STATE OF VERMONT
DEPARTMENT OF LABOR

Kevin Wilber

v.

FoodScience Corporation

Opinion No. 06-20WC

By: Beth A. DeBernardi
Administrative Law Judge

For: Michael A. Harrington
Interim Commissioner

State File No. LL-61223

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Jennifer K. Moore, Esq., for Defendant

ISSUE PRESENTED:

Is Defendant entitled to judgment in its favor as a matter of law on the question of whether Claimant's hernia is work-related?

EXHIBITS:

Defendant's Statement of Undisputed Material Facts filed January 31, 2020

Defendant's Exhibit A:	Employer First Report of Injury (Form 1)
Defendant's Exhibit B:	Claimant's recorded statement, March 6, 2019
Defendant's Exhibit C:	Medical record, March 6, 2019
Defendant's Exhibit D:	Dr. Davignon's October 9, 2019 independent medical examination report

Claimant's Statement of Undisputed Material Facts[1] and Response to Defendant's Statement of Undisputed Material Facts filed March 4, 2020

Claimant's Exhibit 1:	Employer First Report of Injury (Form 1)
Claimant's Exhibit 2:	Claimant's recorded statement, March 6, 2019
Claimant's Exhibit 3:	Medical record, March 6, 2019
Claimant's Exhibit 4:	Dr. Davignon's October 9, 2019 independent medical examination report
Claimant's Exhibit 5:	Dr. Davignon's February 10, 2020 supplemental report

[1] Claimant did not number the paragraphs in his Statement of Undisputed Material Facts, as required by V.R.Civ.P. 56(c)(1)(A). I have numbered them sequentially for reference.

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Claimant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following facts:

1. Claimant is a 53-year-old man who works as a shipping clerk for Defendant. *Defendant's Statement of Undisputed Material Facts* ("*Defendant's Statement*"), ¶ 1; *Defendant's Exhibit A.* His job involves lifting boxes that weigh between five and seventy pounds. *Claimant's Statement of Undisputed Material Facts* ("*Claimant's Statement*"), ¶ 3; *Claimant's Exhibit 2*, at 5-6.

2. Claimant reported a work injury to Defendant with an accident date of March 6, 2019. *Claimant's Statement,* ¶ 1; *Claimant's Exhibit 1.*

3. Claimant sought treatment at Champlain Medical Urgent Care on March 6, 2019. The visit record includes the following patient-provided history:

> Pt denies any known injury. About one week ago while at work, he started developing some right lower abdominal pain with coughing or bending to pick something up. He thought he had strained his groin[,] but it gradually has worsened. [N]ow there is swelling to that area. He has never had a hernia before. He notes that his job in shipping does require frequent lifting of heavy objects weighing anywhere to 5-70#.

Claimant's Statement, ¶ 4; *Claimant's Exhibit 3.*

4. Physician Assistant Molly Somaini noted that Claimant was "unsure" about his condition's causality and that she was "unable to determine" the cause during the March 6, 2019 office visit. *Defendant's Statement*, ¶ 3; *Defendant's Exhibit C.* She assessed him with an acute inguinal hernia, restricted him to lifting no more than 30 pounds, and referred him for a surgical consultation. *Claimant's Statement*, ¶ 5; *Claimant's Exhibit 3*; *Defendant's Statement*, ¶ 3; *Defendant's Exhibit C.*

5. In a recorded statement taken by Defendant on March 6, 2019, Claimant stated:

> Like I told them at work, I have no idea when [the injury] occurred. I can't put a specific time to it. But I know I, I do a lot of lifting there. I've been there for a long time. I do a lot of lifting. That's the only time I could think that it would happen, is at work. It just started getting progressively worse, basically. And I started . . . last week, I started getting pain.

Claimant's Statement, ¶ 2; *Claimant's Exhibit 2*, at 3; *see also Defendant's Statement*, ¶¶ 2, 4; *Defendant's Exhibit B*, at 3.

6. On October 9, 2019, occupational medicine physician Philip Davignon, MD, performed an independent medical examination of Claimant at his attorney's request.

Dr. Davignon noted in his report that Claimant's job includes "a lot of repetitive bending and twisting and heavy lifting. He can move pallets, using a manual pallet jack, up to 2,000 lbs. He noted over the course of time that he felt a bulge of pain in the right groin." *Claimant's Statement*, ¶ 6; *Claimant's Exhibit 4*, at 2.

7. Dr. Davignon offered his causation opinion as follows:

> I do feel that the claimant's right sided symptoms are causally related to the injury of record. After extensive discussion, the claimant denies any prior injuries or conditions that propagated his pain.

Claimant's Statement, ¶ 6; *Claimant's Exhibit 4*, at 4; *Defendant's Statement*, ¶ 5*; Defendant's Exhibit D,* at 4.

8. On February 10, 2020, Dr. Davignon provided a supplemental report in which he stated:

> After obtaining history from the claimant, the claimant has a labor-intensive job. This includes repetitive bending, twisting and heavy lifting. At the time of the injury, he notes a bulge and pain in the right groin. He had had no prior abdominal symptoms or abdominal injuries.
>
> Evaluation noted a right inguinal hernia. The claimant's symptoms and physical findings are consistent with a hernia and I am not aware of any other condition, activity or injury that would have impacted or contributed to this condition.

Claimant's Statement, ¶ 7; *Claimant's Exhibit 5.*

9. In both reports, Dr. Davignon stated that the "opinions in this report are based on reasonable medical probability." *Claimant's Exhibit 4*, at 4; *Defendant's Exhibit D*, at 4; *Claimant's Exhibit 5*.

CONCLUSIONS OF LAW:

1. Claimant relies on Dr. Davignon's opinion to establish that his hernia is work-related. Defendant seeks summary judgment on the grounds that Claimant cannot prove causation as a matter of law.

Summary Judgment Standard

2. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44, 48 (1990). Summary judgment is appropriate only when the facts in question are clear,

undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.

3. In determining whether there is a genuine issue of material fact, the Department will "accept as true all allegations made in opposition to the motion for summary judgment, so long as they are supported by admissible evidence." *Fritzeen v. Gravel*, 2003 VT 54, ¶ 7; *Souligny v. PB&J, Inc*., Opinion No. 12A-18WC (September 27, 2018).

Burden of Proof

4. 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, *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, 369 (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,* 112 Vt. at 20; *Morse v. John E. Russell Corp*., Opinion No. 40-92WC (May 7, 1993).

5. In cases such as this, where the cause of Claimant's hernia is not readily apparent, expert testimony is the sole means of establishing a causal connection between his employment and his injury. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395-96 (1979).

Sufficiency of Claimant's Causation Evidence to Create a Genuine Issue of Material Fact

6. Claimant relies on Dr. Davignon's opinion to establish a causal connection between his employment and his hernia. Citing Claimant's labor-intensive job, Dr. Davignon offered his opinion that Claimant's hernia is work-related, to a "reasonable medical probability." He further stated that, based on information provided by Claimant, he was not aware of any other condition, activity or injury that would account for the hernia. *See* Finding of Fact Nos. 7-9 *supra*.

7. For an expert opinion to defeat summary judgment, it must present "specific facts demonstrating a genuine issue for trial." *Morais v. Yee*, 162 Vt. 366, 371-72 (1994); *Reed v. Craftsbury Academy*, Opinion No. 21-19WC (November 20, 2019). Further, while a purely conclusory opinion will not defeat summary judgment, the opinion need not provide an elaborate analysis. *See Provost v. Fletcher Allen Health Care, Inc*., 2005 VT 115, ¶ 9 (expert's affidavit in medical malpractice case stated that physician had deviated from the standard of care, proximately causing plaintiff's injury; "[w]hile the affidavit provides little explicit reasoning, it articulates a theory of the case sufficient to withstand summary judgment").

8. Dr. Davignon's expert opinion relates Claimant's injury to his employment. He identified specific job activities that are likely to have caused Claimant's hernia and noted the absence of other activities or conditions that would have caused it. Although Dr. Davignon did not explain in detail how heavy lifting might cause a hernia, he has articulated a theory of the case. Further, he offered his opinion to a reasonable medical probability, indicating no doubt or speculation. *See Everett v. Town of Bristol*, 164 Vt. 638, 639 (1996) (expert testimony must meet a standard of reasonable probability or reasonable degree of medical certainty). I therefore conclude that, although Dr. Davignon's opinion does not provide a detailed causation analysis, it presents specific facts demonstrating a genuine issue for trial. *See Morais, supra*, 162 Vt. at 371-72.

9. Defendant contends that Dr. Davignon's opinion is insufficient because, among other reasons, he relies on Claimant's report of heavy lifting in the workplace and not elsewhere. However, medical providers routinely rely on their patients' reports of injury. While Dr. Davignon's analysis does rest on Claimant's truthfulness, that in no way makes it insufficient to create a genuine issue of material fact. Instead, it simply makes the persuasive force of his argument dependent on Claimant's credibility. Witness credibility, of course, is always a factual issue that is not appropriately determined on summary judgment. *Pierce v. Riggs*, 149 Vt. 136, 139-40 (1987).

10. Finally, Defendant contends that Claimant's treating provider stated that causation *cannot* be established. *Defendant's Motion*, at 4. Specifically, the treating provider wrote in her March 6, 2019 record that she was "unable to determine causality." However, her function on that date was to diagnose and treat Claimant's condition, not to perform a causation analysis. Further, even if she performed a causation analysis, her statement merely creates a factual dispute with Dr. Davignon's opinion.

11. I therefore conclude that Claimant has presented sufficient evidence to create a genuine issue of material fact as to whether his hernia is causally related to his employment by Defendant. Therefore, summary judgment in Defendant's favor is not warranted.

ORDER:

For the foregoing reasons, Defendant's Motion for Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont this 30th day of March 2020.

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Michael A. Harrington
Interim Commissioner