

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

Cynthia Young) File # C-16051
v.) By: J. Stephen Monahan
Federal Express) General Counsel
) For: Dana J. Cole-Levesque
) Opinion # 2 - 91WC
) Commissioner

APPEARANCES

Mark Kaplan, Esq. for the claimant
Christopher McVeigh, Esq. for the defendant

ISSUES

1. Did the claimant's back injury arise out of and in the course of her employment at Federal Express on July 21, 1988?
2. If the answer to the first question is yes, are the claimant's current pain complaints causally linked to her employment injury, and has she reached a medical end result? If she has reached a medical end result, when did she reach it?
3. Did the claimant fail to mitigate her medical damages by leaving her bed after July 25, 1988, possibly against physician's orders?
4. Did the claimant fail to mitigate her damages by not pursuing employment opportunities after January 5, 1989, when Dr. Binter released her for light duty work?
5. Did the claimant fail to mitigate her damages by discontinuing her physical therapy sessions prior to their completion?
6. Does the Commissioner have jurisdiction over this matter given that claimant first filed a notice of claim nine months after the injury occurred?

THE CLAIM

1. Temporary total disability compensation under 21 V.S.A. §642 from 7/22/88 until she reached a medical end result.
2. Permanent partial disability compensation under 21 V.S.A. §648.

3. Attorneys fees and costs under 21 V.S.A. § 678(a).

STIPULATIONS

1. On July 21, 1988:

- a. The claimant, Cynthia Young, was employed by the defendant, Federal Express Corporation, of Williston, Vermont as a service agent.
- b. The defendant was an employer within the meaning of the Workers' Compensation Act.
- c. The claimant had a ruptured disc and depressed nerve in her lumbar spine which required surgery. At issue is whether this injury was caused by work activity.
- d. The National Union Fire Insurance Co., was the workers' compensation carrier for the defendant.
- e. The claimant's average weekly wage for the twelve weeks preceding the accident was \$184.85, resulting in a weekly compensation rate of \$172.00 (plus \$10.00 for each dependent) = \$182.00. (Since 2/3 of the \$184.85 is less than minimum compensation rate, the minimum must be used.)
- f. The claimant has one dependent under the age of 21, identified as William, born 1/18/83.
- g. The claimant was 32 years of age at the time of the incident. The claimant's current mailing address is: 176 Hayes Ave., South Burlington, VT.

2. On 4/12/89, the defendant filed a first report of injury.

3. On 8/29/89, the defendant or its workers' compensation carrier notified the claimant that it was denying her claim for compensation because it did not believe that the claimant's injury arose out of and in the course of her employment with Federal Express.

4. On June 7, 1990, the Commissioner, represented by Phyllis Severance, issued an interim order to pay temporary total compensation.

5. On July 1, 1990, the claimant's compensation was increased under 21 V.S.A. §650(d) to \$187.00.

6. On December 21, 1989, the claimant filed a Notice and Application for Hearing.

7. There are no objections to the amount or reasonableness of the surgical, medical and nursing services and supplies, including hospital services or supplies.

8. Judicial notice may be taken of the following documents in the Department's file:

Form 1: Employer's First Report of Injury, dated 4/12/89

Form 25: Wage Statement

Form 10: Certificate of Dependency

Form 28: Notice of Change in Compensation Rate dated 7/20/90

Form 6: Notice and Application for Hearing dated 12/21/89

9. The following documents are offered into evidence without objection:

Claimant's Exhibit 1: Nancy E. Binter, M.D., notes dated 6/12/89; 1/12/89; 1/5/89; 11/18/88; 10/19/88; 9/1/88; 8/14/88; 7/29/88

Claimant's Exhibit 2: Mary West, M.D., office notes dated 2/1/89; 4/15/89

Claimant's Exhibit 3: MCHV CT Lumbar Spine dated 7/22/88; 12/12/85

Claimant's Exhibit 4: Fanny Allen Hospital operative note 7/25/88; operative note 8/10/88; X-ray 7/22/88; Clinical record 7/24/88; 5/24/88; 6/16/88; 6/27/88; 7/22/88

Claimant's Exhibit 5: Patrick Mahoney, M.D., 8/4/89; 1/24/89; 12/15/88; 11/29/88; 9/23/86; 9/8/86; 9/3/86; 5/5/86; 3/6/85; 11/23/81; 1/28/81

Claimant's Exhibit 6: Jerome Davis, M.D., and Medical Center Plattsburgh Hospital 7/24/90; CT Scan 2/8/90; myelogram 2/8/90; electromyography 1/16/90; M. Azcer, M.D., 1/16/90

Claimant's Exhibit 7: John R. Johansson, M.D., 7/19/90;

Claimant's Exhibit 8: Deposition of Patricia Jones

Claimant's Exhibit 9: Fanny Allen Hospital admission, 1/26/85; lumbar spine xray, 1/26/85; discharge summary, 8/17/88

Claimant's Exhibit 10: Jerome Davis, M.D., letter dated 1/16/91; John Johansson, D.O., letter dated 1/14/91

Defendant's Exhibit 1: May 10, 1989 denial letter; August 29, 1989 denial letter

Defendant's Exhibit 2: MCHV radiology report dated 11/3/88

Defendant's Exhibit 3: Fanny Allen Hospital discharge summary dated 8/29/88

Defendant's Exhibit 4: Fanny Allen Hospital Physical Therapy Record of September, 1988

FINDINGS

Based on the stipulations and the evidence offered at the hearing, I find:

1. Stipulations numbered 1-4-6-8 are true and the exhibits listed in number 9 are admitted into evidence. Stipulation number 5 should read to \$184.85 since claimant cannot earn more than her wages on workers' compensation. During the hearing the following exhibits were admitted into evidence:

Claimant's Exhibit 11: Termination notice dated 5/16/90

Defendant's Exhibit 5: Steve Etheridge handwritten notes dated 8/8/89

Defendant's Exhibit 6: Statement of claimant to Steve Etheridge on 7/25/89

2. After the hearing, before the record closed, Defendant's Exhibit 8 and Defendant's Exhibit 9 were admitted into evidence (they are described below). Defendant's Exhibit 7 was not admitted.

Defendant's Exhibit 8: Gilles Bertrand, M.D., letter to Jerome Davis, M.D., dated 9/21/90; Davis discharge summary dated 2/12/90; Davis history and physical dated 2/7/90; progress notes 9/12/89 - 1/30/91

Defendant's Exhibit 9: Jerome Davis, M.D., letter to attorney McVeigh dated 3/4/91; handwritten physician's notes; John Johansson,

D.O., letter to attorney McVeigh dated
2/20/91; clinical data sheet 3/1/89 -
3/27/89

3. Claimant was employed by defendant as a service agent. Her job involved accepting packages from customers at the front counter. Claimant's job required that she be able to lift packages on a regular basis, and defendant required that its employees be able to lift 70 lbs.

4. Claimant normally worked the second shift with a co-worker named Patricia Jones. Claimant and Ms. Jones were working together on July 21, 1988.

5. During claimant's shift on July 21, 1988, Atelier Norstar brought two large, wooden crates weighing 106 lbs. and 130 lbs. to the defendant for shipping. It was the responsibility of claimant and Ms. Jones to lift these crates onto the scale and weigh them.

6. When claimant lifted one of the packages she felt a sharp pain in her back. Ms. Jones heard claimant say "ouch" and reach around to her back with her hands. Ms. Jones observed that the "color in her face was gone". The rest of the evening passed without incident. Claimant reported no further pain that evening and did not recall any pain when she first awoke the next morning.

7. Ms. Jones' deposition testimony is credible. It coincides with what she told the adjuster when interviewed in 1989 while she still worked for defendant (Def. Ex. 5 - notes of the 8/8/89 interview) but does provide greater detail than is reflected in the notes.

8. On the morning of July 22, 1988, claimant prepared to vacuum her home. She bent over to pick up her cat, heard a ripping sound, and felt severe pain in her right side. She fell to the floor and couldn't stand or put weight on her right leg. She managed to telephone a friend for help.

9. The friend drove her to her doctor's office, where she was seen by Mary West, M.D. Dr. West sent claimant to Fanny Allen Hospital for x-rays. After reviewing the x-rays Dr. West referred the claimant to Nancy Binter, M.D., a neurosurgeon.

10. Dr. Binter examined the claimant, reviewed the x-rays and had claimant undergo a CT scan. She diagnosed claimant's problem as a herniated disc and recommended emergency back surgery.

11. Claimant sought a second opinion from Patrick Mahoney, M.D. an orthopedist, who had treated claimant in the past. Dr. Mahoney concurred in the surgery recommendation. Claimant underwent surgery the following day.

12. The surgery initially seemed successful and claimant had a complete return of neurological responses. She evidently got out of bed the evening after the surgery and this caused a small spinal fluid leak from the operative area. The leak caused pain, discomfort and low pressure headaches. It was necessary to reopen the area and restitch the dura to stop the leak.

13. No evidence was presented as to what instructions were given the claimant, nor was evidence presented as to whether she was under the influence of any post-operative medication. Therefore it is not possible to determine whether claimant deliberatively disregarded medical advice when she got out of bed after her surgery.

14. Claimant was discharged before the end of August and prescribed physical therapy. She did not keep up with the physical therapy sessions because she couldn't afford it.

15. Shortly after her discharge from the hospital, claimant began to experience pain in her left leg. Neither x-rays, a CT scan, nor an MRI was able to attribute this pain to her back injury or subsequent surgery. In the credible opinion of Dr. Mahoney, claimant's left leg problems are related to a cyst in the hip and not to her back problems.

16. Dr. Binter and Dr. Mahoney are of the opinion that it was "certainly possible" for claimant's back injury to have been caused by her work on July 21, 1988. Dr. Mahoney explained further that "[i]t is very common for patients to experience sudden severe back and leg pain due to a relatively trivial incident." Neither Dr. Davis nor Dr. Johansson offered opinions as to the causal connection between her work activity on July 21, 1988 and the subsequent injury and surgery. Both physicians appear to have assumed a causal connection based on their records but neither set forth the basis for such an assumption nor did they evaluate the likelihood that the home-based activity (bending and picking up the cat) was the cause rather than the work activity.

17. Claimant did not file a workers' compensation claim until April 12, 1989. She filed the claim after being questioned by her attorney whom she was consulting on another matter. The questions asked by her attorney caused her to rethink the events leading up to her injury and she then filed a claim, some 8 months after the injury. The delay in filing has not prejudiced the employer's ability to investigate the claim.

CONCLUSIONS

1. Under 21 V.S.A. §660, want of or delay in giving notice of injury and claim for compensation shall not be a bar to

proceedings under the provisions of the Workers' Compensation laws if it is shown that the employer, his agent or representative, had knowledge of the accident or that the employer has not been prejudiced by such delay or want of notice. 21 V.S.A. §660.

2. Furthermore, Vermont has adopted the "discovery rule" for workers' compensation cases. Hartman v. Ouellette Plumbing and Heating Corp., 146 Vt. 443, 446 - 447 (1985). The "date of injury" for purposes of giving notice and filing a claim pursuant to 21 V.S.A. §656 is the point at which, through reasonable care and diligence, it is discoverable and apparent that a compensable injury has been suffered. Hartman, (supra), at 447.

3. The Vermont Supreme Court has described the discovery rule as commencing not only upon the discovery of the injury but also upon the discovery of the claimant's "legal injury," i.e., when the claimant has or should have discovered both the injury and the fact that it may have been caused by the defendant's negligence or other breach of duty. See e.g., Lillicrap v. Martin, no. 86-443, slip op. at 11-12 (Vt. July 14, 1989); Univ. of Vermont v. W.R. Grace & Co., 152 Vt. 287, 289 - 291 (1989).

4. In this case although claimant did not file within six months of her injury, there is no showing of prejudice to the employer by the delay. Furthermore, claimant did not discover that she had a possible workers' compensation claim until she spoke with her attorney, and she filed promptly after learning of the possibility. Therefore this claim is not barred by 21 V.S.A. §§ 656 - 660 and the Commissioner has jurisdiction.

5. A workers' compensation claimant has the burden of showing that an injury comes within the scope of this chapter and of showing the causal connection between the accident causing the injury and his or her employment. Lapan v. Berno's Inc., 137 Vt. 393 (1979).

6. Where the claimant's injury is obscure and a layman could have no well-grounded opinion as to its causation, expert testimony is the sole means of laying a foundation for an award. Lapan v. Berno's, Inc., 137 Vt. 393 (1979). There must be created in the mind of the trier of fact something more than a mere possibility, suspicion, or surmise that the incident complained of was the cause of the injury, and the inference from the facts proved must be at least the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941). Expert testimony is required to remove the final decision from the realm of speculation. Marsigli's Estate v. Granite City Auto Sales, Inc., 124 Vt. 95 (1963).

7. Back injuries of this type are obscure and expert testimony is necessary to establish the causal connection between

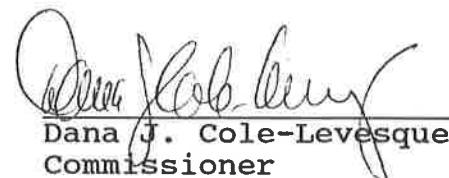
claimant's work activity and the injury. Claimant has not met her burden. Expert testimony as to a possible connection between work and the back injury is not sufficient to establish work as the most probable hypothesis. Indeed, the best reading of the medical evidence of record is that claimant's theory is "certainly possible." See Dr. Binter's letter of June 12, 1989. Probabilities, not possibilities are necessary and are lacking here.

8. Since claimant did not meet her burden of proof, she has not prevailed and therefore is not entitled to costs or attorneys fees.

ORDER

Based on the foregoing findings and conclusions, claimant's request for compensation is DENIED.

Dated at Montpelier, Vermont this 27th day of July, 1991.



Dana J. Cole-Levesque
Commissioner