

Karl Brucker v. Ethan Allen Interiors, Inc.

(August 31, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Karl Brucker

Opinion No. 24-11WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

Ethan Allen Interiors, Inc.

For: Anne M. Noonan
Commissioner

State File No. CC-51538

OPINION AND ORDER

APPEARANCES:

Patricia Turley, Esq., for Claimant
Andrew Boxer, Esq., for Defendant

ISSUES PRESENTED:

1. Are Claimant's lumbar, groin and thoracic injuries causally related to his August 3, 2010 work incident?
2. If so, to what workers' compensation benefits is he entitled?

EXHIBITS

Claimant's Exhibit 1: Medical records
Claimant's Exhibit 2: Medical bills
Claimant's Exhibit 3: Ethan Allen maintenance logs

Defendant's Exhibit A: Prepeco employment application, December 9, 2010
Defendant's Exhibit B: Helen Gagnon, R.N., records
Defendant's Exhibit C: Dan Kurzman handwritten notes, July 26, 2010

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640
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 an employer as those terms are defined in Vermont Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.
3. Claimant worked for Defendant at its Beecher Falls, Vermont plant for approximately two years until December 2009, when Defendant closed that plant.
4. After the Beecher Falls plant closed, Claimant sought employment elsewhere. He submitted an application for work at PrepcO, a medical manufacturing company located in Colebrook, N.H., where he lived. Claimant was not hired, as there were no openings. However, he did see the owners of the company from time to time around town.
5. Approximately two weeks after the Beecher Falls plant closed, Defendant's human resources administrator, Dan Kurzman, contacted Claimant and offered to rehire him at Defendant's Orleans, Vermont plant. Mr. Kurzman thought Claimant was a hard worker. Claimant accepted Defendant's offer and began working at the Orleans plant in early January 2010. His duties consisted of maintenance and mechanical repair in all departments within the facility.
6. On July 26, 2010 Claimant and Mr. Kurzman met to discuss various issues related to Claimant's job. Mr. Kurzman described the meeting as contentious. As he recalled it, Claimant asked to be laid off so that he could qualify for the grant-funded training and unemployment benefits that certain other employees were receiving. Claimant denied that he asked to be laid off. Instead, he recalled that the issues he discussed with Mr. Kurzman revolved around what he perceived to be a lack of appropriate training and safety equipment.
7. On August 3, 2010 Claimant was called on to repair a scissor lift. To do so, he needed first to transport it outside. For that, he needed a hardwood pallet.
8. After retrieving a pallet, Claimant had to push it down a long, narrow hallway. The pallet weighed forty pounds and was awkward to push. As Claimant was pushing the pallet, a co-employee accidentally pushed over another pallet, which was piled high with pieces of broken down cardboard. The falling cardboard speared into Claimant's right armpit.
9. Claimant credibly testified that the force of the falling cardboard almost knocked the wind out of him and caused him to fall somewhat backwards in a twisting motion. A pile of debris broke his fall.

10. Alan Vanier, a manager, was on the floor, about eight feet away from Claimant when the cardboard incident occurred. However, his view was obstructed. The pallet was piled 5 to 6 feet tall with cardboard, and therefore Mr. Vanier could not see any part of Claimant's body from the upper waist down. For that reason, I find that his testimony regarding the mechanics of Claimant's off-balance fall backwards is not reliable.
11. Mr. Vanier credibly testified that he saw Claimant wince when the cardboard struck him on the side, near his armpit. This corroborates Claimant's testimony about the force of the cardboard's impact and the resulting pain that it caused.
12. The pain Claimant experienced immediately after the incident was primarily restricted to his right rib cage. He testified credibly that he thought the force of the cardboard's impact had broken one of his ribs. Claimant reported his injury to Defendant's first responder, Tim Cota, that day.
13. After finishing his shift, Claimant returned home. He showed his bruised rib cage to his wife. Ms. Brucker testified credibly that:
 - Claimant's right rib cage area was swollen, red and had little welts;
 - Claimant told her that he "kind of twisted or fell backwards" when the cardboard impacted him;
 - Claimant had not engaged in any activities outside of work during that week that would have caused any injuries; and
 - Claimant was a hard worker, who would not stay out of work by choice.
14. On August 4 and 5, 2010 Claimant went to work as usual. He thought he could "tough out" the pain in his rib cage. However, over those two days he developed an increasing amount of pain in his lower back and right groin area. Claimant testified that on August 5th, he went to see Defendant's nurse, Helen Gagnon, because he felt he needed some medical help. I find this testimony to be credible.
15. In her record of Claimant's August 5th visit, Ms. Gagnon noted that Claimant complained of both low back and right groin pain. She attempted to schedule an appointment for Claimant with Dr. Haas, an occupational medicine physician, but no openings were available. As an alternative, Claimant's wife scheduled an appointment for him with Faye Memolo, a physician's assistant at the Indian Stream Health Center, on the following day. Claimant had never treated with Ms. Memolo before.
16. Claimant presented to Ms. Memolo on August 6, 2010. He reported pain in his right hip, groin and lower back. Upon examination, Ms. Memolo noted muscle spasms in Claimant's back. This was an objective finding that supported Claimant's complaints. Ms. Memolo also noted that Claimant appeared to her to be in severe pain. He had difficulty sitting and exhibited very painful, labored movements. Ms. Memolo removed Claimant from work on August 6, 2010.

17. Ms. Memolo's treatment of Claimant was conservative at first. She prescribed a muscle relaxant, an anti-inflammatory and pain medications.
18. Claimant followed up with Ms. Memolo at one week intervals. At his second visit, he reported that his lower back was getting somewhat better, but that he still had right side groin pain. Once again, Ms. Memolo observed that Claimant was experiencing back spasms. She referred Claimant to physical therapy to treat what she diagnosed as a lumbar strain with radiculopathy and groin pain.
19. On his fourth visit to Ms. Memolo, on August 31, 2010 Claimant complained for the first time of thoracic (midback) pain that radiated around his chest. The pain was unrelenting and interrupted his sleep. Upon examination Ms. Memolo observed spasming of the paraspinal muscles on the left side of Claimant's thoracic spine.
20. Diagnostic testing, including x-rays, CT scan and MRI, failed to reveal any acute bony injury or other abnormality attributable to Claimant's injury in either his lumbar or thoracic spine.
21. Claimant last saw Ms. Memolo on October 13, 2010. He reported that he had improved greatly with physical therapy and had little pain. Ms. Memolo released him to return to work with no restrictions.
22. Shortly after Ms. Memolo released him, on October 18, 2010 Claimant began working for Prepeco, the manufacturing company to which he previously had applied when he first was laid off from Defendant's Beecher Falls plant.

Expert Medical Opinions as to Causation

23. Both parties presented expert medical testimony to the causal relationship, if any, between the August 3, 2010 incident and Claimant's lumbar, groin and thoracic injuries. Ms. Memolo concluded that such a relationship existed. Dr. Backus concluded that Claimant suffered only a contusion to his right rib cage, which quickly resolved, and that his subsequent complaints of lumbar, groin and/or thoracic pain were unrelated.

(a) Faye Memolo, PA-C

24. Ms. Memolo received her Bachelor of Science degree from the University of New Hampshire in 1998 and then, after a two year course of study at the Notre Dame College, a master's degree in Physician Assistant Sciences. During the two-year certification process, she engaged in twelve months of classroom and lab study and then twelve months of clinical training. Ms. Memolo has testified as an expert on injury causation in Social Security disability and workers' compensation cases, as well as for insurance companies. During her six-year tenure at Indian Stream Health Clinic she saw numerous patients with back symptoms, both acute and chronic.

25. Ms. Memolo credibly testified to the following:
- The fact that Claimant experienced severe pain in his lower back and right groin three days after his injury is consistent with how muscle pain develops;
 - It is fairly typical for a person with muscle pain to suffer more pain as time elapses after an injury, with the most pain usually occurring on the third day;
 - Claimant's lumbar and groin pain were consistent with a twisting mechanism of injury.
26. Ms. Memolo credibly opined that Claimant's low back and right groin injuries resulted from being thrown off balance when the pile of cardboard hit him on his right side and twisted him to the left. Even a minor twisting motion such as this can cause a lumbar and groin strain. I find this reasoning persuasive.
27. Ms. Memolo reasoned that after the initial injury Claimant altered his body carriage due to the pain in his lower back, groin and rib cage, thus causing him to develop pain in his thoracic spine as well. I find this reasoning to be persuasive.
- (b) Verne Backus, M.D.
28. Dr. Backus is board certified in occupational medicine. He received his license to practice medicine in Vermont in 1985. His specialty focuses on workplace injuries.
29. Dr. Backus performed an independent medical evaluation of Claimant on August 27, 2010. As part of that examination, Dr. Backus reviewed Claimant's medical records, interviewed Claimant and conducted a physical examination.
30. In Dr. Backus' opinion, to a reasonable degree of medical certainty:
- Claimant suffered a contusion to his right rib cage as a result of the August 3, 2010 incident;
 - There is no causal relationship between Claimant's lumbar, thoracic and groin injuries and the August 3, 2010 incident;
 - Claimant's right rib cage contusion resolved within one month of the injury, with no permanent impairment resulting; and
 - As of August 27, 2010 Claimant had a light duty work capacity.

31. In reaching these conclusions Dr. Backus relied in large part on Mr. Vanier's written statement as to the mechanism of Claimant's injuries. He did not hear Mr. Vanier's hearing testimony. Dr. Backus was unaware, therefore, that Mr. Vanier's view of Claimant's fall actually was obstructed, to the point where he could not have observed the twisting nature of Claimant's off-balance fall. By his reliance on an eye witness account that I have found unreliable, the credibility of Dr. Backus' causation opinion is significantly undermined.
32. Dr. Backus also relied on eye witness statements of people who did not testify at the formal hearing. He concluded that because these witnesses gave inconsistent accounts of how the incident occurred, the mechanism of injury could not have happened as Claimant described. I find this reasoning unpersuasive as well, not only because there is no way to judge the credibility of witnesses who do not testify, but also because I have found Claimant to be credible in his description of how the incident occurred.
33. Dr. Backus agreed that when impacted with the stack of cardboard, Claimant naturally would have moved away from the insult. He acknowledged that such a movement likely would have involved twisting. In this respect, his testimony lends support to Ms. Memolo's theory of how Claimant's injury occurred.

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. The disputed issue in this case is one of causation. Claimant asserts that his lumbar, thoracic and groin injuries were caused by the August 3, 2010 cardboard incident. Defendant argues that Claimant suffered only a minor contusion to his right rib cage as a result of that incident, and that his subsequent complaints of lumbar, thoracic and groin pain were either unrelated or fabricated.
3. Where expert medical opinions are conflicting, 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).

4. Here I conclude that the first factor favors Ms. Memolo. She treated Claimant for his injuries from the outset and continued this treatment for ten weeks subsequently. She observed Claimant's labored, painful movements the first time she examined him on August 6, 2010. She also observed muscle spasms in his lower back, an objective finding that corroborates Claimant's complaints of pain.
5. The second factor disfavors Dr. Backus. To the extent he relied upon Mr. Vanier's statement as to the mechanics of Claimant's injury, his opinion is seriously flawed. As Mr. Vanier himself acknowledged, his view of Claimant at the exact moment when the cardboard impacted him was obstructed, such that he could not see Claimant's body below his upper waist. Mr. Vanier could not have observed the extent to which Claimant twisted away from the cardboard as it hit him, or exactly how he fell against the debris.
6. The third factor favors Ms. Memolo. She observed spasms in Claimant's right lower back, which is an objective finding. She also observed spasms of Claimant's left thoracic paraspinal muscles, another objective finding that corroborated Claimant's complaint of thoracic pain.
7. While both Ms. Memolo and Dr. Backus conducted comprehensive evaluations, Ms. Memolo's occurred during the course of multiple visits over a ten-week period. Dr. Backus had no such opportunity to observe Claimant's symptoms over time. In this respect, I conclude that the fourth factor favors Ms. Memolo.
8. As to the final factor, I conclude that both Ms. Memolo and Dr. Backus are qualified to render opinions as to causation based upon their training and experience.
9. Considering all of the *Geiger* factors together, I conclude that Ms. Memolo's opinions are more persuasive than Dr. Backus'.
10. I also find unpersuasive Defendant's argument that Claimant fabricated the nature and extent of his injuries. Even accepting that Claimant was a somewhat disgruntled employee, I remain convinced that the accident happened as he said it did and that his symptoms developed as he reported them to Ms. Memolo.
11. I conclude that Claimant has sustained his burden of proving that his thoracic, lumbar and right groin injuries were caused by the August 3, 2010 incident with the cardboard and are therefore compensable.
12. Claimant was totally disabled from working after the August 3, 2010 incident from August 6, 2010 until October 13, 2010. He is entitled to temporary total disability benefits covering that period. In addition, Claimant is entitled to medical benefits covering all reasonable and necessary treatment causally related to his compensable injuries.
13. 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 to submit his claim.

ORDER:

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

1. Temporary total disability benefits from August 6, 2010 through October 13, 2010, in accordance with 21 V.S.A. §642;
2. Interest on the above amount calculated in accordance with 21 V.S.A. §664;
3. Medical benefits covering all reasonable and necessary medical services and supplies causally related to the treatment of Claimant's thoracic, lumbar and right groin injuries, in accordance with 21 V.S.A. § 640;
4. Costs and attorneys fees in amounts to be determined in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 31st day of August 2011.

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.