

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

Richard Larrabee	)	Opinion No. 13-05WC
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Heavensent Farm	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. T-01803

Pretrial conference on October 18, 2004  
Hearing held in Montpelier on December 28, 2004  
Record Closed on January 10, 2005

**APPEARANCES:**

David J. Williams, Esq., for the Claimant  
John. W. Valente, Esq., for the Defendant  
Steven Robinson, Esq., for Frances Woods

**ISSUE:**

Did the claimant Richard Larrabee sustain a work related back injury at Heavensent Farm?

**EXHIBITS:**

- Joint I: Medical Records
- Claimant 1: Packet of NE Builders Invoices
- Claimant 2: Form 2 Denial from Frances Woods/Heavensent Farm (11/07/02)
- Claimant 3: Denial from The Hartford dated 1/30/03
- Claimant 6: Gonyaw's record of conversations
- Claimant 7: Deposition of Victor Gennaro, D.O.

**CLAIM:**

Claimant alleges that in August of 2000 he hurt his back unloading paving stones from a dump truck at Heavensent Farm, that he fell to the ground and was paralyzed looking up at a large stone at the back of the truck hoping it would not fall on him. After a few minutes, he regained movement, got in the truck, finished unloading the stone and drove home.

## **FINDINGS OF FACT:**

1. Claimant was an employee and Heavensent Farm his employer within the Workers' Compensation Act in August of 2000. Frances Woods owns and runs the farm. Claimant was the manager.
2. During the summer of 2000 Ms. Woods was building a stone walkway at the farm using large flat paving stones.
3. The first medical record reflecting claimant's complaint of back pain is from November 15, 2000 when he reported to Henry Schmidek, M.D., neurosurgeon, that he had a history of back pain related to a tailgate incident "a number of years ago." He also reported a more recent onset of constant back pain that had begun three weeks before that visit.
4. Daniel Wyand, physical therapist, also noted a history of back pain with a recent exacerbation three weeks before the November 15, 2000 visit.
5. Neither Dr. Schmidek nor Mr. Wyand made any note of a work related injury or unloading stones.
6. On December 6, 2000, Dr. Schmidek surgically excised the herniated disc. By January 8, 2001, he noted that claimant was "essentially asymptomatic, off all medication and is back to a full and normal life."
7. Claimant had an uneventful clinical course until the spring of 2001 when he returned to Dr. Schmidek with back pain "after riding in the desert 4-5 hours a day for a period of days."
8. Claimant continued to work as manager at Heavensent Farm for another year. Then, sometime in late 2001 or early 2002, he quit that job.
9. In the late summer or fall of 2002, claimant first made a claim for benefits for an incident he alleges occurred in August 2000. His wife at the time recalls his complaining of a back pain after a day at work, although she does not recall when that was. The complaint did not prompt her to recommend that he file a workers' compensation claim, although she had experience in this area.
10. In August 2002 claimant was referred to Dr. Gennaro, an orthopedic surgeon, for persistent back pain.
11. Bills from Dr. Gennaro were mailed to Francis Woods at Heavensent Farm. She then met with her insurance agent and filed a workers' compensation claim with Farm Family who denied the claim on the grounds that the claimant was not an employee and the injury predated the policy.

12. In January of 2003, claimant filed a claim under a policy that was in effect in August 2000. That claim was denied on the basis that there was no causal relationship between the injury and claimant's employment.
13. Dr. Victor Gennaro has treated the claimant for back pain, recommending various studies and courses of treatment. Based on the claimant's history, Dr. Gennaro opined that claimant herniated the disc in his back when he was unloading paving stone in August of 2000.
14. Claimant has submitted documentation supporting his claim for reasonable attorney fees and 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 (1962). He 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. As with other unwitnessed cases, this one highlights the difficulty of the claimant sustaining his burden of proof when a written report of injury was not filed for a period of time. "In such instances, the trier of fact must weigh carefully the credibility of witnesses, the initial medical reports, and explore any inconsistencies and hidden or not-so-hidden motivations." *Russell v. Omega Electric*, Opinion No. 42-03WC (2003); *Fanger v. Village Inn* Opinion No. 5-95WC (1995).
4. Four questions assist in this analysis: First, are there medical records contemporaneous with the claimed injury and/or a credible history of continuing complaints? Second, does the claimant lack knowledge of the workers' compensation reporting process? Third, is the work performed consistent with the claimant's complaints? Fourth, is there persuasive medical evidence supporting causation? *Seguin v. Ethan Allen*, 28S-02 (2002).
5. In this case, there are no contemporaneous medical records to corroborate claimant's description of a dramatic work-related accident. His testimony cannot stand alone when he failed to seek help of any kind that day and arrived home with mild enough complaints that his wife did not recommend that he seek medical care. As manager of the farm, he undoubtedly had some familiarity with the reporting of work related events, and even if he did not, his wife had that knowledge and never suggested he file a report. Had the claimant been doing the work he described, he certainly could have ruptured a disc, as Dr. Gennaro described. However, with weak factual underpinnings for such an opinion, I cannot accept it.

6. Without corroboration, claimant has not convinced me that he sustained an injury in the course of his employment with Heavensent Farm.

**ORDER:**

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

Dated at Montpelier, Vermont this 4<sup>th</sup> day of February 2005.

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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.