STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-25379
	)	
	)	By: Margaret A. Mangan
Gerald Seguin	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Ethan Allen, Inc.	)	
	)	Opinion No. 28S-02WC

RULING ON DEFENSE MOTION FOR STAY

Ethan Allen, Inc., by and through its attorneys, Kiel, Ellis & Boxer, asks for a stay of the order that it pay workers' compensation benefits to Claimant Gerald Seguin. Mr. Seguin, by and through his attorneys, Diamond & Robinson, P.C., opposes any stay. At issue at the hearing was whether the Claimant sustained a compensable injury while employed at Ethan Allen. In Opinion No. 28-02WC dated June 26, 2002, the Commissioner held that he did.

Any award or order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner, any appeal notwithstanding. 21 V.S.A. § 675. To prevail on its request in the instant matter, Defendant must demonstrate: (1) it is likely to succeed on the merits on appeal; (2) it would suffer irreparable harm if the stay were not granted; (3) a stay would not substantially harm the other party; and (4) the best interests of the public would be served by the issuance of the stay. *In re Insurance Services Offices, Inc.*, 148 Vt. 634, 635 (1987). The conjunctive "and" indicates that all four prongs must be met before a stay can be granted. The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b)*; Austin v. Vermont Dowell & Square Co.*, Opinion No. 05S-97WC (May 29, 1997) (*citing Newell v. Moffatt*, Opinion No. 2A-88 (Sept. 20, 1988)). The granting of a stay should be the exception, not the rule. *Bodwell v. Webster Corporation*, Opinion No. 62S-96WC (Dec. 10, 1996).

Defendant argues that it is likely to succeed on the merits because it has sufficient evidence to support its position; it will suffer irreparable harm because it might not be able to recover the benefits it has been ordered to pay if it succeeds at the superior court; that claimant will not suffer irreparable harm and that the best interests of the public would be served by the issuance of stay.

On the first prong of the four-part test, Defendant argues that it is likely to succeed on the merits due to the lack of evidence provided by the Claimant to show that his injury was work-related combined with substantial contradictory evidence. The evidence presented, however, was thoughtfully weighed. It was the province of the hearing officer to determine the credibility of witnesses and weigh the persuasiveness of the evidence. See, *Bruntaeger v. Zeller*, 147 Vt. 247, 252 (1986). She was under "no obligation to accept, interpret, or apply evidence in accordance with the views of either party. The weight, credibility and persuasive effect of the evidence [was] for the [hearing officer] to determine." *Kruse v. Town of Westford*, 145 Vt. 368, 374 (1985) (state board of appraisers as trier of fact).

Central to the defense that the injury did not occur as claimed was the Claimant's initial denial that his injury was work-related and his failure to report an injury for several months. Indeed, a late report in many cases supports a denial. See, e.g., *Conrad v. Central Vermont Hospital*, Opinion No. 28-01WC (Sep. 14, 2001). But a blanket denial in all late reported cases would create unfairness to a injured worker who is unaware that a gradual onset injury is work-related, does not understand the workers' compensation process and/or believes a report is not necessary for a minor injury expected to resolve. This case demonstrates the need to weigh several considerations in a late-reported case: 1) Are there medical records contemporaneous with the claimed injury and/or a credible history of continuing complaints? 2) Does the claimant lack knowledge of the workers' compensation reporting process? 3) Is the work performed consistent with the claimant's complaints? and 4) Is there persuasive medical evidence supporting causation?

Mr. Seguin reported heavy lifting at work when he went to the emergency department on December 27, 1999. Because he was unaware that his back pain was caused from work activities, he applied for short-term disability, demonstrating that he was unaware of the nuances of the workers' compensation system. His work involved frequent lifting of pieces weighing from 50 to 90 pounds. Dr. Johansson's opinion, based on medical records, knowledge of lifting requirements at Ethan Allen and a physical examination of Claimant, supports the causal link between the Claimant's heavy lifting at work and his back condition.

Based on the evidentiary support of the Claimant's case, it is not likely that the defense is likely to succeed on the merits of its appeal to a trial court. Without the requisite first prong of the four-part test, the Defendant's argument for a stay fails. See, *In re Insurance Services Offices, Inc.*, 148 Vt. 634.

THEREFORE, the motion for a stay is DENIED.

Dated at Montpelier, Vermont this 25th day of July 2002.

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R. Tasha Wallis
Commissioner

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Hearing held in Montpelier on December 17, 2001
Record Closed on March 12, 2002

APPEARANCES:

Steven P. Robinson, Esq., for the Claimant
Andrew C. Boxer, Esq. for the Defendant

ISSUE:

Did the Claimant sustain a compensable low back injury while employed at Ethan Allen?

EXHIBITS:

Claimant's Exhibit 1:	Medical Records
Claimant's Exhibit 2:	Transcript of deposition of Ryan Poulin
Claimant's Exhibit 3:	Weather data
Defendant's Exhibit A:	Short-term disability form
Defendant's Exhibit B:	Supplemental Medical Records

FINDINGS OF FACT:

1. Notice is taken of Department forms and the exhibits are admitted into evidence. An exception to the general rule against the admissibility of evidence disclosed after the disclosure deadline is made for weather data, Claimant's Exhibit 3, from the National Weather Service. After the handwritten note offered at the hearing was rejected for its lack of reliability, Claimant's counsel sent the official record, to which the defense objects. This evidence about the relative low snowfall in November and December of 1999 is in rebuttal to the defense that the Claimant injured himself while shoveling snow and not in the course of his employment. The defense had more than ample opportunity to verify the accuracy of the document and testimony offered on this subject. The weather data record constitutes appropriate rebuttal evidence and, in the interest of fairness, is admitted.

2. Claimant moved to Newport, Vermont in 1990.

3. Between 1993 and August 16, 2000, Claimant was an "employee" and Ethan Allen his "employer" as those terms are defined in the Workers' Compensation Act. He was earning $9.80 hour at Ethan Allen when he left that job.

4. When first hired, Claimant worked on the night shift in a job involving sanding furniture. In 1998 he began assembling tables, a job he worked on in a team and one that did not require much lifting. He worked with furniture that had defects, took the pieces apart and returned them to assembly. In the process he moved furniture from a wooden pallet to a table, worked on the piece and then returned it to the pallet. He worked with Georgette Griffen, who was a cleaner.

5. In September or October 1999 Claimant became a Line Load Inspector in which he inspected the completed, but unfinished, pieces of furniture. All pieces were solid hard wood-- birch, cherry and oak, without the legs. Sizes were 4 to 6 feet long, 3 to 5 feet wide with hardware. A typical cherry model weighed 55 to 60 pounds; maple 80 to 90 pounds. The job required him to lift and move furniture, with some pieces weighing 90 pounds. The claimant moved 60 to 80 pieces a day. During a normal shift, that meant lifting and moving furniture every 5 to 10 minutes.

6. Claimant had no history of back problems. The only other times he missed time from work were for treatment of a hernia and for tendonitis. The current case is his only worker's compensation case.

7. A few weeks before Christmas 1999, he noticed back stiffness that loosened up as the day went on. On December 23rd he worked a full shift, then he had difficulty getting out of bed the morning of December 24th, with pain in the lower back.

8. There was from a trace to 2 inches of snow on the ground in Newport from December 23rd to the 29th. The highest daily snowfall in November was 2.8 inches on the 16th; in December, before the 27th, it was less than two inches.

9. Because the pain did not improve over the next few days, on December 27th Claimant went to the emergency department where he reported doing a lot of lifting at work and a three-week history of back pain that had worsened in the previous three days. He reported no trauma. After an examination, he was released with instructions to avoid bending, lifting and sitting and to return if there was no improvement.

10. Claimant was not engaged in strenuous activities outside of work in the days leading up to the emergency department visit.

11. Claimant applied for short-term disability in December 1999, stating on the application that the injury was not work-related. He also stated that the cause was unknown. At that time, he had no understanding of what could have been causing the back pain. In fact, he imagined different possibilities, including a tumor, but did not consider work-relatedness.

12. Georgette Griffen worked alongside Claimant at Ethan Allen. She reported to her employer that claimant had said he hurt his back playing touch football at home. She also told the employer that Claimant had reported hurting his back shoveling snow, but that was when they were assembling tables and not in the fall or winter of 1999.

13. Rajay Miller, lead person at the Orleans plant of Ethan Allen, supervised the Claimant and 13 other people in late 1999. According to Mr. Miller there was some snow at that time and the claimant said he hurt his back shoveling snow. Mr. Miller corroborated the Claimant's testimony that his job required a lot of lifting and that Claimant lifted 80 to 90 tables a day.

14. Pamela LaMadeliene worked with the Claimant inspecting tables in 1999. In December she noticed that Claimant moved slowly and inquired what was wrong. She now remembers his telling her that he slipped on ice getting out of his car.

15. Ryan Poulin, a former employee of Ethan Allen, worked with the Claimant when he complained of back pain. Mr. Poulin denied as false a disclosure made by the defense that he would testify that the Claimant fell on ice in his driveway at home. Mr. Poulin conceded that he left Ethan Allen on less than favorable terms.

16. David Horn, who lives in North Troy and also worked in the Orleans plant of Ethan Allen, noticed in December 1999 that the Claimant was slumped over and walked slowly. Mr. Horn remembers heavy snow that required him to shovel his driveway the morning Claimant exhibited signs of back pain.

17. When the Claimant completed the short-term disability form, he mentioned nothing about falling on ice or shoveling snow. In fact, he identified the cause of back pain at that time as unknown. When he visited the emergency department on December 27th, he denied any trauma, although he reported doing heavy lifting at work. It is inconceivable that at a time the Claimant was unaware that this was a worker's compensation claim, he would have denied a specific cause for the pain when he completed the short term insurance form and denied trauma to a physician, yet would have reported falling on ice and shoveling snow to co-workers.

18. The testimony of the co-workers, elicited for the first time in December 2001, is inconsistent with the weather data, inconsistent with the objective and contemporaneous medical record and is inconsistent with the Claimant's credible testimony. That Claimant would have told some people that he slipped on ice (a possibility even with a low snowfall) and others that he hurt his back shoveling snow is not credible, especially when he mentioned nothing of the sort to his health care providers.

19. After the emergency department visit, the Claimant first treated with Betsy Hartman, ARNP, a nurse practitioner, then with Dr. Robert Wood, who ordered physical therapy and medications, but symptoms continued. Next, he treated with Dr. Rizwan Ul Haq, a neurologist, who ordered diagnostic work including a MRI and EMG.

20. After a month out of work, the Claimant returned on January 31, 2000 and worked until February 12th at the same work he had been doing in December, with some assistance from others. When, after two weeks of work, the pain returned to its pre-treatment level, Claimant left work.

21. A May 2000 MRI confirmed that the Claimant had a herniated disc. He continued with medical treatment and physical therapy.

22. Claimant made himself available for work at Ethan Allen on several occasions – from March of 2000 to September 2000- but was told there was no light duty work available. He did not look for a job outside of Ethan Allen until September.

23. Sometime after he had the MRI and further treatment, he realized that there was a connection between his work and his back condition. He filed this workers' compensation claim on August 8, 2000.

24. On August 16, 2000 Claimant was fired.

25. Claimant obtained another full-time job in September of 2000.

Medical Opinions

26. Dr. John Johansson performed an independent medical examination (IME) on the Claimant, reviewed all medical records, had knowledge of the lifting requirements at Ethan Allen and opined to a reasonable degree of medical certainty that Claimant's herniated disc was caused by the repetitive physical requirements of his job. He reached that opinion on the Claimant's complete history and his training and experience, particularly that it would be unusual for a man of claimant's age (32) to herniate a disc without some external force, thereby rejecting the defense theory that the herniation was due to degenerative disc disease. Dr. Johansson acknowledged that snow shoveling could cause a disc to herniate, but had no facts to suggest that the claimant had engaged in such activity when injured.

27. For the defense, Dr. Victor Gennaro, an orthopedist, also performed an IME, issued a report and testified at the hearing. In his report, he stated that he was unable to "state with any degree of certainty that the complaints of pain or difficulty with his back were directly related to his occupation."

28. It was clear at the hearing that Dr. Gennaro had no knowledge of the claimant's lifting activities at Ethan Allen. For the first time, he espoused that theory that it was degenerative disc disease (DDD) that led to Claimant's disc herniation. He explained that the claimant had two risk factors for DDD—he is a smoker and is a large man. From a biomechanical standpoint, the heavier one is, the greater the stress is on the spine. Smoking is a risk factor because nicotine constricts the blood vessels thereby decreasing the blood supply to the discs in the back. He reasoned that the risk factors, lack of a specific incident and Claimant's failure to report it initially support his conclusion that one cannot state that the work at Ethan Allen caused the problem.

29. Further, Dr. Gennaro explained that a disc can occur spontaneously in one with DDD, with the possibility of it happening at work no more likely than if claimant had jumped off a curb or had been riding in a car all day. He also opined that sitting could cause increased pressure in the disc, suggesting that the Claimant's 1 ½ to 2 hours at his computer was the causative mechanism. Finally, Dr. Gennaro opined that the claimant's symptoms have abated and he did not sustain any residual impairment.

30. Claimant submitted evidence that his attorney worked 60 hours litigating this case and incurred $1,207.70 in necessary costs.

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*, 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).

2. 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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. 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).

4. This state has long recognized the existence of a class of injury known as gradual onset injuries. *Campbell v. Savelberg*, 139 Vt. 31 (1980). "Injury, to be accidental, need not be instantaneous." Id. Citing 1B A. Larsen, Workmen's Compensation Law § 39. 20 (now § 50.2).

5. This case is complicated by Claimant's initial denial that it was work-related when he completed a short-term disability form and by this failure to make a claim for several months. As a layperson, however, the Claimant cannot be expected to have knowledge of a gradual onset work-related injury.

6. This Claimant had no history of back pain. His job responsibilities in December of 1999 involved heavy and frequent lifting. Importantly, he reported work-related lifting activities when he visited the emergency department in December 1999 and mentioned nothing about any other type of activity such as shoveling or playing football.

7. There was no significant snowfall during that period. Claimant was engaged in no strenuous activity outside of work.

8. Dr. Johannson's opinion that work caused the disc herniation is well supported by the credible facts, including the claimant's testimony, contemporaneous medical records and his knowledge of the pathophysiology of disc herniations. The work connection is a more likely cause than the claimant's evening computer activities or degenerative disc disease, especially given his young age. As such, Claimant has met his burden of proving that work was the probable cause of his back injury.

9. Pursuant to 21 V.S.A.§ 678(a), a prevailing claimant is entitled to attorney fees as a matter of discretion and necessary costs as a matter of law. This has been a highly contested case, with numerous depositions and necessary attorney time. Claimant has prevailed because of the efforts of his attorney. The 60 hours are reasonable and the $1,207.70 in costs necessary. Therefore he is awarded fees in the amount of $5,400 (60 x $90) and interest on unpaid compensation computed from the date of this order.

ORDER:

THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, defendant is ORDERED to:

1. Adjust this claim;

2. Pay Claimant attorney fees of $5,400, costs totaling $1,207.70 and interest from the date of this order.

Dated at Montpelier, Vermont this 26th day of June 2002.

_____
R. Tasha Wallis
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.