STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-15052
Daniel White	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
	)	For: Steve Janson
Ames Department Stores	)	Commissioner
	)	
	)	Opinion No. 08-99WC

Hearing Held in Montpelier on December 21 and December 29, 1998
Record closed on January 28, 1999

APPEARANCES:

Geoffrey W. Crawford, Esq. for the Claimant
William C. Dagger, Jr., Esq. for the Employer

ISSUE:

Whether claimant suffered an injury that arose out of and in the course of his employment on January 30, 1998.

EXHIBITS:

Claimant's Exhibit 1: Curriculum Vitae of Dr. George White
Claimant's Exhibit 2: Medical Records
Claimant's Exhibit 3: Medical Bills
Claimant's Exhibit 4: Medical articles (for identification only)
Claimant's Exhibit 5: Fee Agreement

Defendant's Exhibit A: Claimant's prior workers' compensation claims
Defendant's Exhibit B: Curriculum Vitae of Dr. John Johansson
Defendant's Exhibit C: Dr. Johansson's IME dated March 5, 1998
Defendant's Exhibit D: Dr. Johansson's IME addendum dated July 31, 1998

FINDINGS OF FACT:

1. Notice is taken of all forms filed with the Department. The exhibits, except the one

marked for identification, are admitted into evidence.

2. Claimant was an "employee" and defendant his "employer" as those terms are defined in the Vermont Workers' Compensation Act at all times relevant to this claim.

3. Claimant began working for Ames in 1983, at first as a temporary employee, later as a janitor, receiving clerk, and receiving manager. At the time of the injury alleged here, he was working as a receiving manager with duties that involved unloading trucks, bending and lifting weights that ranged from one half pound to 50 pounds. He helped customers by carrying bulky and heavy items.

4. In November 1997 employees in the Rutland store learned that the store would be closed for good and their jobs terminated after the first of the year. Some, but not all, employees could expect to be assigned to a job in another Ames store. Claimant did not accept the employer's offer for a different job in another store, instead opting for a severance package. But it was not until January 29, 1998 that Roland Ostrout, the Store Manager, told claimant that the next day would be his last. Mr. Ostrout testified that claimant displayed no noticeable sign of sadness from that news.

5. On January 30, Mr. Ostrout asked claimant to clean out the upstairs stock room, a task that involved carrying boxes of files and documents down the stairs and moving them to another location.

6. Claimant testified that, at about 3:45 p.m., he was carrying a carton of documents from the stock room, down a cement set of stairs, when the bottom of the carton gave out. As a result, he slipped on a paper, fell back, then down half a flight of stairs, stopping when his right leg hit a door. He felt a sharp pain in his back and leg, but did not report the incident to his supervisor thinking that he would walk off the pain. No one saw claimant fall.

7. Claimant testified that he felt a stabbing pain in his lower back and a tingling in the back of his right leg almost immediately. But he gathered up the papers, replaced them in the box, and finished the task assigned him before the end of the shift. He was upset, flustered, and embarrassed. He did not know what to say. This was not the first time he had been hurt at work and the last time he made a report, he said, his supervisor had given him a hard time. The person with whom he had the earlier disagreement, however, was not in the store on January 30.

8. After he finished his work, claimant explained, he returned the keys to Mr. Ostrout, but said nothing about the fall that he alleges occurred only 15 minutes earlier. Mr. Ostrout testified that he prides himself on his observational skills and that he observed nothing unusual about claimant's mood, gait, or general condition that day. He also testified that all the employees, on this, their last day on the job, worked professionally with no outward sign that they were in any way upset that the store was closing and their jobs changing or ending. Even though long term employees had just lost their jobs, morale was high, he said, because they kept things positive. He also said that claimant always

maintained professional composure.

9. Bev Delpha, the Store Trainer, walked with claimant to the door where they said farewell. Claimant said nothing about the fall to Ms. Delpha. The Store Trainer is the person at Ames to whom employees were to report any work related injury, a fact claimant knew from previous experience.

10. Claimant then went about his usual activities, including driving from Rutland to Brandon to pick up his son from basketball practice on Friday and attending a basketball game in Rutland on Saturday. He testified that his back pain radiated to his leg and intensified. At one point his leg gave out when he walked across a gym floor.

11. When he awakened on Saturday, he felt more pain, but continued to push himself. Although claimant remembered that his wife drove him to the hospital, the records reflect that at about 8:00, he drove himself to the Emergency Department at the Rutland Regional Medical Center (RRMC) where he presented complaints of tailbone and right leg pain. He told the staff that his right leg gave out after a fall at work the day before. He refused a wheelchair because his pain, assessed as a 6 out of 10, was worse sitting. The examination of his back revealed no bruising, but was " remarkable for a lumbosacral moderate spinous process tenderness." Examination of his legs was "remarkable for right straight leg raising at minimal hip flexion." An x-ray of his lower spine was negative for fracture. Claimant was sent home with motrin, prescriptions for narcotics, back strain instructions, and a work release through February 4 with light duty thereafter until approved otherwise by an orthopedist.

12. On February 9, 1998 claimant saw an orthopedist, Dr. John Ayres, who recorded claimant's history as follows: "Patient . . . previously worked at Ames. His store closed and he was helping move some boxes full of papers. The box on the bottom of the pile he was carrying opened from below, dumping papers. He tried to step back and stepped on the papers and slipped and fell on the stairs on 1/30/98." The claimant described weakness, back and leg pain. Dr. Ayres attributed the leg pain to nerve root involvement. He diagnosed a possible ruptured disc with nerve root entrapment, ordered a CAT scan, and determined that claimant was "unable to work with his back the way it is." Dr. Ayres testified that the pain claimant described to him at this visit was definitely the type of pain one would get from falling down the stairs. The CAT scan confirmed his conclusion that claimant was not able to work.

13. At a February 17, 1998 office visit, Dr. Ayres expressed his reluctance to do surgery, since it had only been 2½ weeks since claimant's fall. He, therefore, recommended physical therapy. By March, when the back and leg pain persisted, Dr. Ayres recommended evaluation at the Spine Institute. He noted that the "broad based posterior protrusion of L4-5 with more prominence on the right than the left," as seen on CT scan, was not getting any better and was resistant to conservative treatment.

14. In May of that year, claimant began treating with Dr. George White (who is not related to claimant) at the Spine Institute. Dr. White determined that claimant's symptoms were

suggestive of possible L5 radiculopathy. He recommended epidural corticosteroid injection and a multidisciplinary rehabilitative approach.

15. Claimant conceded on cross examination that when he injured his back at work in March 1997, he reported the incident and sought medical care that day. He also reported work related injuries in 1993 for fractured ribs, in 1994 when a rack fell on his toe, in March of 1995 when an object fell on him causing a bruise on his neck and head, in July 1995 for a strain to his lower back, in November 1995 for a pulled a muscle in the middle of his neck from moving a box, in 1996 for a strain to his abdomen when he lifted a box, and in 1997 for a strain to his lower back from moving a piece of furniture.

16. At the hearing, Dr. Ayres testified that the type of pain with which claimant presented in February 1998 would be uncomfortable, an opinion consistent with claimant's testimony. Dr. Ayres also testified that it was a little "surprising" that claimant would have driven to Brandon and watched a basketball game with the symptoms he described. In fact, he would not expect such activities.

17. Dr. White also testified at the hearing. Based on the history given him by the claimant, he testified that claimant's symptoms were related to the work related fall.

18. Dr. John Johansson, a board certified family practitioner with a practice in non surgical orthopedics, saw claimant at the request of the employer on March 5, 1998. He reviewed claimant's medical records, took a history from him, performed a physical examination, and an assessment. He concluded that claimant's L4-5 disc bulge and L5 radiculitis were due to a January 30, 1998 fall that claimant described to him.

19. Claimant received physical therapy for a month last spring from a therapist who noted that he had symptoms consistent with radicular pain. When Dr. Ayres saw claimant again in the fall of 1998, the doctor noted that claimant needed to return to physical therapy and work hardening. Return to the work force, he opined, would require modified work.

20. After he spoke with the employer's counsel, but without reading claimant's deposition, Dr. Johansson submitted an addendum which was based on "new information" – that claimant made no mention to the supervisor after the alleged fall, that the supervisor did not notice an abnormal gait, that claimant sat through a basketball game and later went to an emergency room. His revised opinion stated in pertinent: "When a ruptured disc occurs causing nerve irritation, it generally develops almost immediately following the trauma and would have been evident by fellow employees when observing his gait. He certainly would have been made more uncomfortable and it possibly could have precluded him from sitting in the bleachers immediately following the injury. The diagnosis that I made in March 1998 is inconsistent with the history as provided by the patient based on information provided by Mr. Dagger."

21. Dr. Johansson conceded that full-blown symptoms, particularly the leg pain, could develop gradually. Nevertheless, he opined that the majority of people with acute spasm to the lower back would demonstrate pain behaviors such as a limp or "hunched over"

posture, although a slight limp would not be noticed. According to Dr. Johansson, claimant already had a weak back which was predisposed to injury that could be as simple as bending the wrong way or coughing.

22. On cross examination, Dr. Johansson agreed that at the time he wrote his initial report, he had the medical records and was aware that claimant had not sought medical attention until the day after the fall. When presented with "new facts" as well as claimant's description of pain, the doctor testified that the discomfort claimant said he had during the basketball game was consistent with his injury. And he conceded that going to a child's basketball game is a subjective desire on a parent's part, notwithstanding physical discomfort.

23. Claimant submitted a copy of his contingency fee agreement with his attorney, a statement showing a time of 30.25 hours on this case, and an itemization of reasonable and necessary expenses totaling $1,070.34 (with estimates for expenses related to the testimony of Dr. Ayres).

CONCLUSIONS OF LAW:

1. In a workers' compensation claim, it is the burden of the claimant to establish all facts essential to support his 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 layperson 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 medical evidence in this case fully supports claimant's position that he injured his back at work on January 30, 1998, if, and only if, claimant is to be believed. The employer argues that it is impossible to reconcile the observations of co-employees, other admissions of claimant, and the medical testimony. Admittedly, claimant did not report the fall at the time he says it occurred. He finished his work that day. Yet he testified that he had immediate pain. Physicians testified that most people would have given outward signs of pain, although the store manager observed nothing unusual about claimant's gait or appearance that afternoon. That same store manager also testified that workers who were losing their jobs seemed just fine that day. No one, in his opinion, gave even so much as a hint that anything was wrong. The store manager characterized such stoical behavior as professional and expressed considerable pride in his staff. The store manager's failure to observe any outward signs of pain in claimant's face and gait speaks more to his inability to observe anything negative on a day that must have produced some level of pain in many of those working under him, perhaps even in himself. It does not convince this trier of fact that claimant had no pain.

4. The employer points to claimant's admissions that he was able to finish his assigned task, did not request help from others, drove to Brandon, attended a basketball game, and sought medical attention only after 28 hours as further evidence that claimant did not fall as he now claims. Claimant says he was embarrassed. Because he thought the pain would go away, he continued with his usual activities, including driving to Brandon and attending a basketball game. Realizing that the pain was not going away, but was actually increasing, he sought medical attention, not a week or a month after the alleged incident, but 28 hours later. Every medical record that follows references a work-related fall as the causative mechanism.

5. The employer's defense is a reasonable one, especially in light of claimant's history of past claims and a failure to report the incident when it happened. But the circumstances at work that day were unusual. That claimant did not want to end his 14-year career with a report of injury may not have been a wise decision, but it is understandable. Claimant

testified openly, sincerely and convincingly. The trier of fact accepted his testimony. The medical reports, based on his history, confirm that his fall caused his back condition that necessitated treatment.

6. Accordingly, his workers' compensation claim is compensable. Because claimant prevailed, he is entitled to attorney's fees as a matter of discretion and reasonable and necessary costs as a matter of law. 21 V.S.A. § 678. A discretionary award of fees is appropriate given the factual issues presented and the fact that claimant was not responsible for any delay is this case. See, *Morrisseau v. Legac*, 123 Vt. 70 (1962). However, the time expended and straightforward legal issues support no more than the hourly rate in this case.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, I conclude that claimant's back injury arose out of and in the course of his employment with Ames on January 30, 1998. If the parties cannot resolve the issue of what benefits are due as a result of this decision, either may request another hearing. Defendant is ORDERED to pay claimant attorney's fees of $35 per hour for 30.25 hours and expenses.

Dated at Montpelier, Vermont, on this 16th day of February 1999.

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Steve Janson
Commissioner