

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Michael Richards

Opinion No. 05-15WC

v.

By: Jane Woodruff, Esq.  
Hearing Officer

C & S Wholesale Grocers

For: Anne M. Noonan  
Commissioner

State File No. DD-57226

**OPINION AND ORDER**

Hearing held in Montpelier, Vermont on November 25, 2014  
Record closed on January 5, 2015

**APPEARANCES:**

Spencer Crispe, Esq., for Claimant  
John Valente, Esq., for Defendant

**ISSUES:**

1. Is Claimant's L5-S1 condition causally related to his December 9, 2011 work injury?
2. If so, does the proposed L5-S1 fusion surgery constitute reasonable medical treatment under 21 V.S.A. §640?

**EXHIBITS:**

Joint Exhibit I: Medical records

Claimant's Exhibit 1:	Dr. Sobel report, June 14, 2012
Claimant's Exhibit 2:	Dr. Sobel report, May 29, 2013
Claimant's Exhibit 3:	Dr. Sobel report, March 26, 2014
Claimant's Exhibit 4:	Physical therapy evaluation, December 15, 2011
Claimant's Exhibit 5:	Brattleboro Primary Care office note, January 27, 2012
Claimant's Exhibit 6:	Cheshire Medical Center office note, February 10, 2012
Claimant's Exhibit 7:	MRI, February 13, 2012
Claimant's Exhibit 8:	MRI, November 26, 2013
Claimant's Exhibit 9:	Dr. Thomas office note, March 7, 2012
Claimant's Exhibit 10:	Back evaluation form, March 8, 2012
Claimant's Exhibit 11:	Dr. Thomas office note, April 25, 2012
Claimant's Exhibit 12:	Dr. Thomas office note, May 23, 2012
Claimant's Exhibit 13:	Back evaluation form, June 20, 2012

Claimant's Exhibit 14:	Dr. Thomas office note, June 20, 2012
Claimant's Exhibit 15:	Elliott Hospital admitting chart, July 19, 2012
Claimant's Exhibit 16:	Back evaluation form, December 18, 2012
Claimant's Exhibit 17:	Back evaluation form, February 15, 2013
Claimant's Exhibit 18:	Dr. Thomas office note, February 15, 2013
Claimant's Exhibit 19:	Dr. Thomas office note, May 23, 2013
Claimant's Exhibit 20:	Dr. Thomas office note, November 23, 2013
Claimant's Exhibit 21:	Dr. Frates office note, January 6, 2014
Claimant's Exhibit 22:	Dr. Thomas office note, April 2, 2014
Claimant's Exhibit 23:	Dr. Thomas letter to Attorney Crispe, June 2, 2014
Claimant's Exhibit 24:	Dr. Thomas' deposition, November 4, 2014

**CLAIM:**

Temporary total disability benefits pursuant to 21 V.S.A. §642  
 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 contained in the Department's file relating to this claim.
3. Claimant began working for Defendant in January 2011 as a frozen food selector. His duties included grabbing pallets of frozen foods and throwing them down onto his pallet jack. He then moved them with the pallet jack to the loading area. In a typical day he would lift approximately 35,000 pounds of frozen foods and walk approximately ten miles. As a result of these strenuous job activities, he became very physically fit.
4. Defendant utilized productivity quotas to rate its selectors' performance. Each order needed to be filled in a certain amount of time. If the selector met these time goals, he or she would receive a "100 percent productive" rating. Prior to his injury, during his entire employment tenure Claimant missed his productivity quota only once, with a 99 percent rating instead of 100 percent.

*Claimant's Work Injury*

5. On December 9, 2011 Claimant began his shift normally. The crew began with their shift meeting and then stretched for ten minutes. Thereafter, Claimant inspected his vehicle and filled out the corresponding form. Next he took his pallet jack to the pallets of frozen food to begin the loading process. Unbeknownst to him, the first pallet he attempted to load was frozen to the ones beneath it, so when he pulled up on it with significant force, it did not budge.

6. Claimant credibly testified that at first, nothing hurt. However, about 30 to 40 minutes later, he could not stand up straight. He credibly described the pain in his back as excruciating. He walked out of the freezer to report the injury to his supervisor, who sent him to see a physician.
7. Prior to this incident, Claimant had never suffered from back pain, had not sought any treatment for back pain and did not have any activity restrictions referable to back pain.
8. Defendant accepted Claimant's injury, initially diagnosed as a lower back strain, as compensable and began paying workers' compensation benefits accordingly.

#### Claimant's Course of Treatment

9. Claimant first treated at Brattleboro Primary Care. He was diagnosed with a lower back strain. Five to seven days after the work injury, additional symptoms developed. Specifically, Claimant credibly described intermittent shooting pains and electric shocks down the front of both legs.
10. Claimant participated in physical therapy over the course of the next six weeks. While at times his back felt better immediately after a session, overall he felt that his condition was worsening rather than improving.
11. In February 2012 Claimant underwent an evaluation with Dr. Kimball, an occupational medicine specialist. He reported that he was still experiencing pain down the front of both legs and a numb feeling down the side of both legs. The latter symptom in particular compelled Dr. Kimball to order a lumbar spine MRI. The MRI documented findings at three levels: (a) a large left central disc herniation with severe spinal canal stenosis at L3-4; (b) disc space narrowing and a smaller disc herniation with mild to moderate spinal canal stenosis at L4-5; and (c) disc space narrowing and gross nerve impingement at L5-S1.
12. In March 2012 Claimant began treating for his back complaints with Dr. Thomas, an orthopedic surgeon. At his first office visit, he reported both low back and bilateral leg pain, left greater than right. Claimant underwent a series of epidural steroidal injections for both diagnostic and treatment purposes. He also underwent an EMG of both legs in June 2012 to ascertain the location of his pain generator. The results in the right leg were within normal limits. However, on the left side the EMG demonstrated evidence of a recent L4 radiculopathy and findings of acute denervation.
13. After exhausting conservative treatment options, Claimant underwent a left L3-4 disc excision on November 6, 2012. The surgery successfully addressed his left leg symptoms. However, he continued to complain of right lower extremity pain.

14. In February 2013 Dr. Thomas ordered a limited functional evaluation to assess Claimant's work capacity. Claimant demonstrated a light to medium work capacity, with restrictions against lifting more than 35 pounds occasionally, 17 pounds frequently and 5 pounds constantly. He was capable of frequent sitting, walking and reaching, as well as occasional standing, bending, squatting, kneeling, crawling and climbing. Subject to these limitations, Dr. Thomas released him to return to work effective February 19, 2013.
15. Claimant was involved in a one-car motor vehicle accident in April 2013. He sustained a right heel and right ankle injury as well as a seat belt injury. In July 2013 he complained of increased low back pain to Dr. Larocca, his primary care physician. He indicated he had been painting his house and moving some ladders a few days earlier. On examination, Dr. Larocca noted that Claimant's paraspinal muscles showed some of the "most prominent muscle tenderness that I have ever felt." These back spasms resolved over the course of the next few months.
16. Both prior to and after his motor vehicle accident, from the date of his work injury forward Claimant consistently and continually complained of right lower extremity pain. He voiced these complaints not only to Dr. Thomas, but also on a regular basis to Dr. Larocca.
17. In November 2013 Dr. Thomas ordered a second MRI of Claimant's lumbar spine. The findings at L5-S1 revealed the same severe foraminal narrowing as had been documented in the earlier, February 2012 MRI, Finding of Fact No. 11 *supra*.
18. In January 2014 Claimant underwent an epidural steroidal injection at L5-S1, following which he enjoyed complete relief of his right leg pain for one day. Given these results, Dr. Thomas recommended that he undergo L5-S1 fusion surgery to address his right-sided symptoms. Claimant wanted some time to consider his options.
19. Claimant returned to see Dr. Larocca later that month, complaining of increased radicular pain in his right ankle, foot and knee. They discussed Dr. Thomas' proposed surgery and a smoking cessation program. Claimant indicated to Dr. Larocca he wanted to proceed with the surgery. With that in mind, Dr. Larocca determined that pending surgery Claimant was totally disabled from working, and would remain so until twelve weeks thereafter.
20. Claimant returned to see Dr. Thomas on April 2, 2014 complaining of increased pain in his right leg. At this time he indicated to Dr. Thomas he wanted to proceed with the proposed surgery.

21. On May 2, 2014 Defendant filed a Notice of Intention to Discontinue Benefits (Form 27), in which it sought to discontinue temporary total disability benefits on the grounds that the proposed L5-S1 fusion surgery was not causally related treatment for Claimant's work injury and therefore he had reached an end medical result. The Department approved the discontinuance effective May 14, 2014.

Expert Medical Opinions

22. The parties presented conflicting expert opinions as to the causal relationship, if any, between Claimant's December 2011 work injury and his L5-S1 pathology. The experts also disagreed on the need for fusion surgery at that level.

(a) Dr. Thomas

23. Dr. Thomas testified by deposition. Prior to his deposition he reviewed all of the medical records that he had generated as part of Claimant's care, as well as the imaging studies.
24. In Dr. Thomas' opinion, Claimant's L5-S1 symptomatology is causally related to his work injury. He based his opinion on the following:
- Claimant's degenerative disc disease at L3-4, L4-5 and L5-S1 was completely asymptomatic prior to his December 2011 work injury; and
  - From the very onset of his work injury, Claimant's constellation of symptoms included complaints of right leg pain, numbness and tingling, which are indicative of L5-S1 pathology as the pain generator.
25. Dr. Thomas was not troubled by the lack of objective findings of right-sided radiculopathy on Claimant's June 2012 EMG study, Finding of Fact No. 12 *supra*. As he credibly explained, an EMG is merely a snapshot of one point in time and the radiculopathy has to reach a certain threshold before it will show on an EMG study. Dr. Thomas has had other patients who suffered nerve pain notwithstanding the absence of positive EMG findings. In his opinion, the fact that the L5-S1 epidural steroid injection that Claimant underwent in January 2014 produced complete relief of his right-sided symptoms is a strong indication that the pain generator is at this level.
26. I find Dr. Thomas' causation analysis very credible.
27. According to Dr. Thomas, Claimant needs L5-S1 fusion surgery to address his symptoms. The surgery will open his bilateral foramen, which in turn will allow the spinal nerve "room to breathe again" so that it will stop generating pain. I find Dr. Thomas' rationale persuasive.

28. Dr. Thomas' opinion regarding treatment is further buttressed by his global approach to treating Claimant. It was always his plan to treat Claimant's left-sided symptoms first, as these were the most problematic. Thereafter, Dr. Thomas treated the right-sided symptoms conservatively. When those measures did not alleviate Claimant's pain, and as the right-sided symptoms were intensifying, in Dr. Thomas' opinion the time has now come to address Claimant's severe bilateral foraminal narrowing with surgery. I find this analysis compelling.

*(b) Dr. Sobel*

29. At Defendant's request, Claimant underwent three independent medical examinations with Dr. Sobel, a board certified orthopedic surgeon. The first examination occurred in June 2012, the second in May 2013 and the third in March 2014. In addition to his examinations, Dr. Sobel has reviewed all of Claimant's medical records.

30. Dr. Sobel diagnosed Claimant with a lifting injury, with secondary disc herniation at L3-4 and a good result from disc excision surgery at that level. Dr. Sobel placed Claimant at end medical result on May 13, 2013 and rated him with an eight percent whole person permanent impairment, based on a single level discectomy without residuals.

31. In Dr. Sobel's opinion, Claimant's L5-S1 pathology is not causally related to his December 2011 work injury. Dr. Sobel based his opinion on the following:

- There was no objective evidence of right-sided radiculopathy on Claimant's June 2012 EMG study;
- There was no evidence on MRI of right-sided nerve compression at L5-S1;
- Dr. Thomas' notes made no mention of any right-sided radiculopathy prior to his November 2013 office note; and
- Between December 2011 and November 2013 Claimant was involved in two incidents that could have caused his right-sided radiculopathy – a “significant” motor vehicle accident in April 2013, and the house painting activities he reported to Dr. Larocca in July 2013.

32. Notwithstanding these observations, I find that in formulating his causation opinion Dr. Sobel failed to account for the fact that prior to his work injury Claimant was completely asymptomatic. He also failed to account for the fact that the medical record, which according to his testimony he reviewed in its entirety, was replete with reported complaints of right leg pain, numbness and other symptoms indicative of right-sided radiculopathy dating back to the December 2011 work injury and continuing essentially without interruption thereafter. Last, Dr. Sobel failed to account for the fact that Claimant's second MRI, which was taken after both his motor vehicle accident and his house painting activities, documented that there had been no changes at L5-S1 from the earlier MRI in February 2012. These omissions significantly undermine the support upon which Dr. Sobel's causation analysis was based, and for that reason I find it largely unpersuasive.
33. As for Dr. Thomas' proposed L5-S1 fusion surgery, according to Dr. Sobel this is not yet an appropriate treatment option. In his opinion, Claimant should undergo a repeat EMG study on the right side prior to considering surgery. Even then, in Dr. Sobel's view a better approach is to treat Claimant's degenerative disc disease conservatively, with nonsteroidal anti-inflammatory medicines, smoking cessation, abdominal strengthening and posture exercises.
34. I do not find Dr. Sobel's opinion regarding treatment persuasive. Claimant is experiencing worsening symptoms on his right side and has already exhausted his conservative treatment options. Further, given the results of the January 2014 epidural steroid injection Dr. Thomas is confident that L5-S1 is Claimant's pain generator, and for that reason a repeat EMG is not necessary.

#### **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).

#### *Causation of Claimant's L5-S1 Pathology*

2. The first issue presented in this case is whether Claimant's L5-S1 pathology was caused or accelerated by his December 2011 work injury. Defendant argues that he had pre-existing degenerative disc disease at that level. Claimant counters that his preexisting disease was completely asymptomatic until the work injury caused it to become symptomatic, to the point where surgery is now necessary.

3. The parties presented conflicting expert opinions on this issue. In such cases, 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. Based primarily on the third factor, I conclude that Dr. Thomas' causation opinion was more persuasive than Dr. Sobel's. The most compelling aspect of Dr. Thomas' opinion is his regard for the fact that prior to the work injury Claimant had no prior history of either low back pain or radiculopathy. Thus, it was the work injury that triggered his symptomatology, both at L3-4 and at L5-S1. As Dr. Thomas convincingly explained, because the left side symptoms were worse, he decided to address the pain generator for those symptoms first, by way of L3-4 disc excision surgery. But his decision to do so does not in any way negate the fact that Claimant's right-sided radiculopathy was ongoing, and had been so essentially since his work injury.
5. In contrast, Dr. Sobel's opinion points to allegedly intervening events as the cause of Claimant's right-sided symptoms. It thus fails to account for the fact that, as well documented in the contemporaneous medical records, those symptoms were not new, but rather dated back to the December 2011 work injury.
6. The Vermont Supreme Court has instructed:

When considering a progressively degenerative disease such as osteoarthritis, 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 v. Stannard*, 203 VT 52 ¶11 (May 29, 2003) (quoting *Jackson v. True Temper Corp.*, 151 Vt. 592 (1989) (internal citations omitted)).
7. I conclude that Claimant has sustained his burden of proving that his December 2011 work injury caused his preexisting L5-S1 pathology to become symptomatic to the point where his associated disability came upon him sooner than otherwise would have occurred. Therefore, I conclude that his condition is causally related and compensable. *See Chase v. State of Vermont*, Opinion No. 03-15WC (January 28, 2015).

Reasonable Medical Treatment

8. The second disputed issue is whether Dr. Thomas' proposed L5-S1 fusion surgery is reasonable medical treatment. Again, the parties' expert medical witnesses presented differing opinions.
9. Vermont's workers' compensation statute obligates an employer to pay only for those medical treatments that are determined to be both "reasonable" and causally related to the compensable injury. 21 V.S.A. §640(a); *MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009). The Commissioner has discretion to determine what constitutes "reasonable" medical treatment given the particular circumstances of each case. *Id.* A treatment can be unreasonable either because it is not medically necessary or because it is not related to the compensable injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010).
10. The determination whether a treatment is reasonable must be based primarily on evidence establishing the likelihood that it will improve the patient's condition, either by relieving symptoms and/or by maintaining or increasing functional abilities. *Quinn v. Emery Worldwide*, Opinion No. 29-00WC (September 11, 2000). However, as is the case with many aspects of medical decision-making, there can be more than one right answer, and thus more than one reasonable treatment option for any given condition. *Lackey v. Brattleboro Retreat*, Opinion No. 15-10WC (April 21, 2010).
11. Here again, I conclude that Dr. Thomas' opinion is clearer and more objectively supported than Dr. Sobel's. Dr. Sobel's opinion is based on his belief that conservative treatment should provide adequate relief of Claimant's right-sided symptoms. In fact, however, it has not. Dr. Thomas' surgical plan, which will "allow the spinal nerves to breathe again" by opening up the L5-S1 foramen, proposes an alternative approach, one that offers a reasonable chance for further symptom relief and functional improvement. Claimant wants to proceed with the surgery. Under the particular circumstances of this case, I conclude that this is a reasonable medical choice.
12. I thus conclude that Claimant has sustained his burden of proving that Dr. Thomas' proposed L5-S1 fusion surgery is both medically necessary and causally related to his December 2011 work injury. It therefore constitutes reasonable medical treatment under 21 V.S.A. §640.
13. 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. Medical benefits covering all medical services and supplies causally related to Dr. Thomas' proposed L5-S1 fusion surgery, in accordance with 21 V.S.A. §640;
2. Temporary total disability benefits from the date these were discontinued, May 14, 2014, and ongoing, in accordance with 21 V.S.A. §642, with interest as calculated in accordance with 21 V.S.A. §664; and
3. Costs and attorney fees in accordance with 21 V.S.A. §678.

**DATED** at Montpelier, Vermont this 27<sup>th</sup> day of February 2015.

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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.