

*Apken v. Vergennes Area Rescue Squad, Inc. (April 25, 1995)*

*Vermont Department of Labor and Industry*

*Mage Apken* ) *File No. F-23850*  
 )  
*v.* ) *By: John H. Fitzhugh*  
 ) *Hearing Officer*  
*Vergennes Area Rescue Squad, Inc.* )  
 ) *For: Mary S. Hooper*  
 ) *Commissioner*  
 )  
 ) *Opinion No. 2-95WC*

*APPEARANCES:*

*James Runcie, Esq., for claimant.*  
*Edward Kiel, Esq., for defendant*

*ISSUE:*

- 1. Whether the claimant suffered an injury on June 2, 1993.*
- 2. If so, whether the injury arose out of and in the course of employment.*
- 3. Whether claimant was employed by the Vergennes Area Rescue Squad on June 2, 1993, as defined by the Workers Compensation Act.*
- 4. Whether the claimant was temporarily totally disabled after June 2, 1993.*

*THE CLAIM:*

- 1. Temporary total disability compensation from June 2, 1993 until the present.*
- 2. Medical and hospital benefits under 21 V.S.A. §640 in the amount of \$1,747.05.*

3. *Attorney's fees.*

**STIPULATIONS:**

1. *On June 2, 1993*

*a. the defendant was an employer within the meaning of the Workers' Compensation Act, but the employer does not stipulate that it employed this claimant.*

*b. the Travelers Insurance Company was the defendants workers compensation carrier.*

*c. the claimant was employed by Interactive Arts, with an average weekly wage of \$280.00.*

*d. the claimant had one dependent, Monica Kirsch, born 10/26/79.*

*e. the claimant was 35 years old. Her current address is 20 Hillside Drive, Unit 10, Vergennes, Vermont.*

2. *On June 15, 1993, the employer filed a First Report of Injury (Form 1).*

3. *On August 19, 1993, the claimant filed a Notice and Application for Hearing.*

4. *The Commissioner may take judicial notice of the following documents:*

*Form 1 - Employer's First Report of Injury dated June 15, 1993, filed by the defendant.*

*Form 10 - Certificate of Dependency*

*Form 25 - Wage Statement from Vergennes Area Rescue Squad*

*Form 25 - Wage Statement from Interactive Arts.*

*Form 6 - Notice and Application for Hearing dated August 19, 1993.*

5. *The following records are admitted by stipulation:*

*Exhibit 5 Medical records of Claimant:*

*1. McDaniel letter dated 8/28/93.*

*2. McDaniel reports and materials dated 6/10, 6/11, 6/15, 6/16, 6/17 (2), and*

- 6/24.
3. Hazard notes dated 2/10/94.
  4. Grzyb notes dated 1/6/94 and 12/22/93.
  5. Spine Assessment Form dated 1/6/94.
  6. UHC Bill dated 1/7/94.
  7. MCH Bill dated 12/27/93.
  8. Wells PT documents dated 2/12/94, 2/14/94 and 3/1/94.
  9. Therapy Referral Form dated 2/10/94.
  10. Wells PT Evaluation dated 2/14/94, 3/4/94 and 3/17/94.
  11. Kinney Drug Bill.
  12. MCH ER dated 6/6/93.
  13. MCH Discharge dated 6/7/93.
  14. MCH Bill dated 6/6/93.
  15. MCH Radiology Report dated 1/27/94.
  16. Spine Institute follow-up visit dated 2/3/94.

*PRELIMINARY CONSIDERATIONS:*

1. A formal hearing on this claim was commenced December 9, 1994. Present for the defendant were Attorney Ed Kiel and his law clerk Andy Boxer; and Attorney Jim Runcie for the claimant. Also present were the claimant, and witnesses Dan Sachar, Marion Davis, Christine McCarthy, and Margaret Stanton. Appearing by telephone was Julia McDaniel.
2. At the request of claimant's attorney, witnesses other than the claimant and a representative of the defendant (Sachar) were excluded from the hearing room until such time as they testified.
3. During the course of the hearing, the following additional evidence was admitted:
  - Claimant's Exhibit 6: Wage Statement from Interactive Arts, Inc.
  - Employer's Exhibit A: Charlotte Rescue Squad membership application.
  - Employer's Exhibit B: Claimant's letter dated November 12, 1993.
  - Employer's Exhibit C: EMS incident reporting system dated 8/21/93.

*Employer's Exhibit D: EMS incident reporting system dated 8/22/93.*

*Employer's Exhibit E: EMS incident reporting system dated 8/24/93.*

*Employer's Exhibit F: EMS incident reporting system dated 8/25/93.*

*Employer's Exhibit G: EMS incident reporting system dated 10/23/93.*

*4. In addition, the first two paragraphs of a paraphrase of a recorded statement by the employer's representative, Dan Sachar, contained in a letter dated July 29, 1993 from Crawford & Company to the Travelers Insurance Co., page 4, was admitted.*

*5. At the conclusion of the hearing on December 9, 1994, the hearing was left open to submit testimony of another witness who was unavailable for medical reasons. By letter dated December 23, 1994, the claimant waived presentation of such additional testimony.*

*6. At the hearing, Dr. McDaniel was permitted to testify regarding an examination of the claimant conducted October 27, 1994. The defendant's attorney was unaware of this examination, and did not have copies of any medical records regarding it and objected to the testimony. The hearing officer asked that the medical record be provided to the parties and himself following the hearing, and the defendant be given the opportunity to re-question Dr. McDaniel at a continuation of the hearing, if necessary. Dr. McDaniels medical report dated October 27, 1994, was submitted and is in evidence. No request having been received by the defendant for reexamination of Dr. McDaniel, it was waived.*

*7. Proposed Findings of Fact and Conclusions of Law and an affidavit of claimants attorney fees were submitted by the parties on January 6, 1995. The evidence closed January 9, 1995.*

#### *FINDINGS OF FACT:*

*1. Stipulations 1 through 3 are hereby adopted as true.*

*2. In December 1992, the claimant began serving as an unpaid, probationary member of the Vergennes Area Rescue Squad (VARS). VARS rules provided that*

*after six months, the squad would by majority vote determine who should be invited to become a permanent member of the squad.*

*3. The claimant made herself available for rescue work on Wednesdays and weekends.*

*4. Prior to volunteering with VARS, the claimant had worked as a phlebotomist, drawing blood. From January to May of 1993, she worked as an administrative assistant/examiner for EMSI in South Burlington. Beginning in May of 1993, she worked as an administrative assistant principally doing desk work for Interactive Arts in Vergennes.*

*5. In 1993, the claimant had an intense interest in pursuing service as an Emergency Care Attendant, and eventually an Emergency Medical Technician, with a rescue squad. She took the Interactive Arts job in order to have flexible hours to pursue the rescue squad work.*

*6. Prior to June 2, 1993, the claimant worked 40 hours a week at Interactive Arts at a gross pay of \$7.00 per hour.*

*7. Pursuant to claimant's exhibit 6, the claimant had no earnings for the week ending June 8, 1993 and earned \$119.00 for the week ending June 18, 1993 (3 hours June 16, 6 hours June 17, 8 hours June 18). On June 18, 1993, Interactive Arts terminated the claimant because she had not met expectations and had been absent from work too many times.*

*8. On June 2, 1993, while she was working at Interactive Arts late in the afternoon, she received a VARS call. She was "on call" at the time. She left for the VARS station and met Margaret Stanton, who drove her to the scene of an off-the-road accident in Ferrisburg. There she met VARS lieutenant and crew chief, Dan Sachar. A large, approximately 250 lb. man was slumped in the front seat of the auto, in a ditch along the side of the road. The claimant, Sachar and two other volunteers eased the driver, with some difficulty, onto a backboard and then carried the backboard to the ambulance. The ground was wet. The claimant was on the back position on the left side of the backboard. In the course of carrying the driver to the ambulance, she slipped but did not fall, leaning heavily on her right leg in the process. Dan Sachar reported to the insurance adjuster that he recalled that claimant slipped but did not fall while carrying the driver.*

*9. Until June 9, 1993, the claimant did not mention to any fellow workers*

*(except perhaps Marion Davis on Sunday, June 6), that she might have hurt herself while carrying the backboard. Previous to June 2, 1993, she had no significant back problems.*

*10. The next day (Thursday, June 3, 1993) the claimant felt that she might have pulled a muscle in her back during the incident on June 2, 1993. She took over-the-counter Motrin. She worked at Interactive Arts on Thursday and Friday.*

*11. On Saturday, June 5, 1993, the claimant's back pain was considerably worse and she stayed in bed. Sunday her condition worsened. On Sunday night, a friend and VARS volunteer, Marion Davis, drove her to the Medical Center Hospital of Vermont in Burlington. The emergency room record indicates "no precipitating event or trauma." The claimant doesn't recall providing this history. The claimant was somewhat disoriented from pain and medication on Sunday night, June 6, 1993.*

*12. On Thursday, June 3, 1993, the claimant had been notified that she had not been voted in as a permanent member of the rescue squad. She understood this was for personal reasons and not related to the June 2 incident (which VARS didn't know about). She did not recall talking to Sachar on Friday, June 4, 1993.*

*13. On Saturday, June 5, 1993, the claimant asked Sachar for a letter of recommendation for future rescue squad work. He had not been at the business meeting at which she was denied permanent membership, but agreed to provide the letter of recommendation. The claimant did not refer to any injury suffered at the job at that time.*

*14. On June 10, 1993, at the suggestion of Ms. Davis, the claimant saw Julia McDaniel, a chiropractor. Dr. McDaniels notes say the claimant "states that she had fallen several times during the transfer" of the driver on June 2, 1993. After examining the claimant, Dr. McDaniels diagnosed "lumbar sprain/strain with a resultant bilateral L5 facet syndrome." She recommended six visits in the next two weeks, and twice a week after that. Dr. McDaniel said the claimant should not sit longer than 30 minutes at a time or lift over 10 pounds. Based on the history she had received, Dr. McDaniel on June*

17, 1993, opined that the claimant's injury arose of and in the course of her employment.

15. The day prior to seeing Dr. McDaniel, June 9, 1993, Dan Sachar and Marion Davis visited the claimant at her residence. The claimant told Sachar that she had been injured at work. Sachar was surprised that she would have sought a letter of recommendation prior to reporting her injury. He never did issue a letter of recommendation.

16. The claimant saw Dr. McDaniel June 11, June 15, June 16, June 22, and June 24. On June 24, 1993, the doctor advised the claimant to use a lumbar support if she returned to lifting jobs or EMS work. The doctor notes the claimant was discharged from "WC care." Dr. McDaniel told the claimant that she could return to the desk work that she had been doing at Interactive Arts, but shouldn't go back to EMS work. At the time Dr. McDaniel thought that the claimant had reached a medical end result on June 24, 1993.

17. On June 15, 1993, the VARS president submitted a First Report of Injury (Form 1) to the Department. It indicated the claimant had been hired 12/3/92; that she had "slipped on a wet inclined surface" on June 2, 1993; and that she had a soft tissue injury of back muscle.

18. On June 28, 1993, the claimant submitted an application to become a member of the Charlotte Area Rescue Squad (CARS). The claimant indicated on the application form that she had no physical handicaps, limitations, injuries, etc. When asked whether she had ever received compensation for an illness or injury, she answered "no" but wrote in "pending claim 6.2.92 / injury slight--fully recovered." At the hearing, she said she wrote "6.2.92" because she was "notoriously bad with dates."

19. Pursuant to the CARS application, she was admitted as a probationary member of that rescue squad, again with a six-month probationary period. With CARS she participated in at least five incidents, four of which involved lifting. On November 12, 1993, she resigned from CARS with a letter in which she said that she was no longer able to fulfill both her rescue and family commitments.

20. In July, 1993, the claimant also activated an application for membership in the Fair Haven Rescue Squad.

21. *After losing her job at Interactive Arts, the claimant sought unemployment benefits from the State of Vermont. She received those benefits from July through October, 1993, when the claimant had to care for her daughter who had been hospitalized. To receive unemployment compensation in Vermont, claimant's must state that they are ready, willing, and able to work. She has received no unemployment compensation since October, 1993. As of early December, 1993, her daughter was better and she could have returned to work in some capacity. In the fall of 1994, the claimant ceased looking for work, and instead focused on obtaining further training. She began to take English, algebra and a computer course from Champlain College via computer modem.*

22. *Beginning in July, 1993, the claimant suffered a series of incidents involving her back or leg. While soliciting money for a charity volley-ball game, her right leg gave out, starting at the hip. This occurred several times while she was fund raising. In February, 1994, she slipped on ice in a parking lot and fell. Another time she tried to lift a five-gallon water cooler and found she couldn't do it. Finally, while trying to push furniture around in her home, she experienced pain. None of these other incidents appear to have directly arisen from any employment.*

23. *On December 22, 1993, the claimant was seen by Dr. Grzyb at the University Health Center in Burlington. She relayed the history of tripping but not falling on June 2, 1993. The doctor diagnosed mechanical low back pain and recommended an MRI and physical therapy rehabilitation. An MRI was conducted December 27, 1993, and found mild L5-S1 degenerative change without evidence of disc herniation or high grade canal stenosis.*

24. *On January 6, 1994, the claimant was seen by the Spine Institute of New England. A functional range of motion test reflected mild defects in lumbar range of motion and moderate limitation in hamstring flexibility. The pain was localized over the left sacroiliac joint.*

25. *She was again seen by the Spine Institute on February 3, 1994. The chart notes indicate that she had fallen again "this week without apparent cause; she states that she fell frequently during the acute phase of her LBP (lower back pain)." Her condition had deteriorated from the visit of January 6, 1994.*



26. On February 10, 1994, the claimant was examined by Dr. Rowland Hazard.  
At the time she saw Dr. Hazard, she was taking Naprosyn, 500 mg twice daily,  
and cyclobenzaprine, 10 mg on an as needed basis. Dr. Hazard recommended  
more intensive physical rehabilitation progressing to work hardening with  
subsequent development of a vocational plan according to her functional  
capacities.

27. On February 14, 1994, the claimant commenced a series of therapy  
sessions with Wells Physical Therapy Services in Middlebury. The claimant  
told the therapist her pain had moved from her low back to her right and  
sometimes her left leg.

28. The claimant's last visit to Wells Physical Therapy was March 17, 1994.  
Attendance at previous sessions was handicapped by not having an  
automobile  
to drive there. The claimant noted a decrease in symptoms without  
performing  
any physical therapy. The therapist questioned the value of continued work  
hardening in light of the claimants attendance record. Invoices from Wells  
Physical Therapy total \$350.50.

29. On October 27, 1994, the claimant was examined again by Dr.  
McDaniel, at  
the request of her attorney. The claimant complained of pain in her  
sacroiliac joint, radiating into her buttocks. Dr. McDaniel at this time did  
not believe the claimant had reached a medical end result. She is unable to  
determine whether the claimants pain on October 27, 1994 resulted from  
the  
incident of June 2, 1993 or was the result of a "couple of falls" the  
claimant had since her last visit with Dr. McDaniel in June, 1993.

30. The medical bills from the following providers were submitted for  
reimbursement and/or payment:

McDaniel Chiropractic	\$ 390.00
MCHV	568.75
University Health Center	414.00
Wells Physical Therapy	350.50
Medications	23.80
	\$1,747.05

31. While all these medical bills are reasonable in amount and were for

*necessary treatment, only the McDaniel, MCHV and medication bills are clearly the result of the June 2, 1993 incident. The others may or may not have been; its impossible to say to a reasonable degree of medical certainty.*

*32. The claimant's attorney has incurred \$56.03 in disbursements and owes Dr. McDaniel \$187.50 for her testimony at trial. He was retained on 20% contingency fee, subject to a \$3,000.00 maximum. He submitted an itemized statement for 37.2 hours. The amount of time spent representing the claimant was reasonable.*

#### *CONCLUSIONS OF LAW:*

*1. The first question to be resolved is whether the claimant was employed by the Vergennes Area Rescue Squad (VARS) at the time of her alleged injury on June 2, 1993. The answer is she was.*

*2. The Workers' Compensation Act covers injuries by accident "arising out of and in the course of employment by an employer subject to the chapter." §618. Employment includes "public employment." §601(4). Public employment includes "members of any regularly organized private volunteer rescue or ambulance squad while acting in the line of duty after election by the organization to have its members covered by this chapter." §601(12)(M).*

*3. The claimant was acting in the line of duty on June 2, 1993 and VARS is a regularly organized private volunteer rescue squad. VARS appears to have elected workers compensation coverage for its members. There is proof that probationary members fall within this insurance coverage (see Form 1), and no evidence to the contrary was offered.*

*4. Contrary to the assertion made by defendant in its proposed Conclusions of Law (paragraph 6), persons need not receive wages or other benefits to be covered by Vermonts Workers Compensation Act, if their employment falls under §601(12). The applicable compensation rate is determined under §650(a) ("the average weekly wage of a volunteer ... rescue ... worker ...injured in the discharge of his duties...shall be his average weekly wage in his regular employment or vocation...") Pursuant to §642, should the claimant have suffered a compensable injury on June 2, 1993, her compensation rate is*

*computed by referring to her average weekly wage at Interactive Arts, stipulated at \$280.00 a week.*

*5. Because two-thirds of the claimant's average weekly wage in June of 1993 was less than the applicable minimum weekly compensation set by § 601(19), her compensation rate in June, 1993, was \$204.00 a week, plus \$10.00 for one dependent.*

*6. The next issue is whether the claimant's injury arose out of and in the course of her employment. It did.*

*7. In worker's compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodman v. Fairbanks Morse Company, 123 Vt 161 (1963). The claimant must establish by sufficient credible evidence, the character and extent of the injury and disability as well as the causal connection between the injury and the employment. Egbert v. Book Press, 144 Vt. 367 (1984). There must be created in the mind of the trier of facts something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. Burton v. Holden Lumber Company, 112 Vt 393 (1941).*

*8. Considering all of the evidence and the credibility of the witnesses, the claimant did suffer a soft tissue injury to her lower back when she slipped while carrying the backboard on June 2, 1993. This incident arose out of and in the course of her employment with VARS.*

*9. The next issue is whether the claimant was temporarily disabled, either totally or partially, as a result of the work-related injury. She was for a brief period of time.*

*10. A claimant is totally disabled for work under 21 V.S.A. § 642 while he or she is either (1) in the healing period and not yet at a maximum medical improvement, Orvis v. Hutchins, 123 Vt 18 (1962), or (2) unable as a result of the injury either to resume his or her former occupation or to procure remunerative employment at a different occupation suited to his or her impaired capacity, Roller v. Warren, 98 Vt 514 (1925), whichever occurs is sooner. Temporary partial disability is due when the claimant can work but for less money than what he or she was earning when injured. §646, Roller,*

*supra.*

*11. As a consequence of the June 2, 1993 incident, confirmed by the claimant's own testimony and the treatment by Dr. McDaniel, she was incapacitated for work completely during the week ending June 11, 1993, and partially during the week ending June 18, 1993. She is thus at least entitled to temporary total for the first week, and temporary partial disability compensation (pursuant to §646) for the following week.*

*12. On June 18, 1993, Interactive Arts terminated her employment and on June 24, 1993, Dr. McDaniel said she could return to desk work but shouldn't go back to EMS work. On June 28, 1993, the claimant sought membership in the Charlotte Area Rescue Squad. In July, the claimant sought and obtained unemployment benefits.*

*13. From these facts, its reasonable to conclude that the claimant was no longer temporarily disabled for work, either totally or partially, after June 24, 1993.*

*14. While it is possible the claimant was subsequently disabled from work as a result of the June 2, 1993 incident, there is insufficient evidence upon which to reach such conclusions, and I find it improbable. The claimant suffered a series of other falls which aggravated or perhaps even caused her current condition. There is no evidence that these subsequent events either occurred as a result of the June 2, 1993 incident or otherwise arose out of employment. The periods of time she could not work or was seeking work, is sketchy, and the claimant is not very credible on these points. The Commissioner will not speculate on the cause or consequences of injuries claimed to be work related; the burden is on the claimant to establish that an incident or activity at work is the more probable cause of her current medical condition. Burton, supra. There is also no evidence that claimant had no permanent disability as a result of her June 2, 1993, slip.*

*15. Section 640 requires employers to pay reasonable surgical, medical and nursing services and supplies to injured employees. Subject to the rules applicable to this dispute, full dollar reimbursement of medical bills is deemed reasonable. Medical services, however, must relate to a work injury.*

*Here only the McDaniel bill, MCHV bill and medications bill are sufficiently linked to the claimant's work-related injury to permit an award.*

16. Rule 10(a) and §678(a) permits the Commissioner to award reasonable attorney's fees when the claimant prevails. Fees are not to exceed (a) \$35.00 an hour, or (b) 20% of the amount awarded, or \$3,000.00, whichever is less.

17. An important issue here was whether claimant was injured on the job. She was, and prevailed on that issue. At \$35.00 an hour, her attorney fees would be \$1,302.00. Based on a contingency fee, she would be entitled to 20% of the amount recovered - perhaps a hundred dollars. Considering the issues in dispute, the defenses raised, and the importance of determining whether an injury is job-related, an award of attorneys fees to the claimant of \$1,000.00 is reasonable.

#### ORDER

Therefore, based on the foregoing, the Travelers Insurance Company, or in the event of its default, the employer Vergennes Area Rescue Squad, is HEREBY ORDERED to:

1. Pay temporary total disability benefits for the week of June 7-11, temporary partial disability benefits for the week of June 14-18, and temporary total disability benefits for the period June 21-24.
2. Medical benefits totalling \$982.55.
3. Attorney fees of \$1,000.00.

DATED in Montpelier, Vermont this \_\_\_\_ day of April, 1995.

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Mary S. Hooper  
Commissioner