

*STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY*

Penny Bursey)	State File No. L-20405
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
)	For: Steve Janson
)	Commissioner
Bennington College)	
)	Opinion No. 05-99WC

Hearing held in Rutland, Vermont on November 20, 1998
Record closed on December 11, 1998

APPEARANCES:

Sam W. Mason, Esq. for the Claimant
Keith J. Kasper, Esq. for the Defendant

ISSUE:

Whether claimant suffered a personal injury by accident arising out of and in the course of her employment with defendant.

EXHIBITS:

Joint Exhibit	I:	Medical Records
	II:	April 1998 calendar
	III:	Stipulation
Claimant's Exhibit	I:	Employee's Claim and Employer First Report of Injury, 4/20/98
Defendant's Exhibits	A:	Statement of James Hasenfus, 4/24/98
	B:	Statement of James Hasenfus, undated

STIPULATION:

1. Claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act ("Act") at all relevant times.
2. Defendant was an employer within the meaning of the Act at all relevant times.
3. FutureComp Insurance Company was the workers' compensation insurance carrier for defendant at all relevant times.

4. On April 20, 1998 claimant alleges she suffered a personal injury by accident arising out of and in the course of her employment with defendant.
5. Claimant seeks medical reimbursement for her unpaid medical bills to date pursuant to WC Rule 40, temporary total disability benefits from April 22, 1998 until her return to work on August 17, 1998 and, if successful, attorney fees and costs.
6. The sole issue for resolution in this matter is whether claimant suffered a personal injury by accident arising out of and in the course of her employment with defendant.
7. The parties agree to the admission of Joint Exhibit I, medical records of claimant.
8. The parties agree that the Department may take judicial notice of any and all forms in its file in this matter.

FINDINGS OF FACT:

1. Facts in the first three stipulations are accepted as true. The exhibits are admitted into evidence.
2. Claimant began her job as snack bar worker in the food service department at Bennington College in November of 1997. Her duties included cooking, handling the cash register, and cleaning in the snack bar. On Sundays and Mondays, she worked in the upstairs dining hall cleaning, ordering and, on special occasions, setting up tables and chairs. For recreation, claimant rode her motorcycle.
3. At staff meetings, Bennington College food service employees learned the procedure for filing a workers' compensation claim, i.e., to notify their supervisor, then go to the maintenance department for a First Report of Injury form. Claimant knew how to file a claim from those meetings and from earlier experiences.
4. Claimant testified that on April 5, 1998 she developed a backache after moving chairs and tables all day. She testified further that the pain did not interfere with her work and that she did not report it to her supervisor. That evening, she said, she took Tylenol and applied cold compresses to her back to relieve the pain that lasted a couple of days. She did not see a doctor. Claimant's husband testified that he did not notice that claimant suffered any physical difficulties following that incident.
5. Dave Remington testified that he and claimant worked together on April 5 when they cleaned the large dining room and moved tables and chairs. He does not remember her complaining of back pain or appearing as if she was in pain. In fact, claimant never told him she hurt her back at work.
6. April 14, 1998 was a day off for claimant. She testified that she and her husband took their motorcycles out for a ride. On a gravel driveway her bike went out from under her

after she hit her front brake. She and her husband both testified that he picked up the bike and they continued to ride. Claimant testified that she did not have pain and did not injure herself when her bike dropped.

7. Claimant testified that the college had a special event necessitating more than the usual number of tables and chairs on Monday, April 20, when she was working in the upstairs dining room. That afternoon, she said, she moved an eight-foot long table alone, then felt a sudden pain in her back, reported it to her supervisor, and called her doctor. She testified further that her back pain that day was a ten on a scale from one to ten.
8. Chris Darwell, head chef at Bennington College, coordinated the food preparation at special events. He testified that he checked his files and could find no record that the college had a special event on April 20. Mr. Darwell also testified that claimant told him she had a doctor's appointment on April 21, but never said that it was for an injury related to work.
9. Marshall Ogert, the food service manager at Bennington College, testified that the college did not have a special event on April 20, a conclusion he confirmed after reviewing his production sheets on which such events are recorded.
10. During a smoking break one April day in 1998, claimant told her coworkers that she "dropped her bike," something that "didn't help" her back. Claimant acknowledges making the statement, but maintains that it was on April 15, the day after she says she dropped the bike. She remembers that Dave Remington was on break with her when she mentioned the bike incident. She also said that James Hasenfus was present when she made that statement, although time cards show that claimant's and Hasenfus's schedules did not overlap that day.
11. Mr. Hasenfus, wrote a statement that described an event as follows:

Monday, April 20, a few employees and myself were sitting on the loading dock on break. Penny [claimant] came down and in a kind of bubbly . . . stated how tired she was because she had hurt her back pushing her motorcycle. It wasn't until two days later that I heard she was out sick and had ask[ed] for papers to fill out for her back because she had hurt it in the dining hall. *Defendant's Exhibit A.*
12. Claimant and her coworkers were members of a labor union at the college where claimant's daughter was the union secretary. Claimant gave Mr. Hasenfus's statement to her union in the hope that he would lose his union card and his job.
13. Mr. Hasenfus testified that he wrote an undated "retraction" (*Defendant's Exhibit B*) because he thought he would lose his job. In the "retraction," he conceded that he "could have been mistaken on the comment she [claimant] made prior to coming to work on Monday, April 20. I was not with her at the time of her injury and cannot honestly say how she hurt her back." At the hearing he testified that his first statement (*Defendant's Exhibit A*) was correct and that the only comment he ever heard from claimant about her back was in relation to the motorcycle incident.

14. Claimant followed the procedure taught her when she went to the maintenance department to arrange for the submission of a First Report of Injury. That report, signed by Robert Ayers, Director of the Physical Plant, on April 20, 1998 was based solely on the following information provided by claimant: date of injury -- April 5, 1998; the activity -- moving chairs; and the accident -- “lifting/moving chairs—strained her back.”
15. On April 21, claimant saw Dr. Gregory King who noted that she had low back pain, that this was a workers’ compensation case, that she had a history of low back pain dating back to a work related injury at Mary McClelland Hospital, that she developed low back pain on April 5 moving chairs and tables, and that she had a flare-up two days before that visit, i.e., on April 19. Dr. King diagnosed work related lumbar disc syndrome and instructed her to stay out of work for two days. No mention of claimant’s motorcycling activities appears in the note for that visit.
16. On April 22, claimant informed the college that she would be losing time from work. Soon thereafter, her supervisors learned that the injury may have been related to a non-work incident and called a meeting with claimant and her union shop steward to discuss the situation. At that meeting, claimant admitted that she did not “do her back any good” with her motorcycle.
17. Over the next several months, claimant saw Dr. King from whom she requested “something else” in the way of pain medication and received percocet. Dr. King extended her release from work until June 1. She also saw Dr. Dranginis who, on May 29, noted that she had increased back pain after riding her motorcycle three days earlier and suggested that she return to work four hours a day with a lifting restriction of five pounds and no bending. By July of that year she received another “no work” order for four weeks from the Orthopaedic and Hand Surgery office in Bennington.
18. Claimant’s testimony as a whole was less than credible. Her assertion that there was a college special event on April 20, a fact that would have made the possibility of her moving a table more likely, could not be verified by business records of special events or by the testimony of her coworkers. Her memory that Mr. Hasenfus was present on April 15, when she said she described the motorcycle incident, conflicted with their time records that show that the two did not work at the same time that day. The strength of the medical records she offers to support her claim for a work related injury weakens markedly when they fail to mention an April motorcycle incident that everyone agrees occurred. Her spontaneous statement to coworkers that the motorcycle incident affected her back is far more convincing than her steadfast denials at the hearing. Her failure to communicate in any way to her coworkers, by words or nonverbal behavior, that she was uncomfortable on April 20 belies her assertion that she had pain at the level of ten out of ten on that day. When she had the opportunity to file an official form, she chose April 5, not April 20, as the date of injury. It defies common sense to accept her assertion that she was injured at work on April 20 when her first report never mentioned that date, when no corroborating evidence has been offered, and when so many of her other statements conflicted with objectively verifiable facts.

CONCLUSIONS OF LAW:

1. In a workers' compensation claim, it is the burden of the claimant to establish all facts essential to support her claim. *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963). Sufficient competent evidence must be submitted verifying 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).
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. On the evidence presented, claimant has failed to meet her burden of proving that she suffered an injury as a result of her work for defendant. As the Vermont Supreme Court stated in *Goodwin*:

In view of the record, the vital question as to when and where the claimant sustained the injury of which he complains remains unanswered, nor could it be determined by the commissioner except by indulging in speculation or surmise, which affords no legal basis for an award.

123 Vt. at 166.

4. It is possible that claimant injured her back at work on April 5. It is possible that she injured her back at work on April 20. Yet, it is far more likely that she injured her back when she "dropped" her motorcycle. The evidence offered to support this claim was not sufficient; it was not competent. It did not verify a causal connection between claimant's employment and her alleged injury. Accordingly, with no more than possibilities and conjecture in the face of incredible testimony, this claim must fail. *Id.*

ORDER:

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont, on this 25th day of January 1999.

Steve Janson
Commissioner

