Liberty v. Fletcher Allen Health Care (March 25, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

David Liberty	)	Opinion No. 21-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Fletcher Allen Health Care	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. H-9352; U-12507

Pretrial conference held on August 30, 2005
Hearing held on February 16, 2005
Record Closed on March 16, 2005

APPEARANCES:

Joseph Galanes, Esq., for the Claimant
Stephen D. Ellis, Esq., for FAHC (self insured in 2003, administered by Canon Cochran)
David R. McLean, Esq., for FAHC (insured by CNA in 1994)

ISSUE:

Did the claimant suffer a compensable injury arising out of and in the course of his employment with Fletcher Allen Health Care on November 10, 2003? If so, was it an aggravation or a recurrence?

EXHIBITS:

Claimant 1: Medical Records and Forms
Claimant 2: Employee charting note
Claimant 3: Medical bills

Defendant A: (CNA) Report from Dr. Johansson
Defendant B: (Canon Cochran): Fax Cover sheet
Defendant C: (Canon Cochran): Five page fax
Defendant D: (Canon Cochran): Fax from BC/BS
Defendant E: (Canon Cochran): Employee Report of Event

CLAIM:

Claimant alleges that he injured his low back while lifting a box of x-rays from a cart into his car for transport to the Fanny Allen Campus of FAHC on November 10, 2003 when he was working as a courier.

FINDINGS OF FACT:

1. Claimant has worked at Fletcher Allen Health Care (FAHC) for 19 years, first in the Housekeeping Department, then in the Recycling Department and more recently as a courier. The courier job was the least physically demanding of the three jobs, although it required lifting boxes and transporting them from one campus of the medical center to another.

2. Claimant has had back pain on and off since 1988.

3. In 1994 claimant injured his back at work. That injury was accepted by CNA, insurer at the time. Dr. Martin Krag treated the claimant afterwards.

4. Claimant's testimony that he told a supervisor about hurting his back lifting a box of x-rays on November 10, 2003 is uncorroborated. No incident was witnessed. No contemporaneous medical report describing such an event has been produced.

5. On November 19, 2003, Dr. Evans saw claimant for a return office visit and for a complaint of back pain that claimant described as keeping him from hunting. While there is no indication in that note of a work related lifting incident, it has been established claimant took a deer sometime in November 2003.

6. Claimant filled out an "Employee Report of Event Form" for a pre-existing injury aggravated by lifting a box of x-rays. The form is dated December 12, 2003, but was never received in the Employee Health Department at FAHC until January 28, 2004 when it was faxed from the Security Office where claimant worked.

7. Nancy Nathan, R.N. at the Employee Health Department then called claimant to discuss his written report. During that conversation, claimant denied that a specific event led to the more recent onset of back pain, but said that he had experienced that pain after a long day at work with a lot of lifting and twisting. He insisted that the pain was from the 1994 work related incident.

8. When CNA denied the claim for treatment of claimant's back pain in 2004, a new claim was filed with FAHC and adjusted by Cannon Cochran.

9. Claimant returned to Dr. Krag who diagnosed a lumbar disc herniation, treated claimant's back pain and ultimately preformed the surgery for which claimant seeks compensation.

10. At hearing claimant denied having seen Dr. Krag's records, yet those records indicate they were copied to the claimant.

Medical Opinions

11. Dr. Krag offered the opinion that claimant's lumbar disc herniation was the result of a November 2, 1994 work related incident. In his opinion, a more recent inciting event was not necessary to explain his symptoms.

12. In the summer of 2004, Dr. John Johansson performed an independent medical examination of the claimant for CNA, the insurer for FAHC in 1994. Claimant did not tell Dr. Johansson about a November 2003 work related incident or about any injury in 2003 or 2004.

13. Dr. Jonathan Fenton examined the claimant, took a history and opined that the worsening of his symptoms in 2003 was due to a November 10, 2003 lifting incident, which he described as worsening the underlying back condition. The opinion is based on claimant's description of lifting a box of x-rays, the type of event that could cause a bulging disc to become symptomatic. Hunting is also an activity that could lead to those symptoms.

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. Claimant has failed to sustain his burden of proof. While his description of a 2003 work-related incident may be true, he has not convinced me that such is the more probable hypothesis under *Burton v.* 112 Vt. 17. No one witnessed the described event. No one corroborated claimant's testimony that he described the event in November to a supervisor, or to any coworker. The first written report of an injury has the fax date of January 28, 2004, although claimant's handwritten date is in December. The medical record of November 2003 makes no mention of a work-related event. Claimant got a deer that year.

4. With factual underpinnings of expert opinions lacking, I cannot accept the medical opinion on causation.

5. Because this is not a compensable claim it is not necessary to address the aggravation-recurrence issue presented.

ORDER:

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

Dated at Montpelier, Vermont this 25th day of March 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.