

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

Robert Newton)	Opinion No. 20-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
MEMIC Indemnity Co.,)	
Insurer for Fab Tech, Inc.)	For: Laura Kilmer Collins
)	Commissioner
)	
)	State File No. W-01500

Pretrial conference held on February 7, 2005
Expedited hearing held in Burlington on March 9, 2005
Record closed on March 16, 2005

APPEARANCES:

Scott Skinner, Esq., for the Claimant
Jeffrey W. Spencer, Esq., for the Defendant

ISSUE:

Did claimant suffer a work-related injury at Fab Tech on June 26, 2004?

EXHIBITS:

Joint I: Medical Records
Joint II: Out of Work Notes from Community Health Center

Defendant's Exhibit A: Diagram

CLAIM:

That claimant injured his back lifting a heavy pipe on June 26, 2004 and has been disabled and in need of medical treatment since.

FINDINGS OF FACT:

1. On June 26, 2004 claimant was an employee and Fab Tech his employer within the meaning of the Workers' Compensation Act.

2. Claimant has held at least six laborer jobs since he graduated from high school and had a history of back problems before the events at issue here. He is 40 years old.
3. In April 2004 claimant began working at Fab Tech. He had no active back problems at that time, although he had been treating with narcotics for back pain into October of 2003.
4. Claimant's job at Fab Tech was a physically stressful one leading him to feel "beat" at the end of a workday. He worked in the "wash room" on second shift, putting in 40 to 54 hours in a week, washing pipes of various sizes, from a few inches to several feet in length and diameter. Some pipes weighed a hundred pounds. He power washed the pipes and cleaned them manually with a cloth, bending over and moving each pipe as he worked.
5. Saturday June 26, 2004 was an overtime day when claimant gladly took up his supervisor's offer to leave early and went to a bar with a co-worker. Although he had been instructed to report work-related injuries, claimant did not report that he had been injured that day, although he said he felt beat.
6. Claimant's testimony that he stayed at home, completely inactive, on Sunday, June 27th, is uncorroborated.
7. On Monday, June 28th, claimant went to the Community Health Center with a complaint of low back strain. He was given medication and an out of work note. He called Fab Tech and left a message with his supervisor stating that he would not be in to work that day because of back pain. He did not work on June 29th or 30th either.
8. Then on Thursday July 1st, claimant returned to work where he had help with lifting. Later that day he left work after a conversation with his supervisor. Since then, he has not returned to Fab Tech or any other employer.
9. On July 2nd, claimant returned to the Community Health Center where he was taken out of work again, at his request.
10. Since July 2004 claimant has continued to treat for back pain. When physical therapy was recommended, he did not attend at first because he had no way to get to the appointments.
11. Eventually claimant was able to purchase bus passes and began physical therapy in February 2005. After a few treatments, he reports improvement.
12. Claimant lives under extreme financial straits.

13. He submitted a request for attorney fees on a contingency basis.

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. In unwitnessed and late reported cases, this Department considers four factors in evaluating the validity of a claim: 1) Are there medical records contemporaneous with the claimed injury and/or a credible history of continuing complaints? 2) Does the claimant lack knowledge of the workers' compensation reporting process? 3) Is the work performed consistent with the claimant's complaints? and 4) Is there persuasive medical evidence supporting causation? See *Seguin v. Ethan Allen* Opinion No. 28-02WC (2002).
4. Only the third criterion supports this claimant's allegations---the work he performed certainly could have caused a back injury. However, no one witnessed an event. Medical records supporting the claim begin two days after the alleged incident, with an intervening non-workday. Claimant was well aware of how to report a work-related injury, yet failed to do so the day he alleges it occurred. Repetitive references in medical records about a work-related injury based on a history with the gaps mentioned above suggest a possibility of a work connection, but do not prove causation with the requisite probability. See *Burton*, 112 Vt. 17.

ORDER:

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

Dated at Montpelier, Vermont this ____ day of March 2005.

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.