Muris Dzano v. Agri-Mark Inc (June 6, 2012)

STATE OF VERMONT
DEPARTMENT OF LABOR

Muris Dzano

v.

Agri-Mark, Inc.

Opinion No. 15-12WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. CC-60494

OPINION AND ORDER

Hearing held in Montpelier, Vermont on February 16, 2012
Record closed on March 15, 2012

APPEARANCES:

Jennifer Pacholek, Esq., for Claimant
Keith Kasper, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant suffer a low back injury causally related to his work for Defendant on or about May 3, 2010?

2. If so, to what workers' compensation benefits is Claimant entitled?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	First aid log
Claimant's Exhibit 2:	Email from Carla Messier, May 6, 2010
Claimant's Exhibit 3:	Carla Messier notes, April 7, 2011
Claimant's Exhibit 4:	Carla Messier notes of conversation with Bob Andrews, October 13, 2011
Claimant's Exhibit 5:	Carla Messier notes of conversation with Jason Hale, October 13, 2011
Claimant's Exhibit 6:	Email from Fletcher Allen Health Care, February 16, 2012
Claimant's Exhibit 7:	First Report of Injury (Form 1), April 7, 2011
Claimant's Exhibit 8:	Robert Andrews statement, October 14, 2011
Defendant's Exhibit A:	Claimant's work log
Defendant's Exhibit B:	Final Warning of Violations, August 6, 2010

Defendant's Exhibit C: Claimant's affidavit, October 19, 2011

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 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 contained in the Department's file relating to this claim.

3. Claimant is a 38-year-old immigrant from Bosnia. He and his wife came to the United States in 2001 to escape discrimination in their homeland.

4. Claimant does not understand or speak English well. He was assisted by an interpreter during the formal hearing.

5. Claimant began working for Defendant seven years ago, first on the production line and more recently on the third-shift sanitation line. His wife also works for Defendant.

6. As of May 3, 2010 Claimant's average weekly wage was $604.88, which results in an initial compensation rate of $403.25, including two dependents.

7. Claimant has no prior medical history of low back pain or related complaints.

Claimant's May 3, 2010 Work Injury

8. On May 3, 2010 Claimant was working his normal sanitation line shift. As he began washing in and around the cheese cutting machine on line four, he noticed that the pan under the shrink tunnel was dirty. Claimant removed the pan, which rests three inches off the floor and weighs approximately 40 pounds, from its brackets and washed it.

9. After cleaning the pan, Claimant bent over to slide it back into place. As he did so, he felt a sharp pain in his back. He immediately let the pan fall to the floor.

10. Claimant next went outside to see if he could find someone to help him slide the pan back onto its brackets and under the shrink tunnel. His line leader, Jason Hale, helped him do so.

11. Soon thereafter, Claimant reported his back injury to Robert Andrews, his supervisor. Mr. Andrews recorded the event in Defendant's first aid log, noting that on May 3, 2010 Claimant had experienced back pain while maneuvering the pan under the shrink tunnel

on line four. He thus provided contemporaneous corroboration of both the date and mechanism of injury as Claimant initially reported it.

12. Claimant did not initially seek medical treatment or lose any time from work as a result of his May 3, 2010 injury. Mr. Andrews testified credibly that he followed up with him in the two days following the incident to inquire if his back was still bothering him, and Claimant told him that it was all right. Mr. Andrews passed this information along to Defendant's Human Resource Administrator, Carla Messier, in response to her May 6, 2010 email inquiry about the event. Having learned that Claimant had neither sought treatment nor lost time from work, she determined that it was not necessary to file a First Report of Injury.

Claimant's Course of Treatment

13. After completing his shift on May 3, 2010 Claimant returned home. Although his back pain was worsening, he did not seek medical treatment. Instead, the next day he purchased a back brace to help alleviate his pain and enable him to work. Claimant wore the back brace over a tee shirt but under his uniform and apron, such that it was not readily visible to others. This explains why neither Mr. Hale nor Mr. Andrews could recall observing it.

14. Although his low back pain continued to nag at him, Claimant did not seek medical treatment for more than nine months after the May 2010 incident. He testified that he was reluctant to do so because he feared that his and his wife's jobs with Defendant would be jeopardized as a result. Given their recent immigration to the United States, unfamiliarity with the law and lack of fluency in the English language, I find Claimant's reasoning in this regard both understandable and very credible.

15. Finally, at his wife's insistence, on February 24, 2011 Claimant sought treatment for his low back pain at the hospital emergency room. Although the record of that visit indicates that the mechanism of injury involved a motor vehicle accident, I find that this was an inaccurate description most likely caused by Claimant's limited English proficiency.[1] Claimant testified that he told the emergency department staff that while he had been involved in motor vehicle accidents in the past, he had not injured himself as a result. He further testified that he advised the emergency room physician that he had suffered no recent trauma, and that his pain had been worsening gradually over a period of months. I find Claimant's testimony in this regard to be completely credible.

16. X-rays taken at the emergency department failed to reveal any compression fractures or other recent trauma. Claimant was diagnosed with left paralumbar radiculopathy and advised to follow up with his regular physician.

[1] Although Claimant's wife accompanied him to the hospital and assisted with interpreting, I find it likely that a significant language barrier still remained between Claimant and the attending medical staff.

17. Three weeks later, in March 2011 Claimant sought treatment with Dr. Gleiner, his primary care physician. He reported that he had been experiencing low back pain for approximately one year, and that the onset of the injury had been related to lifting at work. Claimant also reported (a) that he routinely lifted items weighing 40 to 50 pounds at work; (b) that he had reported his injury to his supervisor, but that the supervisor had taken no action; and (c) that both Claimant and his wife felt vulnerable over the possibility that they might lose their jobs with Defendant. I find these reports to be both credible and consistent with Claimant's formal hearing testimony.

18. Dr. Gleiner diagnosed Claimant with lumbar radiculopathy at the L4 level, possibly related to "an injury at work that was not reported." He recommended physical therapy as treatment.

19. Some two weeks later, in response to a telephone inquiry from Claimant's wife, Dr. Gleiner provided Claimant with a note temporarily disabling him from working. Claimant presented this note to Mr. Hale on April 6, 2011. He has remained out of work since.

20. Claimant met with the physical therapist three times in April 2011. Notwithstanding that Claimant's wife accompanied him to his appointments to help translate, the therapist specifically noted that her treatment efforts were impeded by the language barrier that existed between them.

21. Upon returning to see Dr. Gleiner in May 2011, Claimant reported that neither physical therapy nor pain medications had provided him with any relief. An MRI scan revealed a disc herniation with nerve root compression at the L4-5 level, and also a mass on the spinal cord at L2-3. Otherwise the scan was normal, with no degenerative disease or pathology noted at any other levels.

22. Dr. Gleiner referred Claimant to Dr. Penar, a neurosurgeon, for further evaluation and treatment. As Dr. Penar's June 2011 office note indicates, Claimant reported that he had been experiencing low back pain since suffering a lifting injury at work in July 2010. He further reported that although he notified his supervisor of his injury, no action was taken, and that he was fearful of taking additional steps himself lest he jeopardize his and his wife's jobs. Aside from a minor discrepancy as to the date of injury, Claimant's history as he reported it to Dr. Penar was thus entirely consistent with the history that Dr. Gleiner had reported.[2]

[2] As the physical therapist had reported, and notwithstanding that Claimant's wife assisted with interpreting, Dr. Penar specifically noted that given the language barrier it was difficult to obtain precise details from Claimant. I find that this fact, either alone or in combination with Claimant's fading memory more than a year later, adequately accounts for the discrepancy as to the date of injury.

23. Dr. Penar recommended treating Claimant's L4-5 disc herniation surgically. To that end, Claimant underwent a disc excision on July 1, 2011. Thereafter, on July 26, 2011 Dr. Penar performed a second surgery, in which the mass at L2-3 was removed. This mass, which was diagnosed as a benign nerve sheath tumor, in no way contributed to Claimant's low back symptoms and was not in any way related to his May 2010 work injury. Both surgeries were accomplished without complications.

24. Since his disc excision surgery Claimant's low back pain has improved, though it is still not entirely asymptomatic. Claimant testified credibly that his back gets achy with changes in the weather, and that he still has difficulty with bending, lifting his children, and walking or sitting for extended periods of time.

25. Although he never formally released him to do so, Dr. Penar estimated that Claimant would be capable of returning to work within three months after his second surgery, or by October 26, 2011. By this point, however, Defendant already had terminated his employment, in accordance with its policy precluding employees from being out of work for more than six months.

26. Defendant has never formally notified Claimant of his obligation to make a good faith search for suitable work in accordance with Workers' Compensation Rule 18.1000. As of the formal hearing, he was still unemployed. He has requested a functional capacity evaluation prior to seeking another job, though no physician has yet referred him for one.

27. Claimant has not yet been declared at end medical result for his L4-5 disc herniation.

Expert Medical Opinions as to Causation

28. The parties presented conflicting medical evidence as to the causal relationship, if any, between Claimant's L4-5 disc herniation and his work for Defendant.

(a) Dr. Penar

29. Based on his review of Dr. Gleiner's records, the MRI scan and the history given him by Claimant, Dr. Penar concluded that Claimant likely injured his lower back while lifting at work. Although Dr. Penar understood that the injury occurred in July 2010, I already have found that this discrepancy was minor and does not undermine the basis for his medical opinion in any respect. Nor do I find significant the fact that Dr. Penar may not have reviewed either the emergency room records or the physical therapy notes prior to rendering his opinion as to causation.

(b) Dr. Backus

30. Dr. Backus is a specialist in occupational and environmental medicine. At Defendant's request he reviewed Claimant's medical records, as well as various witness statements, in January 2012.

31. Dr. Backus concluded, to a reasonable degree of medical certainty, that Claimant suffered a minor lower back strain on May 3, 2010. In his opinion, this soft tissue injury likely resolved quickly and neither caused nor contributed in any way to the subsequently diagnosed L4-5 disc herniation.

32. Rather than relating it to any work-induced trauma, Dr. Backus attributed Claimant's L4-5 disc herniation solely to lumbar degenerative disc disease. In reaching this conclusion, Dr. Backus relied primarily on two factors. First, he asserted that the inconsistencies in Claimant's reported history as to both the date and mechanism of any work-related injury rendered his account unreliable. Second, Dr. Backus asserted that the medical literature fails to support a causal link between a single lifting incident and a herniated lumbar disc.

33. I have already found that Claimant's poor command of the English language, combined with his faulty memory for dates, likely accounted for the inconsistencies reported in his medical records. I question whether Dr. Backus' heavy reliance on such discrepancies as a means of discrediting Claimant's version of events was justified, therefore. This is particularly true given that even Dr. Backus acknowledged that a language barrier likely existed between Claimant and his treatment providers.

Claimant's Credibility

34. Defendant has noted inconsistencies among the various versions of events that Claimant reported, whether to his doctors, or in his October 2011 affidavit, or in his formal hearing testimony, that it contends fatally undermine his credibility. For example:

- At various times, Claimant reported that his lower back injury had occurred in May, June or July 2010; at other times he asserted that he did not recall when it occurred;

- Claimant asserted at one point in his formal hearing testimony that he did not tell anyone other than Mr. Andrews, Mr. Hale and his friend Bill about his injury, but later conceded that others probably knew of it;

- Claimant testified at hearing that his injury occurred while he was attempting to slide the pan back under the shrink tunnel; in his affidavit he described it as occurring while lifting the pan itself;

- Claimant reported variously (a) to his physical therapist, that his back pain abated after wearing a brace for 15 to 20 days; (b) to emergency room staff, that his pain had gradually worsened over the course of some months; and (c) to Dr. Penar and at formal hearing, that he was in constant pain from the date when the injury first occurred.

35. I do not find any of these inconsistencies to be significant. At best, they indicate only that Claimant's memory for dates was not perfect and that his English language skills impeded his ability to communicate effectively at times. I do find significant the fact that the core components of Claimant's story – that he injured his lower back at work while cleaning in and around the shrink tunnel – were consistent throughout.

36. Defendant also points to inconsistencies between Claimant's testimony and both Ms. Messier's and Mr. Andrews' as to comments made during a disciplinary meeting in August 2010. Claimant recalled that he advised at that point that he had injured his back at work and wanted to file a workers' compensation claim. Ms. Messier and Mr. Andrew denied that any such discussion took place. Again, although the discrepancy is difficult to reconcile, given both the language barrier and Claimant's questionable recollection I do not consider it fatal.

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. The disputed issue in this case is whether or not Claimant's herniated disc and subsequent need for surgical intervention arose out of and in the course of his employment for Defendant. Claimant asserts that his disc herniation occurred while at work on May 3, 2010 when he attempted to replace a pan under the shrink tunnel after cleaning it. Defendant asserts first, that the inconsistencies in Claimant's varying versions of events render his account incredible, and second, that the medical evidence does not support a work connection.

3. I conclude from the credible evidence, which includes not only Claimant's formal hearing testimony but also Mr. Andrews' contemporaneous first aid log entry, that on May 3, 2010 Claimant suffered a work-related lower back injury while maneuvering the pan under the shrink tunnel on line four.

4. I further conclude that despite notations contained in various medical providers' notes, Claimant did not suffer any subsequent trauma to his lower back, whether work-related or not, between May 3, 2010 and February 24, 2011, when he first sought treatment.

5. What remains to be considered is whether the credible medical evidence establishes a causal connection between Claimant's May 2010 work injury and the L4-5 disc herniation that was diagnosed almost a year later. The parties presented conflicting expert evidence on this issue. In such cases, 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 (September 17, 2003).

6. Based primarily on the third factor, I conclude here that Dr. Penar's causation opinion carries the most weight. Considering the credible evidence establishing (a) a consistent mechanism of injury; and (b) the absence of any intervening event between May 2010 and February 2011, I find persuasive Dr. Penar's conclusion that the May 2010 lifting incident was the most likely cause of Claimant's L4-5 disc injury.

7. In contrast, I am troubled by Dr. Backus' analysis, which seems to be based as much on his determination as to Claimant's credibility as it is on his medical expertise. Many of the supposed inconsistencies upon which he relied either did not exist or have been adequately explained. His opinion thus lacks factual support, to the point where I find it unpersuasive.

8. I conclude that Claimant has sustained his burden of proving that his L4-5 disc herniation was caused by his May 3, 2010 work-related lifting injury, and is therefore compensable.

9. As a result of his compensable injury Claimant was totally disabled from April 6, 2011 until at least October 26, 2011 when Dr. Penar estimated that he could safely return to work. As Claimant had not yet reached an end medical result, at a minimum Defendant was obligated at that point to notify him of his responsibility to make a good faith search for suitable work, pursuant to Workers' Compensation Rule 18.1000. This it failed to do. Defendant remains liable, therefore, for ongoing temporary total disability benefits until such time as it can establish an appropriate basis for terminating them in accordance with Rule 18.1000.[3]

10. Claimant also is entitled to coverage for all reasonable medical treatment causally related to his compensable injury, including his July 2011 disc excision surgery and necessary follow-up care.

11. As Claimant did not provide any medical evidence regarding the need for a functional capacity evaluation, he has not carried his burden of proof on that issue. However, given its ongoing responsibility for temporary total disability benefits so long as Claimant maintains a good faith search for suitable work, it may be in Defendant's best interests to arrange and pay for such evaluation in any event.

12. Claimant has submitted a request for reimbursement of costs totaling $1,047.21 and attorney fees totaling $16,544.50, representing 114.1 hours billed at $145.00 per hour. An award of costs to a prevailing claimant is mandatory under the statute, 21 V.S.A. §678(a). As Claimant has prevailed, these are awarded.

[3] Defendant could have avoided this result by accepting the possibility that Claimant's claim might be compensable, and consequently following both his medical care and his return to work efforts more closely.

13. As for attorney fees, these lie within the commissioner's discretion. Here, Defendant has objected to various billing entries on the grounds that they relate to Claimant's pursuit of long-term disability benefits rather than to his workers' compensation claim. Upon review, I concur that for this reason Claimant's attorney fee award should be reduced by 8.5 hours.[4]

14. In addition, it is unclear whether a portion of five other billing entries also may have related to matters not pertinent to Claimant's workers' compensation claim.[5] These entries total six hours. Claimant shall have 30 days from the date of this decision to provide the necessary clarification as to the work reflected on these billing entries. In the meantime, his fee award is reduced accordingly.

15. As thus reduced, the undisputed fees amount to 99.6 hours, or $14,442.00, which is hereby awarded.

[4] The disallowed billing entries are for services rendered in 2011 on July 19th and 26th, August 2nd, 8th, 9th, 25th and 31st, and November 22nd (second entry).
[5] The billing entries in question are for services rendered in 2011 on July 27th, August 3rd, August 18th, September 23rd and November 22nd.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Temporary total disability benefits from April 6, 2011 and ongoing until appropriately terminated in accordance with Workers' Compensation Rule 18.1000;

2. Interest on the above amounts calculated in accordance with 21 V.S.A. §664;

3. Medical benefits covering all reasonable medical services and supplies causally related to the treatment of Claimant's work-related L4-5 disc herniation, in accordance with 21 V.S.A. §640;

4. Costs totaling $1,047.21 and attorney fees totaling $14,442.00, the latter amount to be supplemented in accordance with Conclusion of Law No. 14, *supra*.

DATED at Montpelier, Vermont this 6th day of June 2012.

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Anne M. Noonan
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.