DEPARTMENT OF LABOR AND INDUSTRY

Robert Martell	)	File No. E-16400
	)	
v.	)	By: Mark L. Stephen Hearing Officer
	)	
Eastern Refractories Company, Inc.	)	For: Barbara G. Ripley Commissioner
	)	
	)	Opinion No. 25-93WC

APPEARANCES

Ronald A. Fox, Esq. for the Claimant
Michael J. DiRusso, Esq. for the Defendant

ISSUES

Whether medical care which commenced on September 24, 1992 was necessitated by, and the direct result of, a slip and fall incident which occurred while the Claimant was at work for the Defendant on February 25, 1992?

THE CLAIM

1. Medical and hospital benefits under 21 V.S.A. § 640 in an amount to be determined.

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

STIPULATIONS

1. On February 25, 1992, the Claimant, Robert Martell, whose address is RD1, Box 1800, Marshfield, VT 05658, was employed by the Defendant, Eastern Refractories Company, Inc. of Montpelier, VT, as a laborer/warehouseman.

2. The Defendant was an employer within the meaning of the Workers' Compensation Act (21 V.S.A. §§ 601 *et seq* .).

3. The Claimant suffered a personal injury by accident when he slipped and fell on ice in the Defendant's parking lot, landing on his back and hitting his head.

4. The Claimant's injury arose out of and in the course of his employment with the Defendant.

5. The Travelers' Insurance Co. was the workers' compensation carrier for the Defendant on February 25, 1992.

6. The Claimant's average weekly wage for the twelve weeks preceding the accident was $385.48, resulting in a weekly compensation rate of $256.99, plus $20.00 per week for his two dependent children.

7. The Claimant has two dependents who are under 21 and unmarried, identified as:

a. Wayne Martell, DOB 3/2/77
b. Carrie Martell, DOB 3/2/81

8. The Claimant's date of birth is 8/29/54.

9. On 3/6/92, the Defendant filed a First Report of Injury.

10. On 10/8/92, the Defendant notified the Claimant that it was denying his claim for compensation because care commenced in September after he left the employ of the Defendant, and was not related to Claimant's fall in February 1992, among other reasons.

11. On 11/5/92, the Claimant filed a Notice and Application for Hearing.

12. There are no objections to the amount or reasonableness of the medical services and supplies received by the Claimant.

13. Judicial notice is taken of the following documents in the Department's file:

a. Employer's First Report of Injury (Form 1)
b. Wage Statement (Form 25)
c. Certificate of Dependency (Form 10)
d. Notice and Application for Hearing (Form 6)

14. The following documents are admitted into evidence without objection:

Claimant's Ex. 1-51	page packet of medical records
Claimant's Ex. 2-5	page packet, consisting of an 8/6/93 letter from Atty. Fox to Robert Monsey, MD (2 pages), an 8/20/93 response to Atty. Fox from Dr. Monsey (2 pages) and an 8/11/93 letter to Atty. Fox from John Matthew and Ruth Crose, both MDs.
Claimant's Ex. 3-5	page letter dated 8/10/93 from Peter D. Upton, MD to Atty. DiRusso.
Claimant's Ex. 4-1	page letter dated 3/18/85 from Maria Tavares to Mark L. Stephen.

Defendant's Ex. A-62	page packet of various documents relating to prior claimed work injuries of Claimant.
Defendant's Ex. B-46	page packet of various documents concerning Claimant.
Defendant s Ex. C-20	page packet of various documents from Department of Labor & Industry records concerning past claims for workers' compensation by Claimant.
Defendant's Ex. D-12	page packet of medical records.
Defendant's Ex. E-2	page letter dated 10/31/83 from George Dwenger to Terri Partlow.
Defendant's Ex. F-3	page letter dated 7/19/84 from Atty. Charles S. Martin to Labor & [Industry.

FINDINGS OF FACT

1. Stipulations 1-13 are true and the documents listed in Stipulation 14 are admitted into evidence. At trial, the following documents were admitted into evidence:

Defendant's Ex. G-1	page letter dated 11/2/87 from Claimant to Defendant employer.
Defendant's Ex. H-1	page employment record of Claimant.
Defendant's Ex. I-3	page Interhouse letter dated 10/2/92.
Defendant's Ex. J-1	page Interhouse letter dated 10/17/89.

2. As a result of the slip and fall accident which he suffered on February 25, 1992, the Claimant incurred medical bills for two visits to the Central Vermont Hospital Emergency Room. This care, which included an unremarkable spine X-ray, has been accepted and paid for by the Defendant. Claimant also lost two or three work days, not enough under 21 V.S.A. § 642 to trigger an entitlement to temporary total disability compensation. On March 2, 1992, the Claimant made two trips to the ER to be checked for blood in his urine. A nurse's note stated that Claimant's back was "much improved but still has some discomfort." Janet Anthony, MD, the ER physician, indicated no further treatment was needed at that time and that the Claimant would follow up with Dr. Poplawski, an urologist, if he had more problems. Based upon the evidence of record, the Claimant sought no further treatment of any sort until September 24, 1992, nearly seven months later.

3. Claimant's job as a warehouseman for ERCO entailed frequent lifting, including weight of up to 100 pounds, and forklift operation. He also had clerking responsibilities as part of his oversight of the warehouse. Despite a prior history of significant back injuries, he had been performing this job successfully for the Defendant for over four years at the time of the fall. But for the two or three days he lost immediately after the fall, the Claimant returned to this job and performed all aspects of it successfully, except for a one month layoff for business reasons, until he resigned from ERCO on September 9, 1992, to become effective September 11, 1992, in order to take a new job. It should be noted that upon callback from the layoff, which also affected other ERCO employees, the Claimant was informed that he would have less job security, due to the impact of the recession upon the Defendant's operations, and that he would henceforth be treated as a temporary employee, without vacation, holidays, health care or other benefits.

4. Both the Claimant and his wife testified that during the seven months between the fall and the commencement of treatment at the Plainfield Health Center, Claimant took aspirin or Tylenol, in addition to trying an over-the-counter product marketed as a back medicine, more frequently than previously because his back was painful. Each also testified that the Claimant doesn't like treating with doctors, and the Claimant added that he didn't wish to miss work or pay for medical care as additional explanations for why, if he were having problems, he did not seek evaluation and care.

5. These explanations are simply not credible. First, Claimant continued to perform in a fully acceptable (to the employer) manner a physically demanding job during virtually all relevant times. Second, of his co-workers, only one was aware of any discomfort complaints and he could not connect any such complaints to the fall. Further, he noted the Claimant always performed his job. Third, especially with his normal work hours of 7:00 am to 3:30 or 4:00 pm, it would have been very easy for the Claimant to schedule and receive appropriate treatment with little or no impact upon his workday. Fourth, whether the claim is covered under workers' compensation or not, Claimant had health insurance through his work until the layoff, over a month later. The record is unclear whether his wife had health insurance through her employer, a property and casualty insurance company. Fifth, given the enormity of medical records and the lengthy list of physicians who have treated the Claimant for a variety of problems, including several workers' compensation claims, the notion that he hates to visit and treat with doctors is fully unsupported by his history. So, too, are his protestations of inability to understand workers' compensation and its role in health care and in employer/employee law.

6. Several specialists who have treated or evaluated the Claimant since the fall, though none sooner than October 13, 1992, 8 months post-fall, have opined that if one accepts the Claimant's statements and relies upon them in formulating an opinion as to causation, one could conclude that the fall on February 25, 1992 is the cause of his current back discomfort, which is generally diagnosed as musculotendinous strain of the lower back. Certainly, a diagnosis has not been a problem for any of the orthopods who have seen the Claimant. However, causation is fully conditioned by each upon the accuracy of the history provided. Indeed, Peter Upton, MD, a neurologist who examined the Claimant at the request of the carrier and issued a very lengthy report, stated that he didn't know "of any way in the world to (medically) prove one way or the other whether or not his (Claimant's) current problem is directly related to the fall in February of 1992." At a minimum, though, each appears able to determine that his/her diagnosis could have arisen from a fall.

7. The upshot of the foregoing is that even if causation in this case is essentially a medical question, there is, at best, insufficient medical evidence to meet Claimant's burden of proof that his back problems for which he began treatment after leaving ERCO and which have apparently worsened in the ensuing months are related to his fall while at work.

8. Although the Claimant testified that his new job involved no lifting, the history taken by Stephanie Landvater, MD, an orthopedist who began treating him in 1992, described his duties for his subsequent employer as including lifting, twisting and moving tires around. The Claimant evidently had not been using any precautions for his back. The note further hampers the credibility of the Claimant. Assuming, *arguendo,* that the Claimant had some lingering discomfort from the fall in February, the fact is that he was neither seeking treatment nor in such apparent pain that it either affected his job performance or became noticeable to his employer and co-workers. Then, within a couple weeks of starting his new job, he had both sought medical care and apparently begun a downhill slide as far as his back is concerned.

9. In his resume prepared for ERCO at the time he was applying for the job as warehouseman, the Claimant omitted two of his prior employments, for Reynolds & Son and for the City of Montpelier. The Claimant testified that those jobs weren't very relevant to the job he was applying for, but that he couldn't recall why they were omitted. Whether oversight or not, it is important to note

that in each job, the Claimant had suffered a work-related low back injury which caused him to lose significant time from work and incur a degree of permanent partial impairment, as well as numerous medical suggestions that he no longer do physically difficult jobs, due to his back. Certainly, the warehouseman job would be classified as heavy work. Nonetheless, the notion, argued by the employer, that because physicians had previously advised the Claimant to avoid heavy work, he should now be denied compensation, the basis for which is totally apart from what the doctors were advising against, that is heavy lifting versus a slip and fall on ice, is rejected.

CONCLUSIONS OF LAW

1. In a workers' compensation case, the claimant has the burden of establishing all facts essential to the rights asserted, including the character and the extent of the injury and disability. Goodwin v. Fairbanks, Morse & Co., 123 VT 161 (1962); McKane v. Hill Quarry Co., 100 VT 54 (1946).

2. The claimant must establish by sufficient competent evidence the character and the extent of the injury and disability, as well as the causal connection between the injury and the employment. Rothfarb v. Camp Awanee, Inc., 116 VT 172 (1950). An injury arises out of the employment when it occurs in the course of it and is the proximate result of it. Rae v. Green Mountain Boys Camp, 122 VT 437 (1961).

3. There must be established in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incident complained of was the cause of the injury and the inference from the facts proven must be at least the more probable hypothesis. Jackson v. True Temper Corp., 151 VT 592, 596 (1989); Egbert v. The Book Press, 144 VT 367 (1984).

4. Under the facts of record in this matter, the Claimant has failed to prove that his claim is the more probable or credible hypothesis, which is the minimum standard. The facts are that there were minimal, if any, complaints or observable limitations upon his ability to do his job, that he sought no treatment until after he had left the job, to begin one which may have involved equally heavy and awkward lifting, after which he has treated with regularity and that his stated reasons for not seeking care don't square with objective evidence or his subsequent behavior. Further, while the existence of a medical problem with his low back is established, the medical opinions, in essence, link that condition to the fall at the Defendant's place of employment only to the extent one can rely upon the history provided them by the Claimant. As I view the evidence of record, one cannot rely upon such history, as there are too many inconsistencies and inaccuracies.

5. In my judgment, based upon the evidence of record and the demeanor and testimonial content of the witnesses, the Claimant has failed to meet his burden of proof that his assertions constitute the more probable hypothesis.

ORDER

It is therefore **ORDERED** that the Claimant's claim for compensation be and hereby is **DENIED.**

DATED at Montpelier, Vermont this 23rd day of November, 1993.

Barbara G. Ripley
Commissioner