

Fanger v. Village Inn (April 20, 1995)

Vermont Department of Labor and Industry

Bruno Fanger) *File No. D-3016*
)
v.) *By: John H. Fitzhugh*
) *Hearing Officer*
Village Inn))
) *For: Mary S. Hooper*
) *Commissioner*
)
) *Opinion No. 5-95WC*

APPEARANCES:

David G. Reid, Esq., for Claimant
Stephen Ellis, Esq., for Defendant

ISSUE:

- 1. Did the claimant suffer a compensable injury in June/July of 1990?*
- 2. Has the claimant reached a medical end result?*

THE CLAIM:

- 1. Temporary partial disability under 21 V.S.A. §646 from July 10, 1990 to June, 1991.*
- 2. Medical and hospital benefits under 21 V.S.A. §640 in the amount of \$339.00.*
- 3. Attorney fees under 21 V.S.A. §678.*

STIPULATIONS:

- 1. On July 2, 1990:*
 - a. the claimant, Bruno Fanger, was employed by defendant,*

The Village Inn, as a handyman.

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

c. the Travelers Insurance Company was the defendant's workers' compensation carrier.

d. the claimant was 44 years old. His current mailing address is P.O. Box 534, Jamaica, Vermont 05343.

e. the claimant had no dependents.

2. On August 8, 1990, the Claimant filed a Notice of Injury and Claim for Compensation alleging that he pinched nerves in his back while clearing branches and logs off property.

3. On August 13, 1990, the Defendant filed a First Report of Injury (Form 1) without admitting that any work-related injury had occurred.

4. On April 25, 1993, the claimant filed a Notice and Application for Hearing.

5. Claimant stopped working July 10, 1990 at Village Inn.

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

Form 1 - Employer's First Report of Injury dated August 13, 1990, filed by the Defendant.

Form 5 - Notice of Injury and Claim for Compensation dated August 8, 1990, filed by Defendant.

Form 6 - Notice and Application for Hearing dated April 25, 1993, filed by claimant.

Form 25 - Wage Statement

7. The parties agree that the following records may be admitted by stipulation:

Claimant's 1: Dr. Foster's Medical Records of Bruno Fanger

Claimant's 2: Dr. Fox's Medical Records of Bruno Fanger

Claimant's 3:

Claimant's 4:

Defendant's A: Unsworn Videotaped Statements of Jeffrey Snyder, Don Snyder and Millie Clark

Defendant's B: Fox Report 10/8/91 and accompanying letters.

Defendant's C: Mountain Valley Health Center 7/5/90.

PRELIMINARY CONSIDERATIONS:

1. *This matter came on for a hearing November 18, 1994. At that hearing, the following additional exhibits were introduced and admitted:*

Exhibit 9: 12/4/91, Letter of Justin Israel
Exhibit 11: 10/4/90 Statement of Bruno Fanger
Exhibit 12: 10/4/90 Statement of Jeff Snyder
Exhibit 13: Bruno Fanger 1991 1040 with exhibits
Exhibit 14: Bruno Fanger 1990 IRC-1040 with exhibits

Defendant's Exhibit D: 10/9/90 Consent for Medical Information

Defendant's Exhibit E: 10/9/90 Employee's Injury Report

Defendant's Exhibit F: 11/15/90 Letter of Bruno Fanger

Defendant's Exhibit G: 4/25/94 Statement of Bruno Fanger

2. *Certain other exhibits were not then admitted for lack of trustworthiness.*

3. *Following the hearing, plaintiff was given the opportunity to cross-examine witnesses whose testimony was offered via videotape (Defendant's A) and to seek telephonic testimony of the authors of the letters which were not admitted at the hearing.*

4. *In mid-December, the parties filed a stipulation in which the claimant waived cross-examination of the videotape witnesses (Defendant's A) and the employer stipulated to the admission of the following documents excluded in the November hearing:*

Exhibit 6: Marie Johnson letter dated 12/3/91
Exhibit 7: Francine Paneley letter dated 12/6/91
Exhibit 8: Theodore Storm letter dated 3/16/92
Exhibit 10: Robert Pugliese letter dated 12/2/91

5. *Pursuant to the above-mentioned stipulation, the evidence was closed and the parties were given until December 30, 1994 to submit proposed Findings of Fact and Conclusions of Law.*

6. *At the hearing, witnesses were the claimant, Dr. Raymond C. Foster (by telephone); Justin Israel (by telephone); Francine Paneley (by telephone).*

Assisting claimant's counsel was Jim Rogers.

FINDINGS OF FACT:

1. *I find that stipulations 1 through 5 are true.*
2. *The claimant is a native of Switzerland who immigrated to the United States in 1970. Although his father is or was a surgeon, the claimant historically has avoided physicians and medicines. He has always prided himself on his physical fitness. He is a stoic who, at least prior to 1990, enjoyed pushing his body to its physical limits.*
3. *Prior to becoming employed at the Village Inn in December, 1989, the claimant had held a number of different jobs in different parts of the United States. He had some training as a pastry chef. He particularly enjoyed, and was good at, forestry, including cutting and felling trees. From 1987-1988 the claimant operated a business, Bruno's Maintenance, maintaining private homes.*
4. *In 1988, the claimant began working as a caretaker for a large estate in Andover, Vermont owned by Justin Israel. In return for living quarters, for which he paid nominal rent to Israel, the claimant did carpentry and outdoor work on the Israel estate. Some of this in 1989 was extremely heavy work, including clearing a stand of pine trees and cutting up logs with a chain saw. The claimant was not covered by workers' compensation insurance by Israel.*
5. *In December, 1989, the claimant began working six days a week from 8:00 a.m. to 3:00 p.m., at the Village Inn, for which he was paid \$400.00 a week. He took the job because he wanted a regular paycheck, with benefits. He worked for the most part alone. He was a maintenance person and handyman, serving as a carpenter, snow plower, tree trimmer, etc., for the defendant. This was strenuous work. Jeff Snyder was the general manager of the Inn; his grandfather, Don Snyder, who started the Inn, supervised matters for his son, the owner.*
6. *At the time he was hired, Don Snyder told claimant: "If you need help and can't get it, leave it alone."*
7. *In mid-June 1990, by mutual agreement, the claimant and defendant*

reduced the claimant's hours to three days a week, Tuesday, Wednesday and Thursday. To make up the lost time, claimant anticipated working part-time for the Jamaica House in Jamaica, Vermont starting in mid-July.

8. In January, 1990, the claimant experienced aching in his quads and numbness in his lower leg. He did not see a physician. He claims the pain began shortly after doing some work while on the defendant's payroll at the personal residence of the defendant's owner, Don Snyder. He did not report this pain to his employer. It appears he had also, in late 1989, been doing the lumbering at the Israel estate.

9. In February, 1990, the claimant missed two to three days of work because he was snow bound at the Israel estate. He had to snowmobile out to get gas. To obtain vehicular access to his home, he had to shovel a good portion of the estate's driveway (1/2 to 1 mile in length) by hand.

10. In June, 1990, the claimant was asked by the defendant to clean up and burn brush around a paddle tennis court which had recently been installed. Some of this brush included logs which the employer told the claimant need not be removed. Don Snyder told him to cut up the logs "if he could."

11. Claimant began cleaning up the brush. It was wet and difficult work. He decided to try and move the logs. He says it was while doing this work that he thinks he hurt his back. He doesn't recall any specific incident or trauma. It's unclear whether this work occurred before or after the claimant began working three days a week.

12. On July 5, the claimant saw Dr. Roger Fox. X-rays of his lumbar spine were within normal limits. The doctor's notes state that "since yesterday--aching of quads since yesterday with strange prickling feeling of lower leg--no recalled injury. Similar in January." Dr. Fox prescribed some medication (Tolectin) for what he believes was sciatic irritation. Reference to a work injury on the July chart note was written in by the doctor's secretary.

13. On July 10, 1990, the next Wednesday, the claimant stopped at the Village Inn and saw Don Snyder. He told Snyder he couldn't work because he had "pinched a nerve" in his back, but did not specify that it was work-related (nor did Snyder inquire). He later offered to perform light duty or office work, but no such position was available.

14. Shortly thereafter the claimant went to pick up a UPS package left for

him at the Village Inn. Again he failed to mention that his back pain was work-related. Later that afternoon he called the Inn and told Jeff Snyder his pain was "from the work." Around June 20, he contacted Jeff Snyder and asked about filing a workers' compensation claim.

15. On August 8, 1990, the claimant filed Form 5 listing July 2 as the date of injury. On August 13, 1990, the employer filed a First Report of Injury, but did not acknowledge the claim nor any date of injury.

16. The claimant has been inconsistent with respect to the date of injury. His Forms 5 and 6 state the date as July 2, a Monday, yet he was not working Mondays at that time. In his statement to the insurance investigator (Exhibit 11) he said he hurt his back Monday, June 4 (and that June 14 was his last full day of work at the Village Inn). An insurance form, signed by the claimant but apparently not prepared by him, lists the date of injury as June 2 and June 15 as the date of disability (Exhibit E). A letter to the Department dated November 15, 1990, signed by the claimant states the date of injury as July 2, 1990.

17. Dr. Foster in his September, 1990, report (Claimant's 1) says the claimant's symptoms first appeared July 2-4, 1990.

18. After leaving the employment of Village Inn, the claimant sought work with the Jamaica House as a waiter/chef. His back pain prevented him from doing any regular employment there until September 16, 1990, when he began working two to three days (6-7 hours) a week (Exhibit E). He grossed \$1,425.00 from his Jamaica House employment in 1990. During 1991, he grossed \$1,204.00 from his work at Jamaica House, and did other little jobs. In January, 1992, he began working as a caretaker and observer for "Weiner" 20 hours a week for \$250.00 gross. The claimant states that since 1990, he wears a back belt to lift anything more than 25 lbs.

19. On July 19, 1991, the claimant saw Dr. Fox again. The doctor found full range of motion with pain, and that claimant "now has intermittent pain across low back--never down leg. Finds it hard to do heavy lifting without squatting." He advised the claimant to continue taking Naprosyn (a pain killer) and, if the patient wished, to see him further for physical therapy or a CT scan if necessary. Apparently the claimant hasn't returned to see Dr. Fox, perhaps for lack of funds.

20. On July 31, 1990, the claimant saw Dr. Raymond Foster, a chiropractor,

who diagnosed "lumbar plexis disorder with sciatic neuritis." He did not think the claimant was partially or totally disabled (Exhibit 1).

21. The claimant saw Dr. Foster for additional treatment on August 2, 9, 24 and September 21. The latest entry states claimant "feels it coming back but nowhere as bad."

22. After 1990, the claimant continued to reside at the Israel estate. He continued to do a "fair" amount of work (Israel testimony) in 1991 for unknown compensation; in 1992 he was paid \$700.00 to \$800.00 by Israel; in 1993, more than \$1000.00; and in 1994 \$400.00 to \$500.00. The claimant continued to reside at a house on the Israel estate for which he paid (or was given credit against work done) \$50.00 a month in the winter and \$100.00 a month in the summer.

23. There are substantial inconsistencies between the written statement given by the claimant (Exhibit 11) and other evidence introduced at the hearing, including the claimant's own testimony. Among these inconsistencies are the reason for the claimant's reduced hours of work at the Village Inn; when Don Snyder first learned of the workers' compensation claim; when the claimant first informed his employer that he was going to see a doctor; how the claimant's employment terminated at the Village Inn; and reference to the use of the chain in removing logs around the paddle tennis court. The inconsistencies in Exhibit 11, when compared to other credible testimony, raise substantial doubts regarding the claimant's testimony.

24. From the medical evidence, the testimony of the claimant, and other evidence submitted, the claimant was totally incapacitated for work from July 5 through September 16, 1990, and capable of working full-time thereafter.

25. The claimant retained his attorney on a 20% contingency fee, not to exceed 20% of the amount recovered.

CONCLUSIONS OF LAW:

1. In dispute here is whether the claimant suffered an injury arising out of and in the course of employment, and if so, the extent of his temporary disability.

2. *In workers' 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).*

3. *An injury arises in the course of the 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 his employment contract. Marsigli Estate v. Granite City Auto Sales, Inc., 124 Vt 95 (1964).*

4. *This case highlights the difficulty of the claimant sustaining his burden of proof when the alleged work injury was unwitnessed, did not arise from specific trauma, and was unreported for a period of time. In such instances, the trier of fact must weigh carefully the credibility of witnesses, the initial medical reports, and explore any inconsistencies and hidden or not-so-hidden motivations.*

5. *Here, the claimant, by the weight of the testimony, suffered some lower back injury during the first half of 1990 which resulted in a short period of total disability and, it appears, some ongoing lower back difficulties. During the first half of 1990, he worked mostly, but not exclusively, for the defendant in a job involving lifting. This work history, and the claimant's un rebutted testimony of no previous back ailments prior to 1990, raise some inference that his injury arose out of and in the course of his employment.*

6. *However, looking at all the evidence, I don't think it possible to conclude that the claimant has carried his burden of proof. While working at the Village Inn he continued to "caretake" the Israel estate; he appears to have done some work for Francine Paneley; and he engaged in some strenuous snow shoveling. This, coupled with substantial inconsistencies between his written statement (Exhibit 11) and other credible testimony (including his own) at the hearing, raise substantial questions regarding the causation of his lower back problems.*

ORDER

For the reasons set forth above, the claimant's claim for workers' compensation benefits arising out of his employment with the Village Inn is DENIED.

DATED in Montpelier, Vermont this _____ day of April, 1995.

*Mary S. Hooper
Commissioner*