Miner v. The Auto Exchange (March 13, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRIES

Richard Miner	*)*	*File #: H-22079*
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	*For: Mary S. Hooper*
The Auto Exchange	*)*	*Commissioner*
	)	
	)	*Opinion #: 8-96WC*

Hearing held at Montpelier, Vermont, on January 8, 1996.
Record closed on January 17, 1996.

APPEARANCES

Jonathan D. Weidman, Esq., for the claimant
John W. Valente, Esq., for the defendant

ISSUE

Whether the claimant suffered a compensable injury while in the employ of the defendant.

THE CLAIM

1. Temporary total disability compensation pursuant to 21 V.S.A. §642 from May 22, 1995, to the present.

2. Temporary partial disability compensation pursuant to 21 V.S.A. §646 as applicable.

STIPULATIONS

1. The claimant was on May 19, 1995, an employee within the meaning of the Workers Compensation Act.

2. The defendant was on May 19, 1995, an employer within the meaning of the Workers Compensation Act.

3. On May 19, 1995, the claimant worked for the defendant from 7:06 a.m. to 4:12 p.m.

EXHIBITS

Joint Exhibit 1	*Medical records exhibit*
Claimant's Exhibit A	*Photograph of pot cover*
Claimant's Exhibit B	*Small claims action by Moses J. Delphia*

FINDINGS OF FACT

1. The above stipulations are accepted as true, and the exhibits are admitted into evidence. Notice is taken of all forms filed with the Department as required.

2. The issue here is credibility. The claimant alleges that he tripped at work and hurt his knee, while the defense suggests that the claimant hurt his knee in a motorcycle accident on a Friday night.

3. The claimant rented his home from one Moses J. Delphia in West Fairlee, Vermont. He worked at the defendant The Auto Exchange d/b/a/ Collision Works, where he repaired heavily damaged vehicles. The claimant has fifteen years of experience in this field, and occasionally works on friends cars away from his employer's premises. The claimant indicated that he set his own hours at work, and that the injury occurred at a slow time of the year. He testified that he was aware that he should report any injury to his supervisor as soon as he could after the injury occurred.

4. On May 19, 1995, according to the claimant, he finished his day's work at around 4:00 p.m. and proceeded to clear up his work area. This involved picking up his tools and returning them to his work station. He had been working in a bay some distance from his assigned area. He picked up about fifty pounds worth of tools and began to walk across an empty bay towards his work area. He tripped over the metal hook of something called a pulling pot cover and, after jerking backwards, fell to his knees, dropping all of his tools. He said that he felt something pop in his right knee. He indicated that there was another employee in the work area, who did not appear to notice the incident.

5. The claimant thought he had just bruised his knee, and therefore he did not report the injury. He testified that he did not believe that it was necessary to report such an injury, and likened it to banging his head on a car. He punched out of work, and left his time card in the slot, not going into the office. He then left work, and went to the home of a friend named Tony Emerson. Mr. Emerson was in the middle of a barbecue, and had some other friends there. The claimant hung around there for about 20 minutes, limping a little, and then went home.

6. When the claimant got home, he testified that he went into the house, and then went outside to try to walk off the injury. He decided to put his motorcycle into the garage. At that time, according to the claimant, the Delphia boy , the son of his landlord, showed up. Together they put the bike in the garage. The claimant denied riding the motorcycle at all that day, and indicated that he had been trying to roll it into the garage because he was unable to start it. It was a kick-start motorcycle, and the claimant alleged that he could not use his injured leg, the right one, to start it.

7. The claimant testified that his knee got progressively worse over the weekend but that he did not call a doctor or visit the hospital. He rested it over the weekend, and then went in to work on Monday at about 7:00 a.m.
He was planning to try to work, but the foreman told him to go to the doctor at around 7:30. While he was at work, he testified that he took a picture of a pot cover, although he could not be sure it was the same one that he had tripped over. The claimant testified that he did not go to the doctor until 9:30. He then went to Dartmouth-Hitchcock, where he told the doctors what
had happened. However, the medical note only reflects that the claimant said
that he fell on May 19.

8. The claimant testified that he and Tony Emerson are good friends, and they hang around together. He indicated that he had had difficulties with both of the Delphias, and that Mr. Delphia, Sr., has sued him in small claims court. He also testified that Mr. Delphia, Jr., has sworn that he will get the claimant and his wife. The claimant also testified that he moved out of the premises at the end of May or the beginning of June.

9. Anthony Emerson testified that he has known the claimant for several years. He indicated that the claimant had trained him in body work, and Mr. Emerson is now a certified Subaru technician. He buys, fixes and sells used Subarus.

10. Mr. Emerson recalls that one day last year on a Friday evening as he was

preparing a barbecue, the claimant came by to see him and was limping. The claimant told Mr. Emerson that he had slipped and hurt his knee at work. Mr. Emerson can not place the date of the incident, but recalls that the weather was very nice, and that he and his friends were drinking beers.

11. Mr. Delphia, Jr., testified. He is a senior in high school, and he has known the claimant about three and a half or four years. The claimant has done some work for Mr. Delphia, and he is a very good car mechanic. Mr. Delphia recalls that he was at the claimant's residence, where Mr. Delphia now lives, one day last spring when the claimant pulled into the driveway on his motorcycle.

12. According to Mr. Delphia, the claimant stated that he had dumped his motorcycle about seven miles away, and had had a terrible time getting it restarted. In fact, the claimant indicated that he had had to walk almost half of the way home. He was limping, and in great pain. He told the witness that he had fallen into a skidder rut, as the dirt road was still quite wet and soft. He had landed on his right knee. The witness observed that there was some dirt and grass on the motorcycle.

13. The two apparently exchanged some good natured comments about the claimant's inability to start the bike. The witness then tried to start it with his left leg, as the claimant had had to do, and concurred that it was very difficult to start with the left leg. The witness had no difficulty starting it with his right leg.

14. The witness cannot recall exactly when the incident with the motorcycle occurred. He knows that it occurred while he was still in school, and that it happened after school. He recalls that it was mid to late afternoon, although his efforts at placing a specific time on the incident are questionable. He also testified that the claimant was always banged up and that he had observed the claimant limping on at least one prior occasion.

15. The witness also testified to some statements that the claimant made at some later time. The claimant told the witness that he was waiting for a check for workman's [sic] comp because he had hurt himself on the job. The witness then asked if he had really hurt himself at work or if it was from the bike accident. According to Mr. Delphia, the response was Yeah, just between you and me, it was the bike....

16. Mr. Delphia testified that he was very bothered about what the claimant had told him, and that he spoke about it with his father. After much soul

searching, the witness called the claimant's employer, who referred the witness on to the insurer.

17. The witness denied having any problems with the claimant until after he had reported him to the insurer. He indicated that his father had some serious problems with the condition that the claimant left the house when he moved out. In fact, the witness father sued the claimant in small claims court for the damages inflicted upon the house. The witness was not involved
in that action.

18. The final witness was William Morrison, the owner of the business. He testified that he does not believe that the pot cover pictured in Claimant's Exhibit A came from his shop. His reason for this is that he had personally removed all of the hooks, such as the one visible in the picture, from the pot covers, precisely because they made the covers stick up when they were knocked loose. He testified that he had removed all of the hooks several years prior to the time when the claimant came to work for him. He was unable to identify either the pot cover or the scene in the picture, although he conceded that there was nothing in the picture to say where it was taken.

19. Mr. Morrison also testified that the normal procedure on a Friday afternoon was for an employee to drop the time card into a mailbox in the office. The claimant did not do this with his Friday timecard on May 19. He also indicated that the claimant was aware of the necessity for reporting an injury, and in fact in the past had reported one as minor as a pulled fingernail. He also testified that, if the claimant had placed his timecard in the office, there was a person there to whom he could have reported the slip and fall.

20. The claimant had suffered a complete tear of the anterior cruciate ligament and a complex tear of the medial meniscus. The first report to a doctor that the injury was work-related appears to have occurred on June 12,
1995.

CONCLUSIONS OF LAW

1. In workers compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse Co., 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. Egbert v. The Book Press, 144 Vt. 367 (1984).

2. In order for a claimant to prevail, he must establish that his injury

arose out of and in the course of his employment. Rothfarb v. Camp Awanee, Inc., 116 Vt. 172 (1950), rev d on other grounds. Where the causal connection between an accident and an injury is obscure, and a lay-person would have no well grounded opinion as to causation, expert medical testimony is necessary. 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 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 & Martin Lumber Co., 112 Vt. 17 (1941).

3. The claimant has failed to establish that his version of the case is the more probable hypothesis. When analyzing a factual situation, where credibility is of primary importance, factors such as the demeanor of the witnesses and the logical consistencies of their testimony become increasingly important. There is no question that the claimant injured his knee at some time. However, assuming that Mr. Morrison is correct in his testimony that he personally removed the hooks from all of the pot covers in his shop and that the picture does not appear to represent his shop, then the photograph produced by the claimant is seriously compromised and smacks of sheer fabrication. Mr. Morrison was a credible witness, although his obvious interest in the outcome cannot be denied.

4. Mr. Delphia's testimony, coming as it did from an apparent whistle blower, had a certain measure of credibility. The disputes between the claimant and Mr. Delphia's father are in large measure irrelevant to this proceeding. There is also a certain ring of truth to the reported conversation about the expected receipt of workers compensation benefits, as well as the tale about trying to start the motorcycle.

5. On the other hand, there is the testimony of Mr. Emerson, whose bias for the claimant was also established. Mr. Emerson's testimony was reasonably credible, although not particularly helpful. Even assuming that the conversation and observations took place as reported, there is no evidence that these occurred on May 19 as opposed to any other Friday evening. Without other evidence of credibility, such as that exhibited in Mr. Delphia s report to the insurer, I cannot find that Mr. Emerson's testimony is sufficient to outweigh the other weaknesses in the claimant's case.

6. The claimant himself was not a particularly credible witness. Specifically, the testimony about his behavior at work is inconsistent with

the severity of the injury to his knee as ultimately diagnosed. The fact that he had once reported a pulled nail and now failed to report a seriously deranged knee suggests that the knee injury did not in fact occur at work. The problems with the photograph have been discussed supra. The claimant was not able to address adequately the issue of Mr. Delphia's supposed animosity to him, in spite of the evidence that the father of the witness had ample reason to dislike the claimant. Put simply, the claimant's story is not logical nor is it internally consistent. Nor has he been able adequately to shore up his own inadequacies with the testimony of others.

7. For all of these reasons, I find that the claimant has not met his burden of proof.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, Richard Miner's claims for benefits under the Workers Compensation Act for injuries sustained on May 19, 1995, while in the employ of The Auto Exchange are DENIED.

DATED at Montpelier, Vermont, this 13th day of March 1996.

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Mary S. Hooper
Commissioner