

Richard Dunlevy v. Howard Printing (July 2, 2009)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Richard Dunlevy

Opinion No. 24-09WC

v.

By: Jane Dimotsis, Esq.  
Hearing Officer

Howard Printing, Inc.

For: Patricia Moulton Powden  
Commissioner

State File No. W-55730

**OPINION AND ORDER**

Hearing held in Montpelier on May 2, 2008

Record closed on June 20, 2008

**APPEARANCES:**

Thomas Bixby, Esq., for Claimant

John Valente, Esq., for Defendant

**ISSUE PRESENTED:**

Is Claimant's low back pain causally related to his December 15, 2004 work injury?

**EXHIBITS:**

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Deposition of Paul Azimov, D.O., taken on March 12, 2008

**CLAIM:**

Workers' compensation benefits in amounts to be proven

Costs and attorney's fees pursuant to 21 V.S.A. §678

**FINDINGS OF FACT:**

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.

3. Claimant worked as a printing press operator for Defendant from August 2004 until the date of injury. His job was fast-paced and required him to move constantly from the front to the back of a large printing press, bending, kneeling and lifting stacks of paper repetitively.
4. On December 15, 2004 Claimant leaned over to pick up a two-foot-high stack of paper. As he did so, he over-extended and twisted. Claimant testified that he immediately felt extreme pain in his right groin and lower back. He took a break and then finished his work for the day.
5. Claimant was diagnosed with a right inguinal hernia and underwent surgical repair in January 2005. Defendant accepted this injury as compensable and paid workers' compensation benefits accordingly.
6. Initially Claimant appeared to be recovering well from the January 2005 hernia surgery. As time went on, however, he continued to experience right groin pain and testicular discomfort. Possible diagnoses included epididymitis or minor nerve entrapment, both complications related to the hernia repair surgery.
7. As treatment for his ongoing symptoms, from June 2005 until May 2006 Claimant underwent a series of nerve blocks. These provided only temporary pain relief. Ultimately, in December 2007 he underwent additional surgery, following which most of his right flank, groin and testicular pain abated.
8. Claimant testified that in addition to experiencing right groin pain at the time of the December 2004 lifting incident at work, he also felt the immediate onset of low back pain. Claimant described this pain as radiating around the right side of his body and into his right inner thigh, which felt as if it was being stretched or pulled. Claimant has no prior history of low back pain.
9. Despite Claimant's assertion that he began experiencing pain in his low back and right thigh immediately after the December 2004 work injury, the medical records do not document any such symptoms until almost a year and a half later. Of particular note, a pain drawing that Claimant himself completed in June 2005 reflects only groin pain, no low back, right flank or right thigh pain.

10. In May 2006 Claimant presented to the Community Health Center of Franklin County (Ma) seeking a referral for further diagnostic studies relating to his persistent right groin pain. The medical note states:

Right groin pain. Since right hernia repair 1/05. Described a “muscle pull” type pain in right groin, occasionally to right flank and down leg (to medial thigh and then posterior thigh). Normal gait. Patient notes pain with shoveling and lifting.

Claimant was noted to have a positive straight leg raise on the right, an indication of sciatic nerve entrapment. Subsequent MRI studies in October 2006 and April 2007 confirmed degenerative disc disease and a herniated disc at L5-S1 abutting on the S1 nerve root.

11. Claimant acknowledged the shoveling activity referred to in the above medical note, but testified that it only briefly aggravated the low back pain he had been experiencing since the December 2004 work injury. Claimant also acknowledged another non-work-related aggravation as well, this one occurring in November 2007. Claimant testified that after that incident, which occurred while moving an automobile jack across a concrete floor, he was bed-ridden with low back pain for two weeks, following which his symptoms subsided back to their baseline level.
12. Dr. Azimov, an osteopath, has treated Claimant’s low back symptoms since April 2007. Based on Claimant’s report – particularly that he had no prior history of low back pain until the December 2004 lifting incident at work and has suffered from symptoms ever since – Dr. Azimov concluded that Claimant’s L5-S1 disc herniation was causally related to that incident. Dr. Azimov admitted that he did not know anything about the mechanism of Claimant’s work injury, and also that Claimant had presented the incident to him as having caused a low back injury, not a hernia.
13. At Defendant’s request, Dr. Ordia, a neurosurgeon, reviewed Claimant’s medical records and rendered an opinion as to the causal relationship, if any, between Claimant’s work injury, his low back and right thigh pain and his L5-S1 disc herniation. As Dr. Azimov had, Dr. Ordia admitted that he did not know the specifics of the December 2004 lifting incident. He also acknowledged that he had not evaluated Claimant personally, but testified that it was not necessary for him to do so given that his role was solely to determine causation, not to treat.
14. In Dr. Ordia’s opinion, had the work injury caused the disc herniation Claimant would have experienced low back and right leg pain long before those symptoms were first documented in May 2006. According to Dr. Ordia, furthermore, the S1 nerve root shown by MRI to be involved in Claimant’s disc herniation typically causes symptoms in the right foot, not the flank or thigh. For those reasons, Dr. Ordia concluded that neither Claimant’s low back and thigh pain nor his disc herniation were causally related to his December 2004 work injury.

## CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).
3. Neither of the expert opinions here is particularly strong. Dr. Azimov did not begin treating Claimant for his low back pain until April 2007, more than two years after his work injury. Dr. Ordia's opinion was based on a medical records review only and did not include any clinical evaluation or direct description from Claimant as to when his symptoms occurred and how they progressed. Neither knew much, if anything, about the specifics of the December 2004 lifting incident. Under these circumstances I am somewhat skeptical of either doctor's ability to give an opinion as to causation to the required degree of medical certainty.
4. I also am skeptical of Claimant's claim that he began experiencing low back and right thigh pain immediately after the December 2004 lifting incident, given that the medical records make no mention whatsoever of any such symptoms until almost a year and a half later. Even if his treating physicians had failed to note his complaints, it would seem that Claimant himself would have done so when asked to mark them on a pain drawing in June 2005. He did not.
5. By its reliance on Claimant's assertion that his symptoms began with the lifting injury despite the lack of any corresponding documentation in contemporaneous medical records, Dr. Azimov's opinion lacks sufficient credibility to justify a finding of causation. I conclude, therefore, that Claimant has failed to sustain his burden of proving that his work injury caused his low back pain and disc herniation.

**ORDER:**

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits is hereby **DENIED**.

**DATED** at Montpelier, Vermont this 2<sup>nd</sup> day of July 2009.

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Patricia Moulton Powden  
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.