

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Andres Collado

Opinion No. 26-15WC

v.

By: Jane Woodruff, Esq.
Administrative Law Judge

Mack Molding

For: Anne M. Noonan
Commissioner

State File No. FF-00727

OPINION AND ORDER

Hearing held in Brattleboro, Vermont on April 28 and 29, 2015
Record closed on June 1, 2015

APPEARANCES:

Matthew Newborn, Esq., for Claimant
Keith Kasper, Esq., for Defendant

ISSUE PRESENTED:

1. Did Claimant suffer a compensable injury arising out of and in the course of his employment on January 23, 2014?
2. If yes, to what workers' compensation benefits, if any, is Claimant entitled?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	Nine photographs of Press #28
Claimant's Exhibit 2:	Timecard
Claimant's Exhibit 3:	Email correspondence between Patty Warner and Edgar Billings
Claimant's Exhibit 4:	Claimant statement, March 26, 2014
Claimant's Exhibit 5:	Catherine Logrono statement, March 26, 2014
Claimant's Exhibit 6:	Kristy Collado statement, March 26, 2014
Claimant's Exhibit 7:	Andres E. Collado statement, March 26, 2014
Claimant's Exhibit 8:	Letter from Amber Menard, March 26, 2014
Claimant's Exhibit 9:	Letter from Dr. Abdu, August 26, 2014
Claimant's Exhibit 10:	<i>Curriculum vitae</i> , William Abdu, M.D.

Claimant's Exhibit 11:	Joannie Houle statement, March 24, 2014
Claimant's Exhibit 12:	Deposition of Joannie Houle, July 18, 2014
Claimant's Exhibit 13:	Deposition of Kevin Peets, July 18, 2014
Claimant's Exhibit 14:	Deposition of Edgar Billings, July 18, 2014
Defendant's Exhibit A:	Incident Report, January 23, 2014
Defendant's Exhibit B:	Voluntary resignation letter, January 24, 2014
Defendant's Exhibit C:	Undated, transcribed voicemail message
Defendant's Exhibit D:	Two photos of work tables
Defendant's Exhibit E:	Timecard
Defendant's Exhibit F:	Joannie Houle statement, January 24, 2014; Edgar Billings statement, March 24, 2014
Defendant's Exhibit G:	Employee's Notice of Injury and Claim for Compensation (Form 5), February 19, 2014
Defendant's Exhibit H:	Pre-employment questionnaire, July 27, 2004
Defendant's Exhibit I:	<i>Curriculum vitae</i> , Nancy Binter, M.D.
Defendant's Exhibit J:	Deposition of Claimant, June 4, 2014
Defendant's Exhibit K:	Deposition of Catherine Logrono, June 4, 2014
Defendant's Exhibit L:	Deposition of Kristy Collado, June 4, 2014

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
 Medical benefits pursuant to 21 V.S.A. §640
 Vocational rehabilitation benefits pursuant to 21 V.S.A. §641
 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 57 years old and was born in the Dominican Republic. He immigrated to the United States in 1980. His primary language is Spanish, which he can speak, read and write. While he understands English, he cannot read or write it and his spoken English is very broken. His two daughters, Catherine Logrono and Kristy Collado, are fluent in English and translate for him when necessary.
4. Claimant first lived in Brooklyn, New York and worked as a taxi driver. In 2001 he was rear-ended while driving the taxi and suffered a low back injury,

which resolved within a couple of weeks. Claimant was awarded a \$50,000.00 settlement as a result of this accident.

5. Claimant and his family moved to Claremont, New Hampshire in March 2004. He began work as a molder at Defendant's Cavendish, Vermont plant in July 2004. He worked the first shift, from 7:00 AM to 3:00 PM. His primary job duty was to run one of various presses, as assigned to him by his supervisor, Edgar Billings. Some of the presses required two people to operate. Among these was Press #28, which was used to manufacture the plastic Emeco chair.
6. Press #28 has both a top and a bottom station. The top molder's job is to take the chair out of the mold when the press ejects it, place it on the upper table, trim it and then put it on a cooling fixture. From there it is conveyed to the bottom station. The bottom molder's job is to position the chair upside down and affix four feet, four screws and a label. There are times when the top molder has to wait for the bottom molder to catch up; when that occurs, the top molder is supposed to help the bottom molder.
7. Press #28 is almost always set up to produce the Emeco chair. The two molders do not need to make adjustments on the machine. If anything has to be re-set, the molders buzz for floor help and a technician will adjust the press.
8. Defendant's absenteeism policy provides that when an employee arrives late or is absent without medical excuse, he or she will receive an "occurrence." An employee is subject to termination if too many occurrences accumulate.
9. A couple of days before January 23, 2014 Claimant received a letter from Defendant indicating that if he had one more occurrence, he would be terminated. I find this warning significant, as Claimant was the sole wage earner in his family.

Claimant's Version of the Events of January 23, 2014

10. On January 23, 2014 Claimant arrived at work at 7:00 AM. Mr. Billings assigned him to run Press #23, a one-person job. At around 9:00 or 9:30 AM, Mr. Billings reassigned him to work on Press #28. Claimant had the top position and his co-worker, Joanie Houle, had the bottom station.
11. Claimant testified as follows: As he and Ms. Houle began producing the Emeco chairs, Ms. Houle asked him to lift up the table so that it could be re-positioned. The table weighed between 100 and 125 pounds, and as he lifted one end, he felt a pop in his back on the left side, and then immediate pain down the entire left side of his body, from the top of his left shoulder down to his foot. He screamed "oh" because of the pain; Ms. Houle asked him what the matter was, and he replied that he had hurt something.

12. Claimant further testified: He continued working for four or five more minutes until he could no longer stand the pain, then told Ms. Houle that he needed to report his injury to Mr. Billings, his supervisor. As he walked down the aisle by Press #28, Mr. Billings was approaching him. Claimant asked Mr. Billings to send a replacement to take his place on Press #28, because he had hurt himself while lifting the table. Claimant said he would sign his timecard. Claimant ended his interaction with Mr. Billings by saying, "God willing, I hope I am not fired for this."

Defendant's Version of the Events of January 23, 2014

13. Mr. Billings corroborated Claimant's testimony that at 9:00 or 9:30 AM he reassigned Claimant to work on Press #28 with Ms. Houle. Mr. Billings credibly testified that he knew that Claimant did not like working with Ms. Houle, as Claimant had told him that on previous occasions. However, Claimant and Ms. Houle were the only molders he could assign to that job that day.
14. Mr. Billings credibly testified as follows: As he walked down the aisle towards Press #28, Claimant was walking very quickly towards him. As Claimant walked by him, Claimant stated, "I quit. I fired." Mr. Billings called to Claimant to come back, as he wanted to talk to him. Claimant did not tell Mr. Billings that he was in pain, and Mr. Billings did not observe that he was having any problem walking. As a result, Mr. Billings was unaware that Claimant had suffered any injury that morning.
15. Ms. Houle credibly testified as follows: As she and Claimant were producing the Emeco chairs, she fell behind the pace Claimant had set. However, he did not come down to help her out, as others had done in the past. It was apparent to Ms. Houle from Claimant's facial expressions that he was frustrated or angry. When she told him that the chairs needed to go onto the fixture, he slammed a chair down and broke it. Thereafter, he told her it was not his fault that she was behind and that he was going to talk to Mr. Billings.
16. Ms. Houle further testified that she did not ask Claimant to lift the table at Press #28, that Claimant did not scream out in pain that morning and that he did not tell her either that his back hurt or that he had hurt his back. I find this testimony credible.
17. Ms. Houle credibly testified that as she observed Claimant walk to Mr. Billings, he was not limping and did not appear to be hurt. Next she observed him pick up his toolbox and walk out the back door. Ms. Houle had a clear line of sight to Claimant and Mr. Billings, and did not see either one of them say anything to the other. Ms. Houle never heard Claimant say that he quit.

Claimant's Termination from Employment and Subsequent Events

18. After Claimant had left, Mr. Billings informed Defendant's plant manufacturing manager, Kevin Peets, of the morning's events, and then completed an Incident Report to document them. The next day, January 24, 2014, Ms. Houle dictated a statement to Patty Warner, Defendant's human resources manager. I find that both Ms. Houle's and Mr. Billings' statements were consistent with their formal hearing testimony.
19. On January 24, 2014 Ms. Warner wrote a letter to Claimant in which she confirmed that he had voluntarily resigned his employment by walking off the job on January 23, 2014. The letter also outlined what steps he needed to take with regard to continuing any employee benefits to which he was entitled. Claimant received the letter on January 30th or 31st, 2014.
20. Late in the afternoon of January 24, 2014 Ms. Warner received a voicemail message from Ms. Logrono, Claimant's daughter. In the voicemail, Ms. Logrono asserted that over the course of the previous two weeks Claimant had made several complaints to the effect that he was in physical pain and that he needed a less strenuous job. Significantly, in her message Ms. Logrono did not give any indication that Claimant had sustained a work injury on the previous day, January 23, 2014.
21. On January 27, 2014 Ms. Warner emailed Mr. Billings and asked him to comment on Ms. Logrono's assertion that Claimant had requested a less strenuous job to accommodate his pain. Mr. Billings replied that Claimant had never done so.
22. On January 30th or 31st, 2014 Ms. Logrono arrived at Defendant's plant to see Ms. Warner and to drop off some medical records pertaining to Claimant's condition. Mr. Peets, the plant manufacturing manager, met her at the door and explained that Ms. Warner was not there, but that he could help her. Ms. Logrono gave him two Activity Restriction forms from Springfield Hospital, which Mr. Peets photocopied and placed in Ms. Warner's inbox. Neither of the forms referenced a January 23, 2014 work injury, nor did Ms. Logrono mention any such injury to Mr. Peets.
23. On February 19, 2014 Ms. Logrono completed an Employee's Notice of Injury and Claim for Compensation (Form 5) on Claimant's behalf. In doing so, Ms. Logrono did not indicate a date of injury, and did not identify any other injuries suffered other than Claimant's back. I find these omissions significant.

Other Evidence Impacting Claimant's Credibility

24. Given their differing versions of the events surrounding Claimant's alleged injury and its aftermath, the witnesses' credibility is squarely at issue. I find

ample reason to question Claimant's credibility based on the following evidence:

- On his July 27, 2004 pre-employment questionnaire, Claimant denied ever having suffered a back injury, ever having filed an application for workers' compensation benefits, and ever receiving an award or settlement on account of a work-related injury, notwithstanding that only three years earlier he had received a \$50,000.00 settlement for the work-related low back injury he had suffered while employed as a taxi driver, *Finding of Fact No. 4 supra*;
- Claimant gave different versions of the mechanism of his work injury to his medical providers, specifically:
 - Upon presenting to the hospital emergency room on January 24, 2014, the nurse's triage report stated, "Onset was abrupt at work on Monday while lifting and employer insisted on his continuing to do the same lifting."
 - On the same day, also at the hospital emergency room, the physician assistant's report stated, "Onset was four days ago when he was left alone to lift what normally two people lift and continued working for a couple of days but was unable to maintain the stamina for the job."
 - At an April 17, 2014 office visit with his primary care provider, Linda Brown, an advanced practice registered nurse reported the history of his injury as, "On January 23, 2014 he was assembling a 100 pound table with another person and felt pain in his low back."
 - Upon first evaluating Claimant on August 14, 2014, Dr. Abdu reported the history of his injury as, "On or about January 23, 2014 he had the acute onset of back pain when he was lifting a heavy table with a co-worker."
- In describing how his injury occurred on his February 19, 2014 Employee's Notice of Injury and Claim for Compensation (Form 5), Claimant stated: "Job partner was not assisting, I previously complained to supervisor on numerous occasions. I was still placed with the same partner, I was left to do heavy lifting alone, at which time I felt unbearable back pain." Claimant's formal hearing testimony was directly contradictory, however – he testified that Ms. Houle was a good worker, that he had never had any problems working with her and that he had never told Mr. Billings that he disliked working with her.

25. I cannot attribute these discrepancies to poor recall, innocent misunderstanding or mistranslation. Claimant worked for Defendant for ten years and had no problem communicating with, or being understood by, either his supervisors or his co-workers. His daughter, who is fluent in both Spanish and English, accompanied him to every medical appointment, furthermore, so it is unlikely that the different histories his providers reported were due to their inability to understand his version of events. Perhaps most troubling, the glaring difference between Claimant's description of his relationship with Ms. Houle in his Notice of Injury and Claim for Compensation and his sworn formal hearing testimony causes me to question whether and to what extent he tailored the latter solely to strengthen his case and advance his cause.
26. In contrast, no evidence was submitted establishing a basis for me to question the credibility of Defendant's witnesses with respect to the events of January 23, 2014 and thereafter. Their formal hearing testimony was straightforward and consistent, both with their previously documented written statements and with each other. For that reason, I find Defendant's version of the events more credible than Claimant's.

Claimant's Course of Treatment

27. Claimant left Defendant's plant on January 23, 2014 and went home. He said he needed assistance from his son to walk up the flight of stairs to his apartment. The following morning, due to his pain level, his daughter, Catherine Logrono, took him to Springfield Hospital.
28. With Ms. Logrono as an interpreter, Claimant was examined in the emergency department by both a nurse and Physician Assistant Delfausse. He complained of severe neck and back pain along the entire left side of his spine and radiating into his left leg, shoulder and arm. Curiously, after describing the mechanism of his injury to Mr. Delfausse, Claimant indicated that he had been relieved of his employment the day before. I find that this medical notation indicates his awareness that walking off the job after the incident on Press #28 the day before had cost him his job.
29. Claimant returned to the emergency department on January 30, 2014 complaining of the same pain as he had previously. A cervical spine MRI revealed multilevel degenerative disc disease, including significant narrowing at C6-7. There was no evidence of fracture, ligamentous injury or obvious muscle strain. Given these findings, the examining physician assistant reported that there was no significant abnormality to explain Claimant's pain.
30. Claimant next followed up with Dr. Barbeau, his primary care provider, for both cervical and lumbar pain. Dr. Barbeau diagnosed C5-6 radiculopathy and left sciatica. As treatment, she referred him to physical therapy.

31. Claimant attended physical therapy but did not enjoy any pain reduction. At Dr. Barbeau's referral, in April 2014 he underwent an evaluation with Linda Brown, a nurse practitioner at the Dartmouth-Hitchcock Pain Clinic. A second MRI on April 30, 2014 revealed an extruded disc on the left side at L5-S1, as well as disc space narrowing and other degenerative changes. Ms. Brown believed that some of Claimant's low back pain could be facet-related, but that his leg pain was probably due to a herniated disc.
32. As his symptoms had not responded to conservative treatment, in August 2014 Claimant underwent an evaluation with Dr. Abdu, a board certified orthopedic surgeon. Dr. Abdu did not review the records from Claimant's initial evaluations at the Springfield Hospital emergency department. Claimant described the history of his injury as having occurred while lifting a heavy table with a co-worker. He reported symptoms including low back pain radiating from his buttock and down his left leg to his knee, as well as occasional numbness and tingling in the plantar aspect of his foot. Conspicuously absent from Claimant's recitation of the symptoms he had experienced at the time of his injury were any complaints of left-sided neck, shoulder or arm pain.
33. Upon reviewing Claimant's most recent MRI, Dr. Abdu diagnosed a soft herniated disc at L5-S1 on the left side. Treatment options included medications, therapy, injections and surgery. Claimant opted for surgery, which Dr. Abdu described as a left-sided L5-S1 disc decompression.
34. On September 16, 2014 Claimant underwent surgery. Dr. Abdu's post-operative diagnosis was lateral recess stenosis on the left at L5-S1, meaning that an enlarged facet joint at that level was restricting the spinal canal and compressing the nerve root. Dr. Abdu decompressed the nerve root. Significantly, his operative report did not indicate any evidence of soft disc herniation, his pre-surgery diagnosis.
35. Claimant returned to see Dr. Abdu in October 2014. He appeared to be in less discomfort than he had been prior to surgery, but Dr. Abdu did not think he had made much progress otherwise. His motor examination was normal and his sensation was slightly diminished on the left. Dr. Abdu referred him to physical therapy.
36. At his next follow-up visit with Dr. Abdu, November 2014, Claimant reported that physical therapy was not reducing his pain. According to Dr. Abdu, his lower extremity motor examination was normal, and as far as he could tell, sensory function was intact in both his legs and his feet.
37. In April 2015 Claimant underwent a consultation and electrodiagnostic testing with Dr. Ayres, a board certified neurologist. EMG studies on both legs were

normal, and Dr. Ayers concluded that there was no evidence of significant peripheral nerve damage.

Expert Medical Opinions

(a) Dr. Binter

38. At Defendant's request, Dr. Binter, a board certified neurosurgeon, performed a medical records review on November 24, 2014. Dr. Binter's review encompassed all of Claimant's relevant medical records, beginning with his first visit to the emergency department and on through Dr. Abdu's post-surgery follow up evaluations.
39. In Dr. Binter's opinion, Claimant's description of having lifted a 100- to 125-pound table at work, his subsequent complaints, and clinical and surgical findings were inconsistent with a lumbar disc herniation caused by a lifting injury. Among the medical evidence she cited for support:

- Claimant had intact motor strength and reflexes and global decrease in sensation in his left leg and foot; he thus did not exhibit clinical radiculopathy to correlate with the reportedly large disc herniation seen on MRI;
- Dr. Abdu's operative findings did not indicate any evidence of soft disc herniation; and
- The enlarged facet joint, or hard annulus, that Dr. Abdu found during surgery was most consistent with degenerative disc disease, and most likely pre-dated January 23, 2014.

I find Dr. Binter's analysis very credible.

(b) Dr. Abdu

40. On August 26, 2014, some two weeks before Claimant's disc surgery, Dr. Abdu wrote a "To Whom It May Concern" letter in which he stated:

It is my medical opinion that the incident of 1/23/14 described by [Claimant] in which he was lifting a table at work that resulted in acute onset of back pain with left leg, buttock and posterior thigh pain to his knee is more likely than not the cause of his current left-sided disc herniation in the posterolateral region of the L5 disc space which correlates with the above symptoms.

41. As noted above, Finding of Fact No. 34 *supra*, Dr. Abdu's surgical findings proved this diagnosis to be incorrect. In fact, there was no disc herniation at L5-S1; instead, the surgical findings revealed the enlarged facet joint that was compressing the nerve root at that level. Dr. Binter credibly attributed that finding to pre-existing degenerative disc disease, and Dr. Abdu has not provided a contrary opinion. Lacking any expert opinion establishing a causal link between Claimant's alleged lifting injury and the surgical findings Dr. Abdu actually observed, I find his opinion incomplete and unpersuasive.

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. Defendant argues that Claimant has failed to meet his burden of proof for two reasons: first, he did not credibly establish that a workplace injury occurred; and second, his expert medical evidence was insufficient to establish medical causation. I agree.

Did an Injury Occur on January 23, 2014?

3. Credibility is the key to determining whether or not Claimant sustained an injury arising out of or in the course of his employment on January 23, 2014. In such instances, the trier of fact must evaluate the factual evidence carefully so as to explore any inconsistencies, investigate possible intervening causes and evaluate "hidden or not-so-hidden motivations." *Darrah v. Censor Security, Inc.*, Opinion No. 16-09WC (June 3, 2009); *Jurden v. Northern Power Systems, Inc.*, Opinion No. 39-08WC (October 6, 2008); *Russell v. Omega Electric*, Opinion No. 42-03WC (November 10, 2003), citing *Fanger v. Village Inn*, Opinion No. 5-95WC (April 20, 1995).
4. Claimant's testimony was replete with disturbing inconsistencies. On his pre-employment questionnaire, he denied having received a \$50,000.00 settlement only three years before on account of injuries he suffered in a work-related motor vehicle accident. He reported varying accounts of the mechanism of his injury to his medical providers. In his sworn formal hearing testimony, he denied ever having any problems working with Ms. Houle, a statement that was directly contradicted by his Notice of Injury and Claim for Compensation.

Taken together, the picture is one of a witness whose recollection of events was based more on expediency than truthfulness.

5. In contrast, Ms. Houle and Mr. Billings provided testimony that was both internally consistent and corroborated by others. There being no way to reconcile Claimant's version of events with theirs, I conclude that theirs is the most credible.
6. Whether Claimant intentionally misrepresented the event or simply forgot the details is more difficult to ascertain. There was evidence from which I might conclude that he became frustrated with Ms. Houle's inability to keep up and impulsively walked off the job, then later realized the ramifications of his actions and concocted an injury to excuse them. Whatever the reason, I conclude that his testimony was not credible. Lacking a credible base, I must also conclude that the injury he alleged likely did not occur as he said it did.

Medical Causation

7. On the issue of causation, the parties presented conflicting medical opinions. 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).
8. Based primarily on the second and third factors, I conclude that Dr. Binter's opinion is more persuasive. Dr. Binter reviewed all of the pertinent medical records prior to rendering her opinion. Her opinion was clear, thorough and supported by the objective medical findings, which documented intact motor strength and reflexes and no evidence of radiculopathy.
9. In contrast, Dr. Abdu's own surgical findings did not support his causation opinion. Dr. Abdu attributed Claimant's symptoms to a soft disc herniation causally related to his lifting injury, but this proved to be inaccurate. Thereafter, he did not propose an alternate theory. As Claimant bears the burden of proof on the causation issue, in the final analysis it is his expert's credibility that matters most. In this case, Dr. Abdu's opinion does not carry the necessary weight.
10. I thus conclude, based on the evidence presented, that Claimant has failed to sustain his burden of proving the necessary causal relationship between his

work injury and his left neck, shoulder, back and leg conditions to establish compensability.

11. As Claimant has failed to establish his claim for benefits, he is not entitled to an award of attorney's fees and costs.

ORDER:

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

DATED at Montpelier, Vermont this ____ day of _____, 2015.

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.