VERMONT DEPARTMENT OF LABOR AND INDUSTRY

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| Yvonne L. Nadeau | ) | File # F-5594 |
| | ) | |
| | ) | By: Sheldon A. Keitel, Esq. |
| | ) | Hearing Officer |
| v. | ) | |
| | ) | For: Barbara G. Ripley |
| | ) | Commissioner |
| | ) | |
| Ames Department Stores | ) | Opinion # 31-93WC |

Heard in Montpelier, Vermont on October 29, 1993
Record closed November 12, 1993

APPEARANCES

Patrick L. Biggam, Esq. for the claimant
William C. Dagger, Esq. for the defendant

ISSUES

1. Did the claimant sustain a personal injury by accident on the date in question?

2. If so, did the injury arise out of and in the course of claimant's employment?

THE CLAIM

1. Temporary total disability compensation under 21 V.S.A. 642 from September 9, 1992 to April 1, 1993.

2. Medical and hospital benefits under 21 V.S.A. 640 in the amount of $2,057.33.

3. Attorney fees.

STIPULATIONS

1. On September 9, 1992:

   a. The claimant, Yvonne L. Nadeau, was employed by the defendant, Ames Department Store of Middlebury, Vermont as a cashier.

   b. The defendant was an employer within the meaning of the Workers' Compensation Act.

c. Gallagher-Bassett Services, Inc. was the workers' compensation claims administrator for the defendant.

d. The claimant's average weekly wage for the purposes of wage computation pursuant to 21 V.S.A. §650 was $102.00.

e. The claimant's current mailing address is RR 3, Box 799, Middlebury, Vermont 05753.

2. On September 18, 1992, the employer filed an Employer's First Report of Injury (Form 1). The Form 1 indicates that the date of injury was September 9, 1992.

3. On October 28, 1992, Gallagher Bassett Services, Inc. notified the claimant that it was denying her claim for compensation because the injury did not arise out of and in the course of employment.

4. On March 5, 1993, the Commissioner ordered that temporary total disability benefits be commenced and paid through the date of receipt of the results of a pending independent medical examination.

5. The employer paid temporary total disability benefits to the claimant pursuant to the Department's Order, but the exact amount actually received by claimant is in dispute.

6. On February 16, 1993, Gallagher-Bassett Services, Inc. filed a Notice and Application for Hearing (Form 6).

7. The employer submitted a Notice to Commissioner and Employee of Intention to Discontinue Payments (Form 27) on March 29, 1993 and discontinued temporary disability payments pursuant thereto as of April 2, 1993.

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

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| Form 1 : | Employer's First Report of Injury |
| Form 6 : | Notice and Application for Hearing |
| Form 27: | Notice of Intention to Discontinue Payments dated March 29, 1993 |
| ORDER | by letter of March 5, 1993 from Commissioner of Labor & Industry to employer to commence temporary disability payments |

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

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| Claimant's Exhibit 1: | Letter dated October 12, 1992 from Tom Reinsel, M.D. to John F. Dick, M.D. |

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| Claimant's Exhibit 2: | Letter dated November 24, 1992 from Dr. Reinsel to Dr. Dick |
| Claimant's Exhibit 3: | Ambulatory Services Record from Porter Medical Center, Inc. dated 9-10-92 |
| Claimant's Exhibit 4: | E.R. Report of 9/10/92 from Porter Medical Center signed by Dr. Kniffin |
| Claimant's Exhibit 5: | Porter Med. Center Emergency Department Patient Discharge Instructions dated 9/10/92 |
| Defendant's Exhibit A: | IME report of Philip E. Gates, M.D., dated March 18,1993 with three enclosures (patient questionnaire, pain drawing, and lumbar examination sheet) |
| Defendant's Exhibit B: | Records of Larson Chiropractic Clinic (sixteen pages) including billing history, treatment records from 1/8/92 through 3/1/93, and letter dated June 22, 1993 to claimant's counsel |

FINDINGS

1. Stipulations 1 through 9 are true.

2. The following documents were received into evidence during the hearing:

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| Claimant's Exhibit 6: | Summary of medical expenses and copies of bills totalling $2,057.33 |
| Defendant's Exhibit C: | Typed progress notes of Dr. Reinsel dated 2/22/93 |
| Defendant's Exhibit D: | Ames Report of an Accident Investigation (undated) |
| Defendant's Exhibit E: | Affidavit as to Payment of Compensation (Form No. 13) |

3. The claimant's medical history includes complaints of intermittent back problems dating as far back as 1975. She had a previous work-related back injury in 1989 at a different job involving the same area of the back as in the present claim.

4. The claimant has received various types of treatment and therapy for her back condition over the years including lessons in body mechanics. The claimant saw a chiropractor for her back and other problems at least once per month during each of the

eight months prior to September of 1992. The last chiropractic office visit prior to the incident which is the subject of the present claim was in August of 1992, early in the same week during which she started her employment with Ames Department Store.

5. The claimant was involved in an automobile accident in May of 1992 which exacerbated her chronic back condition to some degree, but the major complaints as the result of the auto accident were for injuries other than her back. Her chiropractor's progress notes for 8/17/92 indicate that, at the time of that visit, claimant was experiencing her "usual" lumbosacral pain. His letter dated June 22, 1993 to claimant's counsel indicates that, with treatment, "her acute symptoms resolved" following the auto accident. There is no medical evidence that the May 1992 auto accident caused any problems with her back which still existed as of the date of the injury which is the subject of this claim.

6. The claimant performed her regular duties at Ames Dept. Store in Middlebury without incident for approximately two weeks prior to the alleged injury. The claimant arrived at work feeling fine the morning of the events in question.

7. After working for a while at her cash register on the date in question, the claimant was told by her supervisor to move some stock in the toy department. The task involved climbing a ladder to a platform at the top, moving boxes from the top shelf to a middle shelf, descending the ladder, and, finally, moving the boxes once again to the lowest shelf.

8. The boxes which claimant was moving were not heavy and the nature of the work was not particularly strenuous. While moving one of the boxes from an upper to a lower shelf, and with her torso in a twisted position, the claimant dropped the box and tried to grab and catch it to prevent it from falling. Claimant testified that she felt a "twinge" in her back while trying to catch the falling box. The "twinge" was not in itself disabling but was nevertheless painful and different than any symptoms which she had experienced previously.

9. While descending the ladder to retrieve the fallen box, claimant ripped her pants. Claimant decided to replace the unserviceable pants by purchasing a new pair with her employee discount. The claimant went to the service desk to make arrangements to do so. Claimant testified that she asked for and was given Tylenol at the service desk.

10. Laurie Mahoney, a fellow employee, was working at the service desk. Ms. Mahoney testified that, although she was busy at the time and has only a vague present memory of the events in question, she does recall authorizing the purchase of a new pair of pants and that claimant had a pained expression on her face but that claimant did not mention anything regarding an injury.

It was Ms. Mahoney's regular practice to dispense aspirin or Tylenol to employees who requested it, but she has no present, independent recollection whether claimant requested, or whether she gave the claimant, any pain medication on the occasion in question.

11. Claimant proceeded to a rest room where she changed her pants and used the facilities at the same time. In the course of rising from the seat, bending at the waist to reach for her pants, and returning to a standing position to pull her pants up, her back "locked" and she experienced a significant increase in pain which she feared would prevent her from finishing out the day. Claimant testified that she took her lunch break in the employee lounge, still "in a lot of pain," but hoped to be able to rest and recover sufficiently to complete the work day.

12. Barbara Cogswell, the store trainer, testified that she saw claimant in the smoking lounge while claimant was on her lunch break. The claimant did not appear to be feeling well; claimant explained to Ms. Cogswell that she had hurt her back while in the bathroom.

13. Following her lunch break, claimant returned to her cash register and waited on a few customers. Her back pain was such that she could not continue working; she notified the store manager that she needed to go home. The manager completed the transaction in progress at the cash register for her and sent claimant back to the lounge.

14. Claimant went to the non-smoking lounge where she waited until an assistant manager drove her home. Ms. Cogswell testified that she then saw claimant for the second time that day and that the Report of Accident Investigation (Defendant's Exhibit D) was filled out at that time.

15. Claimant testified that she did not discuss the accident with Ms. Cogswell for the purpose of filling out the accident report on the day of the injury.

16. Claimant testified that she tried to telephone both her chiropractor and her family physician after returning home on the date of injury but that she was not able to reach either one. When her husband returned home that afternoon, he drove her to Porter Medical Center in Middlebury.

17. Claimant was admitted at the Emergency Room, Porter Medical Center at 4:40 p.m. on September 10, 1992 (Claimant's Exhibit 3). The Porter Medical Center records describe the inciting incident as "unpacking carton at work." Claimant was discharged the same day with an assessment of chronic low back pain and instructions to take over-the-counter medications and to apply heat.

18. Based on the credible testimony of the claimant, the admitted uncertainty of the store trainer regarding the dates in question, the consistency of the reported date of injury in the medical records, and a presumption of the reliability of medical records, I find that the actual date of the alleged injury was September 10, 1992.

19. The claimant was subsequently followed regarding her back condition by her family physician, Dr. Dick, who referred her to the Spine Institute of New England, which resulted in a recommended program of physical therapy (Claimant's Exhibit 2). Dr. Reinsel's opinion was that claimant had reached the point of maximum medical improvement for the condition for which she had begun treatment on September 10, 1992, as of February 22, 1993 (Defendant's Exhibit C).

20. The claimant underwent an independent medical examination by Dr. Gates on March 18, 1993 at the employer's request (Defendant's Exhibit A). Dr. Gates determined that claimant "apparently did have some aggravation of her longstanding, pre-existing back problem while she was at work" and that she had reached end medical result as of the date of his examination.

21. The claimant reached an end medical result for the condition for which she began treatment on Sept. 10, 1992, not later than February 22, 1993, per Defendant's Exhibit C.

22. The claimant incurred medical expenses to date arising out of the alleged injury in the amount of $2,057.33 in accordance with Claimant's Exhibit 6.

DISCUSSION

23. The employer's defense of this claim has included virtually every conceivable theory and has made use of every conceivably disputable fact. Although the thrust of the employer's defense has been that the cumulative effect of apparent inconsistencies, discrepancies, and gaps in the available record creates sufficient doubt to overcome the facts proffered by the claimant necessary to sustain her burden of proof, it is necessary to summarize the main points of attack and to address them individually:

(i) claimant's credibility and inconsistencies in the circumstances surrounding the reporting of the claim;

(ii) claimant's longstanding back problems; and

(iii) the legal argument that an injury arises out of employment only if it results from a risk associated with the employment; harm caused by a risk which is personal to the claimant, not caused by conditions associated with the work place, is therefore non-compensable. The employer cites Larson's

Workmen's Compensation §§7.2 and 12.10, Sacks v. Industrial Commission, 474 P.2d 442 (Ariz. 1970), and Martin v. Unified School District No. 233, 615 P.2d 168 (Kansas 1980).

24. (i) Claimant's credibility. The defendant argues that the differing accounts at different times as to when and how the injury occurred (e.g., toy department vs. rest room), as well as claimant's failure to report an injury when she first went to the service desk after ripping her pants, undercut the credibility of her claim.

Defendant has especially stressed the discrepancy between the date of injury reflected in the employer's reports (September 9 per the Form 1 and Defendant's Exhibit D) and the date of treatment shown on the emergency room reports (September 10). Since claimant did not have medical treatment until the following day (the argument goes), something occurred in the interim to cause her to seek medical treatment and it was the hypothesized interim occurrence which resulted in her disability, as opposed to an injury, if any, while at work.

The claimant's testimony in formal hearing regarding the events in question was consistent and credible. A discrete incident (the falling box and claimant's attempt to catch it) set in motion a chain of causally related events which led to the onset of an acute medical condition for which she received medical treatment that same day and which left claimant unable to continue working that day and for some period thereafter. There is no evidence whatsoever to support the existence of an hypothesized intervening event.

Cross-examination of the store trainer who filled out the employer's paperwork, on the other hand, revealed that

(a) any mistake made in reporting the date of injury on the Report of Accident Investigation (Defendant's Exh. D) would necessarily have been carried forward to the Form 1 which was completed at some time thereafter;

(b) there is no entry on Exhibit D regarding (and no place to enter) a date of completion or signature of the form as a cross-check against entries for the date of accident; and

(c) it was indeed possible that a mistake could have been made in the recording of the date of accident.

The corroborating testimony of claimant's fellow employees to the effect that claimant appeared to them to be in pain and that, when questioned, claimant spontaneously related her discomfort to a recent incident or incidents during duty hours on the employer's premises while in the course of carrying out her assigned tasks only supports claimant's version of events. The

discrepant dates are ultimately as insignificant (other than affecting the date of entitlement) as the discrepancy regarding the date of the IME as reflected in Dr. Gates' reports (3-17-93 per the "Patient Pain Drawing" versus the "Lumbar Examination Sheet" dated 3/18/93, although no one has questioned the fact that claimant saw Dr. Gates but once, on March 18, 1993).

(ii) Claimant's longstanding back problems. Claimant has not downplayed or disguised her pre-existing back condition or her tendency toward exacerbating injuries thereto. Claimant testified convincingly that all after-effects of the May 1992 auto accident had subsided prior to beginning her employment with Ames, which is supported by the records of her chiropractic practitioner. Although employed only a few weeks at the time of the incident in question, the fact that claimant was able to fulfill her job responsibilities without incident and without having sought further outside intervention for her back after starting work, but prior to the incident in question, negates the argument that a pre-existing condition, rather than a new injury, was the cause of disability.

(iii) Personal risk factors vs. risks of employment. The type of injury claimed here is eminently within the risks associated with claimant's job responsibilities and the facts as known insofar as it may have originated in the toy department. See, Shaw v. Dutton Berry Farm, ___ Vt. ___, 4 Vt. L. W. 216 (1993); Miller v. IBM, ___ Vt. ___, Docket No. 92-636, slip op. at 2-3 (12/10/93).

The facts as determined in this case include a dimension of risks and conditions associated with employment not present in the Sacks case, which defendant argues should control. The physical nature of claimant's work-related activities (ascending and descending the ladder, reaching, bending and twisting) had physical consequences (the falling box, mild but non-disabling back pain, and the tearing of claimant's clothing) which resulted in claimant having to go to the rest room to change her pants, having to bend again at the waist to pull up her pants, and, ultimately experiencing, as the outcome of the work-related chain of events leading to aggravation of her back condition, an even more severe, disabling pain. The "but for" test enunciated in Shaw and Miller has clearly been met.

Larson's §§7.2 and 12.10 cited by defendant are not inconsistent with the above. The other case cited by defendant, Martin v. Unified School District No. 233, 615 P.2d 168 (Kansas 1980) is off point to the extent that the injury therein occurred prior to the start of the workday.

Whether the cause of disability can be factually determined to have originated in the toy department as opposed to in the rest room is, in this case, immaterial: it clearly arose on the

employer's premises while the employee was engaged in activities intended to accrue, and ultimately accruing to, the benefit of her employer.

CONCLUSIONS OF LAW

25. In workers' compensation cases, the claimant has the burden of establishing all the facts necessary to support the claim. Goodwin v. Fairbanks, Morse & Co., 123 Vt. 161 (1962). The claimant must establish by sufficient competent evidence the nature and extent of the injury. Rothfarb v. Camp Awanee, Inc., 116 Vt. 172 (1949) (overruled on other grounds). 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).

26. An injury or accident is an unexpected or unforeseen event happening suddenly, with or without human fault, and producing at that time subjective symptoms of an injury; although an "accident" is commonly thought of as an external event such as an explosion or fall, it includes something going wrong within the human frame itself, such as a muscle strain or a broken blood vessel. Campbell v. Heinrich Savelberg, Inc., 139 Vt. 31 (1980).

27. An injury arises in the course of employment when it occurs within the period of time when the employee was on duty at a place where the employee may reasonably be expected to be while fulfilling the duties of employment. Moody v. Humphrey & Harding, Inc., 127 Vt. 52 (1968).

28. An aggravation or acceleration of a pre-existing condition can constitute a personal injury under the Vermont Workers' Compensation Act; if the claimant meets the burden of proof that she suffered an injury as a result of work, or proves that work accelerated a previously existing condition, the injury is compensable. Campbell v. Heinrich Savelberg, Inc., 139 Vt. 31 (1980).

29. In Vermont, pain may be a disabling factor and the claimant may testify as to the existence or continuing nature of the pain and testify as to its disabling degree. Bradley v. Giroux Body Shop, Commissioner's Opinion 3-88WC, (Sept. 30, 1988).

30. Claimant's testimony, the corroborating testimony of other employees regarding their observations of the claimant and the circumstances surrounding the events in question, and the documented medical condition (including the impression of the defendant's IME physician that claimant indeed suffered some aggravation of her back problem, albeit a pre-existing back problem) support the conclusion that claimant has met her burden of proof that she sustained a personal injury by accident arising

out of and in the course of employment on Sept. 10, 1992.

ORDER

Based on the foregoing Findings and Conclusions, the defendant Ames Department Stores is ORDERED to pay the claimant temporary total disability compensation for the period September 10, 1992, through February 22, 1993, in the amount of $2,407.20, less amounts previously paid.

Defendant Ames Department Stores is further ORDERED pursuant to 21 V.S.A. §640 to pay claimant's medical expenses arising out of this claim in the amount of $2,057.33.

As claimant has substantially prevailed in her claims for compensation, and pursuant to 21 V.S.A. §678(a), defendant Ames Department Stores is ORDERED to pay claimant's attorney fees in the amount of $892.91.

DATED at Montpelier, Vermont this 11th day of January, 1994.

Barbara G. Ripley
Commissioner