STATE OF VERMONT
DEPARTMENT OF LABOR

Brian Griffin

v.

Houle Brothers Granite Co. Inc.

Opinion No. 05-17WC

By: Phyllis Phillips, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. AA-63473

OPINION AND ORDER

Hearing held in Montpelier on September 2, 2016
Record closed on October 18, 2016

APPEARANCES:

Steven Robinson, Esq., for Claimant
J. Christopher Callahan, Esq., for Defendant

ISSUE PRESENTED:

Did Claimant suffer a compensable low back injury on May 11, 2009?

EXHIBITS:

Claimantôs Exhibit 1:	Medical records from May 11, 2009 through August 12, 2009
Claimantôs Exhibit 2:	Insurance carrier questionnaire and job description forms
Claimantôs Exhibit 3:	Employerôs accident investigation form, June 4, 2009
Claimantôs Exhibit 4:	Denial of WorkersôCompensation Benefits (Form 2), June 23, 2009
Claimantôs Exhibit 6:	Letter from Charles Houle, June 22, 2009
Claimantôs Exhibit 7:	First Report of Injury (Form 1), June 4, 2009
Claimantôs Exhibit 9:	Deposition of Roger Houle, October 20, 2015

CLAIM:

All workersôcompensation benefits to which Claimant proves his entitlement as causally related to his alleged work injury

Costs and attorney fees pursuant to 21 V.S.A. §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 the Vermont Workersô Compensation Act.

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

3. Defendant is a granite memorial and sign manufacturer. Until recently, it was co-owned and operated by cousins Roger Houle and Charles Houle.

4. In 2004 Defendant hired Claimant to work as a lumper. Lumpers move large stones by attaching straps and hoisting them with a crane. They also wash stones, remove rubber from sandblasted stones, build crates for finished products and pick up scraps of granite (called grout) that are left over after the stones are cut.

5. Claimant has a prior medical history of low back pain, for which he underwent surgery in 2003 with a good result. When he started work for Defendant, he was not subject to any work restrictions and was not taking any pain medications. Although he had low back pain from time to time, prior to May 2009 he did not miss any work as a consequence of this condition.

6. In 2008 Claimant bumped his elbow at work. His foreman took him to the doctor. The injury was minor, and he did not miss any time from work. Defendant initiated a workersô compensation claim, and Claimant did not suffer any negative repercussions thereafter.

Claimant's May 11, 2009 Injury

7. At approximately noon on Monday, May 11, 2009 Claimant was at work, moving a pile of stones onto rollers for the sandblasters. As he bent over to attach a strap to one of the stones, he felt sudden severe pain in his back that brought him to his knees. A few minutes passed before he was able to stand up.

8. Because another employee was out that day, Claimant attempted to continue working, but his back pain was severe. At 1:30 PM he told Roger Houle that he had hurt his back and needed to leave. Claimant left the granite plant, called his wife and drove himself to the hospital Emergency Department.

9. Emergency Department staff examined Claimant at approximately 2:12 PM. When staff asked him about the onset of his back pain, he lied, and reported that it had started when he bent over to tie his shoe. At hearing, Claimant credibly testified that he did so because he was concerned that he might lose his job if he filed a workersô compensation claim, and he worried that if other local granite industry employers found out, he might not be rehired elsewhere. Besides, he thought he had just pulled a muscle, which he assumed would resolve on its own.

10. Two days later, on Wednesday, May 13, 2009 Claimant followed up with his doctor. Again he made no mention of hurting his back bending over to strap a stone, but the medical record implies that the injury occurred at work. It states: ñBrian here with continued back pain ï onset Monday morning ï had to leave early. Tried to go back for light duty yesterday ï was unable to do anything.ò

11. Claimantôs back pain worsened over the next two weeks. On May 27th he was admitted to the hospital for pain control. While he was there, Charles Houle telephoned him and asked whether he had identified his injury as work-related for hospital billing purposes. Claimant responded that he had not, but if he had known how bad it was, he would have. Mr. Houle told him not to worry about using up his vacation days; they would ñtake care ofò him.

12. When Claimant received his next paycheck, he discovered that Defendant had applied his vacation days to the time he missed from work. He told Roger Houle about his conversation with Charles Houle, which Roger subsequently confirmed. Nevertheless, despite Charlesô promise to the contrary, Defendant charged Claimant for using his vacation days. Claimant contacted the union and filed a workersô compensation claim on June 4, 2009.

13. In July 2009 Claimantôs primary care provider, Monique Karthaus, PA-C, stated in a letter that his May 11, 2009 reported low back pain and diagnosed disc injury were causally related to his work activities. Similarly, in August 2009 Dr. Penar, Claimantôs treating neurosurgeon, also stated that Claimantôs low back condition was causally related to an incident at work that occurred on May 11, 2009.

14. Claimant credibly testified that he does not own a camper, and also that he did not attend any auto races at Thunder Road Speed Bowl during the weekend of May 9th and 10th, 2009.

15. I find Claimantôs account of when and how his injury occurred to be credible in all respects.

Defendant's Version of Events

16. Defendant did not witness Claimantôs alleged May 11, 2009 injury. Claimant notified Roger Houle of the injury, but Mr. Houle does not recall the date or circumstances, other than learning of it on a Monday.

17. According to Mr. Houle, on the Friday before he learned of the alleged injury, Claimant had asked whether he could leave work early to set up his camper and attend the races at Thunder Road. Mr. Houle allowed him to leave work that day at 2:00 PM.

18. Mr. Houle learned about the injury from Claimant on the Monday after the Thunder Road conversation, but he does not remember whether Claimant reported the injury by telephone or in person. He also does not remember whether Claimant worked Monday morning before reporting the injury or not.

19. Mr. Houle credibly testified that he did not take any steps to report Claimantôs injury when he first learned of it, because he did not know how severe it was. Defendantôs practice was not to report every workplace injury. If an injury resulted in less than $750.00 in medical bills, Defendant would pay it out of pocket and not report it to its workersô compensation insurance carrier or to the Department.[1] Mr. Houle recalled that Defendant might have handled Claimantôs elbow injury in this manner.

20. Mr. Houle also testified that he and Charles Houle were suspicious that Claimant might have injured his back over the weekend, while camping or attending a race at Thunder Road. I have already found, based on Claimantôs credible testimony, Finding of Fact No. 14 *supra*, that this suspicion was entirely speculative and unfounded.

21. After Claimant filed his workersô compensation claim, Defendantôs accident investigation committee investigated the accident. The committeeôs June 4, 2009 report identified an injury occurring in the washstand area on May 11, 2009 while Claimant was putting a crane strap on a stone. Under ñPrevention,ò the report stated: ñThis injury could happen to anyone. All employees need to take precautions when bending.ò The investigation report made no mention of camping or attending a race at Thunder Road.

22. Claimant worked for Defendant for five years. Roger Houle testified that he was an honest and good worker, who was generally amenable to doing whatever he was asked. I find this testimony credible.

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, *see, e.g., Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941), 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, supra* at 19; *Morse v. John E. Russell Corp*., Opinion No. 40-92WC (May 7, 1993).

2. Defendant asserts that Claimant has not produced sufficient credible evidence to sustain his burden of proving that he suffered a workplace injury when and as he claims he did. The matter is complicated by his admittedly untruthful account to hospital Emergency Department staff, to whom he reported that his low back pain was triggered not by work activities but while bending over to tie his shoe.

[1] Vermontôs workersô compensation statute permits an employer to pay a medical bill referable to ñfirst-aid-only-treatmentò of a work-related injury, provided that (a) the bill is for less than $750.00; and (b) the injury does not result in lost time from work. While the employer need not report the injury to its workersô compensation carrier in such cases, it is obligated to file a First Report of Injury (Form 1) with the Department. 21 V.S.A. §640(e).

3. Credibility is the key to determining whether or not Claimant sustained an injury arising out of and in the course of his employment on May 11, 2009. Notwithstanding the inconsistencies in his account, I conclude that his version of events was, at its core, both accurate and truthful. The mechanism of his injury ï bending over ï was consistent with his complaints. The circumstances under which it allegedly arose ï attaching a strap to a stone ï were consistent with his job duties. And given his honestly held fear of repercussions, his decision not to correct his initial untruthfulness until Defendant reneged on its promise to ñtake care ofò him makes sense, both substantively and chronologically.

4. In contrast, Defendantôs version of events was speculative and implausible. To assert, with no evidentiary support whatsoever, that because Claimant asked to leave work early on a Friday, he must therefore have injured himself at some point before returning to work on the following Monday, is a leap in reason I simply cannot fathom.

5. I thus conclude that Claimant has sustained his burden of proving that he suffered a compensable work-related injury when he bent over to attach a strap to a stone on May 11, 2009. Defendant is therefore obligated to provide whatever workersô compensation benefits he establishes as causally related to that incident.

6. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit his itemized claim.

ORDER:

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

1. All workersô compensation benefits to which Claimant proves his entitlement as causally related to his May 11, 2009 injury at work; and

2. Costs and attorney fees in amounts to be determined in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 27th day of February, 2017.

_____
Lindsay H. Kurrle
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.