Arthur Saffold v. Palmieri Roofing Inc. (July 14, 2010)

STATE OF VERMONT
DEPARTMENT OF LABOR

Arthur Saffold	Opinion No. 24-10WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
Palmieri Roofing, Inc.	For: Patricia Moulton Powden Commissioner
	State File No. H-22526

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ATTORNEYS:

David Williams, Esq., for Claimant
Robert Cain, Esq., for Defendant

ISSUE:

Defendant moves for summary judgment on the grounds that the undisputed evidence establishes that Claimant's current claim for workers' compensation benefits arose from a non-work-related condition for which it cannot be held liable.

FINDINGS OF FACT:

Taking the evidence in the light most favorable to the non-moving parties, as is required when considering a motion for summary judgment, *Carr v. Peerless Insurance Co.*, 168 Vt. 465, 476 (1998), I find the following facts:

Claimant's 1994 Injury and Subsequent Treatment

1. Claimant worked for Defendant as a general laborer and roofer. On September 30, 1994 he injured his back while carrying a 12-foot-long roll of roofing paper weighing 320 pounds.

2. Claimant presented to Littleton Orthopaedics on November 8, 1994 with complaints of low back and right-sided radicular pain. A subsequent myelogram revealed findings suggestive of a disc herniation at L5-6.[1] On November 30, 1994 Claimant underwent a laminectomy and discectomy at that level.

[1] Claimant has six lumbar vertebrae, which can lead to some confusion when counting disc levels. Early radiological studies and operative reports referred to the lowest (most inferior) lumbar disc level as L5-6; this corresponds to what later is referred to as the L4-5 level.

3. Claimant recovered well from the November 1994 surgery. His low back pain lessened significantly, and the pain, numbness and tingling in his right lower extremity abated as well.

4. Claimant underwent physical therapy in early 1995, during which he made steady progress but continued to complain occasionally of numbness in his thigh and/or foot. His therapy was interrupted for a time after he suffered a heart attack in March 1995. After his recovery from that event, Claimant continued to experience some residual low back pain, as well as radicular symptoms into his right lower extremity.

5. In December 1996 Claimant's treating physician, Dr. Howard, determined that he had reached an end medical result and rated him with a 20% whole person permanent impairment. Even at that time, Claimant continued to experience symptoms in his low back and right leg. He had difficulty with lifting, bending, standing on concrete floors and sitting for more than 40-50 minutes. Claimant also complained of ongoing weakness and numbness in his right leg.

6. At Defendant's request, in February 1997 Claimant underwent an independent medical examination with Dr. Jennings, who rated his permanent impairment at 10% whole person. Subsequently, the parties executed an Agreement for Permanent Partial Disability Compensation (Form 22) that reflected a compromise of the two impairment ratings, which the Department approved in July 1997.

7. Claimant experienced an episode of increased low back and right leg pain in April 1997, for which he underwent an epidural steroid injection. In June 1997 Claimant reported to Dr. Howard that he had obtained "quite a bit of relief" from the injection, notwithstanding some lingering residual symptoms. Dr. Howard's impression at that time was "disc degeneration following herniated disc L5-6 and scar tissue."

8. Aside from one visit to his primary care provider immediately following a motor vehicle accident in 2005, from June 1997 until April 2006 Claimant did not seek medical treatment for any low back pain or other radicular symptoms. Claimant testified that he continued to experience occasional stiffness in his back during this nine-year period, for which he may have taken an occasional muscle relaxant, but nothing serious enough to warrant specific medical treatment.

9. Claimant held a variety of jobs during this time, though none after March 2004. From July 1996 until some time in 1997 he worked at Hitchener's, a golf club manufacturing company. For approximately two years thereafter, he owned and operated a small coffee shop; that business closed in 2000. From 2001 until 2004 he worked as a lathe operator at NSA Industries. In Claimant's words, this job required "grueling" hours and a significant amount of standing on mat-covered concrete floors.

10. Following triple-bypass surgery in September 2001, Claimant was disabled from working at NSA Industries for six months. Upon returning to work he continued to experience cardiac symptoms. As a result, in March 2004 his doctors again advised him to stop working, which he did.

11. Claimant has not worked since March 2004. He has been receiving social security disability benefits since that time, primarily due to his cardiac condition.

12. Claimant testified that his work activities from 1997 through 2004 neither caused nor aggravated his low back pain or radicular symptoms.

Claimant's 2006 Surgery

13. In April 2006 Claimant experienced the spontaneous onset of low back pain with radicular symptoms down his right leg. Contemporaneous medical records reflect that Claimant was "simply walking along" when he felt a "spasm" in his back, followed by worsening pain, tingling, numbness and weakness down his right lower extremity. The symptoms were exactly the same as those he had experienced prior to his 1994 surgery.

14. A May 2006 MRI revealed a right-sided disc herniation at L4-5, the same level as had been operated on in 1994.[2] There also was evidence of scar tissue at the site. Upon reviewing the MRI, Dr. Sengupta, the orthopedic surgeon to whom Claimant had been referred, observed that the disc herniation "appears to be moderate in size, but it appears that because of the scar tissue around the right L5 nerve root it is producing significant symptoms on the right leg."

15. As treatment for Claimant's symptoms, Dr. Sengupta recommended a repeat L4-5 discectomy, which Claimant underwent in June 2006. In his operative findings, Dr. Sengupta reported "scar tissue identified from prior surgery." He also remarked that the "dura and [L5] nerve root were . . . found to be tight within the canal."

16. The medical records reflect that after the June 2006 surgery Claimant initially experienced good relief of his symptoms, but by the following year his radicular complaints had returned. According to Dr. Sengupta's June 18, 2007 office note, an MRI study completed two days earlier showed disc degeneration at both L4-5 and L5-S1, but no evidence of disc herniation at either level.

Expert Medical Opinions

17. At Defendant's request, in October 2006 Claimant underwent an independent medical examination with Dr. Gennaro, an orthopedic surgeon. The purpose of the examination was to determine whether Claimant's June 2006 surgery represented a recurrence causally related to his 1994 work injury and subsequent disc surgery or alternatively, whether it reflected an unrelated aggravation or new injury.

18. Unfortunately, without being able to review the previous MRI studies and operative reports side by side, Dr. Gennaro was unable to determine whether the L5-6 disc herniation addressed in the context of Claimant's 1994 surgery was in fact at the same level as the L4-5 disc herniation addressed during his June 2006 surgery. Dr. Gennaro did state, however, that if the 1994 surgery was in fact at the same level as the 2006

[2] As noted above, *see* footnote 1, this level previously had been referred to as L5-6. In April 2007 Defendant's own medical expert, Dr. Gennaro, conducted a side-by-side comparison of the various radiographic studies and operative reports and confirmed that both references actually related to the same disc level. *See* Finding of Fact No. 19, *infra*.

surgery, "then I believe this represents a recurrence of his previous disease, and that it would be related. If in fact his new surgery is at a different level, the conclusion would be that it is not related."

19. In April 2007 Dr. Gennaro compared Claimant's MRI studies and operative reports side by side, and concluded that in fact both surgeries had taken place at the same disc level. In addition, Dr. Gennaro reported that a January 25, 2007 MRI "shows a new disc herniation now present at L5-S1, . . . [w]hich represents a new disc herniation at a newer level."[3]

20. With this new finding in mind, Dr. Gennaro concluded that Claimant's 2006 surgery reflected neither an aggravation nor a recurrence. As Claimant had not identified any "specific work or other activity which provoked a disc herniation," Dr. Gennaro discarded the possibility of an aggravation or new injury. Given the number of years that had passed since Claimant's original surgery, furthermore, Dr. Gennaro deemed it "unlikely" that the 2006 surgery would have been caused by a "recurrent" disc herniation, as those typically occur within a "relatively short period of time" after the original injury.

21. Having discarded both aggravation and recurrence as likely causes, Dr. Gennaro concluded that the symptoms Claimant began experiencing in 2006 were more likely than not "the manifestation of longstanding chronic degenerative disc disease in his spine." The natural progression of this disease, according to Dr. Gennaro, was evidenced both by worsening degeneration "at the old [L4-5] disc level and other levels," and by "a newer disc herniation at an adjacent level [L5-S1]." In Dr. Gennaro's opinion, Claimant's condition was the consequence of "aging and time," and thus was completely independent of either the 1994 surgery or of any subsequent injury or event.

22. With Dr. Gennaro's opinion as support, on April 17, 2007 Defendant issued a Form 2 denial of Claimant's claim for workers' compensation benefits referable to his June 2006 surgery and subsequent symptoms.

23. At Dr. Sengupta's referral, in July 2008 Claimant underwent an evaluation with Dr. McLellan, a physician at Dartmouth Hitchcock Medical Center. Upon reviewing Claimant's June 2007 MRI Dr. McLellan remarked that it revealed evidence of a disc herniation at L4-5 and postoperative changes, prior surgery at the L5-S1 level and also "considerable scar tissue around [the] right L5 nerve root."

[3] Dr. Gennaro is the only medical expert who claims to have reviewed a January 25, 2007 MRI. The report is not included in the attachments to Defendant's Motion for Summary Judgment. Nor is it referenced by Dr. Sengupta, who noted that an MRI study done six months later, in June 2007, showed no evidence of disc herniation. *See* Finding of Fact No. 16, *supra*.

24. Absent a more comprehensive review of Claimant's medical records, Dr. McLellan declined to issue a "final" opinion as to the causal relationship, if any, between Claimant's 1994 surgery and the symptoms that led to his 2006 surgery. Speaking "in a more generic way," however, Dr. McLellan stated:

> [Claimant] clearly had a disc herniation back in 1994. Individuals who have had disc herniations are at high risk of recurrence. In the absence of an intervening injury, recurrent symptoms on the same side at the same level are more probably than not related to the original injury. Given insidious onset of [symptoms] in the same dermatomal pattern as before and given the MRI results, the current radicular symptoms are also more probably than not related to the original injury.

25. At the request of Claimant's attorney, Dr. Ross, an orthopedic surgeon, conducted a medical records review in December 2008. Although his initial report was somewhat confusing, ultimately Dr. Ross concluded that Claimant's 2006 disc herniation, subsequent surgery and current condition most likely were causally related to his 1994 injury and surgery.

26. Dr. Ross based his conclusion both on the existence of scar tissue around Claimant's L5 nerve root and on the likelihood that the earlier surgery resulted in spinal instability at adjacent disc levels. According to Dr. Ross, it is well-documented in the spinal literature that a discectomy at one level predisposes a patient to disc degeneration and/or instability at adjacent levels as well. In contrast to Dr. Gennaro's viewpoint, therefore, in Dr. Ross' opinion there was "no basis in fact" from which to conclude that the natural history of Claimant's disc degeneration would have caused his current condition had the 1994 surgery not predisposed him to further deterioration.

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 judgment in its favor as a matter of law. *Samlid 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. Heritage Realty of Vermont*, 137 Vt. 425 (1979). Summary judgment is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of facts offered by either party or the likelihood that one party or another might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶15.

2. In this claim, Defendant argues that the undisputed evidence establishes that the symptoms that led to Claimant's 2006 disc surgery and subsequent disability were not causally related in any way to his 1994 work injury. With reference to the factors enunciated in *Trask v. Richburg Builders*, Opinion No. 51-98WC (August 25, 1998), for differentiating between an aggravation and a recurrence, Defendant asserts that it was the natural progression of Claimant's degenerative disc disease that ultimately caused his disability, an aggravating condition for which it bears no responsibility.

3. In *Trask*, the Commissioner identified five factors that typically will support a finding of aggravation, thus severing the causal connection back to an earlier injury:

    (1) Whether there has been 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 incident or work condition contributed independently to the final disability.

    In accordance with the Vermont Supreme Court's holding in *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997), the fifth factor – whether the subsequent incident or work condition contributed independently to cause the final disability – is accorded the greatest weight. *Id.*

4. When considering a progressively degenerative disease in the context of an aggravation-versus-recurrence dispute, one "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 Co, Inc.*, 175 Vt. 549, 552 (2003), quoting *Jackson v. True Temper Corp.*, 151 Vt. 592, 596 (1989).

5. Here, Defendant asserts that the evidence is undisputed as to all five of the *Trask* factors, and that all five point undeniably to a non-work-related aggravation. With particular reference to the fifth factor, Defendant asserts that both its own medical expert, Dr. Gennaro, and Claimant's medical expert, Dr. Ross, agree that Claimant's degenerative disc disease contributed independently to cause his 2006 symptoms. That, Defendant claims, is the beginning, the middle and the end of any aggravation-versus-recurrence dispute.

6. Defendant's argument ignores the patently obvious discrepancy between Dr. Gennaro's opinion and Dr. Ross'. It is true that according to Dr. Gennaro, the symptoms Claimant began experiencing in 2006 resulted from the natural progression of his underlying degenerative disc disease, a process that Dr. Gennaro claims existed wholly separate and apart from Claimant's 1994 work injury and ensuing disc surgery. According to Dr. Ross, however, the process was not at all independent from Claimant's earlier injury. To the contrary, Dr. Ross asserts that Claimant's 1994 surgery predisposed him to further disc degeneration, such that the symptoms he experienced in 2006 most likely came on sooner than they otherwise would have.

7. The factual dispute between the parties is thus clearly framed. Resolving it will require me to consider both the facts underlying each doctor's opinion and the reasoning each used to arrive at his conclusions. I am curious, for example, to understand what role, if any, Dr. Gennaro believes the presence of scar tissue at the 1994 operative site may have played in causing the symptoms Claimant exhibited in 2006. It also will be relevant to my determination to judge the credibility of Dr. Ross' assertion that a disc herniation more than ten years earlier most likely accelerated the progression of a disease that naturally worsens over time in any event. These questions are not amenable to resolution by summary judgment, but rather will require an evidentiary hearing to decide.

8. The sole purpose of summary judgment review is to determine if a genuine issue of material fact exists. If such an issue does exist, it cannot be adjudicated in the summary judgment context, no matter how unlikely it seems that the party opposing the motion will prevail at trial. *Provost, supra; Fonda v. Fay*, 131 Vt. 421 (1973). That is the case here. Summary judgment is not appropriate.

ORDER:

For the foregoing reasons, Defendant's Motion for Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont this 14th day of July 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.