

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

Anthony Odrechowski)	Opinion No. 05-05WC
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
Travelers Indemnity Co, Insurer for)	
Mayotte Tree Service)	For: Laura Kilmer Collins
)	Commissioner
)	
)	State File No. U-00295

Pretrial conference held on May 6, 2004
Hearing held in Montpelier on October 21, 2004
Record Closed on November 22, 2004

APPEARANCES:

Craig A. Jarvis , for the Claimant
Jennifer K. Moore, for the Defendant

ISSUE:

Did claimant’s shoulder and back injuries arise out of and in the course of his employment?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant’s 1:	Wage statement (Form 25)
Claimant’s 2:	Denial letter
Defendant’s A:	June 28 th letter from claimant
Defendant’s B:	Invoices
Defendant’s C:	Calendar

STIPULATIONS:

1. Claimant was an employee and Mayotte Tree Service his employer within the Workers' Compensation Act at the time of the alleged work injury.
2. Travelers Indemnity Co. was Mayotte Tree Service's workers' compensation insurance carrier at the time of the alleged work injury.
3. On June 30, 2003, claimant first sought medical treatment in connection with his alleged work injuries. He presented to an emergency room and complained of low back pain, right shoulder pain and headaches.

FINDINGS OF FACT:

1. Claimant started working for Mayotte Tree Service on February 12, 2003. Charles Mayotte owns the company; Glenn Boyd was the only other employee.
2. Claimant replaced Glenn Boyd as tree climber during Mr. Boyd's leave from work in 2003. As a climber, claimant earned \$13.00 per hour.
3. When Boyd returned, claimant became a groundsman at \$11.00 per hour. The wage reduction became effective during the week ending June 28, 2003.
4. In early June claimant had some back pain while working with Mr. Mayotte and Mr. Boyd. He mentioned it to Mayotte who suggested he take medication and get a massage.
5. On June 25, 2003, claimant borrowed some climbing gear from Boyd to do some tree work for a neighbor. That work never materialized.
6. Claimant played a gig with his band at Common Ground on Sunday June 29, 2003. He plays bass.
7. On June 30, 2003 claimant telephoned his employer to say he had to go to the hospital. He then went to the Brattleboro Memorial Hospital emergency room with a complaint documented as a one-month history of back pain and a two week history of shoulder pain. Claimant criticized the history reflected in the notes as inaccurate.
8. Claimant did not return to Mayotte after June 25, 2003

9. A week later, on July 7, 2003, claimant began treating with Dr. Kinley who suspected a rotator cuff injury to the right shoulder. Dr. Kinley referred claimant to a neurologist for headaches and to physical therapy for the back and shoulder.
10. Based on a history from the claimant, Dr. Kinley wrote a letter on August 28, 2003 relating claimant back problems to a June 4th work-related injury and shoulder problems to an incident on June 18th or 19th. After Dr. Kinley's first letter, claimant's wife asked him to revise it to reflect what she characterized as the correct dates involved.
11. Claimant has a history of a learning disability, a history he relied on when he could not remember dates, yet one that seemed irrelevant when he steadfastly held to other aspects of his history.
12. Claimant's attorney submitted an affidavit showing 50.8 hours of work pursuing this claim and \$717.89 in expenses incurred.

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 (1962). 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 from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. Although I accept claimant's testimony that he pulled something in his back in early June, other factors lead me to reject his claim that later back and shoulder problems are work related. On the day of the alleged injury of June 25th, he borrowed climbing gear from a coworker with the intent of doing work that weekend, work that never materialized. It is hard to believe that he would have taken that step had he been in as much pain as he now alleges. Nor can I accept his testimony that he lay in bed all that weekend, when he played a gig that Sunday. In fact, it was the day after the gig that he finally sought medical care, providing a history of a work injury with no mention of other activities that involved lifting. And, claimant later criticized the ER note as inaccurate, even while he maintains that a learning disability keeps him from accurately remembering dates.

4. In sum, claimant has failed to prove that his injuries are work related.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 14th day of January 2005.

Laura Kilmer Collins
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.