**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

Kenneth Morey

v.

Chittenden South
Supervisory Union

Opinion No. 23-10WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. AA-60457

## OPINION AND ORDER

Hearing held in Montpelier, Vermont on March 23, 2010
Record closed on April 26, 2010



**APPEARANCES**:

Frank Talbott, Esq., for Claimant
Brendan Donahue, Esq., for Defendant

**ISSUE PRESENTED**:

Did Claimant suffer a compensable low back injury as a result of an alleged fall at work on March 9, 2009?

**EXHIBITS**:

Joint Exhibit I: Medical records
Joint Exhibit II: Deposition of William Benoit, March 3, 2010

Claimant's Exhibit 1: Photographs (4 pages)
Claimant's Exhibit 2: Weather information, March 9, 2009
Claimant's Exhibit 3: Accident report, March 9, 2009
Claimant's Exhibit 4: Ken Martin written statement
Claimant's Exhibit 5: Vermont Civil Violation Complaints (2 pages)
Claimant's Exhibit 6: Dr. Bucksbaum report, June 10, 2009
Claimant's Exhibit 7: Letter to Ken Martin (with attachments), January 22, 2008

Defendant's Exhibit A: CSSU Criminal Record Check statement
Defendant's Exhibit B: Request for Criminal Record Check
Defendant's Exhibit C: Confidential Criminal Record Report
Defendant's Exhibit D: Fingerprint Receipt
Defendant's Exhibit E: Letter from Robert Mason, March 10, 2009
Defendant's Exhibit F: Letter from Robert Mason, March 24, 2009
Defendant's Exhibit G: Vermont District Court Docket Sheet
Defendant's Exhibit H: First Student, Inc. personnel records

**CLAIM:**

All workers' compensation benefits to which Claimant proves his entitlement causally related to a low back injury he allegedly suffered at work on March 9, 2009.

**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 began working for Defendant as a school bus driver in 2007. His responsibilities included driving special needs students to and from school.

4. For approximately a year and a half previously Claimant had been employed by First Student, Inc. as a school bus driver in Westford, Vermont. He left that job because Defendant's position offered better pay and benefits. Prior to his First Student employment, Claimant had worked for many years at IBM, then as a self-employed consultant and last as the owner of a small construction firm. He had essentially retired and embarked on his school bus driving career primarily to keep busy and stay productive.

*Claimant's First Student Employment Application; Prior Criminal Convictions*

5. On his First Student employment application, which Claimant completed in July 2006, he responded, "No," to the question, "Have you ever been convicted of a crime?" A subsequent criminal records check revealed no criminal charges, either felony or misdemeanor, in Merrimack, New Hampshire, where Claimant had lived from 1992 until 2002. However, the records check did reveal a 1999 misdemeanor charge in Chittenden County, Vermont. This charge, an alleged theft of services from a local golf club, stemmed from a misunderstanding as to the proper use of a promotional coupon the club had issued. Claimant pled not guilty, and ultimately the charge was dismissed.

6. In conjunction with Claimant's First Student employment application his name also was checked against the state Sex Offender Registries in Vermont, New Hampshire and New York (where Claimant had resided and/or worked from 1975 until 1992). No convictions in any state were discovered.

7. In fact, in 1987 Claimant had been convicted in New York of two charges – one a felony, one a misdemeanor – stemming from inappropriate sexual contact with his then fourteen-year-old stepdaughter. Claimant was never incarcerated for these crimes, but was placed on probation for two or three years thereafter.

8. As noted above, Claimant made no mention of these convictions on his First Student employment application. Claimant testified that he simply did not think of them in that context. I find this testimony incredible.

*Claimant's Authorization for Defendant's Criminal Record Check*

9. As had been the case with First Student, Claimant's employment with Defendant also was conditioned upon the completion of a criminal record check. To that end, on February 22, 2007 Claimant executed a release authorizing Defendant to undertake a search of the criminal records both in Vermont and in "other states where I have been employed and/or resided, and the FBI."

10. On the release form Claimant was asked to list the states, other than Vermont, in which he had "resided or been employed." Claimant listed only New Hampshire. When asked why he failed to list New York as a state in which he had resided and/or been employed for more than 15 years, Claimant testified that the omission was not intentional and that in any event, he assumed that a criminal background check automatically would encompass nationwide records. When asked whether he might have been motivated to omit New York from the list because that was the state in which his 1987 sex offense convictions had occurred, Claimant testified that he did not remember his 1987 convictions and was not thinking about them at the time. I find this testimony incredible.

11. It appears from the release form that at the time it hired Claimant Defendant did not intend to conduct its own criminal record check but rather planned only to obtain the results of the background check First Student had completed in 2006. It is unclear whether Defendant took even that step. In any event, as First Student had obtained no information relating to Claimant's New York convictions, short of conducting its own investigation Defendant likely would have been unaware as well.[1]

*Claimant's Safety Concerns*

12. As Claimant's employment for Defendant progressed, he became concerned about what he considered to be an inappropriately lax attitude towards safety. In Claimant's opinion, Defendant's maintenance staff failed to keep the school buses in proper repair, which Claimant felt put both drivers and children at risk. In addition, after a March 2008 accident in which Claimant fell at Defendant's Hinesburg garage and fractured his left arm, he also criticized Defendant's staff for failing to keep parking lots and door yards free from melting ice and snow.

[1] First Student's criminal court database searches encompassed only Chittenden County, Vermont and Merrimack, New Hampshire, but not New York. While First Student did conduct a search of the sex offender registries in all three states, none of these were in existence at the time of Claimant's 1987 felony conviction, which might explain why it was not revealed. *See* N.Y. Correction Law §168 *et seq.* (McKinney 1995); N.H. Rev. Stat. Ann. §651 *et seq.* (1996); 13 V.S.A. §5401 *et seq.* (1995).

13. During the summer and fall of 2008 Claimant became particularly concerned about the tires on one of the school buses he drove, which he claimed were bald and in need of immediate replacement. Claimant even photographed one of the tires with a tread gauge inserted to show that the tire was now so worn that it should not have passed inspection. Claimant voiced his concerns both to the maintenance staff and to Ken Martin, Defendant's Transportation Director and Claimant's immediate supervisor. When no action was taken, on January 26, 2009 Claimant himself drove the bus to the Williston Police Department and asked that the tires be inspected. As a result of this action the police issued two citations to Defendant, one for defective equipment and one for allowing the vehicle to pass inspection.

14. Two days later, on January 28, 2009 Claimant met with Robert Mason, Defendant's Chief Operating Officer, to discuss his safety concerns. As the meeting concluded, Mr. Mason mentioned that Claimant's personnel file appeared to be lacking the required criminal record check. Mr. Mason requested that Claimant submit to fingerprinting so that a background check could be completed. Claimant did so on February 3, 2009.

15. Also in February 2009 Claimant began photographing those areas on Defendant's premises that he felt were unsafe due to melting snow and ice. These included both the parking lot at the Hinesburg garage and the door yard where he had fallen and fractured his arm in 2008. Claimant also took photographs of a particular section of the Williston Central School parking lot where he claimed ice and snow frequently melted and refroze, creating a hazardous, slippery surface.

*Claimant's Alleged Injury and Subsequent Termination from Employment*

16. Claimant testified that early on the morning of March 9, 2009 he was proceeding across the Williston Central School parking lot when he slipped and fell on a patch of ice and snow. The area in which he fell was in the same location as the area he had photographed barely a month earlier.

17. Immediately after falling, Claimant called Ken Martin to report the accident. Claimant told Mr. Martin that he had broken his fall with his right arm, that he had bruised his right elbow and that his chest was stiff. Mr. Martin asked Claimant if he needed medical care and suggested that he go to Defendant's designated provider, Urgent Care, to be evaluated. This Claimant declined to do.

18. Just moments later William Benoit, another bus driver, arrived at the school yard. Mr. Benoit testified that he did not witness the fall and that as he drove into the parking lot Claimant was standing up. According to Mr. Benoit, Claimant told him that he had just fallen and that he wanted to show Mr. Benoit that the area was snow-covered and icy. Mr. Benoit confirmed that the area was indeed slippery. He testified that Claimant "looked normal" and did not appear to be in any pain.

19. Following his fall, Claimant completed both his morning shift (from 5:45 AM to 9:30 AM) and his afternoon shift (from 1:30 PM to 4:30 PM). In between, however, he testified that he began feeling somewhat stiff.

20. Claimant testified that when he awoke the next day (March 10th) his lower back was very stiff. Upon completing his morning bus run, Claimant felt very uncomfortable. He testified that he decided to seek medical treatment and so called Dr. King, his primary care provider, for an appointment. According to Claimant, Dr. King was out of the office, and the earliest appointment he was able to book was not until March 18th, more than a week later.

21. Later that day Claimant was summoned to a meeting with Mr. Mason. At that meeting Mr. Mason informed Claimant that as a result of its criminal background check Defendant had learned of his 1987 convictions, and that it was undertaking a further investigation prior to determining what additional action it would take. Pending the results of that investigation, Claimant was placed on paid administrative leave, effective immediately.

22. Subsequently, on March 24, 2009 Defendant informed Claimant that it was terminating his employment, effective immediately, on the grounds that his criminal background check had revealed an "inappropriate" felony conviction.

*Medical Treatment and Causation Opinions*

23. On March 18, 2009 Claimant attended his previously scheduled appointment with Dr. King. Dr. King has been Claimant's primary care provider since 2002, during which time she has treated Claimant regularly for such ongoing issues as hypertension and diabetes. According to Dr. King's medical records, Claimant had no prior history of low back pain.

24. According to Dr. King's office note, Claimant reported that he had fallen on the ice eight days previously and had landed on his lower back. Claimant complained of low back pain and numbness in his right thigh. Based both on the mechanism of the injury as Claimant described it and on the fact that he had no prior history of low back pain, Dr. King concluded that his current symptoms were causally related to the March 9th fall.

25. At Dr. King's suggestion, Claimant underwent diagnostic imaging studies, both MRI and x-ray, in May 2009. These revealed evidence of multilevel degenerative disc disease, including moderate spinal stenosis at L4-5 and significant facet arthritis at L5-S1.

26. In June 2009 Claimant was evaluated by Dr. Flimlin, an orthopedist at the Spine Institute of New England. According to Dr. Flimlin's office note, Claimant reported that his March 9th fall at work involved "a twist and landing on his right arm," then worsening back pain over the following day and gradual progression of paresthesias since then. Based on this history, Dr. Flimlin concluded that Claimant's fall "could have exacerbated" his pre-existing facet arthritis, causing increased inflammation and nerve root encroachment.

27. Also in June 2009, at his own referral Claimant underwent an independent medical evaluation with Dr. Bucksbaum, a physiatrist. According to Dr. Bucksbaum, Claimant reported that he fell on the ice and landed on his lower back, that he initially felt pain in his right arm and chest and later developed low back pain as well. From this history, and given that Claimant's medical records did not document any prior complaints of low back pain, Dr. Bucksbaum concluded that his symptoms most likely were causally related to his March 2009 fall.

28. In reaching this conclusion, Dr. Bucksbaum made special note of certain findings on Claimant's MRI that in his opinion provided objective evidence of recent trauma, which when superimposed on Claimant's underlying degenerative disc disease were now causing him to be symptomatic. As for Claimant's failure to report any back pain immediately after his fall, Dr. Bucksbaum commented that this was neither unusual nor inconsistent with the mechanism of injury as Claimant had reported it.

29. Dr. Bucksbaum diagnosed Claimant with an aggravation of his underlying degenerative spine disease resulting in chronic mechanical low back pain. He determined that Claimant had reached an end medical result and rated him with a 7% whole person permanent impairment referable to the March 9, 2009 fall.

30. Claimant testified that he continues to feel pain in his lower back, with some symptoms in his left leg as well. He declined to undergo the injection treatment suggested by Dr. Flimlin, opting instead for self-directed physical therapy at a local health club. There is no evidence that he was totally disabled from working for any period of time following his March 9, 2009 fall.

**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. Here, Claimant has presented a claim for workers' compensation benefits that under different circumstances might have been relatively straightforward: he fell at work, he reported the accident immediately and later, when his back stiffened up, he sought medical treatment. What complicates the claim are issues that go directly to Claimant's credibility: the fall was unwitnessed, and Claimant did not allege any injury to his lower back until after Defendant had terminated his employment for failing to disclose serious prior criminal convictions.

3. When a claimed work-related injury is unwitnessed, the trier of fact must scrutinize and weigh the credibility of the witnesses, explore any inconsistencies and look at all motivating factors. *L.Z. v. University of Vermont*, Opinion No. 26-08WC (July 2, 2008), citing *Fanger v. Village Inn*, Opinion No. 5-95WC (April 20, 1995). Even where the medical evidence establishes that an injury has occurred, credibility issues still may taint the claimant's ability to prove that its cause was work-related. *See, e.g., K.C. v. Windham Northeast Supervisory Union*, Opinion No. 45-06WC (November 17, 2006); *M.M. v. Mack Molding*, Opinion No. 58-05WC (September 9, 2005).

4. I find that to be the case here. Claimant lied about his prior criminal convictions on his First Student employment application, and then omitted critical information pertaining to them on the criminal records release form he signed in the context of his employment for Defendant. When asked at formal hearing why he had done so, his testimony was evasive and far-fetched. There was good reason, therefore, for me to question his credibility as a witness.

5. With his credibility thus at issue, I must consider the fact that Claimant's initial report of the accident, in which he described breaking his fall with his right arm, was inconsistent with the reports he later gave to medical providers, in which the fall came to involve twisting and landing on his lower back. Last, I must consider the fact that Claimant neither complained of nor sought treatment for any lower back symptoms until after he learned that Defendant had discovered his prior criminal convictions and likely would be terminating his employment as a result.

6. The bottom line is that when a witness lies about one issue, it taints his or her credibility as to other issues as well. Here, my doubts as to Claimant's credibility encompass the history he reported to his medical providers regarding the mechanism of his fall and the onset of his symptoms. In forming their opinions as to causation, those providers relied in large part on that history. As a result, their credibility suffers as well. *M.M. v. Mack Molding, supra.*

7. I conclude that Claimant has failed to sustain his burden of proving that he sustained a compensable low back injury on March 9, 2009.

**ORDER:**

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

**DATED** at Montpelier, Vermont this 30 day of June 2010.

Patricia Moulton Powden
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.