

J. L. v. NSK Steering

(May 18, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

J. L.

Opinion No. 24-06WC

v.

By: Margaret A. Mangan
Hearing Officer

NSK Steering

For: Patricia A. McDonald
Commissioner

State File No. W-02683

Hearing held in Montpelier on February 2, 2006
Record closed on March 9, 2006

APPEARANCES:

Jonathan M. Cohen, Esq., for the Claimant
Christopher McVeigh, Esq., for the Defendant

ISSUES:

1. Whether Claimant suffered a work-related injury in the course of his employment at NSK Steering.
2. If he suffered a work related injury, whether Claimant materially misrepresented his physical condition justifying forfeiture of Workers' Compensation benefits.
3. If Claimant is entitled to benefits, the extent of temporary total disability benefits due.

EXHIBITS:

Joint I: Medical Records
Joint II: Short Term Disability Records

Claimant 1: Claimant's 2004 calendar
Claimant 2: Letter from Attorney McVeigh March 15, 2005

FINDINGS OF FACT:

1. Claimant, who is 32 years old, worked for Nastech a/k/a NSK Steering (NSK) from June 1993 to February 2005.
2. The last time he treated for back pain, prior to events at issue here, was in May 2003.
3. Until the end of July 2004, Claimant's work at NSK was sedentary.

4. After a long weekend off, Claimant returned to work on July 30, 2004 to learn his job had been changed to the Ford Line, more physically demanding than his previous work. He was on his feet more and needed to bend and twist at a machine. Occasionally he had to lift as much as 30 pounds. Claimant was unhappy with the transfer.
5. Claimant hurt his back in early August 2004. On a short-term disability form he signed, he described the cause as “slipped on a rock.” He received disability benefits from August 2004 until February 2005. Claimant now alleges he lied on that form because he needed to receive cash benefits in a hurry. He testified that he had hurt his back on the job and has offered to repay the short-term disability carrier.
6. On August 17, 2004, Claimant saw Dr. Brian Timura, a chiropractic physician, who noted that Claimant presented with “low back pain since 8/5/04 without known injury at work or home. His symptoms came on while at work doing his usual job tasks (he has just started the new line).” Because of the severity of Claimant’s symptoms, Dr. Timura referred him to an orthopedic surgeon.
7. His doctors took claimant out of work because of back pain in August 2004, although Dr. Robbins suggested he maintain some activity.
8. Claimant continued to operate his private water pumping business in the summer of 2004. That work involves pulling a heavy hose to deliver water to area pools. He also continued his work as a Deputy Sheriff at the Bennington County Sheriff’s Department. He was also building his own home during this time.
9. Claimant brush hogged acres of land with his tractor on August 19 and August 20, 2004.
10. An August 19, 2004 MRI confirmed herniated discs at L4-5 and L5-S1.
11. On August 27, 2004 Claimant sought orthopedic care from Taconic Orthopedics. He reported back and leg pain and reported that he was receiving compensation. Dr. Block noted that Claimant was to remain out of work. The doctor also noted that Claimant “re-injured” his back at work on August 2, 3 and 4th after starting work on a new line that required bending a twisting.
12. Claimant had an epidural block on September 22, 2004.
13. The employer filed a First Report of Injury with this Department on October 1, 2004 for an August 4, 2004 work related herniated disc from doing normal job duties. A denial of the claim was filed within three weeks based on the lack of medical support on causation.

Medical Opinions

14. Dr. Brian Timura, a rehabilitation physician who evaluated the Claimant on August 17, 2004, opined, based on his observation of a machine operator at NSK, that Claimant's work did not cause his herniated disc. Dr. Timura's opinion is problematic, however, because Claimant's work differed from what the doctor observed with another worker.
15. Dr. James Storey, who performed an evaluation for the defendant in this case, opined that slipping on a rock may have been the "inciting event [for a herniated disc], although the lifting and twisting certainly could have been aggravating factors."
16. Dr. Block, orthopedic surgeon, based on the history from the Claimant that his pain began at work, opined that work related activities caused Claimant's herniated disc.
17. None of the medical reports document the labor Claimant did outside of work.

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 from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. Although Dr. Block's opinion in support of this claim is well reasoned and based on orthopedic expertise and years of experience, it alone cannot support the claim because it is based on the inherently unreliable testimony of the Claimant, who was willing to write "slipped on a rock" on a disability application, and then disavow the statement. Although he may well have convinced himself that his work at NSK caused the disc herniation, he had too many physically active endeavors that summer: building a house; pumping water; and brush hogging, to sustain his burden of proving that work caused the herniation. Even accepting his description of the work, the other activities were more strenuous. The record as a whole suggests only a possibility that work was a factor, an insufficient basis for an award.

ORDER:

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

Dated at Montpelier, Vermont this 18th day of May 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.