any additional symptoms in either his legs or his arms.
20. Claimant and his friends stayed at a campground in South Dakota, sleeping on air mattresses in a tent they pitched themselves. They rode scenic day trips on Thursday and Friday, August 4<sup>th</sup> and 5<sup>th</sup>, during which Claimant felt fine. However, on Saturday, August 6<sup>th</sup> he awoke feeling unwell. His back hurt and his legs felt “picky.” While his friends went touring that day, Claimant remained behind at the campsite.
21. Claimant felt even worse on Sunday, August 7<sup>th</sup>. His balance was off and he could not walk well. He knew he would be unable to make the return motorcycle trip in this condition, so he called his wife and asked her to come and get him. Claimant’s wife and son left Vermont the following day, arriving in South Dakota on Tuesday, August 9<sup>th</sup>. In the meantime, Claimant’s condition had continued to deteriorate. His legs and feet were “picky” and numb, his balance was impaired and his friends had to assist him when entering and leaving restaurants. His wife credibly testified that he looked weak, thin and unwell when she saw him. They left for Vermont the next day.
22. Immediately upon returning to Vermont, on Saturday, August 13<sup>th</sup> Claimant’s wife took him to the hospital emergency room. His presenting complaints included bilateral upper and lower extremity weakness and sensory losses as well as severe balance problems. Cervical spine x-rays documented extensive degenerative changes. More significantly, a cervical MRI study revealed a large central C3-4 disc herniation with cord compression and signal cord changes. Upon evaluation, Dr. Penar, a neurosurgeon, diagnosed cervical spondylotic myelopathy, meaning that the disc herniation was compressing the spinal cord itself rather than just a nerve root. As treatment, on the following day (August 14<sup>th</sup>) Claimant underwent urgent surgery, during which Dr. Penar excised the herniated disc and fused his cervical spine at the C3-4 level.

Expert Medical Opinions as to Causation

23. The parties each presented expert testimony as to the causal relationship, if any, between Claimant's July 19, 2011 work injury and his cervical spondylotic myelopathy.
- (a) Dr. Penar
24. Dr. Penar is a board certified neurosurgeon with more than 25 years of experience. He testified on Claimant's behalf by deposition.
25. In Dr. Penar's opinion, Claimant's case presents a "very strong medical story" of an initial disc herniation that occurred when he struck his head on the underside of his truck,<sup>1</sup> followed by a progressive cervical myelopathy that developed over the course of the ensuing three weeks. That Claimant did not experience symptoms immediately after hitting his head was not inconsistent with this explanation, as it is not unusual for a patient to report delayed neurological deterioration in such circumstances. Nor is it uncommon for symptoms initially to appear only intermittently, as Claimant's did in the days leading up to his motorcycle trip. According to Dr. Penar, of greater significance was the manner in which the symptoms indicative of central cord compression developed – first in one leg, then in both legs, and then into both arms as well. Such a progression clearly indicates dysfunction in the cervical spinal cord.
26. Because Claimant already was experiencing both sensory and motor deficits indicative of cervical myelopathy even before embarking on his motorcycle vacation, Dr. Penar discounted the possibility that the trip either caused or aggravated the condition. In Dr. Penar's words, the mechanism of Claimant's work injury, during which his neck went into an extension posture, would "easily" explain the large, cohesive "chunk" of disc material that comprised his C3-4 herniation. A "relevant complaint" involving his arms (the episode while signing travelers' checks) placed his cervical cord compression at a point in time before the motorcycle trip. Emphasizing these elements of Claimant's clinical history, in Dr. Penar's opinion to a very high degree of medical certainty the work injury likely caused the myelopathy. I find this analysis compelling.
- (b) Dr. Backus
27. Dr. Backus is a board certified specialist in occupational medicine. As such, his training has included a greater focus on causation, epidemiology and statistical analysis than most other specialized areas of medical practice. At Defendant's request, Dr. Backus reviewed Claimant's pertinent medical records and deposition testimony.<sup>2</sup>

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<sup>1</sup> In the context of a February 2012 letter to Claimant's attorney, Dr. Penar mistakenly referred to Claimant's injury as having occurred as a result of hitting his head on the roof of a truck he was driving. Considering the more accurate description he previously had stated in the context of his August 2011 operative report, as well as the one he provided subsequently during his deposition testimony, I find this error inconsequential.

<sup>2</sup> Due to unforeseen circumstances, Dr. Backus was unable to personally examine Claimant prior to rendering an opinion as to causation. I find that his opinion is not weakened in any respect as a result, because the evidence relevant to causation concerns Claimant's condition as of July and August 2011, not more recently.

28. Dr. Backus concurred with Dr. Penar's diagnosis of cervical spondylotic myelopathy. He also concurred that the condition developed as a consequence of Claimant's C3-4 disc herniation. However, he disagreed that the herniation was either caused or aggravated by Claimant's July 2011 work injury.
29. According to Dr. Backus, there is no medical literature establishing that relatively minor trauma causes discs to herniate. Thus, in his opinion it was more likely that Claimant's C3-4 disc herniation occurred as part of the natural degenerative process in his cervical spine. As evidenced by cervical spine x-rays taken at the time of his work injury, this process was already quite advanced by then.
30. Nor did Dr. Backus find sufficient evidence from which to conclude, to the required degree of medical certainty, that Claimant's work injury caused his cervical myelopathy. In his opinion, that condition as well was likely a long-standing, chronic process that had been progressing over a period of years, if not decades.
31. Dr. Backus conceded the possibility that Claimant's work injury might have been an aggravating factor in hastening the progression of his cervical myelopathy, but did not consider the evidence sufficient to establish this to the required degree of medical certainty. Rather, given the closer temporal relationship between Claimant's motorcycle trip and his rapidly worsening myelopathy, in Dr. Backus' opinion the trip was a far more likely cause of any aggravation.
32. I find ample basis in the evidence to discount Dr. Backus' opinions. First, in concluding that Claimant's cervical myelopathy had been developing over a period of years Dr. Backus initially recalled that Claimant had reported a twenty-year history of symptoms, when in fact this was not the case. Later, he acknowledged the error and stated that it did not impact his opinion as to causation, but I find that difficult to accept.
33. Second, at the same time that he attributed Claimant's worsening myelopathy to his motorcycle trip, Dr. Backus admitted that he had little knowledge as to the specifics of that journey, including either the type of motorcycle Claimant rode or the route he traveled. Aside from what he considered to be a strong temporal relationship, he did not specify any other basis for the causal relationship he asserted, such as excessive vibration, rough roads or sleeping on an air mattress rather than in a bed, for example.
34. Third and most important, Dr. Backus' opinion fails to account for the worsening signs of cervical myelopathy that Claimant had begun to exhibit even *before* leaving on his vacation. As a result, I find it difficult to discern why in his opinion the evidence is sufficient to establish the motorcycle trip, but not the work injury, as an aggravating factor for his condition.

## 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 in this claim involves medical causation. Supported by Dr. Penar's expert opinion, Claimant asserts that his July 2011 work injury either caused or aggravated his cervical disc herniation and resulting myelopathy. Supported by Dr. Backus' opinion, Defendant asserts that such a causal relationship is possible but not probable, and that Claimant's motorcycle trip presents a more likely explanation.
3. 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 (September 17, 2003).
4. With primary reliance on the third factor, I conclude here that Dr. Penar's opinion is the most credible. His analysis as to the causal relationship between Claimant's work injury and his cervical myelopathy was clear and thorough. Dr. Penar adequately explained why Claimant's initial post-injury symptoms, while intermittent, clearly indicated a worsening cervical myelopathy in the days prior to his motorcycle trip. Thus, it adequately accounted for the progression of Claimant's symptoms both before and after his vacation began.
5. In contrast, Dr. Backus failed to explain adequately how the motorcycle trip could be the likely cause of Claimant's worsening myelopathy notwithstanding that by the time the trip began he already was exhibiting signs of an aggravation. Nor did he identify which specific elements of the trip were likely responsible for the causal relationship he claims resulted. For those reasons, I conclude that his opinion is unpersuasive.
6. I conclude that Claimant has sustained his burden of proving that his cervical disc herniation and resulting myelopathy were caused and/or aggravated by his July 19, 2011 work injury and are therefore compensable. In accordance with the parties' stipulation, I thus conclude that he is entitled to workers' compensation benefits as specified in Finding of Fact No. 10, *supra*.

7. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit his itemized claim.

**ORDER:**

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

1. Temporary total disability benefits for a period of 36.57 weeks, in accordance with 21 V.S.A. §642;
2. Medical benefits covering all reasonable medical services and supplies causally related to treatment of Claimant's C3-4 disc herniation and cervical myelopathy, including his August 14, 2011 surgery, in accordance with 21 V.S.A. §640(a);
3. Permanent partial disability benefits in an amount to be determined, in accordance with 21 V.S.A. §648;
4. Interest on the above amounts as calculated in accordance with 21 V.S.A. §664; and
5. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §§664 and 678.

**DATED** at Montpelier, Vermont this 9<sup>th</sup> day of April 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.