STATE OF VERMONT
DEPARTMENT OF LABOR

Marie Fitzgerald	Opinion No. 17-20WC
v.	By: Stephen W. Brown Administrative Law Judge
AE MacKenzie, Inc. d/b/a At Home Senior Care	For: Michael A. Harrington Commissioner
	State File No. LL-584

OPINION AND ORDER

Hearing held via Skype on July 7, 2020
Record closed on August 10, 2020

APPEARANCES:

Marie Fitzgerald, *pro se*
Jason Ferreira, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant sustain a work-related right foot injury on August 25, 2018, and if so, to what benefits is she entitled?

2. If Claimant sustained a work-related right foot injury on August 25, 2018, did that injury result in sciatica or other low back pain?

EXHIBITS:

Joint Exhibit:	Joint Medical Exhibit ("JME")
Defendant's Exhibit 1:	Employee Handbook
Defendant's Exhibit 2:	Claimant's August 25, 2018 Patient Logbook Entry
Defendant's Exhibit 3:	August 22, 2019 Letter from Defendant's President Concerning Claimant's Termination
Defendant's Exhibit 4:	Unemployment Insurance Documents **(not admitted)**[1]
Defendant's Exhibit 5:	*Curriculum Vitae* of Verne Backus, M.D.
Defendant's Exhibit 6:	Dr. Backus's Independent Medical Examination Report

[1] Pursuant to 21 V.S.A. § 1353, I cannot consider unemployment insurance information in the resolution of workers' compensation claims. Therefore, Defendant's Exhibit 4 is not admitted as evidence in this proceeding.

FINDINGS OF FACT:

1. I take judicial notice of all relevant forms and correspondence in the Department's file for this claim.

2. Claimant is a 62-year-old woman residing in Rutland, Vermont. Between approximately November 2015 and September 2018, Defendant employed her as a caregiver and home aide. In that role, she provided a range of services to clients both in their homes and in nursing homes, including house cleaning, grocery shopping, companionship, transportation, and help with other errands and household duties.

July 25, 2018 Non-Workplace Injury

3. During the late evening of July 25, 2018, Claimant suffered a non-work-related injury to her right foot. She was walking down the street in her neighborhood wearing clogs when a dog approached her and began barking and growling. The dog frightened her, and she quickly turned away from it. When she turned, she twisted her right ankle and fell to the ground. She called her son to assist her, and she returned home.

4. After returning home, Claimant's right foot began to swell. She experienced pain when putting weight on her foot. The following morning, a friend transported her to the Rutland Regional Medical Center's emergency room. Claimant had to use crutches to get into her friend's car.

5. At the emergency room, Claimant complained of pain in the top of her right foot and in her ankle. X-ray imaging did not show any acute bone abnormality, and she was diagnosed with a right foot sprain, prescribed medications including ibuprofen, and provided with a walking boot. (JME 14-16). She continued to work for Defendant after this incident.

6. The walking boot had hard plastic sides, a "flimsy" plastic shield along the top, and Velcro straps to hold the boot in place.

7. After this injury, Claimant's foot turned black. She could not put all her weight on her foot during the following month, and she credibly testified that she would not have been able to do her job without the walking boot. She also had to work at a slower pace following this injury. She credibly agreed on cross-examination that her foot and ankle injury was "very bad."

8. In late August 2018, Claimant was still wearing her walking boot because she was still unable to put her full weight onto her right foot; she was still experiencing pain and swelling from her July 2018 incident.

August 25, 2018 Workplace Injury

9. On August 25, 2018, exactly one month after her July 2018 incident involving the dog, Claimant was working for Defendant and still wearing her boot. That morning, she

helped a client in a nursing home get dressed; she then transported him into the dining room for breakfast. Claimant credibly described this client as "the kind of person that would get angry relatively eas[il]y depending on what kind of day he was having."

10. While the client was eating his breakfast, another resident bumped into the back of his chair with a food cart, causing him to become very angry and agitated. He then aggressively pushed his chair backwards, raised his heel, and stomped down onto Claimant's right foot with considerable force. Although Claimant was wearing her walking boot, it was open around the toes except for the "flimsy" shield and Velcro straps. She experienced intense pain on the top of her foot as a result.

11. The client then attempted to stomp on her foot a second time, but Claimant moved out of the way before he could land on her foot again. He remained agitated, however; he got up from the table and threw his chair. (*See* Defendant's Exhibit 2).

12. Claimant sought help from nursing home staff. Three or four staff members escorted the client back to his room, where he remained upset and tried to break things. Eventually, he was medically sedated. Nursing home staff advised Claimant to observe the client from a distance because he was still trying to throw things around the room. He later calmed down and took a nap.

13. Claimant reported this incident both to the nursing home's head nurse and to Defendant. She notified Defendant in two ways: first, by recording it in a daily logbook that Defendant required her to keep for each shift (Defendant's Exhibit 2), and second, by telephoning Defendant's main office.[2] Defendant's employee Jean Brewer answered the phone. She told her that there was no one to cover for her and that she needed to continue working through the end of her shift, which ended at noon. Claimant completed her shift that day. The client was asleep when she left.

14. Claimant did not seek immediate medical treatment following this foot-stomp incident. She never missed a day of work from that time until the end of her tenure with Defendant, although she continued to wear her walking boot. When asked at the formal hearing whether she ever missed any work because of her client stomping on her foot, she credibly replied, "no."

September 2018 Termination from Employment

15. On or about September 21, 2018, about four weeks after the foot-stomp incident, Defendant terminated Claimant's employment because of criminal allegations against Claimant related to alleged neglect of her mother.

16. The reason for Claimant's termination was entirely unrelated to her foot injury.

[2] Defendant contends that Claimant did not follow the company's policies regarding the reporting of work-related injuries as set forth in its employee handbook (Defendant's Exhibit 1). I find that Claimant's verbal report to Defendant's office, combined with her written record of the event in a caregiver logbook, gave sufficient notice of this incident to Defendant.

Claimant's Post-Injury Medical Care

17. In January 2019, Claimant presented to ClearChoiceMD Urgent Care in Rutland with complaints of sudden onset back pain. There is no indication in her medical records from that visit that she expressed any concerns relating to her foot. She was diagnosed with lumbago with sciatica, administered an injection, and prescribed medications including prednisone, muscle relaxants, and a narcotic pain reliever. (JME 30-33).

18. The first medical treatment for her right foot that Claimant received after her August 2018 workplace injury was six months after the incident, on February 25, 2019. On that date, she saw Deborah Henley, MD. (JME 37).[3] Dr. Henley ordered x-rays of Claimant's right foot, which revealed a third metatarsal fracture. (JME 38). Dr. Henley also noted that Claimant reported left buttock and leg pain consistent with lumbar radiculopathy. (JME 37-38). She took Claimant out of work and recommended physical therapy. (JME 40). Before February 2019, Claimant had no work restrictions.

19. Dr. Henley's medical records reflect two opinions relevant to this case: (1) that Claimant's fracture was related to a workplace injury, and (2) that her sciatica was related to a limp caused by her fracture. (*See* JME 38). These opinions appear to have been based, at least in part, on several incorrect factual assumptions. Specifically, Dr. Henley's note (JME 37-38) reports that Claimant told her the following incorrect information:

    a. that her first (July 2018) foot injury occurred "at work" (it did not; *see* Finding of Fact No. 3, *supra*);

    b. that her first (July 2018) foot injury was "mild" (Claimant acknowledged at the formal hearing that it was a "very bad" sprain that caused her foot to become black and prevented her from putting her full weight on it; she also testified that she would not have been able to work following that injury without the walking boot; *see* Findings of Fact Nos. 7-8, *supra*); and

    c. that Claimant's pain following her second (August 2018) injury was "so bad she could not do her work, so she said she got fired" (Claimant continued to work for Defendant following this second injury for almost a full month without missing a day of work, until she was fired because of unrelated criminal allegations; additionally, the August 2018 workplace injury was not so severe as to prompt her to obtain medical attention for it until six months later, *see* Findings of Fact Nos. 14-18, *supra*).

20. At the formal hearing, Claimant credibly acknowledged that these statements in Dr. Henley's notes were "mistakes" that were "not correct."

[3] Claimant testified that she tried to see Dr. Henley for her foot pain as early as November 2018, but that February 2019 was the earliest that she could see her. I find this credible as it relates to Claimant's efforts to schedule an appointment with Dr. Henley, but it does not explain why Claimant could not have sought foot care from other providers in the interim, such as from an emergency room or ClearChoiceMD Urgent Care, which she visited for back pain in January 2019, apparently without mentioning any foot symptoms.

21. Dr. Henley did not testify at the formal hearing. Therefore, Claimant was not able to establish whether her causation opinions would have remained the same after correcting the incorrect assumptions above. Without the benefit of Dr. Henley's sworn testimony, and with no opportunity to allow her to explain how a corrected factual account of Claimant's injury history might affect her analysis, I cannot attach any weight to Dr. Henley's causation opinions.

22. Claimant began physical therapy in April 2019. (JME 48). Physical therapist Lindsay Savage remarked that Claimant sustained a right foot fracture and left-sided lumbar radiculopathy "due to wearing the walking boot for so long and improper gait." (*Id.*). However, neither Ms. Savage nor any other medical provider or expert witness testified at the formal hearing that Claimant's foot injury, walking boot, or gait affected her sciatica in any way.

23. Claimant's foot condition progressed well with physical therapy. In July 2019, Dr. Henley found that her right foot fracture had healed and released her to return to work. (JME 100).

24. Meanwhile, Claimant continued to experience radicular symptoms. In June 2019, she was evaluated by physician's assistant Andrew Newman, who noted that she alleged developing left low back, buttock, and leg pain a month or two after experiencing her right foot fracture. (JME 87). Mr. Newman recommended an MRI, muscle relaxants, and a follow-up with physiatrist Michael Kenosh, M.D. (*Id.*).

25. Dr. Kenosh evaluated Claimant the following month for left lumbar radicular syndrome. Claimant told him that she believed that limping after a metatarsal fracture brought on her symptoms. Dr. Kenosh recommended a lumbar spine MRI and noted that "this will not be normal because of her history of smoking and her age." (JME 95-97).

26. As to causation, Dr. Kenosh indicated that Claimant's radiculopathy was "likely a coincidence and not within a reasonable degree of medical probability associated with her foot fracture." (JME 97).

27. Later that month, Claimant underwent a lumbar spine MRI, which revealed mild-to-moderate multilevel degenerative changes with no evidence of neural compromise. Physician's assistant Andrew Newman reviewed the MRI and advised Claimant that it was "age appropriate with no herniations." (JME 103-105).

28. Claimant began a new round of physical therapy for back and lower extremity pain in September 2019. She responded well to this treatment and was discharged the following month. (*See* JME 125-40).

29. In November 2019, Dr. Kenosh administered a corticosteroid injection to Claimant's left sacroiliac region. (JME 141). Claimant credibly testified that the injection provided significant pain relief. She accepted new employment with After Hours Cleaning later that same month and continues to work there currently.

Independent Medical Examination and Expert Testimony

30. In March 2020, Claimant underwent an independent medical examination (IME) with Verne Backus, M.D., a board-certified occupational medicine physician. (JME 145-179; Defendant's Exhibits 5 and 6).

31. Dr. Backus thoroughly reviewed Claimant's medical records, interviewed her, and physically examined her. He concluded that her August 2018 workplace incident did not cause either her right foot fracture or her lumbar spine radicular symptoms.

32. Dr. Backus could not determine precisely how Claimant fractured her metatarsal. However, he credibly explained that based on the location and type of the fracture and Claimant's medical chronology, the fracture most likely resulted from her July 2018 non-work-related injury involving the dog. (JME 163).

33. He credibly explained that fractures like Claimant's often do not show up on initial x-rays until some healing occurs because what typically appears on an x-ray is a healing callus rather than the fracture itself. Additionally, as a smoker, Claimant was at risk for delayed or incomplete bone fracture healing, which would explain her extended healing timeline. These factors, in Dr. Backus's opinion, would explain why Claimant could have had a normal x-ray in July 2018 shortly after her non-work-related foot injury but before her work-related incident in August 2018.

34. Additionally, Dr. Backus found it noteworthy that Claimant was still wearing a protective boot one month after her non-work-related injury involving the dog. In his opinion, had Claimant's July incident only caused a sprain, it should have healed within approximately two weeks, well before the August 2018 foot-stomp incident. The fact that she was still symptomatic enough to be wearing a boot a month later suggested to him that that July incident likely caused a fracture rather than a mere sprain.

35. Dr. Backus also found it important that Claimant immediately sought treatment after her July 2018 incident but did not obtain treatment following her August 2018 work-related incident until six months later. He reasoned that although the August foot stomp incident could certainly have caused significant pain, if it had fractured her foot, he would have expected Claimant to seek immediate medical care as she had done the month before.

36. Dr. Backus also credibly testified that he could not conclude that Claimant's lower back condition was causally related to her August 2018 workplace injury.

37. I find Dr. Backus's opinions credible, well-supported, and persuasive in all regards.

38. Claimant did not present any expert witness to support any countervailing opinions.

Findings as to Causation

39. Based on Dr. Backus's testimony, I find that Claimant's July 2018 non-workplace injury caused her metatarsal fracture. Claimant has not proven any causal connection between her August 2018 work-related injury and her fracture or her lumbar spinal complaints.

40. Nor has she proven that the August 2018 work-related foot stomp incident affected the timeline of her fracture's healing, or that it affected her ability to work in any way.

41. Nor has she proven that her August 2018 work-related injury gave rise to any need for medical care that Claimant would not already have needed even in the absence of that incident.

CONCLUSIONS OF LAW:

1. Claimant has the burden of proof to establish all facts essential to the rights she presently asserts. *Goodwin v. Fairbanks Morse & Co.*, 123 Vt. 161, 166 (1962); *King v. Snide*, 144 Vt. 395, 399 (1984). She must establish by sufficient credible evidence the character and extent of the injury, *see Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (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).

Claimant Is Not Presently Entitled to Any Medical Benefits

2. Vermont's Workers' Compensation Act requires employers to furnish injured workers "reasonable surgical, medical, and nursing services and supplies, including prescription drugs and durable medical equipment." 21 V.S.A. § 640(a). The Department's Workers' Compensation Rules, in turn, define "[r]easonable medical treatment" as "treatment that is both medically necessary and offered for a condition that is ***causally related*** to the compensable work injury." Workers' Compensation Rule 2.3800 (emphasis added).

3. In this case, Claimant has not established that any of the medical treatment she received was necessitated specifically by her August 2018 workplace injury, or that any such treatment would not have been necessary for her pre-existing non-work-related injury from the month before. *See* Findings of Fact Nos. 39-41. Therefore, she has not proven that any medical treatment that she received was treatment "for a condition that is causally related to the compensable work injury." *See* Rule 2.3800.

4. For these reasons, Claimant has not demonstrated any entitlement to workers' compensation medical benefits under 21 V.S.A. § 640(a).

Claimant Is Not Entitled to Temporary Total Disability Benefits

5. Claimant seeks temporary total disability ("TTD") benefits for the period after Dr. Henley took her out of work on February 25, 2019 and continuing until she obtained new employment in November 2019.

6. Vermont law provides that TTD benefits are available when a workplace injury "***causes*** total disability for work[.]" 21 V.S.A. § 642 (emphasis added).

7. TTD benefits are generally not allowed for an injured worker who is terminated or voluntarily leaves a job for reasons unrelated to the work injury. *E.g.*, *McAllister v. S.T. Griswold & Co.*, Opinion No. 07-03WC (February 5, 2003). There is an exception to this general rule for a claimant who can demonstrate: "1) a work injury; 2) a reasonably diligent attempt to return to the work force; and 3) the inability to return to the work force or that a return at a reduced wage is related to her work injury and not to other factors." *Id.*, Conclusion of Law No. 7. However, even this exception requires claimants to demonstrate a causal connection between their work injury and the disability. *See id.*

8. In this case, Claimant presented no persuasive evidence that her August 2018 workplace injury affected her ability to work, move, or engage in any activity. In fact, she continued to work after her August 2018 injury until she was terminated for unrelated reasons, and she credibly testified that this injury did not cause her to miss any work. *See* Findings of Fact Nos. 14-16; 39-41, *supra.* She has not proven that her workplace injury ***caused*** any disability, as would be required for her to establish entitlement to TTD benefits. *See* 21 V.S.A. § 642.

9. Additionally, Claimant was terminated because of criminal allegations against her that had no relationship with her workplace injury. *See* Finding of Fact No. 16, *supra*; *cf. McAllister*, *supra.*

10. It is true that Dr. Henley took her out of work in February 2019. However, this occurred *after* Defendant had already terminated her employment. Moreover, Claimant has failed to establish that the reason she was taken out of work (to allow her foot fracture to heal) was related to her August 2018 workplace incident. Indeed, the credible evidence shows that her foot fracture occurred one month before her workplace injury. *Cf.* Findings of Fact Nos. 15-16, 18-21, 32-35, and 39-41, *supra*; *McAllister*, *supra.*

11. Therefore, even if Claimant's initial disability had been caused by her workplace injury (which it was not), Claimant would not be entitled to TTD benefits because she was fired for unrelated reasons and has not proven that her workplace injury caused her inability to reenter the workforce. *See id.*

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12. For all these reasons, Claimant is not entitled to TTD benefits.

Claimant Has Not Demonstrated Entitlement to Any Other Workers' Compensation Benefits

13. Claimant has established only that she sustained a work-related injury when her client stomped on her foot in August 2018.

14. She has not established that such injury caused any limitation in her ability to work or necessitated any medical treatment that she would not have needed anyway. *See* Findings of Fact Nos. 39-41.

15. Therefore, she has not sustained her burden to establish any present entitlement to any disability or medical benefits awardable under Vermont's workers' compensation laws.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant sustained a work-related injury to her right foot on August 25, 2018. However, Defendant is not presently obligated to pay any benefits on account of that injury because Claimant has not proven that it caused any disability or need for medical care. All claims for workers' compensation benefits that have allegedly accrued by the date the record closed in this case (August 10, 2020) are therefore **DENIED**.

DATED at Montpelier, Vermont this 20th day of October 2020.

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Michael A. Harrington
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.