

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Matthew McNall

Opinion No. 08-19WC

v.

By: Stephen W. Brown
Administrative Law Judge

Town of Westford

For: Lindsay H. Kurrle
Commissioner

State File No. GG-60713

OPINION AND ORDER

Hearing held in Montpelier on February 15, 2019
Record closed on March 27, 2019

APPEARANCES:

William Skiff, Esq. and Todd Taylor, Esq., for Claimant
Wesley Lawrence, Esq., for Defendant

ISSUES PRESENTED:

- 1) Is Claimant's back condition causally related to his accepted February 25, 2015 workplace injury involving his foot?
- 2) If so, was his spinal surgery performed by Ryan Jewell, MD medically necessary and causally related treatment therefor?

EXHIBITS:

Joint Exhibit	Joint Medical Exhibit ("JME")
Claimant's Exhibit 1	Medical record from Fairfax Associates in Medicine, PLLC dated October 28, 2016 (same as JME, p. 57)
Claimant's Exhibit 2	Medical record from Northwestern Cardiology Services dated December 5, 2016 (same as JME, p. 60)
Claimant's Exhibit 3	Medical record from Fairfax Associates in Medicine, PLLC dated March 10, 2017 (same as JME, p. 65)
Claimant's Exhibit 4	Medical record from Northwestern Orthopaedics dated August 17, 2017 (same as JME, p. 79)
Claimant's Exhibit 5	Medical record from Fairfax Family Physical Therapy dated September 6, 2017 (same as JME, p. 90)
Defendant's Exhibit A	Employee Payroll History Report from Harrison Concrete dated October 24, 2018
Defendant's Exhibit B	Employee's Claim and Employer First Report of Injury with handwritten corrections

FINDINGS OF FACT:

1. I take judicial notice of all relevant forms and correspondence in the Department's file for this claim.

Background

2. Claimant is a 50-year-old man residing in Fairfax, Vermont. Between late 2014 and the summer of 2016, he was an employee of Defendant Town of Westford, where he performed a wide variety of duties including grading roads, plowing snow, and repairing trucks.
3. Claimant has performed physically demanding work for most of his adult life, including farming, construction work, and road maintenance. He lives on a family farm where he performs sugaring work and cares for cows by bringing them hay with a tractor, shoveling their manure, and cleaning their sleeping areas.
4. Despite his long history of physical labor, he had no significant back or leg pain before February 2015.

Claimant's Workplace Injury

5. This case arises out of an injury that Claimant suffered on February 25, 2015 while working for Defendant. Claimant's supervisor, Brent Meacham, was plowing snow when he ran his plow into a tree, causing a large dent in the plow. Mr. Meacham then told Claimant and his coworker Todd Cameron to repair it.
6. Claimant and Mr. Cameron took the plow into the town garage and raised it about two feet above the concrete floor on wooden blocks. They turned on gas torches and planned to heat the plow so they could cut out the dent and insert a new piece of metal.
7. Several minutes later, the plow fell to the ground and one of its "shoes"¹ landed on Claimant's right foot. The plow weighed about 1,000 pounds.
8. Claimant immediately experienced extreme pain in his foot and began "screaming bloody murder." Mr. Cameron turned off the gas torches and worked with Mr. Meacham to jack up the plow and remove it from Claimant's foot.
9. Shortly after his foot was free, Claimant fell backwards and struck his lower back onto the concrete garage floor. Mr. Cameron helped him into a truck and transported him to Northwestern Medical Center's emergency room. *See* JME, pp. 21-29.
10. Claimant suffered multiple bone fractures in his foot and a significant laceration on his big toe. He subsequently underwent foot surgery and extensive physical therapy. This injury caused him to be absent from work for about two months.

¹ A "shoe" refers to a small metal square on the back of the snowplow.

11. Claimant still experiences foot symptoms related to this accident and walks with a limp. Defendant accepted his foot injury as compensable and paid benefits for that injury accordingly.

Claimant's Return to Work with Defendant

12. Claimant was released to work with a light duty capacity in April 2015, and with no restriction in July 2015.
13. When he returned to his job with Defendant, he performed the same duties as before, but experienced greater difficulty and had to take frequent rest breaks.
14. Mr. Cameron interacted with Claimant nearly every day after his return. He credibly testified that Claimant regularly appeared to be in physical pain and complained to him about pain in his foot, back, and leg.
15. Claimant continued working for Defendant until the summer of 2016, when he accepted a more lucrative job offer from Harrison Concrete. He still works for Harrison Concrete.

Claimant's Work at Harrison Concrete

16. Claimant's work for Harrison Concrete is physically demanding. He drives a concrete truck on bumpy terrain at construction sites, shovels spilled concrete, and helps his coworkers carry, hook, and unhook an 80-pound concrete hose. This job requires frequent overtime and sometimes as many as 100 miles per day of driving.
17. After he began working at Harrison Concrete in the summer of 2016, he experienced increasingly frequent and severe pain, numbness, and tingling in his back, shooting into his leg.
18. During the summer of 2017, Claimant worked on a major construction project near Saranac Lake and Lake Placid, New York. This project required between 50 and 65 hours of work every week for three consecutive months. *See* Defendant's Exhibit A. During this period, his back pain became almost constant.

Treatment for Claimant's Back and Leg Complaints Beginning in August 2017

19. In August 2017, Claimant presented to Northwestern Orthopedics complaining of back pain including tingling and numbness. He told his provider that the pain had been going on for about five to six months. *See* JME, pp. 79-82. He credibly testified that by that time, his back pain made it difficult for him to perform household and farming chores at home or endure a full day's work at his concrete job. This was the first recorded instance of Claimant mentioning back pain to any of his medical providers since his return to work after the snowplow incident.²

² There is an isolated reference to Claimant complaining of back soreness in a physical therapist's note in March 2015, before he returned to work. *See* JME, p. 41. This note indicates that Claimant attributed his soreness to how he was walking at the time.

20. Between August and November 2017, Claimant sought care from multiple providers for low back pain radiating down his buttock and thigh. His medical records from this period reflect quadriceps weakness and atrophy, as well as motor weakness in the L5-S1 distribution. His radiological scans show degenerative changes at L3 and L5, and he was diagnosed with lumbar radiculopathy. *See generally* JME, pp. 81-94.
21. In December 2017, Claimant visited Ryan Jewell, M.D., a board-certified neurosurgeon whom one of Claimant's coworkers at Harrison Concrete had recommended. Dr. Jewell ordered an MRI, which confirmed that Claimant had a degenerative condition that Dr. Jewell credibly testified would have predated his fall at work. Dr. Jewell credibly testified that Claimant's degenerative spinal condition caused his leg symptoms by preventing normal nerve transmission to his leg.
22. Dr. Jewell recommended that Claimant undergo an L3-4 decompression and allograft surgery to decrease numbness and pain in his leg and restore strength in his right quadricep. He performed that surgery in April 2018, after which Claimant experienced significant relief.

Factual Dispute Regarding When Claimant First Experienced Back and Leg Pain

23. Based largely on the medical records chronology, Defendant challenges Claimant's assertion that he experienced back or leg pain between the time when he returned to work for Defendant in April 2015 and his resignation in the summer of 2016. Defendant accurately notes that while Claimant visited multiple medical providers during that time, none of those providers' records mention back or leg pain.
24. Additionally, in November 2015, while he was still employed with Defendant, Claimant underwent an independent medical examination with Philip J. Davignon, MD, an occupational medicine physician. *See* JME, pp. 51-55. Dr. Davignon placed Claimant at medical end result and assessed a four percent whole person impairment referable to his foot injury. There is no indication in Dr. Davignon's report that Claimant mentioned back or leg pain, and Dr. Davignon found that Claimant's lumbar spine and lower extremities were normal. Claimant did not seek a second opinion.
25. Claimant credibly testified that following his injury, his foot pain was much more severe than any pain he was experiencing in his back or leg, and that while he had symptoms in those areas the entire time, he was primarily concerned with his foot injury, as he was concerned that he might lose his foot. He also believed that his back and leg symptoms were related to his foot pain, and that once his foot pain resolved, his back and leg issues would resolve as well.
26. Claimant also accurately notes that several of his medical visits after his return to work were for psychological, digestive, and cardiological concerns that were entirely unrelated to his 2015 workplace injury. He stated that he did not mention his back and leg pain during those visits because he did not believe it would be relevant to his primary complaints at those times. While I find it plausible that he was primarily focused on the concerns for which he sought treatment at those times, his medical history shows that

when he experienced severe pain, he sought medical care and was able to express his complaints to his providers.

27. Construing Claimant's testimony and his medical records together, I find that during his post-injury tenure with Defendant, his foot pain was much more severe than either his back or leg pain. While I find that he experienced back and leg discomfort following his 2015 work injury, that discomfort remained minor and stable for over two years, as shown by his failure to seek treatment for it during that period.

Dr. Jewell's Opinions Concerning Causation

28. Dr. Jewell credibly testified that many people of Claimant's age have degenerative spinal conditions like Claimant's with no symptoms, but that such conditions can become symptomatic from minor trauma such as falling down steps or in a driveway. He believes that Claimant's February 2015 fall supplied the minor trauma that made his previously asymptomatic condition become symptomatic, giving rise to the need for surgery.
29. Importantly, Dr. Jewell first met Claimant in December 2017 and did not have any personal knowledge of Claimant's treatment from before that time. He did not review the vast majority of Claimant's medical records; he reviewed only a small set of records dating from shortly before his treatment of Claimant in order to help identify any conditions that might affect Claimant's treatment risk profile. This was in line with Dr. Jewell's normal treatment practice, as his focus was on treating Claimant's condition rather than analyzing its etiology.
30. While Dr. Jewell knew Claimant worked in the concrete industry, he did not know any details about his daily work tasks. He was also unaware of Claimant's home farming operation or the physical demands associated with that work.
31. On cross examination, Dr. Jewell credibly acknowledged that several tasks involved in Claimant's concrete and farming work such as shoveling concrete, hooking and unhooking concrete hoses, and mucking cow stalls could have contributed to his degenerative spinal condition.
32. Dr. Jewell also credibly acknowledged that riding on bumpy terrain can provide the kind of minor trauma that can make degenerative spinal conditions become symptomatic. Indeed, he has seen truck drivers develop symptoms from driving on bumpy roads.
33. I find Dr. Jewell's explanation of how degenerative spinal conditions can become symptomatic after a minor trauma credible and persuasive. However, I find his causal analysis linking Claimant's 2015 fall to his later symptoms hampered by a lack of knowledge about Claimant's medical history and by an inadequate accounting for Claimant's engagement in other strenuous activities that Dr. Jewell acknowledged could have contributed to his spinal condition.

Dr. Binter's Opinions Concerning Causation

34. Nancy Binter, M.D. testified as an expert witness for the defense. Dr. Binter is board-certified as both a neurosurgeon and an independent medical examiner. Though she has retired from the active practice of neurosurgery, she regularly performs medical examinations and medical records reviews for forensic use, including in connection with workers' compensation claims.
35. Dr. Binter previously served as one of Dr. Jewell's supervising physicians during his residency. She and Dr. Jewell mutually vouched for one another's professional excellence in the field of neurosurgery.
36. Dr. Binter reviewed Claimant's medical records spanning from the time of his injury until his surgery, but never personally examined or spoke with him. Based on her records review, she credibly testified that Dr. Jewell's surgery was an appropriate treatment for Claimant's spinal condition. However, she disagreed with Dr. Jewell's conclusion that Claimant's need for that surgery was causally related to his February 25, 2015 work injury. She based her disagreement in large part on the absence in Claimant's medical records of any indicia of L3 radiculopathy or comparable neurological abnormalities close in time to the snowplow incident.³
37. Dr. Binter also found it important that Claimant's records showed an objective worsening of back symptoms in late 2017, suggesting an acute injury that was not two years in the making. She inferred that Claimant's concrete or farming work rather than his 2015 snowplow incident most likely caused his low back condition resulting in his need for surgery.
38. Going beyond her causation opinions, Dr. Binter also attempted to cast doubt on whether Claimant's 2015 fall happened at all, based on a medical record that Claimant received a right buttock injection at the emergency room shortly after the snowplow incident. She testified that a reasonable nurse would not have injected a visibly bruised buttock, and there would have been other available injection sites. I find this analysis entirely speculative and unpersuasive.
39. She also testified that if Claimant suffered pain from L3 radiculopathy in 2016, he would not have been able to perform his labor-intensive concrete work or perform the shoveling and wood cutting associated with his home farming activities. However, the documentary evidence undermines her assumptions about Claimant's activity tolerance in the face of significant pain. Harrison Concrete's payroll records show that Claimant consistently worked overtime until immediately before his back surgery, when his symptoms were undisputedly at their worst. *See* Defendant's Exhibit A.
40. I find that Dr. Binter's inferences concerning Claimant's credibility were significantly hampered by the fact that she never examined or spoke with him.

³ While Dr. Binter acknowledged some recorded sensory defects in his foot following his foot injury, she testified that the recorded symptoms only related to Claimant's peripheral nerves, and that there was no contemporaneous indication of neurological symptoms corresponding to nerves originating in his lower back.

CONCLUSIONS OF LAW:

1. Although Defendant accepted liability for Claimant's foot injury, it has not accepted liability for his spinal condition or the surgery therefor. As such, Claimant has the burden of proof to establish all facts essential to the rights he asserts. *Goodwin v. Fairbanks Morse & Co.*, 123 Vt. 161, 166 (1962); *King v. Snide*, 144 Vt. 395, 399 (1984). He must establish by sufficient credible evidence the character and extent of the injury, *see Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (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, supra*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

Assessment of Conflicting Expert Testimony

2. The parties presented conflicting expert medical testimony regarding the causal relationship between Claimant's back condition and his February 25, 2015 workplace incident. 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).
3. Both Dr. Jewell and Dr. Binter presented impressive qualifications, training, and experience, and they mutually vouched for one another's excellence. *See Finding of Fact No. 35*. Neither is entitled to greater deference on those grounds.
4. Dr. Jewell was one of Claimant's treating providers; as such, he personally observed and interacted with him. *See Findings of Fact Nos. 21-22*. Dr. Binter, by contrast, only performed a medical records review and never saw or spoke with Claimant. *See Finding of Fact No. 36*. I find that Dr. Jewell's actual observations, interactions, and examination provide him an informational advantage over Dr. Binter as it relates to Claimant's symptoms and presentation during the period when he treated him (December 2017 through April 2018). In this respect, the nature of treatment and the duration of the patient-provider relationship favors his testimony.
5. That said, Dr. Binter's review of Claimant's medical history was significantly more comprehensive than Dr. Jewell's. She analyzed medical records spanning from immediately after Claimant's injury through the time of his surgery, while Dr. Jewell only reviewed a small subset of records from immediately before his own treatment of Claimant. *See Findings of Fact Nos. 29, 36*. Dr. Binter is therefore at an informational advantage as it relates the timeline of Claimant's treatment history.

6. The most important factor in evaluating their respective opinions, however, is the clarity and thoroughness of their opinions and the objective support underlying them. *See Hathaway v. Engineers Construction, Inc.*, Opinion No. 03A-17WC (February 27, 2017).
7. Dr. Jewell's opinion that Claimant had longstanding degenerative spinal changes that became symptomatic after a minor traumatic event is clear, persuasive, and objectively supported. Dr. Binter did not specifically contradict this aspect of his opinion.
8. However, equally well-supported are Dr. Jewell's acknowledgments that tasks associated with Claimant's farming and concrete work could have contributed to his degenerative changes and that minor traumas from vibrations from bumpy roads could have made his condition become symptomatic. These acknowledgments beg the question as to which of multiple trauma sources actually caused Claimant's spinal condition to become so symptomatic that surgery was necessary.
9. The temporal gap between Claimant's fall and his seeking treatment for back pain, combined with his lifetime of arduous physical labor, make the affirmative inclusion and exclusion of alternative trauma sources essential to the causation analysis in this case. I do not find that Dr. Jewell convincingly negated Claimant's other labor-intensive activities as potential causes of Claimant's back and leg symptoms that necessitated surgery. Nor do I find that he provided any convincing explanation of the temporal gap between Claimant's fall and his first documented medical complaint of spinal symptoms over two years later. For these reasons, his analysis does not sustain Claimant's burden of proof.
10. That is not to say that Dr. Binter's analysis was more persuasive overall. On one hand, her analysis of Claimant's medical chronology was thorough and helpful in illuminating alternative causes that may have contributed to Claimant's spinal condition. On the other hand, her speculative attacks on Claimant's credibility and her incorrect assumptions about his activity tolerance when his pain was undisputedly at its worst highlight the epistemic limitations of evaluating the honesty of subjective pain complaints based solely on a medical records review. *See Findings of Fact Nos. 38-40.* These aspects of her testimony diminish the persuasive force of her otherwise thorough and cogent medical analysis. However, as Claimant bears the burden of proof, these problems with Dr. Binter's analysis do not render this claim compensable.

Summary and Conclusion

11. While I find that Claimant suffered some back and leg pain after his 2015 workplace injury, those symptoms were not severe enough for him to seek treatment for them for over two years. There is insufficient evidence to prove the specific nature, extent, or etiology of the leg and back pain he experienced at that time, as would be required to establish a compensable claim for this pain during that period. *See Burton, supra*, 112 Vt. at 20.
12. Claimant had long-term degenerative spinal changes that predated his 2015 fall. *Some* form of minor trauma made his spinal condition become neurologically symptomatic,

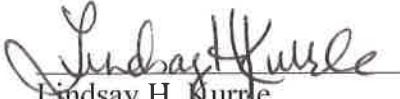
ultimately necessitating surgery. The problem is that the actual source of that minor trauma remains unclear. His 2015 fall at work *might* have contributed to the need for his surgery, but so might his farming or concrete work, some other trauma, or some combination of factors. To be clear, if Claimant's 2015 fall was one of several contributing factors, this claim would be compensable. However, the evidence simply does not prove what role, if any, his fall played in the chain of causation that led to his spinal symptoms and need for surgery. The evidence only establishes the possibility of causation, which is not legally sufficient to sustain Claimant's burden. *Cf. Burton, supra*, 112 Vt. at 20; *Morse, supra*, Opinion No. 40-92WC.

13. As such, Claimant has not met his burden of proof as to causation.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for his back injury and related surgery is hereby **DENIED**.

DATED at Montpelier, Vermont this 10 day of May 2019.


Lindsay H. Kurrie
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.