

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

)	State File No. R-10889
)	
John Rondini)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
)	Commissioner
Ran-Mar Corp.)	
)	Opinion No. 27-02WC

Hearing held in Montpelier, Vermont on January 11, 2002 and January 29, 2002.
Record closed on February 19, 2002.

APPEARANCES:

Joseph C. Galanes, Esq. for the claimant
John W. Valente, Esq. for the defendant

ISSUE:

Did claimant's work injury of November 30, 2000 cause his current back condition?

DEPARTMENT FORMS:

Form 1: First Report of Injury, dated December 1, 2000.
Form 6: Notice and Application for Hearing, filed October 5, 2001.
Form 21: Agreement for Temporary Total Disability Compensation, filed December 21, 2000.
Form 25: Wage Statement, filed December 21, 2000

EXHIBITS:

Joint Exhibit I:	Claimant's medical records
Plaintiff's Exhibit 1:	Deposition of William E. Minsinger, M.D.
Plaintiff's Exhibit 2:	Diagram of accident location
Defendant's Exhibit A:	12/08/00 note of Pierre J. Angiers, M.D.
Defendant's Exhibit B:	12/13/00 note of Pierre J. Angiers, M.D.

FINDINGS OF FACT:

1. Notice is taken of all forms filed with the Department and the exhibits are admitted into evidence.
2. Claimant John Rondini began working for defendant Ran-Mar on May 3, 2000. At all times relevant to this action, claimant was defendant's "employee" and defendant was claimant's "employer" as those terms are defined in Vermont's Workers' Compensation Act.
3. At all times relevant to this action, Cincinnati Insurance Company was defendant's workers' compensation carrier.
4. On November 30, 2000, claimant and two co-workers were sent to a worksite in Marshfield, Vermont to disassemble a mobile home. They first removed the roof and the walls using an excavator; the remaining structure included two steel I-beams approximately 60 feet in length, and several metal crossbeams.
5. The crew foreman, who was operating the excavator, began to break up the frame by striking it with the bucket of the excavator. At this point, claimant was on the opposite side of the structure from the excavator, picking up debris from the ground.
6. Claimant observed the trailer frame lift into the air and travel towards him. He spun in a counter-clockwise direction and ran.
7. The trailer frame struck the claimant just below the right shoulder, knocking him to the ground. Claimant later reported that the frame additionally made contact down the right side of his back, to a point just above his right buttock. Claimant was not pinned and did not lose consciousness.
8. Claimant immediately experienced pain in his upper back and felt that his back was stiffening up.
9. A co-worker drove claimant from the worksite to Berlin, where his car was parked. Claimant then drove himself to Gifford Medical Center emergency room in Randolph, a trip of approximately 30 to 35 minutes.
10. At the emergency room, claimant complained primarily of upper and mid back pain. He indicated that his soreness was increasing. He was diagnosed with a chest wall contusion and he was advised that his activity need not be restricted by his pain. Claimant remained out of work, although it is unclear whether this was a result of the ER doctor's recommendation or claimant's own decision.
11. In December 2000 defendant insurance company accepted, and in January 2001 the Department approved, a claim for temporary total disability compensation.

12. Defendant insurance company arranged for claimant to see Dr. Angiers, an osteopathic physician, on December 8, 2000. Claimant indicated upper back pain and lower back pain particularly on the right side. Dr. Angiers obtained x-rays of claimant's upper back, and claimant questioned why his lower back was not x-rayed. Dr. Angiers indicated that, because the blow had occurred to the upper back, he did not anticipate a fracture in the lower back and the x-ray results would not likely change the course of treatment. Dr. Angiers diagnosed thoracic contusion, muscle spasm, thoracic, rib and lumbar somatic dysfunction and pain magnification. He recommended a conservative treatment including osteopathic manipulation, hot packs and medication. At this visit, Dr. Angiers anticipated he would release claimant to light duty work on December 14, 2000.
13. Claimant next saw Dr. Angiers on December 13, 2000. At that time, claimant indicated soreness and stiffness in his upper back and localized pain in his right lower back. Dr. Angiers assessed that the lower back pain likely represented symptom magnification and possible work avoidance behavior. He released claimant to light duty work as of December 14, 2000 with a 25 pound lifting restriction and a forward bending restriction. At this visit, Dr. Angiers anticipated claimant would reach medical end result and be released to full duty the next week.
14. Claimant returned to work on December 14, 2000.
15. Claimant failed to keep or reschedule his December 22, 2000 appointment with Dr. Angiers. Dr. Angiers therefore assumed claimant was completely better, placed him at medical end result and removed all work restrictions as of that date. Claimant missed the appointment because he was ill, and he did not reschedule because Dr. Angiers had accused him of misrepresenting his lower back pain.
16. Claimant continued to work until he was laid off in mid-January, 2001. His activities included shoveling gravel and moving construction forms. Throughout this period, claimant continued to experience back pain, but he did not seek any medical treatment.
17. While he was laid off in the winter of 2001, claimant shoveled snow from his porch, operated a snow blower and occasionally carried in firewood. His back pain improved somewhat but was continuing and unpredictable, with some days better than others.
18. Claimant returned to work in late March or early April of 2001 and was promoted to crew leader. His work involved operating heavy equipment in addition to the same physical labor he had previously performed. His back pain increased significantly over the summer. A co-worker observed claimant display symptoms of back pain later rather than earlier in the summer.
19. In July 2001, claimant contacted defendant insurance company and sought medical attention. The insurance company refused medical coverage. Claimant then made an appointment with Dr. Minsinger, an orthopedist, at Dr. Minsinger's first available opportunity, which was in September 2001. Claimant continued to work while awaiting this appointment.

20. Dr. Minsinger first saw claimant on September 13, 2001 and noted that claimant reported persistent back pain since the time of the accident. Some lower back soreness was noted during Dr. Minsinger's examination of claimant. Dr. Minsinger recommended muscle relaxing and anti-inflammatory medication, physical therapy and an MRI.
21. Claimant underwent an MRI of his upper and lower back at Dartmouth Hitchcock Medical Center on September 18, 2001. The MRI revealed an L4-5 disc bulge and an L5-S1 disc herniation.
22. On September 25, Dr. Minsinger reviewed the MRI and opined that he would "have to presume that the injury [claimant] describes did indeed cause the bulging disc in his lower lumbar spine even though he was hit higher. Certainly, that could have created a twisting mechanism in his lower back." Dr. Minsinger referred claimant to evaluation for an epidural injection.
23. Claimant's employment at Ran-Mar ended in October 2001.
24. Dr. Backus, an occupational and environmental medicine specialist, performed an IME on November 27, 2001, including an examination of claimant and review of medical records since November 30, 2000. Dr. Backus concluded that, "[b]ased upon the available information, to a reasonable degree of medical certainty, there is no causal relationship between [claimant's] current complaints and the reported injury." This conclusion was based in part on Dr. Angiers's notes regarding symptom magnification, an understanding that claimant's pain had fully resolved by late December 2000 and on an assumption that the beam that struck claimant weighed in the vicinity of twenty to one hundred pounds. Dr. Backus opined that claimant's low back pain "most likely was a new aggravation from shoveling, if there is any relation to an ongoing injury."
25. Dr. Minsinger referred claimant to the Dartmouth-Hitchcock Spine Center where he saw Lois Donelson, PT and Dr. Murray on four occasions during November and December 2001. Physical therapy, including exercises and traction, produced minimal improvement. Dr. Murray recommended a trial epidural steroid injection.
26. Claimant received an epidural injection at Dartmouth-Hitchcock Medical Center on December 28, 2001, which eased his pain somewhat. A second injection was scheduled for January 28, 2002.
27. Defendant has never sought to terminate medical benefits by filing a Form 27.
28. Claimant submitted evidence that his attorneys expended 56.90 hours in pursuit of this claim and incurred \$ 1,285.21 in necessary expenses.

CONCLUSIONS OF LAW:

1. Claimant asserts that his current back pain is a continuation of his November 30, 2000 injury and seeks medical benefits. Defendant argues that the current condition is a result of symptom magnification or of claimant's at-home activities such as snow shoveling, during his layoff early in 2001, and denies liability.
2. 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. 137 (1984).
3. Two contending standards bear on this case:
 - a. Once a claimant establishes his entitlement to compensation, the burden shifts to the employer that would cease or deny compensation. *Kobel v. C and S Wholesale Grocers*, Opinion No. 28-99WC (Aug. 2, 1999), *Merrill v. University of Vermont*, 133 Vt. 101 (1974). Since the parties entered into a Form 21 agreement in which the defendant accepted responsibility for the thoracic contusion claimant suffered on November 30, 2000, this standard would place on the defendant the burden of demonstrating that claimant's current condition is not causally related to that injury.
 - b. Where a claimant has been stable in regard to his symptoms for a long period of time, he has the burden of producing medical evidence that confirms the connections with the original injury and establishes the lack of a causal connection with any intervening event." *Weeks v. New England Telephone*, Opinion No. 62-95WC (Sept. 18, 1985). This standard serves to return the burden of proof to the claimant even when, as here, compensability was once established and benefits were paid.
4. As explained below, claimant prevails regardless of where the burden is placed.
5. Where the causal connection between an accident and an injury is obscure and the layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.* 137 Vt. 393 (1979). 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).
6. This case hinges on the contradictory opinions of the medical experts. Dr. Minsinger concludes that the claimant sustained an injury to his lower back as a result of the November 30, 2000 work incident. Dr. Backus, with reference to Dr. Angiers's notes, concludes that claimant sustained the lower back injury due to work performed at home, or that claimant's current condition reflects symptom magnification behavior.

7. When evaluating and choosing between conflicting medical opinions, this Department has traditionally looked at several factors: 1) whether the expert has a treating physician relationship with the claimant; 2) the professional education and experience of the expert; 3) the evaluation performed, including whether the expert had all medical records in making the assessment; and 4) the objective bases underlying the opinion. *Yee v. International Business Machines*, Opinion No. 38-00WC (Nov. 9, 2000).
8. All of the physicians have significant professional training and experience; however, Dr. Minsinger is the only orthopedist among them. Dr. Minsinger had reviewed all of claimant's medical records regarding this incident, and Dr. Backus had reviewed the majority of them. None of the physicians had examined claimant prior to the November 30, 2000 accident, and none has had a long-term patient-provider relationship with claimant. Analysis of the qualifications of the experts, to the extent it weighs in any direction, favors Dr. Minsinger.
9. Dr. Angiers evaluated claimant's low back pain complaint as inconsistent with the reported injury and possibly reflecting work avoidance behavior. His notes reflect that he understood claimant to have been struck by a "small" beam. Claimant returned to work when released to light duty by Dr. Angiers, and continued to work for Ran-Mar other than during instances of layoff. He was promoted in the spring following the accident and a co-worker testified to his hard work while employed, even while in apparent pain.
10. Dr. Minsinger testified that the disk herniation revealed by the November 2001 MRI, although "not a classic mechanism," was a not unprecedented result of a blow to the shoulder such as claimant received. He additionally testified that the disc damage revealed by the MRI could produce nerve irritation and cause the pain claimant complained of. Claimant's positive response to the epidural injection further substantiated the connection between the disc damage and the presence of pain.
11. Based on the MRI evidence, the onset of claimant's pain coinciding with the initial injury, the consistency of pain symptoms since the injury, and the mechanism of the injury being within the realm of his medical experience, Dr. Minsinger concluded that to a reasonable degree of medical certainty a causal connection exists between the work injury and claimant's current condition.
12. Dr. Backus indicated that he relied on two assumptions, among others, in reaching his conclusion that there was not a causal connection between the initial injury and claimant's current condition: He estimated that the I-beam that struck claimant weighed in the range of twenty to one-hundred pounds; and he understood from Dr. Angiers's records that claimant's lower back pain had fully resolved by late December, 2000. However, Dr. Backus indicated that neither knowing the weight of the I-beam was in the range of 500 pounds nor that claimant's pain had not resolved prior to his layoff would change his opinion.

13. Alternately, Dr. Backus suggests that shoveling caused an “aggravation” of claimant’s symptoms. He noted that shoveling is an activity that often causes low back pain. In associating claimant’s shoveling solely with his period of layoff in the winter of 2001, Dr. Backus was unaware that claimant shoveled gravel as part of his job activities in December, 2000 and after returning from layoff in the spring of 2001. To the extent that shoveling may have aggravated claimant’s back pain, it is more likely that the shoveling in question occurred as part of claimant’s work.
14. Dr. Backus relies in part on the significant elapse of time when claimant was not under medical treatment for his pain. This consideration is mitigated somewhat by the defendant insurance company’s apparent refusal to approve requested medical treatment in July of 2001.
15. That claimant’s low back injury resulted from the November 30, 2000 incident is the more persuasive conclusion. There is no evidence that claimant complained of pain or experienced symptoms prior to that date. Claimant was struck in right shoulder area by an airborne metal trailer frame some sixty feet in length. As Dr. Minsinger noted, such an event could well have created a “twisting mechanism” in claimant’s lower back. Although claimant did not specifically complain of low back pain when seen at the Gifford emergency room shortly after the accident, he did indicate at that time that his back soreness and stiffness were on the increase. When first seen by Dr. Angiers eight days later, claimant reported that he had developed low back pain and testified that the pain had continued since, although with variation in intensity. There is no evidence to indicate that claimant’s low back pain completely abated at any time since the first visit with Dr. Angiers.
16. The evidence sufficiently establishes a causal connection between claimant’s current condition and the November 30, 2000 work accident. Accordingly, the claimant’s current condition is compensable.
17. Having prevailed in this case, the claimant is entitled to an award of costs as a matter of law and attorney’s fees as a matter of discretion. 21 V.S.A. § 678 (a). Given the dispute in this action, 56.90 hours are reasonable for the legal work involved, entitling claimant to \$5,121.00 (\$90.00 x 56.90), see WC Rule 10, and the costs of \$1, 285.21 were necessary in the successful pursuit of this claim.

ORDER:

THEREFORE, based on the forgoing Findings of Fact and Conclusions of Law, Cincinnati Insurance is ORDERED to:

1. Adjust this claim.
2. Pay the claimant attorney fees of \$5,121.00 and costs in the amount of \$1,285.21.

Dated at Montpelier, Vermont this 12th day of June, 2002

R. Tasha Wallis
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.