

K. A. v. AstenJohnson, Inc.

(April 12, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

K. A.

Opinion No. 16-06WC

v.

By: Margaret A. Mangan
Hearing Officer

AstenJohnson, Inc.

For: Patricia A. McDonald
Commissioner

State File No. W-57380

Hearing held on Montpelier on October 19, October 20 and November 17, 2005
Record closed on February 10, 2006

APPEARANCES:

Barbara R. Blackman, Esq., for the Claimant
Jennifer K. Moore, Esq., for the Defendant

ISSUES:

1. Was Claimant K. A. injured in the course of his employment with AstenJohnson, entitling him to workers' compensation benefits?
2. If so, to what benefits is he entitled?

EXHIBITS:

Joint I: Medical Records

Claimant:

1. Medical Bills
2. AstenJohnson job description and task form
3. Short term disability form
4. Eric Shusda's statement
5. Letter from Kim Morse dated April 7, 2005
11. Time Record

Defendant:

A. Brian Thayer's statement

FINDINGS OF FACT:

1. At all times relevant to this action Claimant was an employee and AstenJohnson his employer within the meaning of the Workers' Compensation Act.
2. Claimant worked for AstenJohnson for 20 years. During that time, he was known to have had back problems from time to time.
3. Claimant is an avid runner, sometimes running 70 to 80 miles a week. He often ran to work before his shift.
4. Claimant typically worked a 6 hour shift (1:00 p.m. to 7:00 p.m.) on Wednesday, then 12-hour shifts on Thursday, Friday and Saturday. His regular days off were Sunday, Monday and Tuesday.
5. On December 20, 2004 Claimant and his family moved into a new home.
6. On January 1, 2005, Claimant ran a competitive 5K race.
7. Claimant's first day back to work after a holiday break was Wednesday, January 5, 2005. He also worked Thursday and Friday that week, but called in sick on Saturday, January 8th. He returned to work as scheduled on Wednesday, January 12, 2005.
8. When Tim Gendron, AstenJohnson's Lead and Training Coordinator, noticed that he looked uncomfortable, Claimant commented that his back was hurting him and that he had been moving. That conversation took place on a Wednesday, either January 5, 2005 or January 12, 2005.
9. On Thursday January 13, 2005, Claimant ran to work. When he arrived, he stretched and commented that his back felt stiff.
10. As part of his job, Claimant took dye packs from an oven and placed them on a cart. The movement involved bending and turning. At one point, he reached forward, opened the oven door, reached in and grabbed with both hands. As he removed the dye pack from the oven, his back gave out and he dropped the pack. For the first time, he felt hot pain down his legs.

11. Claimant at the time was working with Eric Shusda, who did not see the incident, but heard the dye fall. Shusda picked the dye from the floor and helped Claimant with the remainder of the job. Claimant did not report the incident to anyone other than Shusda that day and did not enter it in the safety log, as was company policy.
12. After the shift on January 13th, Shusda drove Claimant home, which was a common occurrence. When Claimant arrived home, he told his wife that his back hurt, but did not mention dropping the dye pack.
13. On Friday, January 14th, Claimant called in sick from work and went to see Dr. Haselton, his primary care physician.
14. Dr. Haselton's office note from the January 14th visit reflects a report that Claimant threw his back out three days earlier, that he had just moved into a new house and that he was doing a lot of lifting at work. At that time, he was walking with an antalgic gait and did the heel and toe walking with difficulty. Dr. Haselton noted that Claimant was training for the Boston Marathon.
15. Claimant called in sick on Saturday, January 15th. He then took vacation days on the 19th and 20th.
16. He then worked his scheduled 12-hour shifts on Friday and Saturday, January 21st and 22nd, although his back continued to ache. The following week he took vacation time for all four shifts because of his back pain.
17. On January 24th Claimant saw a Chiropractor, Dr. Hemmett, for back pain, although he did not mention a dye incident at work.
18. On February 2, 2005, Claimant tried to work, but it was obvious to those around him that he was in pain. The plant manager, David Farmer, pulled him off the floor for a meeting with Human Resources. He was told that others with medical problems had filed for short-term disability with good success. The cause of his back pain was not discussed.
19. A February 14, 2005 MRI revealed a herniated disc.
20. Claimant filled out a short-term disability form, but on it answered yes to the question whether the injury occurred at work. When, in early February, the Human Resource Manager saw that answer, she confronted him with it, as it was the first indication she had that a work related incident had happened. He confirmed that in fact he had hurt himself on January 13th when he dropped a dye pack; he suggested she speak with Eric Shusda if she had doubts. She then called the carrier and filed a claim.
21. Claimant qualified for the Boston Marathon with a time of 3 hours 15 minutes. His actual time for the race was 5 hours 30 minutes, suggesting that such a competitive runner walked part of the race.

22. Dr. Haselton opined that the turning and lifting incident at work caused Claimant's herniated disc, although she cannot identify a precise date for the injury.
23. Dr. Warren Rinehart, an orthopedist to whom Dr. Haselton had referred Claimant also opined on causation, specifically that work aggravated a pre-existing degenerative disc.
24. Dr. Mark Bucksbaum, who performed an independent medical examination and research at the request of the disability carrier, opined that Claimant's herniated disc was caused by the work incident of lifting and turning. This was based on the Claimant's asymptomatic state before January 13th, that Claimant had run to work that day, and that his time in the Boston Marathon indicated that Claimant had walked parts of the race.
25. In July 2005, Dr. John Johansson performed an examination for the defense in this case. Because Dr. Johansson did not find that Claimant's medical records corroborated his history, he opined that the dye incident of January 13th did not cause Claimant's herniated disc. He explained that since it often takes 48 to 72 hours for pain associated with a disc to manifest, it is more likely that Claimant herniated the disc several days before he saw Dr. Haselton, consistent with her office note, and not at work as he later alleged.

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 all medical expert opinions are credible, this claim fails because several factors defeat the basis for the opinions supporting the Claimant. First, Claimant missed a day of work on January 8th, for unexplained reasons. Second, Claimant told coworkers and his doctor that his back was hurting and he had just moved, strongly suggesting a link. Although he makes much of the fact that his actual move occurred in December, work involving a move often extends beyond the single moving date. Third, Claimant had complaints of back “stiffness” before his shift ever began on January 13th. Fourth, Dr. Haselton’s office note refers to an onset of back pain 3 days earlier, before he dropped the dye. Fifth, the dye incident was not witnessed and Claimant did not report the incident on the day it happened. Sixth, because the pain from a herniation is often delayed, Claimant could have run even after he herniated the disc.
4. For these reasons, Claimant has failed to sustain his burden of proving that an incident at work caused his herniated disk.

ORDER:

Accordingly, this claim is DENIED.

Dated at Montpelier, Vermont this ____ day of April 2006

Patricia A. McDonald
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.