John Coronis v. Granger Northern Inc. (April 27, 2010)

**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

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| John Coronis | Opinion No. 16-10WC |
| v. | By: Sal Spinosa, Esq.<br>Hearing Officer |
| Granger Northern, Inc. | For: Patricia Moulton Powden<br>Commissioner |
| | State File No. T-06610 |

## RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

**ATTORNEYS:**

Brendan Donahue, Esq., for Claimant
Robert Cain, Esq., for Defendant

**ISSUE PRESENTED:**

Is Defendant obligated as a matter of law to pay for medical treatment related to Claimant's current symptoms by virtue of the fact that it executed an Agreement for Permanent Partial Disability Compensation (Form 22) in the context of Claimant's October 14, 2002 work injury?

**FINDINGS OF FACT:**

Considering the facts in the light most favorable to Defendant, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. On October 14, 2002 Claimant injured his lower back at work while picking up a window. Defendant accepted the injury as compensable and paid workers' compensation benefits accordingly.

*Claimant's Prior Medical History*

2. Prior to this work injury Claimant had been diagnosed with and treated for at least two episodes of low back pain. In February 1997 he complained of left hip pain. He treated with Dr. Muller, who diagnosed lumbar radiculopathy. An MRI study completed at this time revealed degenerative changes at the L4-5 disc space. As treatment, Claimant underwent a series of corticosteroid injections. These ended in April 1997.

3. Claimant next complained of low back pain, with intermittent radiating symptoms into both legs, in October 1999. Again he treated with Dr. Muller. This time, Dr. Muller offered Claimant the choice of either surgery or referral to a pain clinic for a variety of

conservative treatments. Claimant chose the latter. He underwent a facet joint injection in November 1999, following which his symptoms resolved.

*Claimant's Work Injury and Response to Treatment*

4. Claimant sought no further treatment for low back pain between November 1999 and October 14, 2002, when his work injury occurred. Claimant initially treated for that injury at Springfield Hospital on the following day. He reported low back pain, but no radicular symptoms (pain, numbness, tingling or weakness) in his lower extremities. Claimant was prescribed pain medications and advised to avoid work for two days.

5. Six days later, Claimant again sought medical care, this time complaining of low back pain radiating into his left leg. By mid-November 2002 he was reporting significant improvement, with only occasional left leg radiculopathy. Claimant was released to his routine level of function and sought no further treatment.

*Claimant's Medical Status After 2002*

6. Claimant ended his employment with Defendant in 2003. In the spring of 2004 he went to work for Customized Structures, Inc. (CSI), a prefabricated home manufacturer. Claimant worked there for only one to two months. He left because the work, which required him to climb a stepladder frequently, began "aggravating" his leg. Claimant testified in his deposition that his prior pain had never resolved and that his job at CSI was "making the pain that I had before more noticeable."

7. Nearly two years after his 2002 injury, in September 2004 Claimant again sought medical treatment for severe low back pain. He was prescribed pain medications, but these were ineffective, and his condition worsened a few days later. An October 2004 MRI revealed a broad-based disc bulge at L4-5 that had progressed since his 1997 MRI. Claimant's treating neurosurgeon, Dr. Phillips, interpreted the 2004 MRI as showing a significant disc herniation at L4-5 on the left, which corresponded with Claimant's radicular symptoms. Dr. Phillips recommended surgery; Claimant declined. Claimant's back pain and radiculopathy persisted.

8. At Defendant's request, in May 2005 Claimant underwent an independent medical evaluation with Dr. Gennaro, an orthopedic surgeon. Dr. Gennaro noted that the "slight bulge" at L4-5 that had been evident in Claimant's 1997 MRI had progressed, such that the 2004 MRI[1] now revealed a "rather significant" central herniation at that level that had not been present previously. In comparing the two studies, Dr. Gennaro acknowledged that Claimant's underlying degenerative disc disease had progressed in the intervening years. In his opinion, however, Claimant's reported pattern of waxing and waning symptoms dating back to the October 2002 work injury[2] was consistent with a disc herniation that most likely occurred at that time. Dr. Gennaro concluded, therefore, that the disc herniation was causally related to the work injury.

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[1] In his report, Dr. Gennaro references a 2002 MRI; however, it is apparent from the context that this was in error.

[2] Again, in his report Dr. Gennaro references an October 2004 work injury, but it is clear from the context that he intended to reference the 2002 injury.

9. Because Claimant was not interested in treating his symptoms surgically, Dr. Gennaro determined that he was at end medical result. With specific reference to Claimant's L4-5 disc herniation, Dr. Gennaro assessed a whole person permanent impairment of 8%.

10. As for treatment, Dr. Gennaro determined that Claimant's use of pain medications to address his ongoing symptoms was reasonable, though he did recommend a prescription change. Dr. Gennaro anticipated that Claimant might require additional treatment in the future, including possibly surgery.

11. Consistent with Dr. Gennaro's opinion, in November 2007 Defendant proposed to pay the 8% permanency he had rated. To that end, the parties executed an Agreement for Permanent Partial Disability Compensation (Form 22) and submitted it to the Department for its approval.[3] The form described Claimant's injury (a "strained lower back"), noted that he had reached an end medical result and specifically referenced Dr. Gennaro's impairment rating in determining the number of weeks' worth of benefits to be paid. On November 14, 2007 Defendant issued a lump sum payment of those benefits to Claimant.

12. At Defendant's request, in April 2008 Claimant underwent an independent medical evaluation with Dr. Glassman, a physiatrist. Dr. Glassman's conclusions were at odds with Dr. Gennaro's in virtually every respect. Specifically:

- Noting that Claimant's October 2002 work injury appeared to resolve in a matter of weeks and with minimal treatment, Dr. Glassman concluded that the injury did not cause Claimant's L4-5 disc to herniate. In fact, in Dr. Glassman's opinion the 2004 MRI did not even document a "true disc herniation" at that level.

- Upon comparing the 1997 and 2004 MRI scans, Dr. Glassman determined that any changes evident in the later scan were not causally related in any way to Claimant's October 2002 work injury, but rather represented the natural progression of his underlying degenerative disc disease.

- Dr. Glassman concluded that Claimant's October 2002 work injury was minor at best, and that no further treatment for that injury was reasonable or necessary. Dr. Glassman further concluded that the medical treatment Claimant had been receiving since 2004 was causally related to his preexisting degenerative disc disease, not to his work injury.

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[3] The Department received the signed Form 22 in May 2008. Because various supporting wage records were missing, however, it appears the Department never approved the form. Neither party has contested the form's validity. To the contrary, both have treated it in all respects as a binding agreement. As it appears the Department would have had no basis for rejecting the form for any reason related to the issues pending before me now, I too will consider it to be a binding agreement, at least as to those issues.

13. With Dr. Glassman's opinion as support, in April 2008 Defendant filed a Notice of Intention to Discontinue Payments (Form 27), in which it sought to terminate its responsibility for Claimant's ongoing medical treatment. Up until this time, consistent with Dr. Gennaro's earlier report and recommendations Defendant had continued to pay for Claimant's prescription pain medications. The Department approved the Form 27 effective May 13, 2008.

14. Claimant testified at his deposition that he remains undecided about undergoing surgery to treat his ongoing symptoms. Dr. Phillips has continued to offer that option on the grounds that it is reasonable and necessary treatment for what he believes is an L4-5 disc herniation causally related to Claimant's October 2002 work injury. In this respect, Dr. Phillips' opinion is consistent with Dr. Gennaro's and contrary to Dr. Glassman's.

15. Dr. Glassman continues to maintain that there is no disc herniation, work-related or not, at L4-5. Most recently, in a June 2009 addendum to his report Dr. Glassman noted that Claimant had undergone a third MRI scan in October 2008, the report of which documented degenerative disc disease at multiple levels, but made no mention of a disc herniation at any level. In Dr. Glassman's opinion, the findings reported in this MRI are consistent with those reported in the 2004 MRI. Both fail to document any "true disc herniation" at L4-5.

**CONCLUSIONS OF LAW:**

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).

*The Form 22*

2. Claimant argues that Defendant is precluded from contesting its responsibility to provide reasonable and necessary medical treatment to address his current symptoms by virtue of the Form 22 that the parties executed in November 2007. Defendant contends that Claimant's current symptoms are not causally related to his 2002 work injury and that therefore the Form 22 has no bearing.

3. The purpose of a Form 22 is to resolve issues relating to the nature and extent of an injured worker's permanent impairment. Once the parties execute a Form 22 and the Department approves it, it becomes a binding agreement, and "absent evidence of fraud or material mistake of fact the parties shall be deemed to have waived their right to contest the material portions thereof." Workers' Compensation Rule 17.0000.

4. The "material portions" of a Form 22 include the date of end medical result and the extent of the claimant's permanent impairment. *Lushima v. Cathedral Square Corporation*, Opinion No. 38-09WC (September 29, 2009). As to the latter, Workers' Compensation Rule 17.2000 requires that every Form 22 must be supported by medical documentation to substantiate that the permanent impairment has been rated in accordance with the *AMA Guides to the Evaluation of Permanent Impairment*. By logical extension, therefore, the medical documentation that supports an impairment rating is as much a "material portion" of the Form 22 as the rating itself.

5. The Form 22 at issue here obligated Defendant to pay Claimant permanency benefits in accordance with Dr. Gennaro's 8% whole person impairment rating. That rating was itself based on Dr. Gennaro's diagnosis – an L4-5 disc herniation – and determination as to medical causation. In order to give the Form 22 the certainty that Workers' Compensation Rule 17.0000 intended, once the form is executed these material elements – diagnosis, causation and impairment rating – are no longer subject to discussion or dispute by either party.

6. It is true, as Defendant argues, that the Form 22 does not necessarily preclude it from producing new medical evidence to establish that Claimant's current symptoms are causally related to something other than his October 2002 work injury. Defendant cannot do so, however, on the grounds that the injury it accepted in fact did not occur. Yet this is the very sum and substance of its medical expert's opinion. Dr. Glassman's conclusion that Claimant's current symptoms are not driven by an L4-5 disc herniation causally related to his October 2002 work injury is based entirely on his determination that in fact there was no L4-5 disc herniation.

7. Through its expert, Defendant has repudiated the very existence of a work-related L4-5 disc herniation, and in doing so it has gone too far. By specifically adopting Dr. Gennaro's diagnosis and corresponding impairment rating, the Form 22 became dispositive on this issue. When it executed the Form 22 and paid permanency benefits in accordance therewith Defendant accepted those findings; it cannot now reject them.

8. Defendant cites to *L.C. v. Daniel Wyand, P.T.*, Opinion No. 31-07WC (November 6, 2007) in support of its position. The employer in that claim was indeed permitted to challenge causation as it related to the claimant's condition after the Form 22 had been executed. It did so, however, not on the grounds that the original diagnosis had been flawed, as Dr. Glassman did here, but rather on the grounds that a separate and distinct preexisting condition was to blame for the current symptoms. The distinction matters.

9. I conclude, therefore, that the medical evidence Defendant has produced is insufficient as a matter of law to support its discontinuance of benefits.[4] Had there been no Form 22, perhaps Dr. Glassman's opinions as to diagnosis, causation and medical treatment would have been more persuasive than Dr. Gennaro's, and thus he might have carried the day for Defendant. At this point, however, that discussion comes too late.

[4] As Claimant has no current plan to pursue possible surgical treatment options for his symptoms, the question whether Defendant might be responsible if and when he does so is not yet ripe. By virtue of this ruling Defendant is now obligated to resume whatever medical benefits it previously had discontinued, including, for example, routine follow-up appointments and/or prescription pain medications.

*Aggravation*

10. Finally, citing Claimant's deposition testimony Defendant argues that it should no longer be held responsible for treatment of Claimant's current symptoms on the grounds that he suffered an aggravation or new injury during his employment for CSI in 2004. There is no medical evidence to support such a claim, and even if there was, it would be inappropriate to consider it without affording CSI an opportunity to be heard as well.

**ORDER:**

For the foregoing reasons, Claimant's Motion for Summary for Judgment is **GRANTED**. Defendant's discontinuance of benefits was not adequately supported. In accordance with the Form 22 executed by the parties, Defendant remains responsible for reasonable and necessary medical treatment causally related to Claimant's L4-5 disc herniation.

In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this Order within which to submit his request for costs and attorney fees.

**DATED** at Montpelier, Vermont this 27th day of April 2010.

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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.