STATE OF VERMONT
DEPARTMENT OF LABOR

Tony Vohnoutka	Opinion No. 20-16WC
v.	By: Phyllis Phillips, Esq. Administrative Law Judge
Ronnieôs Cycle Sales of Bennington, Inc.	For: Anne M. Noonan Commissioner
	State File No. FF-00938

OPINION AND ORDER

Hearing held in Bennington on April 15, 2016
Record closed on May 16, 2016

APPEARANCES:

Claimant, *pro se*
Jennifer Meagher, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant suffer a compensable neck injury while working in the course and scope of his employment on or about February 22, 2013?

2. If yes, to what workersô compensation benefits is he entitled?

EXHIBITS:

Joint Exhibit I:	Medical records
Defendantôs Exhibit A:	*Curriculum vitae*, William Boucher, M.D.
Defendantôs Exhibit B:	Claimantôs personnel records
Defendantôs Exhibit C:	Vermont First Report of Injury (Form 1), 3/27/14
Defendantôs Exhibit D:	Letter to NYS Workersô Compensation Board (with attachments), March 27, 2014
Defendantôs Exhibit E:	Denial of Workersô Compensation Benefits (Form 2), 4/9/2014

CLAIM:

All workersô compensation benefits to which Claimant proves his entitlement as causally related to his alleged February 22, 2013 work-related injury.[1]

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 Vermontôs Workersô Compensation Act.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Departmentôs file relating to this claim.

3. Claimant worked for Defendant, a retailer of recreational vehicles, as a service technician beginning in March 2009.

4. For the first year of his employment, Claimant occasionally proposed ideas to save money and/or improve safety in the shop, which he felt his supervisor, Dave Munson, appreciated hearing. Over time, however, he came to believe that his suggestions were being ignored. He was particularly troubled by the fact that after voicing his concerns about indoor air quality, Mr. Munson allegedly told him he would be fired if he filed a VOSHA complaint and reprimanded him for going outside to get fresh air. As to these allegations, Mr. Munson credibly testified that there was a working ventilation system in the garage.

Claimant's Alleged February 2013 Work Injury

5. According to Claimantôs credible testimony, on or about February 22, 2013 Mr. Munson asked him to help unload a snowmobile from his pickup truck. At some point while they were both pulling the machine off the back of the truck, Mr. Munson let go, and Claimant was left to bear the entire weight of the vehicle on his shoulders, arms and neck. Claimant felt the immediate onset of numbness and tingling in his neck. He went inside, sat down and told Mr. Munson his neck hurt and he needed a moment ñto figure out how I feel.ò

6. Claimant recalled that while he was sitting inside, Mr. Munson asked whether he needed to go home and advised that if not, he should get back to work. He did not suggest that Claimant seek medical attention, nor did Claimant request it.

[1] Claimant did not appeal the Commissionerôs denial of his claim for temporary disability benefits for any period prior to December 9, 2014 in the context of her ruling on Defendantôs Motion for Summary Judgment, *Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc.*, Opinion No. 01-16WC (January 25, 2016). His entitlement to those benefits is no longer at issue, therefore.

7. Claimant worked through the day, then went home to his motherôs house, where he resided at the time. At formal hearing, his mother, Kimberly VonHaggin, credibly recalled an evening in or around February 2013 when he came home from work complaining of neck pain. She gave him some aspirin and he took a nap. Similarly, Claimantôs close friend, Paul Jones-Fote, who also testified at formal hearing, credibly recalled a time in or around February 2013 when he observed Claimant standing crooked, grimacing and complaining of neck pain.

8. For his part, Mr. Munson denied any recollection of either the snowmobile lifting incident or Claimantôs complaint of neck pain immediately thereafter. While I do not doubt his failure to recall the event, I find from Claimantôs credible testimony that the lifting incident likely occurred, following which Claimant likely experienced some degree of neck pain.

9. Claimant did not seek medical attention for his claimed neck injury until February 2014, almost an entire year after the snowmobile incident. In the intervening months, he visited a medical provider on only one occasion. This was in May 2013, when he complained to Katie Driscoll, a physicianôs assistant, of nausea and headaches reportedly due to inhaling fumes at work. As to any cervical pain, Ms. Driscollôs review of symptoms on that date specifically states, ñNeck ï normal range of motion, no tenderness, supple.ò

10. Mr. Munson credibly testified that between February and November 2013 Claimant gave no indication that he was suffering from neck pain or that he was restricted in any way from performing his normal work duties. His productivity and general attitude had declined as compared to when he was first hired, but Mr. Munson had no reason to attribute this to any injury-related cause.

11. Claimant first made the decision to seek treatment for his neck pain in November 2013, some eight months after his claimed injury. At hearing, he testified that the reason he did not do so sooner was because he believed strongly that it was his employerôs responsibility to cover his medical expenses. ñI couldnôt bring myself to pay for it,ò he stated. I am persuaded that Claimant honestly believed he was justified in delaying treatment on those grounds.

12. On November 12, 2013 Claimant approached Mr. Munson and asked whether he recalled an incident in February 2013 when Claimant hurt his neck while they were unloading a snowmobile. Mr. Munson replied that he did not. Claimant then advised that he wished to file a workersô compensation claim, because he needed medical attention for his ongoing neck pain.

13. Mr. Munson conveyed Claimantôs request via email to Denise Bourassa, Defendantôs human resources manager, and asked how best to proceed. After conferring with her manager, Ms. Bourassa advised that because Claimant had not filed an accident report at the time of his injury, as Defendantôs company policy required, he would have to pay for medical treatment on his own.

14. At formal hearing, Ms. Bourassa testified to her understanding of Defendantôs policy for reporting work-related injuries. According to her interpretation, employees are required to do so ñimmediately,ò that is, within 48 hours at most after the injury occurs. If they do not, company policy requires that they seek medical treatment at their own expense. Thereafter, if the medical information confirms that the injury was in fact work-related, then at that point the company will file a First Report of Injury with state authorities.

15. I find that Ms. Bourassaôs understanding of Defendantôs policy directly contravenes Vermont law, which requires an employer to file a First Report of Injury (Form 1) with the Department within 72 hours of receiving notice or knowledge of a claimed work-related injury requiring medical attention. This is true regardless of whether the employer disputes the facts surrounding the injury and/or its relationship to the claimantôs employment. 21 V.S.A. §701; WorkersôCompensation Rule 3.0500.[2]

Medical Treatment and Evaluations

16. After learning in November 2013 that Defendant would not agree to cover his medical expenses, Claimant again delayed seeking treatment for his ongoing neck pain. Finally, in mid-February 2014 he presented to Melanie Clark, a nurse practitioner, with a complaint of neck pain that reportedly had begun ñabout a year ago at work moving a snowmobile.ò Ms. Clark diagnosed cervicalgia. Based on the history Claimant described, she determined that the February 2013 snowmobile incident was the ñcompetent medical causeò of his injury. As treatment, she prescribed pain medications and made referrals for both physical therapy and an orthopedic consult. In the meantime, noting that Claimant had been able to work without restrictions since his injury, she did not change his work duties. I find Ms. Clarkôs analysis credible.

17. Ms. Clark next examined Claimant on June 20, 2014. She reiterated that his complaints were consistent with the history he had reported, and again recommended both physical therapy (which Claimant had not yet initiated) and an orthopedic consultation. Notwithstanding his subjective report of worsening pain, Ms. Clark also reiterated that Claimant was capable of working without restrictions or limitations.

18. Claimant underwent an orthopedic consultation with Dr. Robbins on July 14, 2014. According to the medical record, he reported the sudden onset of neck pain some two years previously ñas a result of lifting.ò X-rays revealed degenerative changes at two levels of the cervical spine. Dr. Robbinsôclinical impression was of a soft tissue and posterior element cervical spine injury, with resulting spasm and mechanical decompensation. Regarding causation, Dr. Robbins stated:

> The patient demonstrates muscle reaction to injury that can come from a range of motion in spine that exceeded [its] intrinsic flexibility. Whether from an acute event or incremental repeat irritations, it has left the patient in a state of protective response to the painful stimulus.

[2] Effective August 1, 2015 Rule 3.0500 has been amended and is now codified, in substantially similar form, as Rule 3.1100.

19. As treatment for Claimantôs symptoms, Dr. Robbins recommended home exercises, ice and a short course of physical therapy. He described his treatment rationale in this way:

> Desensitizing the patient through creating a more normal range of motion and understanding of good vs. bad pain as long as there is no pathologic problem (so far not detected), will be the thrust of the initial treatment.

20. As for work capacity, consistent with Ms. Clarkôs prior determination, Dr. Robbins as well indicated that Claimant was capable of working full duty, without restrictions.

21. I find Dr. Robbinsô analysis credible in all respects, particularly regarding his treatment rationale. At hearing, Claimant voiced an extreme fear of further injury, stating, ñI choose not to work to not hurt myself further.ò Clearly, he would benefit from treatment that is focused in the manner Dr. Robbins described.

22. On December 9, 2014 Claimant returned to Ms. Clark, again complaining of ongoing neck pain. Defendant having terminated his employment for performance-related issues in July 2014, by this time Claimant had been unemployed for approximately four months.

23. Ms. Clarkôs office note was brief, and aside from a cursory notation of tenderness between Claimantôs shoulder blades, did not reflect any positive findings on objective examination. Nevertheless, she imposed work restrictions against bending, twisting, lifting and operating heavy equipment. She also concluded that Claimant would likely benefit from vocational rehabilitation services. Both of these determinations appear to have been based almost entirely on Claimantôs subjective report. Thus, Ms. Clark noted, ñ[Claimant] feels that this injury has caused him a degree of disability and he is no [sic] unable to perform the type of work he did previously as a mechanic technician,ò and later in her report, ñhe feels due to the ongoing neck pain he is unable to perform heavy lifting anymore.ò

24. Given that Claimant had not undergone any curative treatment whatsoever at the time of Ms. Clarkôs evaluation, I find premature her recommendation that he pursue vocational rehabilitation. Similarly, I find that her decision to impose work restrictions that were neither clearly delineated nor objectively supported significantly weakens her determination as to work capacity.

25. At Defendantôs request, on September 25, 2015 Claimant underwent an independent medical examination with Dr. Boucher. Dr. Boucher diagnosed myofascial pain, which in his opinion was not causally related to the alleged February 22, 2013 work injury. Central to his analysis was the fact that Claimant neither reported nor exhibited any symptoms of neck pain or injury when his primary care provider examined him in May 2013, Finding of Fact No. 9 *supra*, and did not complain of neck pain to any medical provider until almost a year after his injury. From this Dr. Boucher concluded that Claimantôs neck pain must have developed at some point during the intervening months, likely as a consequence of age-related degenerative changes in his cervical spine.

26. Given the negative findings noted on his primary care providerôs May 2013 examination, Dr. Boucher determined that even if Claimant had suffered a work-related neck injury in February 2013, it must have resolved by May. On those grounds, he concluded that Claimant had reached an end medical result, with no permanent impairment and no need for additional medical treatment. As for work capacity, Dr. Boucher found ñno objective reason for any work restrictions.ò

27. At hearing, Claimant disputed Dr. Boucherôs analysis. He theorized that the reason the May 2013 medical record did not reflect any signs or symptoms of neck pain may have been because he was focused on another medical issue that was of greater concern to him at the time. He denied ever having suffered from, or treated for, neck pain in the past, an assertion that the medical records and the witnesses who testified on his behalf (his mother, Ms. VonHaggin, his friend, Mr. Jones-Fote, and another acquaintance, Nicole Stagnitti) all corroborated. Notwithstanding the delay in seeking treatment, he credibly testified that he has been experiencing worsening neck pain ever since the February 2013 snowmobile incident. Again, Ms. VonHaggin, Mr. Jones-Fote and Ms. Stagnitti all credibly corroborated this testimony.

28. I find that the mere fact that the May 2013 medical record does not note any positive cervical findings does not justify Dr. Boucherôs conclusion that Claimantôs neck injury must have resolved by then. To the contrary, based on both Claimantôs and his corroborating witnessesô credible testimony, I find that he likely was continuing to experience symptoms causally related to the February 2013 snowmobile incident at that time. For that reason, and given that he had not undertaken any treatment at all by that date, I find unpersuasive Dr. Boucherôs determinations as to both end medical result and the need for additional treatment.

29. As for Dr. Boucherôs determination that Claimant was able to work without restrictions, consistent with my ruling on Defendantôs previously filed Motion for Summary Judgment, n.1 *supra*, I concur that this was the case at least up until December 9, 2014. The only evidence of work capacity after that comes from Ms. Clarkôs note of that date, which imposed generalized restrictions with little if any objective support, Finding of Fact No. 23 *supra*. I have already found her determination unpersuasive on those grounds, Finding of Fact No. 24 *supra*.

30. Presumably due to lack of funds, Claimant has not sought any treatment for his neck pain since Ms. Clarkôs December 2014 evaluation. Aside from a few odd jobs, he has not worked since Defendant terminated his employment in July 2014. For a time thereafter, he applied for and received unemployment compensation, and in conjunction with those benefits he conducted a job search, which proved unsuccessful. Given the extent of his self-perceived functional restrictions and extreme fear of reinjury, I find that these efforts were likely quite limited.

31. On a typical day, Claimant awakens, has breakfast, and then drives to a friendôs house to ñhang out,ò play with remote control cars and talk. He spends considerable time on his computer, researching legal issues related to his workersô compensation claim. He is able to drive, sit and walk, albeit with constant nagging neck pain. He can lift a gallon of milk, but described a sharp shooting pain when attempting to lift heavier objects, such as the ñsuitcaseò containing his workersô compensation documents. During the formal hearing, which lasted for almost three hours, he appeared to sit comfortably and did not exhibit any plainly visible pain behaviors.

Procedural History

32. Although the record is not entirely clear, it appears that on or about March 14, 2014 Claimant filed a claim for workersô compensation benefits with the State of New York Workersô Compensation Board. In response, on March 17, 2014 the Board mailed a ñNotice of Case Assemblyò to both parties, in which it requested further information from each of them. It does not appear from the record that Claimant responded to this request.

33. Defendantôs human resources manager, Ms. Bourassa, responded to the Boardôs request by letter dated March 27, 2014. In it, she stated that Defendant was reporting Claimantôs claim as a ñNegative Report of Injury.ò Ms. Bourassa referenced Claimantôs November 2013 conversation with Mr. Munson as the date when Defendant first became aware of Claimantôs claimed work injury, Finding of Fact No. 12 *supra*. Citing Defendantôs injury reporting policy, Finding of Fact No. 14 *supra*, she stated, ñWe (Ronnieôs [Cycle Sales of Bennington, Inc.] management and Human Resources) advised [Claimant] to seek medical attention on his own accord because the claim was not made available at time of the incident.ò

34. Concurrent with its response to the State of New York Workersô Compensation Board, Defendant completed a Vermont First Report of Injury (Form 1), and filed it with the Department on or about March 31, 2014. Attached to the filing was a copy of Ms. Bourassaôs March 27th correspondence to the State of New York Workersô Compensation Board.

35. Defendant filed its Denial of Workersô Compensation Benefits by Employer or Carrier (Form 2) on or about April 10, 2014. It cited various grounds for denying Claimantôs claim, including that he had failed to give timely notice of his injury under 21 V.S.A. §656 and also that he had not produced sufficient medical evidence to substantiate that his injury was work-related.[3]

36. Claimant appealed Defendantôs claim denial by way of a Notice and Application for Hearing (Form 6), filed on September 22, 2014 and supplemented on January 23, 2015. After informal dispute resolution efforts failed, the claim was forwarded to the formal hearing docket.

[3] Defendant also questioned whether Vermont had jurisdiction over Claimantôs claim, given that he already had filed a claim for benefits in New York. It appears to have abandoned this defense, presumably because Claimant did not pursue his New York claim.

CONCLUSIONS OF LAW:

1. In workersô 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. Claimant here seeks a determination that he suffered a compensable work-related neck injury while moving a snowmobile on or about February 22, 2013. As a consequence of that injury, he seeks indemnity, medical and vocational rehabilitation benefits.

3. I have already found credible Claimantôs testimony as to the timing of his neck injury and the manner in which it occurred. I also have found credible Ms. Clarkôs determination that the symptoms he experienced subsequently were causally related to the February 2013 snowmobile incident as he described it. I thus conclude that his neck injury arose out of and in the course of his employment, and is therefore compensable.

4. Defendant asserts that even if the injury occurred as Claimant says it did, his claim for benefits should be barred for failure to give timely notice to his employer, as required under 21 V.S.A. §656(a). That statute states:

> **§656. – Notice of injury and claim for compensation**
>
> (a) A proceeding under the provisions of this chapter for compensation shall not be maintained unless a notice of the injury has been given to the employer as soon as practicable after the injury occurred, and unless a claim for compensation with respect to an injury has been made within six months after the date of the injury.

5. Section 656(a) must be read in conjunction with §660(a), however, which states:

> **§660. Sufficiency of notice of injury.**
>
> (a) A notice given under the provisions of this chapter shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or otherwise, unless it is shown that the employer was in fact misled to the injury as a result of the inaccuracy. *Want of or delay in giving notice, or in making a claim, shall not be a bar to proceedings under the provisions of this chapter, if it is shown that the employer, the employer's agent, or representative had knowledge of the accident or that the employer has not been prejudiced by the delay or want of notice* (emphasis added).

6. Notably, the ñknowledgeò that §660(a) requires in order to excuse what would otherwise be an untimely notice under §656(a) is not of the injury itself, but rather of the ñaccident.ò In the workersô compensation context, an ñaccidentò is defined as an ñunlooked-for mishap or . . . untoward event which is not expected or designed.ò *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31, 35 (1980) (internal citations omitted).

7. Reading both sections together, while §656(a) thus imposes a six-month deadline by which an employee must notify his or her employer of a claimed work-related injury, §660(a) allows for the deadline to be waived if the employer was already aware of the circumstances giving rise to it.

8. The ñaccidentò here consisted of Claimantôs and Mr. Munsonôs attempt to unload a snowmobile from Defendantôs truck on or about February 22, 2013. Although Mr. Munson no longer recalls the incident, as he was an active participant in the event I conclude that he knew of its occurrence at the time. Mr. Munson was both Claimantôs direct supervisor and his liaison to Defendantôs human resources manager for injury reporting purposes, and therefore it is reasonable to impute his knowledge to Defendant. I thus conclude that the ñknowledge of the accidentò requirement has been satisfied. Claimantôs failure to give notice of his injury within six months is excused under §660(a).

9. Claimant also meets the second ground for excusing his failure to give timely notice under §660 ï that Defendant has not been prejudiced by the delay. In the workersô compensation context, for an injured worker to establish the absence of prejudicial delay typically requires a showing first, ñthat the employer was not hampered in making its factual investigation and preparing its case, and second, by showing that the claimantôs injury was not aggravated by reason of the employerôs inability to provide early medical diagnosis and treatment. *M.P. v. NSK Steering Systems America, Inc.*, Opinion No. 14-07WC (May 1, 2007) (internal citations omitted).

10. The concept of prejudicial delay thus implies that an employer who has not been given timely notice of its employeeôs claimed work injury would have responded differently had it only known sooner. Presumably, it would have fulfilled its statutory obligation to report, investigate and, if appropriate, provide medical evaluation and treatment much earlier in the process and to much greater effect, such that different results would have been obtained.

11. Under the particular circumstances of this case, there is no basis for presuming that more timely notice would have led Defendant to a different result, however. According to Ms. Bourassaôs undisputed testimony, Finding of Fact No. 14 *supra*, unless Claimant had notified Mr. Munson within 48 hours of the February 2013 snowmobile incident, she would have reacted exactly as she did, by refusing to report his injury and instead leaving him to his own devices. No matter when he subsequently gave notice ï whether months, weeks or even just days later ï his claim still would not have been investigated or adjusted properly, and he likely still would not have been offered appropriate medical evaluation and treatment.

12. That Defendant imposed on its employees an injury reporting policy that contravenes both the letter and spirit of Vermontôs workersô compensation law should work against it, not in its favor. Under the circumstances, it is entirely appropriate that Claimantôs failure to give timely notice of his injury be excused, as §660(a) allows. I conclude that his claim is not barred.

13. Claimant having met his burden of proving that he suffered a compensable neck injury as a consequence of the February 2013 snowmobile incident, it remains to determine the extent to which he has proven his entitlement to medical, indemnity and/or vocational rehabilitation benefits.

14. Consistent with Dr. Robbinsô and Ms. Clarkôs evaluations, I conclude that Claimant likely suffered a soft tissue and posterior element cervical spine injury, which has resulted in ongoing neck pain. As he has undergone almost no focused treatment to date, I further conclude that he has not yet reached an end medical result for his injury. Given the significant gap in time since he was last examined, I anticipate that he will need to undergo additional primary care and/or orthopedic evaluations prior to developing an updated treatment plan. Nurse case management services may assist in allaying his fear of re-injury so that he can be appropriately compliant with treatment recommendations. So long as the treatments proposed are reasonable under 21 V.S.A. §640(a), Defendant will be obligated to pay for them.

15. It is premature to speculate whether Claimant will be entitled to permanent partial disability compensation referable to his work injury, as he has not even resumed treatment, much less reached an end medical result. In accordance with Workersô Compensation Rule 10.1200, when he does so Defendant will be obligated to investigate the extent, if any, of his permanent impairment and pay benefits accordingly.

16. I have previously determined that Claimant is not entitled to temporary wage replacement benefits for any period of time prior to December 9, 2014. *Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc.*, Opinion No. 01-16WC (January 25, 2016). As for the period of time from that date forward, I have found unpersuasive Ms. Clarkôs determination of disability, either total or partial. I therefore conclude that Claimant has failed to establish his entitlement to temporary disability benefits at this time.

17. Whether Claimant can produce sufficient credible evidence of temporary disability from this date forward remains to be seen. As he resumes treatment, it may be reasonable for him to undergo a functional capacity evaluation so that the extent, if any, of his current disability can be objectively determined. Even so, the fact remains that he was able to work full time and full duty for more than a year after his injury occurred, and only stopped working when his employment terminated for unrelated reasons. Under those circumstances, it may be difficult for him to establish a causal connection between his compensable injury and any current disability, whether total or partial. In any event, this issue is not before me now. Should Claimant wish to make a claim for such benefits in the future, he should notify Defendant and if necessary, pursue informal dispute resolution procedures.

18. Similarly, I conclude from the credible evidence that Claimant has failed to establish his entitlement to vocational rehabilitation services. With resumed treatment and formal functional capacity testing, his need for these services will likely be clarified. But again, under the circumstances it may be difficult for him to establish the required causal link between his work injury and any current vocational limitations.

ORDER:

Based on the foregoing, Defendant is hereby **ORDERED** to pay:

1. All reasonable medical services and supplies referable to treatment of Claimantôs compensable soft tissue and posterior element cervical spine injury with resulting cervicalgia, in accordance with 21 V.S.A. §640(a); and

2. To the extent that upon reaching an end medical result Claimant is determined to have suffered a ratable permanent impairment referable to his compensable soft tissue and posterior element cervical spine injury with resulting cervicalgia, permanent partial disability benefits in accordance with 21 V.S.A. §648.

DATED at Montpelier, Vermont this 7th day of November 2016.

_____
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.