

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Nina Morel

Opinion No. 04-08WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

Big Lots

For: Patricia Moulton Powden
Commissioner

State File No. Y-00459

OPINION AND ORDER

Hearing held in Montpelier on June 27, 2007
Record closed on August 20, 2007

**Mailed
State of Vermont**

APPEARANCES:

FEB - 5 2008

Nina Morel, *Pro Se*
J. Christopher Callahan, Esq. for Defendant

**Department of Labor
Workers' Compensation**

ISSUES:

1. Did Claimant suffer a compensable low back injury on or about July 22, 2006?
2. If so, was it a recurrence, flare-up or aggravation of a pre-existing condition?
3. If so, when did Claimant reach maximum medical improvement?

EXHIBITS:

Defendant's Exhibit of Claimant's Medical Records

Claimant's Exhibits including;
Progress Notes of Dr. David Roy, dated 7/26/06.
Medical Records from Dr. Margaret Higgins regarding visit on 8/9/07.
Physician Notes from Dr. Kimberly Bruno dated 11/03/06.
Copley Pain Medical Evaluation from Dr. Vitaletti-Coughlin dated 3/06/07.

CLAIM:

1. Temporary Total Disability from July 22, 2006 to present.
2. Medical Benefits for treatment of lower back injury.

FINDINGS OF FACT:

1. Judicial notice is taken of all forms in the Department's file in this matter.
2. Claimant was an employee of Big Lots under the Workers' Compensation Act in July of 2006. Big Lots was an employer under the Workers' Compensation Act during the time frame of the alleged injury. Claimant is 47 years old and has a 10th grade education.
3. On or about July 22, 2006, Claimant worked as a cashier at Big Lots store. While working, she lifted several large bags and when twisting she felt a "pop" or twinge in her back and suffered sudden significant back pain. She did, however, continue to work until the end of her shift that day. However, the next day the pain was much worse and she had trouble moving and walking.
4. On July 24, 2006, Claimant sought medical treatment from the Morrisville Family Health Center where she saw Cheryl Holton, F.N.P. and reported a "back pain flare-up". On July 26, 2006, Claimant saw Dr. David Roy and told him the severe extent of her lower back pain. She denied previous back problems to Dr. Roy. Neither of the medical reports from these visits mentions a work related injury but do state that the Claimant felt an onset of pain at the checkout counter while at work on the 22nd of July. Neither initial report stated anything specific related to causation or that the Claimant had a work related injury.
5. The Claimant filed her own notice of injury. She stated on that form that she had been experiencing back pain using ibuprofen and lidoderm patches for her pain while working at Big Lots but after the twisting incident at work she could no longer relieve the pain by these methods. Claimant testified that she had been experiencing back pain for several months prior to the work incident at issue.
6. This Claim for benefits was originally denied by the insurance carrier on October 16, 2006. However, the Department's Specialist found the Form 2 denial not supported and benefits were instated. In January of 2007, a Form 27 was filed by the carrier to stop benefits based on Dr. Backus's Independent Medical Examination determining there was no causal relationship between the alleged injury and Claimant's work and a finding that if there was such an injury, Claimant had reached medical end result. The Specialist rejected the Form 27 because she stated it was not specific enough. Therefore, benefits were paid.
7. Claimant was fired shortly after her alleged injury due to what Big Lots claimed was lack of notice that Claimant would not be at work. Claimant disputes the circumstances regarding her firing and insists she told Big Lots that she was injured and would not be at work.

PRIOR MEDICAL HISTORY

8. Claimant did have a prior back history of pain since August 4, 2002. In August of 2002, Claimant filed a Workers' Compensation Claim after slipping on a wet floor, falling and suffering a lumbar strain, spasm, right hip contusion and left scapula contusion. Claimant sought treatment at Copley Hospital for her injuries. She was referred to physical therapy for her bilateral lumbar buttocks pain, left neck and rhomboid pain secondary to her fall at work in August 2002.
9. Claimant was discharged from Copley Hospital physical therapy on October 12, 2002. She attended physical therapy once, cancelled twice and never returned.
10. On July 31, 2003, Claimant sought medical treatment at Copley Hospital for low back pain and right lateral epicondylitis. At that time she reported that she had a two to three year history of right hip and low back pain and had suffered a recent exacerbation of her symptoms. She also reported that she suffered constant low back pain when standing for long periods of time.
11. On August 7, 2003, she obtained a radiology report which showed minimal degenerative changes with slight spurring of the acetabulum and femoral head of the right hip. The lumbosacral spine showed minimal degenerative changes in the lower spine. She was again sent to physical therapy and then discharged after a short time either for an inability to go or a lack of benefit from the sessions or both.
12. On November 8, 2004, Claimant reported to Copley Hospital with possible bladder spasms and "back problems."
13. On July 28, 2005, Claimant complained to the Morrisville Family Health Center that she was suffering from right hip tenderness. She was assessed with osteoarthritis of the hip.
14. On August 15, 2005, Dr. Kimberly Bruno of the Morrisville Family Health Center wrote a letter to Dr. Anne Vitaletti-Coughlin stating that Claimant was suffering pain in her buttocks and over her sciatic nerve.

15. On August 17, 2005, Dr. Anne Vitaletti-Coughlin found the Claimant had ongoing lower back problems and bilateral leg pain since 1997 which had recently worsened in her legs, left greater than right, with a "popping out" sensation. Claimant described her pain at that time as constant. Dr. Vitaletti-Coughlin reported that the pain was "initially worse on the left, the patient is now grossly on the right with burning and shooting to approximately thigh level." Dr. Vitaletti-Coughlin assessed the Claimant with chronic low back pain and leg pain and worsening pain due to S1 arthropathy. The doctor stated "I think what we are dealing with is mostly degenerative arthritis and right S1 dysfunction." Dr. Vitaletti-Coughlin prescribed a TENS Unit to help the Claimant manage her pain. The doctor stated that the Claimant also ought to address the psychological issues in her life as well and that she might benefit from a course of treatment from behavioral medicine intervention with Larry Thompson. Claimant never followed through with the behavioral medicine program.
16. On September 2, 2005, the Claimant was referred to the Sunrise Physical Therapy Center for her right S1 pain. She again did not follow through with the physical therapy plan. This may have been, at least in part, because it exacerbated her pain.
17. On December 9, 2005 the Claimant was prescribed lidoderm patches, which the Claimant stated were to address her stomach pain from surgery. The Claimant testified that throughout the spring and summer of 2006 she continued to suffer lower back pain which she treated with the lidoderm patches prescribed for her stomach pain.
18. A letter dated June 7, 2006 by Dr. Kimberley Bruno to Dr. Darin Wright stated among other complaints that the Claimant did experience chronic back pain.
19. In July of 2006, Claimant claimed her lower back was injured while working at Big Lots. This is the injury that is the subject of the instant case.

POST INCIDENT MEDICAL TREATMENT

20. In addition to Claimant's appointments at the Morrisville Health Center and Copley Hospital (Finding #4), Claimant next saw Dr. Kimberly Bruno on August 4, 2006 and stated she was following up on back pain that had been ongoing for several months. Dr. Roy had prescribed physical therapy which the Claimant could not attend until August 9, 2006, which was the first available slot for her to attend physical therapy. He did not want her to work until after physical therapy was completed. Physical therapy was not completed either due to Claimant's failure to attend or because the therapy was not working. Claimant saw Dr. Bruno at Dartmouth Hitchcock Medical Center on August 30, 2006. She told her of the persistence of her back pain but no causation was established. Most medical reports, however, refer to the Claimant's pain as due to an incident at work without further explanation.
21. Claimant also informed medical personnel that at the time she had the alleged injury at Big Lots that her daughter and baby had moved in with her. She was experiencing significant stress in her life due to her daughter's lack of income and concerns about Claimant's grandchild's health and safety.

22. On August 30, 2006, the Claimant obtained a radiology report that showed her lumbar spine, when compared to radiology reports of 2003, showed only mild degenerative changes.
23. On September 22, 2006, the Claimant went to see Dr. Anne Vitaletti-Coughlin again. After that appointment, Dr. Vitaletti-Coughlin wrote that the Claimant had long standing back pain for a number of years and on 7/22/06, at work, she twisted her back by pulling a bag from the rack and placing it on the counter. Claimant experienced throbbing, shooting pains in her lower back to her right thigh with some radiation down the knee to her foot with tingling on the top of her foot. At that visit, Dr. Vitaletti-Coughlin also noted symptom magnification by the Claimant. Physical therapy was ordered but again, the Claimant did not follow through.
24. In March of 2007 the Claimant received extra-articular medial branch facet injections for facet arthrosis from Dr. Vitaletti-Coughlin. Claimant would like to continue these treatments.
25. Dr. Verne Backus, a Certified Independent Medical Examiner, saw the Claimant on December 14, 2006. He was asked to examine the Claimant by the Defendant. He determined to a degree of medical certainty that Claimant's primary diagnosis "is not causally related to the injury." He did acknowledge that it was conceivable that the Claimant suffered a strain injury and very "probable" that she had been suffering from chronic mechanical back pain and symptom magnification. However, Dr. Backus, an expert in occupational health and injuries, opined that the Claimant was at maximum medical end if any work related injury was found to have occurred and that she was back to the baseline of her chronic back syndrome fairly soon after it occurred and certainly before the time that he saw her. Dr. Backus also determined that the Claimant had a partial work capacity and recommended that she should start working four hours a day and then increase her hours to full-time. Dr. Backus believed that work hardening would increase the Claimant's abilities and was the best treatment for her back.
26. Dr. Backus did not find the medial branch blocks useful to the Claimant to improve her condition nor did he find any other treatment reasonable or necessary except work hardening. Dr. Backus was informed that Dr. Vitaletti-Coughlin had the Claimant undergo an MRI in Mary of 2007. The MRI showed a disc herniation. Dr. Backus stated to a degree of medical certainty that the alleged work incident could not have caused a herniation and that a herniation is more likely to occur due to aging. In order for the herniation to have been work related he stated the Claimant would have to have experienced a major trauma to her back at work. The trauma, he stated, would not have been merely putting groceries into bags and turning to lift the bags. He also stated that this new information did not change his opinion that she was at medical end result and that he still believed the Claimant's best opportunity for improvement was returning to work part-time to build up her strength and then full-time.

27. Claimant sought no medical treatment for her back between September 18, 2006 and March 6, 2007. However, on March 6, 2007, Dr. Vitaletti-Coughlin changed her previous medical opinion that the Claimant's alleged back injury reflected mild degenerative changes to her longstanding back pain to the opinion that Claimant had suffered a traumatic work related injury on July 22, 2006. Dr. Vitaletti-Coughlin now appears to have determined that the Claimant's prior back pain had resolved before the alleged injury in July of 2006. However, this opinion ignores the treatment records of Dr. Vitaletti-Coughlin for pain of Claimant's back in the late summer and fall of 2005 and Claimant's own statements that she used her lidoderm patches prescribed for her stomach on her back.

CONCLUSIONS OF LAW:

1. In a workers' compensation claim, it is the burden of the claimant to establish all facts essential to support his or her claim. *King v. Snide*, 144 Vt. 395 (1984). Sufficient competent evidence must be submitted verifying 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. Where the causal connection between an accident and an injury is obscure and a lay person would have no well-grounded opinion as to causation, expert medical testimony is necessary to establish the claim. *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 probably hypothesis." *Brown v. E.B. & A.C. Whiting*, Opinion No. 21-94WC, (August 1, 1994).
3. When evaluating and choosing between conflicting medical opinions, the Department has traditionally considered several factors: (1) the nature of treatment and length of time there has been a patient-provider relationship; (2) whether accident, medical and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination; (5) the qualifications of the experts, including professional training and experience. *Morrow v. VT Financial Services Corp.*, Opinion No. 50-98WC (Sept. 1 & July 20, 1998).

4. Claimant argues that she injured her back at work on July 22, 2006 and that she is still treating for this condition. Defendant's argument is that Claimant already suffered from a chronic back problem and that if the symptoms worsened in July of 2006, the result was temporary. The Claimant does have a long and significant history of back pain and hip pain. Prior to Claimant's injury, Dr. Vitaletti-Coughlin stated that the Claimant's chronic low back and leg pain was worsening. She stated that she believed this was due to Claimant's chronic arthritis and right SI dysfunction. She also urged Claimant to work on her psychological issues as well as attend physical therapy. Claimant failed to attend physical therapy several times when prescribed. This failure may have been in part due to the fact that she did not find it helped her pain. She also failed to address her psychological issues. Dr. Vitaletti-Coughlin does, however, find that the July 2006 problem with Claimant's back was work related.
5. Dr. Verne Backus, after doing a medical examination and lengthy records review, determined that the Claimant had long standing mechanical back pain unrelated to the incident at work. Mechanical back pain syndrome is a specialty of Dr. Backus that he testified can be caused by many things. Dr. Backus listed possible sources as ligaments, muscles, joints, and discs. He stated that conditions such as nerve root, spondylolitheses, fractures and other conditions identifiable by diagnostic testing on the Claimant were not found. He did find symptom magnification was present compared with the objective findings regarding Claimant's condition. He also determined that the best treatment for Claimant was work hardening and that she should return to work at least four hours per day and steadily increase to a full-time work capacity. At the time that Dr. Backus examined the Claimant in December of 2006, he determined her to be at baseline of her chronic back problems and that if her symptoms had increased after an incident at Big Lots, pain due to that incident had resolved prior to his visit with her. Dr. Vitaletti-Coughlin did not testify and her records do not refute that Claimant had a long history of back pain. It is unclear from her records whether she believed the July, 2006 alleged incident was a flare-up or an aggravation of Claimant's back problems. This is made somewhat more confusing since Dr. Vitaletti-Coughlin did not immediately find Claimant's back problem related to work but did so more than a year later. In fact, the treating doctors appear to merely have accepted that Claimant suffered a back injury at Big Lots without further comment.
6. It is clear that Claimant had significant back issues for several years before working at Big Lots and admitted to Dr. Backus that she was treating herself with Ibuprofen and lidoderm patches for her back pain while working at Big Lots.

7. It is most likely, based on Dr. Backus's testimony and the medical records that the Claimant had a long standing back injury that may have given her increased back pain on the day she was working but was not caused by her work. At most, she experienced increased symptoms on July 22, 2005, while working and in relationship to the additional stress factors at home. Due to these stressors and symptom magnification, failure to follow through with psychological issues and physical therapy, the Claimant's symptoms continued to worsen. Dr. Backus believed the best treatment for Claimant's back was work hardening. However, she has not worked since the incident at Big Lots and continues to suffer back pain.
8. Based on Dr. Vitaletti-Coughlin's medical records and Dr. Backus's testimony, it does appear that the incident at Big Lots played some role in Claimant's increased back problems. An "aggravation" means "an acceleration or exacerbation of a pre-existing condition by an intervening event. WC Rule 2.10.
9. A "flare-up" means a temporary increase in symptoms with no worsening of the underlying condition." *Cehic v. Mack Molding, Inc.*, Opinion No. 16-04 WC (2004).
10. The underlying condition in this claim is chronic mechanical back syndrome. The evening following the incident at Big Lots, the Claimant did experience an increase in symptoms. Although fired from her job, Dr. Roy took Claimant out of work on 7/26/06 until 7/31/06 and Dr. Kimberly Bruno later took Claimant out of work on August 18, 2006. There are no further records regarding work capacity except the opinion of Dr. Backus. Dr. Roy, on August 9th, 2006 did note that the plan was to have the Claimant back to work at least on a part-time basis within one or two months.
11. Based on Dr. Backus's opinion due to his medical expertise in this area, and tempered somewhat by her treating physicians' opinions, it is found most probable that the Claimant suffered a temporary flare-up of her chronic back condition which resolved by the time she saw Dr. Backus on December 14, 2006.
12. The "underlying condition" in this claim is chronic mechanical back pain. The claimant previously suffered a waxing and waning of back pain symptoms since 2002 that ranged from severe to mild. The claimant's symptom course considered along with her treatment history, establish that the incident caused a temporary flare in symptoms but did not alter the claimant's underlying condition. In the case of a flare-up, the employer is responsible for the workers' compensation benefits that are attributable to the causative incident. Dr. Backus credibly found the Claimant back at her baseline by December 14, 2006. Claimant's current degenerative condition is due in part to her failure to engage in work hardening and cannot be attributed to the incident at Big Lots.

13. The Claimant has failed to prove that she suffered an aggravation of an injury which has continued to prevent her from working after December of 2006 due to what occurred at her job at Big Lots on July 21 or 22 of 2006. Claimant is found to have suffered a "flare up" of a back condition that she has had for many years.

ORDER:

Therefore, this claim should be adjusted as follows:

The Claimant's back flare up is found compensable until December 14, 2006 when medical end result was attained.

DATED at Montpelier, Vermont this 1 day of February 2008.



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.