*Kilburn v. Munson Earth Moving (April 8, 1996)*

*STATE OF VERMONT*
*DEPARTMENT OF LABOR AND INDUSTRY*

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| *Norman Kilburn* | *)* | *File #: J-4452* |
| | *)* | *By: Barbara H. Alsop* |
| *v.* | *)* | *Hearing Officer* |
| | *)* | *For: Mary S. Hooper* |
| *Munson Earth Moving* | *)* | *Commissioner* |
| | *)* | |
| | *)* | *Opinion #: 19-96WC* |

*Record closed on March 21, 1996.*

*APPEARANCES*

*Thomas C. Nuovo, Esq., for the claimant*
*Barbara E. Cory, Esq., for the defendant*

*ISSUE*

*1. Whether the claimant wilfully engaged in behavior intended to injure himself in violation of 21 V.S.A.§649.*

*2. Whether the claimant intentionally misled his employer in his application for employment by failing to disclose his prior operation and one prior employer.*

*3. If the answer to #2 is affirmative, whether the claimant's failure to disclose the information bars him from receiving benefits under the Workers Compensation Act as a result of his injury of August 25, 1995.*

*PROCEDURAL HISTORY*

*Pursuant to a pretrial conference and later correspondence between counsel, it was agreed that this matter would be submitted for decision based on medical records, depositions, and proposed findings and rulings.*

*EXHIBITS*

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| *Joint Exhibit 1* | *Medical records notebook* |
| *Joint Exhibit 2* | *Deposition of Norman Kilburn* |
| *Joint Exhibit 3* | *Deposition of Nancy E. Binter, M.D.* |

*The claimant has proposed a number of exhibits, and no objection has been*

*received to them. However, some of the exhibits are already included in Joint Exhibit 1, and will not be accepted.*

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| *Claimant's Exhibit 1* | *Letter of 2/5/96 from Barbara E. Cory to the hearing officer.* |
| *Claimant's Exhibit 3* | *Recorded statement of Jim Adkins, dated September 13, 1995.* |
| *Claimant's Exhibit 9* | *Physical therapy note, August 12, 1994.* |

*The defendant has filed an affidavit and the claimant's application with Munson Earth Moving. There has been no objection to these documents.*

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| *Defendant's Exhibit 1* | *Affidavit of William C. Bohlen* |
| *Defendant's Exhibit 2* | *Applications for employment dated March 28, 1995, and July 3, 1995, by Norman Kilburn.* |

*FINDINGS OF FACT*

*1. The above exhibits are admitted into evidence. Notice is taken of all forms in the Department's file. Neither party offered the Functional Capacity Evaluation (FCE) of the claimant, although it has been marked as Exhibit 6 in the deposition of Dr. Binter. As such, it has been admitted.*

*2. Norman Kilburn is a 56 year old man with a seventh grade education and a marked inability to recall names, dates or events in any detail. He is an operator of heavy machinery, with a lifetime history of manual labor.*

*3. On July 18, 1994, the claimant injured his back while working for Engineer's Construction. As a result of that injury, and after a period of unsuccessful conservative treatment, he underwent spinal surgery performed by Dr. Nancy Binter on September 28, 1994, with discectomies at L4-5 and L5-S1.*

*4. The claimant went through physical therapy and work hardening over a period of several months. On January 24, 1995, he participated in an FCE with physical therapists at Fletcher Allen. The FCE is a blind study in that the subject of the evaluation is not made aware of the weights he is lifting during the evaluation. The claimant had been lifting 40 pounds in physical therapy prior to the evaluation, with a goal of 50 pounds.*

*5. The FCE indicated that the claimant could carry weights, as with a bucket or luggage, up to 42 pounds. His lifting was limited to between 21.4 pounds to 32.4 pounds, depending upon the level at which he was lifting.*

*6. The claimant met with Dr. Binter after the FCE for further discussion. The claimant recalls that he was told not to lift in excess of 50 pounds, and was told not to lift anything excessively heavy. Dr. Binter has no recollection of the particular meeting with the claimant, but was adamant that she always discusses the specific limitations in an FCE with a patient. It is clear that the claimant was insensitive to the significance of the information he was given in this meeting.*

*7. The claimant was released to part time work on January 31, 1995, and he did so, although he reported to Dr. Binter that one of his bosses was reluctant to have him back at work. After the physical therapy program was completed, the claimant was in a rehabilitation program to continue to increase his strength. He was laid off by Engineer's Construction at some time in late March or early April.*

*8. From February through June, the claimant returned to Dr. Binter with reports of difficulties with his back. In February, his pain was in his left buttock and the back of his left leg, and was treated with a Medrol Dosepak, Flexeril and Amitriptyline. In April, the complaint of low back pain was similar to that he had previously experienced, with bilateral leg pain if he bent over. At that time, Dr. Binter's notes reflect that the claimant had been returned to work full duty, full-time without any difficulty prior to his layoff. The June visit occurred after another MRI was performed on June 6, 1995, which showed no change in his operative site, but degenerative disc changes and a bulge at L3-4 that was unchanged from earlier studies. There was no apparent cause for the claimant's then complaints of a pressure in his back extending into his legs.*

*9. On March 28, 1995, and July 3, 1995, the claimant applied for work at Munson Earth Moving Corporation, and he was hired on the second occasion. The claimant did not report Engineer's Contractor as a prior employer on either application. He interviewed with William C. Bohlen, the vice president for the defendant. Mr. Bohlen indicated in his affidavit that the claimant never told him that he had been injured before, that he had worked for Engineer's Construction, nor that he had a lifting restriction. He stated that he assumed that [Mr. Kilburn] could perform lifting and all other duties and tasks necessary to his position as a heavy equipment operator. He asserted that Munson would have worked with the claimant to adhere to his work restrictions and to accommodate him in order to avoid further injury.*

*10. The claimant testified that he did not report any problems to the*

*defendant at the time of his employment because he believed that there was nothing wrong with me anymore and it had been taken care of and there was no reason why I couldn t go back to work.*

*11. On August 25, 1995, the claimant was operating a loader at the Williston landfill, where he and another worker were moving bales of recycled paper to the back of the building. The bales were wrapped in plastic, and some were broken up, and some were wet. The co-worker, identified as Jim Adkins, was putting the bales into the bucket of the loader, and the claimant was then taking them around to the back of the building. At some point in the day, the only bales left were those in an area that the claimant could not reach with the loader because of detritus on the ground.*

*12. The claimant spontaneously got down from the loader to assist Mr. Adkins. He was not asked to do this, but did so to help out. They would bend down to pick them up, but the claimant was careful to use the lifting techniques he had been taught at physical therapy. They were shifting the bales only about three feet. The claimant testified that they were each lifting about half of the weight of the bales. After assisting with approximately 20 bales, taking occasional breathers, the claimant stopped, indicating that it was making his back sore. The claimant testified that he thought he was lifting 50 or 60 pounds, and Mr. Adkins, in his statement to an insurance adjuster, opined that the bales weighed as much as 150 pounds, and that he could not lift them by himself. The claimant indicated that the bales were awkward to lift, because they were broken and covered with plastic, which was slippery in the damp.*

*13. The claimant later retrieved one of the bales from an owner of a tree service, and had it weighed by one Robert Tourneau, the operator of an official weigh station for deer. It was weighed at 63 pounds. The claimant testified that the one he obtained for weighing purposes was quite wet, and that the paper was soaking wet to the touch.*

*14. The claimant continued to work the rest of the day, babying his back. He indicated that he could usually resolve any increase in symptoms this way, but that it was not effective in this case. He worked the following day, but was then unable to work the following day. He advised his supervisor that his back was bothering him too much to continue to work.*

*15. The claimant testified that his back pain was on the opposite side from*

*his earlier injury. He returned to see Dr. Binter at that time, and had a conversation with her. He testified that she told him he had done something he was not supposed to do, that he had lifted too much, and that he was not supposed to do any heavy lifting at all. He contested that and told her that what he lifted was not very heavy at all. His behavior at that meeting confirmed his inability to grasp the intent of her recommendations to him.*

*16. In her testimony, Dr. Binter indicated that it would not be unreasonable for the claimant to lift 32 pounds, assuming that he had maintained the shape*
*he was in at the time of the FCE, and that it similarly would not have been unreasonable to assist another person in lifting 64 pounds, if the body mechanics were fine. The claimant testified, uncontradicted, that he always lifted in the manner he had been taught at physical therapy.*

*17. The claimant has most recently seen Dr. Robert D. Monsey, who noted that*
*the claimant's symptoms were on his right side, as opposed to the area of the*
*prior injury. He recommended further diagnostic studies. It is not clear from the record whether or not those studies have been done. In any event, as Dr. Binter noted, the claimant's complaints were not in a distribution consistent with a nerve root, and hence it was likely that the problem was more consistent with a strain.*

*18. The claimant has produced evidence of his agreement with his attorney for fees amounting to 20% of the amount recovered, as well as expenses in the*
*amount of $45.72. These amounts are reasonable.*

*CONCLUSIONS*

*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. 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 defendant has the burden of proof in this case, as each of its claims is an affirmative defense. See, e.g., Kelly's Dependents v. Hoosac Lumber, 95 Vt. 50 (1921), and Garber v. Hill-Martin Corp., Opinion No. 11-88WC.*

*4. In order to prove a violation of 21 V.S.A. §649, the defendant must establish that the more probable hypothesis is that the claimant had the wilful intention to hurt himself or another. There is absolutely no evidence from which I can find that the claimant lifted the bales in question with the wilful intention of hurting himself. Nor does the defendant produce a single case to support its position that §649 can apply in this case.*

*5. Instead, the defendant asserts that the lesser standard, as enunciated in Whalen v. Lake Champlain Transportation, Inc., Opinion No. 21-93WC, applies. That standard is that [a] claimant who, with knowledge of limiting conditions, engages in unreasonable conduct or activity which exacerbates or aggravates a condition, may not claim compensation for the exacerbation or aggravation. Id., at 13. The defense seems to assume that the conduct in this case is unreasonable per se. No argument is advanced with regard to the evidence that the claimant may have been lifting within his restrictions at the time of the new injury. If, as one reading of the evidence strongly suggests, the claimant had a lifting restriction of 32 pounds and he lifted in the therapeutically recommended manner 31.5 pounds, then the conduct in this case could not be found to be unreasonable. The defendant has simply ignored this possibility, and therefore cannot be said to have met its burden of proof.*

*6. Additionally, there is a qualitative difference in the facts between the instant case and Whalen. In the latter case, that claimant was specifically instructed not to return to work as a waitress, and she ignored that instruction. It is therefore significant in this case that the claimant had returned to his position as a heavy equipment operator for Engineer's Construction with the approval of his treating physician, with the only caveat being the issue of the amount of weight he could lift. He was fully employed at his regular position at the time he was laid off, and there is no evidence that he was not able to perform all of the functions of his position.*

*7. Additionally, Larson has indicated that neither rashness nor impulsiveness in behavior will lead to a finding of intentional self-injury.*

*See, e.g., Larson, Workmen's Compensation Law,§§36.61-36.63. In so finding,*
*he cites to cases in which a claimant engages in hard work after being advised by his physician that it might kill him and it does, a claimant plays Russian roulette on his lunch break with unfortunate results, and a claimant in anger slams hand into a wall and breaks it. As Larson states, Of course, it was possible that these injuries would result in each case. It is quite another matter to say that it was expected, much less intended. Larson, at §36.62, p. 6-200. In all of these cases, compensation was awarded. I find that the claimant's behavior in this case was at most impulsive, in his desire to assist his co-worker, and hence it is compensable, if there is no other bar.*

*8. In that light, the defendant also claims that the claimant misled the employer in his application. The basis for this allegation is that he did not disclose either his employment with Engineers Construction or his injury there. I can see no basis for finding that the withholding of the name of a prior employer is material to the question at hand. Certainly, the factors adopted in Hamilton v. Miller Structures, Opinion No. 64-95WC, require that the withheld information be material. Nothing in the affidavit of Mr. Bohlen, the only evidence on this issue presented by the defense, suggests that the defendant intended to call or did call any of the claimant's prior employers. Therefore, the failure to disclose one of those employers was, at best, harmless.*

*9. The failure to disclose the prior injury to the claimant's back presents a slightly different issue. First, having been returned to full duty at his prior employer, and having reached a medical end result, the claimant had no*
*reason or duty to report that he was unable to do the work for which he was applying. Secondly, to the extent that he had limitations, the claimant was not required to disclose them prior to his hiring, nor was the employer entitled to ask, prior to the hiring. See, e.g., Americans with Disabilities Act, 42 U.S.C.A. §12112(A). In Hamilton, supra, the claimant made the material misrepresentation in a post-employment physical in response to a specific inquiry. There was no such physical examination or inquiry here.*

*10. The claimant is accused only of an act of omission. The defendant has produced no case where an act of omission rises to the level of a sufficiently serious misrepresentation to give rise to a finding of fraud. A nondisclosure, when no disclosure is required and no question is asked, has no legal effect in this context. The affirmative defense of fraud must therefore fail.*

*11. The claimant having prevailed is entitled to an award of costs as a matter of law and attorney's fee as a matter of discretion. Costs are*

*awarded in the amount of $45.72, and fees are awarded in the amount of 20% of all amounts paid pursuant to this decision.*

*ORDER*

*THEREFORE, based on the foregoing findings of fact and conclusions of law, it is hereby ordered that Liberty Mutual Insurance Company, or in the event of its default Munson Earth Moving, pay:*

*1. To the claimant or on the claimant's behalf such benefits under the Workers Compensation Act as are required as a result of the finding in this case; and*

*2. Attorney's fees in the amount of 20% of the amount awarded, and costs in the amount of $45.72.*

*DATED at Montpelier, Vermont, this 8th day of April 1996.*

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*Mary S. Hooper*
*Commissioner*