STATE OF VERMONT
DEPARTMENT OF LABOR

Cori Lucas

v.

Carlôs Equipment Inc.

Opinion No. 05-19WC

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. KK-525

OPINION AND ORDER

Hearing held in Montpelier on December 17, 2018
Record closed on January 23, 2019

APPEARANCES:

Brendan P. Donahue, Esq., for Claimant
Keith J. Kasper, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant sustain a low back injury arising out of and in the course of his employment with Defendant on September 6, 2017?

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

EXHIBITS:[1]

Joint Exhibit I:	Medical records
Claimantôs Exhibit 1:	Text messages between Claimant and Clarence Larose
Claimantôs Exhibit 3:	Clarence Laroseôs deposition (excerpt)
Claimantôs Exhibit 4:	Dermatome diagram
Defendantôs Exhibit B:	June 8, 2018 letter from Attorney Kasper to Attorney Donahue concerning Claimantôs work search duty
Defendantôs Exhibit C:	July 5, 2018 letter from Attorney Kasper to Attorney Donahue concerning Claimantôs work search log
Defendantôs Exhibit D:	Lucas Auto and Detailing advertisement
Defendantôs Exhibit E:	Paystubs for pay dates September 1, 2017, September 8, 2017 and September 15, 2017
Defendantôs Exhibit F:	Dr. Lockridgeôs September 13, 2017 schedule

[1] The designations ñClaimantôs Exhibit 2ò and ñDefendantôs Exhibit Aò were reserved for additional records to be submitted after hearing. On January 4, 2019, the parties indicated they were not submitting additional records.

CLAIM:

Temporary total disability benefits from September 9, 2017 through July 1, 2018 pursuant to 21 V.S.A. § 642
Medical benefits pursuant to 21 V.S.A. § 640
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 Vermontôs Workersô Compensation Act.

2. I take judicial notice of all relevant forms and correspondence in the Departmentôs file relating to this claim.

3. Claimant is a 47-year-old man who lives in Brownington, Vermont. He was hired by Defendant as an auto mechanic in early 2017.

4. Defendant is an auto repair shop owned by Clarence (ñBuzzyò) Larose. Mr. Laroseôs father owned the business before him. As a hands-on manager, Mr. Larose works at the shop every day.

5. The parties stipulated that on September 6, 2017, Claimant had an average weekly wage of $728.68, an initial compensation rate of $486.03, and four dependents as defined in the Workersô Compensation Act.

Claimant's Prior Medical History

6. Claimant testified that he did not have any back problems in 2016, when he worked at Key Auto. However, his medical records establish that he did:

    - In March 2016 Claimant complained to his primary care provider of low back and right leg pain. This visit followed up on a January 2016 emergency department visit for low back pain. Claimantôs provider recommended a lumbar spine and right hip x-ray. *Medical records*, at 012.

    - In April 2016 Claimantôs primary care provider wrote: ñToday the patient presents complaining of severe, acute back pain superimposed on chronic since last January. No specific inciting event or trauma,[2] but severe lower back pain radiating to his anterior left extremity . . .ò *Medical records*, at 013. The provider suspected radiculopathy at the L4-5 level of the lumbar spine. *Id.*

[2] On cross examination, Claimant acknowledged that he woke up one morning with acute low back pain that did not result from an inciting event.

7. Claimant missed some time from work at Key Auto in 2016 due to his back and leg pain. During his time out of work, he collected unemployment benefits and received treatment for his medical condition.

8. Claimantôs back pain resolved before he applied to work for Defendant in 2017.

Claimant's Alleged September 6, 2017 Work Injury

9. Claimant alleges that a work incident late on Wednesday, September 6, 2017, caused a low back injury, as follows: He was working underneath the passenger-side dashboard of a vehicle in the shop. After crouching for several minutes, he stood up and felt a ñvery strange situationò with his back. He described it as discomfort down the back of his legs and into his groin. He found it difficult to move or stand up straight.

10. Claimant alleges that he told Mr. Larose about the incident immediately afterwards. Mr. Larose maintains that he has no knowledge of Claimantôs sustaining an injury on September 6, 2017 and denies that Claimant reported a work injury to him on that date or any other date.

Dispute About Claimant's Hours for September 7, 2017 and September 8, 2017

11. Defendant pays its employees on Fridays. Each paycheck covers the time period from the previous Friday through the Thursday before payday.

12. Claimant regularly worked full days from Monday through Friday and half days on Saturday. His pay rate was $17.00 per hour. Thus, if he worked 40 hours of straight time and four hours of overtime on Saturday, his gross pay would be $782.00 per week. Claimantôs paychecks were subject to a child support withholding order in the amount of $221.56 per week. *Defendant's Exhibit E*.

13. Claimant testified that he went to work on Thursday, September 7, 2017, but left an hour and a half later because of back pain. He further testified that he did not work at all on Friday, September 8, 2017. At his deposition, he testified that he was not paid for these days. In particular, he testified that he ñabsolutelyò did not get paid for Friday, September 8. *Claimant's deposition*, page 40, lines 10-11. Despite these assertions, Defendantôs payroll records establish that Claimant was paid for eight hours on September 7 and eight hours on September 8.

14. When the payroll records were brought to his attention, Claimant explained the discrepancy by alleging that Defendant had a practice of paying him every week in cash for extra hours worked off the books. He testified that when he missed work on September 7 and September 8, Mr. Larose was concerned that his paycheck would not cover his child support obligation. Mr. Larose therefore paid him the overtime he was owed for the week through the payroll system, rather than in cash.

15. Mr. Larose disputes this. He testified that Claimant was always paid through the payroll system, and he denied ever paying him in cash for extra overtime. According to Mr. Larose, Claimant worked eight hours on September 7 and on September 8 and was paid for those hours in the usual course through the payroll system.

16. I find Mr. Laroseôs testimony more credible than Claimantôs. Claimant did not raise the issue of cash payments until he was presented with paystubs contradicting his testimony that he was not paid for September 7 and 8. Further, Claimantôs paycheck dated Friday September 8 covered the time period from Friday, September 1 through Thursday, September 7. It did not cover Friday, September 8. If Claimant worked only 1.5 hours on Thursday, September 7, rather than his usual eight hours, then his gross pay for that period would be $110.50 less than usual. He would still have more than enough wages to cover his $221.56 child support deduction that week. Accordingly, the rationale that Claimant provided for Mr. Laroseôs paying him for extra overtime through the payroll system rather than in cash is unsupported by the evidence.

17. I therefore find that Claimant worked full days on Thursday, September 7, 2017 and Friday September 8, 2017.

Claimant's Activities on Saturday, September 9, 2017

18. When Claimant left work at dayôs end on Friday, September 8, 2017, he mentioned to Mr. Larose that he would be joining his wifeôs family for their annual potato harvest that weekend.

19. Claimant was scheduled to work a half day on Saturday, September 9, 2017. That morning, he called Mr. Larose to inform him that he hurt his back and could not work that day. Claimant contends that he told Mr. Larose that he hurt his back ñat work.ò Mr. Larose testified that Claimant did not say he hurt his back ñat work.ò

20. Claimant relies on Mr. Laroseôs deposition testimony to support his contention here. However, my review of the testimony did not find support for Claimantôs position. Mr. Larose testified: ñWhen he called me Saturday morning, after he left Friday, he ï the next morning he couldnôt come in to work. He said heôd messed up his back last night.ò *Larose deposition*, at page 20, line 25 through page 21, line 3. Claimantôs counsel spoke the words ñat workò when he questioned Mr. Larose, but Mr. Larose did not affirm those words. He testified that Claimant reported hurting his back ñlast night.ò Claimant did not work for Defendant on Friday night. Accordingly, I find that Claimant did not report a workplace injury to Mr. Larose on Saturday morning.

21. Claimant and his wife, Danielle Lucas, both testified that she drove him to the North Country Hospital emergency department on Saturday, September 9, 2017. Claimant testified that he checked in at the admissions desk and then saw a triage nurse. When he told the nurse about his severe back pain, she summoned a doctor over to triage. The doctor told Claimant that there was nothing they could do for severe back pain in the emergency department and advised him to go home and call his primary care doctor. The hospital has no record of the emergency department visit, nor did it generate a bill for the services provided.

22. Defendant contends that Claimant did not go to the emergency department on Saturday, September 9, 2017 because there is no record of the visit or bill for services.

23. Whether Claimant actually went to the emergency department on Saturday bears on his overall credibility, but is not otherwise relevant to this claim. It is surprising to me that an emergency department physician would decline to examine a patient complaining of severe pain, but it is possible that Claimant just acceded to the suggestion that he see his primary care doctor instead. The lack of a medical record or bill is more troubling. However, without any evidence of North Country Hospitalôs record and billing practices, I will not assume that the lack of records disproves his account. Overall, I find the evidence on this issue inconclusive.

24. Later on Saturday, Claimant and his wife joined her family for the annual potato harvest dinner. Although Claimant might have picked potatoes that weekend, there is no credible evidence that he did.

Claimant's Subsequent Medical Course

25. On Monday morning, September 11, 2017, Claimant texted Mr. Larose as follows:

> Buzzy. Itôs cori. My back is still very sore. I am going to let it rest for today as well as per the e.r. room doctors advice I saw saturday. Itôs a little better than it was. So hopefully by morning itôs better. Iôll be in tomorrow.

Claimant's Exhibit 1.

26. Claimant saw his primary care doctor, Leslie Lockridge, MD, for back pain on Wednesday, September 13, 2017. The medical record for that visit is telling, both for what it contains and for what it omits. The record documents Claimantôs report of back pain, but it records the history of his presenting injury as having occurred ñ4 days ago,ò when he ñmade incidental twisting [movement] of trunk and immediately felt back pain in lumbar area radiating to [bilateral] inguinal area and ant[erior] thighs.ò *Medical records,* at 015. Significantly, the medical record does not record the injury as having occurred on September 6, 2017, nor does it record a workplace injury.

27. Four days prior to the doctor visit was Saturday, September 9, 2017. Dr. Lockridge testified that, when he wrote ñ4 days ago,ò he could have meant anywhere from three to five days ago. However, even three to five days would not relate back to the date of the alleged work injury, which was Wednesday, September 6. If Claimant had hurt himself at work on that date, and saw his doctor the following Wednesday, he likely would have reported hurting his back a week ago, not ñfour days ago.ò Accordingly, I find that the first medical record pertaining to Claimantôs back pain is consistent with Claimantôs sustaining a back injury on Saturday, September 9, not Wednesday, September 6.

28. On September 26, 2017, Claimant underwent an MRI scan at North Country Hospital. The MRI study found a prominent disc protrusion at the L2-3 level of the lumbar spine, as well as disc osteophyte complex at the lower levels of his lumbar spine. *Medical records*, at 019. Claimant eventually saw neurosurgeon Joseph Phillips, MD, in December 2017 and underwent surgery to decompress the L2-3 level of his lumbar spine in April 2018. *Medical records*, at 35, 80.

Separation from Employment in October 2017

29. Claimant began missing work on September 9, 2017, but he kept Mr. Larose informed of his medical status and potential availability to return.[3] *Claimant's Exhibit 1.*

30. In early October Mr. Larose informed Claimant that he needed to hire someone else and could no longer wait for his return. He told Claimant to come by and pick up his tools.

31. When Claimant later went to the shop to retrieve his tools, he had a discussion with Mr. Larose. According to Claimant, he asked Mr. Larose about the status of his workersô compensation claim, and Mr. Larose replied that he would not file a claim because he ñcouldnôt afford itò and ñjust wasnôt dealing with it.ò

32. According to Mr. Laroseôs account of their conversation that day, Claimant asked him to put him on unemployment. When Mr. Larose declined, Claimant threatened to file a workersô compensation claim. I find Mr. Laroseôs account of the conversation more credible than Claimantôs. First, Claimant filed for unemployment benefits when he was injured at Key Auto the year before, so there is a precedent for him to take those steps. Second, there is no evidence that Defendant could not afford a workersô compensation claim. To the contrary, Mr. Larose and Ms. Leithead both credibly testified that Defendant had no financial difficulties, paid his workersô compensation premiums on time, and routinely processed claims when employees reported injuries. See Finding of Fact Nos. 47, 49 *infra*.

[3] Claimantôs Exhibit 1 includes 12 text messages from Claimant to Mr. Larose about his medical status between September 11, 2017 and October 1, 2017. None of the messages mentions a workersô compensation claim or any connection between his back injury and his employment.

33. Thereafter, Claimant contacted the Department of Labor and obtained information on how to file a workersô compensation claim.

Job Search Efforts

34. Claimant underwent two back surgeries in April 2018[4] and was released to light duty work sometime later. On June 8, 2018, Defendantôs counsel wrote to Claimantôs counsel that Claimant needed to make a good faith job search if he wished to sustain a claim for temporary total disability benefits. *Defendant's Exhibit B*. On July 3, 2018, Claimant provided a job search log. Defendantôs counsel raised concerns that the jobs applied for (mainly auto mechanic jobs) were not within the scope of his light duty work restrictions. *Defendant's Exhibit C*.

35. Claimant testified that he attempted to do auto detailing work in late June through July 2018, for a total of four to five weeks, but he found that he could not perform such work because of his back. However, on July 30, 2018, Claimant created a Facebook page advertising his own auto repair and detailing business. He added an entry to the page on October 3, 2018 suggesting that customers call for an appointment ñbefore the snow flies.ò *Defendant's Exhibit D*.

Medical Opinions as to Causation

36. Claimant presented testimony from two physicians as to whether his low back injury was causally related to an alleged September 6, 2017 work incident. Defendant cross examined the witnesses but did not present its own medical expert.

(A) Leslie Lockridge, MD

37. Claimantôs treating physician, Dr. Lockridge, is a 1996 graduate of the Chicago Medical School. He currently works in private practice in Newport, Vermont. Dr. Lockridge devotes half his practice to hematology and oncology and the other half to internal medicine.

38. In Dr. Lockridgeôs opinion, Claimantôs pain in September 2017 was caused by a ñpretty massiveò disc protrusion at the L2-3 level of his lumbar spine. He identified this condition as a new injury distinct from his April 2016 lower back injury based on two factors. First, the April 2016 injury was at the L4-5 level of his lumbar spine, not the L2-3 level. Second, osteophytes were present at the lower levels of his lumbar spine, but not at the L2-3 level. Dr. Lockridge explained that osteophytes are calcified scar tissue and, as such, are an indication of a chronic condition, not an acute one. As no osteophytes were identified at L2-3, he concluded that Claimantôs injury at the L2-3 level was acute. I find Dr. Lockridgeôs opinion on the nature of Claimantôs injury to be clear, well supported by the medical records, and persuasive.

[4] Claimant underwent bilateral medial facetectomies at the L2-3 level on April 17, 2018. He developed a cerebrospinal fluid leak and underwent another procedure on April 24, 2018 to repair it.

39. Dr. Lockridge also offered his opinion that Claimantôs injury was causally related to an alleged September 6, 2017 work incident. He based his opinion on Claimantôs report that he hurt his back at work on that date when he twisted his trunk. Dr. Lockridge explained that when a person twists, he puts his lumbar spine in jeopardy.

40. However, Dr. Lockridge acknowledged that Claimant had severe, acute back pain in April 2016, for which there was no specific inciting event or trauma. Based on the degenerative changes throughout Claimantôs lumbar spine, he testified that it was no surprise that Claimant had an onset of acute back pain without an inciting event. Dr. Lockridge explained that ña lot of people will throw their backs out doing the most incidental things, you know, drying themselves off coming out of the shower or something.ò Although some actions are more ñclassically associatedò with acute back injuries, such injuries occur even without any inciting event.

41. Other than Claimantôs report that he hurt himself at work, Dr. Lockridge has no basis for his opinion that Claimantôs injury was causally related to work. His own testimony supports a finding that the injury could have been caused any other incidental movement. This omission seriously undercuts his causation opinion.

(B) Mark Bucksbaum, MD

42. At his attorneyôs request, Claimant underwent an independent medical examination with Dr. Bucksbaum in August 2018. Dr. Bucksbaum received his medical degree from St. Georgeôs University School of Medicine in 1988. His Rutland medical practice focuses on physical medicine and rehabilitation and the performance of independent medical examinations.

43. After reviewing the medical records, interviewing Claimant, and performing a physical examination, Dr. Bucksbaum diagnosed his low back condition as a herniated disc at lumbar spine level L2-3. Citing the same analysis as Dr. Lockridge, Dr. Bucksbaum offered his opinion that Claimant sustained a new back injury in September 2017 based on the herniated disc being at a new level of his lumbar spine and the absence of osteophytes at that level. I find his analysis persuasive.

44. As for whether there is a causal link between Claimantôs injury and an alleged work incident on September 6, 2017, Dr. Bucksbaum testified that the injury is consistent with bending and twisting while working on a motor vehicle. However, he admitted that he was relying on Claimantôs representation that he hurt himself at work and that a similar motion made anywhere else could have caused the same injury.

45. For the same reasons that I find Dr. Lockridgeôs causation opinion to be unpersuasive, I find that Dr. Bucksbaumôs causation opinion is not persuasive, either.

Other Witnesses as to Claimant's Credibility

46. An alleged unwitnessed injury warrants a close examination of a claimantôs credibility. The testimony of several other witnesses is relevant to this issue.

(A) Clarence Larose

47. Clarence Larose is Defendantôs owner and manager. *See* Finding of Fact No. 4 *supra*. He presented in all respects as a competent, responsible employer. Mr. Larose credibly testified that other employees have filed workersô compensation claims and that he routinely reported those claims within 72 hours. He had no concerns about Defendantôs workersô compensation premiums in 2017, and Defendant had no financial difficulties at that time.

(B) Janet Leithead

48. Ms. Leithead works in an independent payroll and tax preparation business with her father. Her father has performed work for Claimant, and she performs work for Defendant. She works at Defendantôs office on Monday and Thursday mornings doing bookkeeping and payroll tasks.

49. Ms. Leithead testified that Defendant has no problem handling workersô compensation claims that arise from time to time. It pays its workersô compensation premiums, payroll obligations and taxes on time and is not in any financial difficulty.

50. Ms. Leithead confirmed that Claimant was paid for full days of work on September 7, 2017 and September 8, 2017. She further testified that Defendant does not pay employees when they do not work, nor does it pay them under the table.

51. Ms. Leithead received a telephone call from Claimant on Monday, September 11, 2017. He told her that he hurt his back and asked for Mr. Laroseôs cellphone number. Claimant did not tell her during that conversation that he hurt his back ñat work.ò

52. I find Ms. Leitheadôs testimony credible in all respects.

(C) Johnny Washer

53. Johnny Washer has worked for Defendant since 2011. His duties include autobody repair and painting. Mr. Washerôs work area is near the employee bathroom.

54. Mr. Washer testified that one day, as Claimant was walking to the bathroom, he mentioned that he had hurt his back. Claimant did not say that he hurt his back ñat work,ò and Mr. Washer did not interpret the statement as indicating that Claimant hurt his back at work. Mr. Washer testified that the statement was made in July or August of 2016. When asked by Claimantôs counsel whether it could have been made in September 2017, he replied, ñIt could have been.ò I find Mr. Washerôs testimony credible but not particularly relevant.

55. Mr. Washer himself sustained a workplace injury when he got a piece of sandblast in his eye. Mr. Larose did not hesitate to process a workersô compensation claim on his behalf.

(D) *Danielle Lucas*

56. Danielle Lucas is Claimantôs wife. She testified that she drove Claimant to Defendantôs shop on Friday, September 8, 2017, so he could pick up his paycheck. However, as I have found that Claimant worked that day, I do not find this testimony credible.

57. Mrs. Lucas also testified that she drove Claimant to the hospital on Saturday, September 9, 2017. As set forth in Finding of Fact No. 23 *supra*, I find the evidence on this issue inconclusive.

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. This claim turns entirely on Claimantôs credibility in describing an alleged work-related incident, unwitnessed, followed by a delay prior to asserting a claim for workersô compensation benefits. In such instances, the trier of fact must evaluate the evidence carefully so as to explore any inconsistencies and evaluate ñhidden or not-so-hidden motivations.ò *Russell v. Omega Electric,* Opinion No. 42-03WC (November 10, 2003), citing *Fanger v. Village Inn*, Opinion No. 05-95WC (April 20, 1995). If a claimant cannot sustain his burden of proving that the relevant events occurred as and when he alleges they did, his claim must fail.

3. The Commissioner has enumerated four questions to assist in the process of evaluating a claimantôs credibility in such claims. First, are there medical records contemporaneous with the claimed injury and/or a credible history of continuing complaints? Second, does the claimant lack knowledge of the workersô compensation reporting process? Third, is the work performed consistent with the claimantôs complaints? And fourth, is there persuasive medical evidence supporting causation? *Jurden v. Northern Power Systems, Inc.*, Opinion No. 39-08WC (October 6, 2008); *Larrabee v. Heavensent Farm*, Opinion No. 13-05WC (February 4, 2005), citing *Seguin v. Ethan Allen, Inc.*, Opinion No. 28S-02WC (July 25, 2002).

4. First, the contemporaneous medical records here do not help Claimantôs cause as to the work-related incident he alleges. There is no record of an emergency department visit on Saturday, September 9, 2017. When Claimant was seen by his primary care physician on Wednesday, September 13, 2017, the record not only fails to mention any work connection to his injury, but it also states that the injury happened four days prior, which would be a Saturday on which Claimant did not work. Even allowing for Dr. Lockridgeôs explanation that four days might mean three to five days, that does not relate the date of injury contained in the medical record back to the date of the alleged work incident on Wednesday, September 6, 2017.

5. No direct evidence was produced in answer to the second question listed above, whether Claimant lacked knowledge of the workersô compensation reporting process. However, Claimant himself does not assert that he lacked such knowledge. Rather, he asserts that he reported the injury to Mr. Larose. Accordingly, I infer that he was familiar with the reporting requirements.

6. As to whether Claimantôs work was consistent with his low back complaints, I find that it was consistent. However, as established by Dr. Lockridgeôs testimony, Claimantôs back injury need not have been caused by twisting at work. Given the preexisting degenerative condition of his spine, many incidental movements could have caused the injury. In fact, when Claimant injured a different level of his lumbar spine the year before, there was no inciting incident beyond waking up in bed.

7. Finally, Claimant offered medical testimony from two doctors as to whether his injury was causally related to work, but neither doctor persuasively established a causal relationship between his injury and his employment. *See* Finding of Fact Nos. 41, 45 *supra*. As the Commissioner recently held, ñmerely stating a conclusion to a reasonable degree of medical certainty does not necessarily make it so, even if no more credible opinion is offered.ò *Meau v. The Howard Center, Inc.*, Opinion 01-14WC (January 24, 2014). Thus, even without a countervailing opinion from a defense expert witness, I am unpersuaded by Claimantôs medical evidence.

8. Claimant has the burden of establishing the necessary causal connection between his low back injury and an alleged work incident on September 6, 2017. Considering the totality of the evidence, and with due regard for the four questions enumerated above, I conclude that he has failed to sustain his burden of proof. Therefore, his claim for workersô compensation benefits must fail.

9. Having failed to prevail on his claim for benefits, Claimant is not entitled to an award of costs and attorney fees.

ORDER:

Based on the above findings of fact and conclusions of law, Claimantôs claim for workersô compensation benefits causally related to his low back condition is hereby **DENIED**.

DATED at Montpelier, Vermont this 15th day of March 2019.

_____
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.