STATE OF VERMONT
DEPARTMENT OF LABOR

Daniel Pecore

v.

Franklin August Trading, Inc.

Opinion No. 05-22WC

By: Beth A. DeBernardi
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. MM-63677

OPINION AND ORDER

Hearing held via Microsoft Teams on November 17, 2021
Record closed on January 26, 2022

APPEARANCES:

Daniel D. Pecore, *pro se*
William J. Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant sustain an injury arising out of and in the course of his employment with Defendant?

2. If so, is Claimant entitled to temporary disability benefits for any weeks for which he received unemployment insurance benefits?

EXHIBITS:

Joint Exhibit I:	Joint Medical Exhibit ("JME")
Claimant's Exhibit 1:	Claimant's recorded statement taken June 29, 2020
Claimant's Exhibit 5:	Claimant's "Statement of Injured" dated June 6, 2020
Claimant's Exhibit 6:	Text messages between Claimant and Tammy Barney
Claimant's Exhibit 7:	Emails between Claimant and Veronica Valz
Claimant's Exhibit 10:	Photographs of cardboard
Claimant's Exhibit 11:	ASTM Standard Specification for Corrugated and Solid Fiberboard Sheet Stock (Container Grade) and Cut Shapes
Claimant's Exhibit 23:	Primary care medical records from Community Health Centers
Defendant's Exhibit B:	Unemployment benefits claim determinations
Defendant's Exhibit C:	Emails between Claimant and Veronica Valz
Defendant's Exhibit D:	Email and text messages between Claimant and Tammy Barney
Defendant's Exhibit L:	Payroll records
Defendant's Exhibit N:	Three videos (audio component not admitted)

CLAIM:

All workers' compensation benefits to which Claimant proves his entitlement as causally related to his alleged abdominal/groin injury

FINDINGS OF FACT:

1. Claimant was an employee and Defendant was his employer as those terms are defined in the Vermont Workers' Compensation Act.

2. I take judicial notice of all forms and correspondence in the Department's file relating to this claim.

Claimant's Work for Defendant

3. Claimant is a 49-year-old man who lives in Burlington, Vermont. He began working for Defendant around 2015. Prior to his employment with Defendant, he worked in the food and beverage industry.

4. Defendant is a manufacturer of packaging, including corrugated boxes and protective cardboard and foam inserts. Owner Robert Achilles established the business in 1992.

5. Claimant worked for Defendant primarily as a box gluer. The first step in performing his job was receiving a pallet of flat box forms from a coworker. Claimant used a forklift to raise the box forms to chest height, and then he cut out the box tabs with a band saw. When he cut tabs on a stack of boxes, he made sure that the boxes were neatly aligned, one on top of the other, so he could cut multiple boxes simultaneously.

6. After cutting the tabs, Claimant moved the box forms to the SAG 4000 gluing machine. He inserted the cardboard tab of each box form into the machine to apply glue and aligned that tab with the opposite panel to which it would adhere. He then ran the glued box through the machine, where pressure was applied. At the machine's other end, he gathered the glued (but still flat) boxes off a conveyor belt. Smaller boxes were placed on a binding machine, where a plastic strap was wound around them; larger boxes were not bound, just stacked. Claimant placed the stacks of flat glued boxes on another pallet for handling by the next employee.

7. Claimant characterized the task of aligning the box forms prior to cutting the tabs as strenuous. One coworker typically delivered neatly aligned box forms to him, but the pallets prepared by another coworker sometimes required Claimant to align the stack prior to cutting. If the box forms needed re-alignment, Claimant performed that task by pushing the side of the stack or by lifting some of the box forms an inch or two and repositioning them. It was within Claimant's discretion how many box forms to align at one time.

8. The smaller boxes handled by Claimant weighed about one pound apiece. The largest boxes weighed six or seven pounds. Claimant routinely handled stacks of boxes

weighing 30 pounds. He also lifted a glue bucket every morning to refill the SAG 4000 machine. Owner Robert Achilles acknowledged that gluing is a physically demanding job, and coworker Justin Brunelle credibly testified that, when he performed the gluing job, he was tired at the end of the day.

Abdominal Pain on April 28, 2020 and Claimant's Reporting of his Condition

9. Claimant alleges that, on April 28, 2020, he noticed mild soreness in the muscles of his lower abdomen while at work. He described "noticing" the pain, rather than performing a specific task that caused pain. *See, e.g., Claimant's Exhibit 1*, at 7. Claimant alleges that the pain must have resulted from the cumulative effect of performing his job duties over time, especially since 2018, when one particular customer began ordering lighter but stiffer V3c cardboard boxes.

10. However, Claimant did not report any work-related abdominal or groin pain either to his employer, or to any of his medical providers, at the time of symptom onset. Instead, he reported an injury from doing laundry at home in his bathtub.

Communications with Defendant and Coworkers

11. On April 28, 2020, Claimant told coworker Suman Majhi that he could not perform heavy work that day due to abdominal pain. Claimant mentioned his pain to Mr. Majhi but did not attribute it to his work activities.

12. The next day, Claimant told manager Tammy Barney that he could not perform heavy work because of abdominal pain. He did not mention any causal connection between his pain and his work activities. From their early discussions, Ms. Barney thought Claimant had digestive concerns. Later, Claimant told Ms. Barney that he had a hernia when he lived in California years ago; he still did not mention any causal relationship between his abdominal symptoms and his work for Defendant. Ms. Barney credibly explained that Claimant was a private person and that she did not pry into his health concerns beyond what he voluntarily shared with her.

13. Claimant texted Ms. Barney on May 14 and 22, 2020, concerning doctor appointments and some absences from work. In none of his texts did he attribute his abdominal condition to his employment. *Defendant's Exhibit D.* Thus, even though Claimant was missing work and attending medical appointments related to his abdominal condition, and was communicating with his manager about the situation, he did not relate his condition to work between April 28, 2020 and June 21, 2020.

14. On June 22, 2020, Claimant told manager Veronica Valz that he wanted to file a workers' compensation claim. Prior to that date, Ms. Valz believed that Claimant was experiencing abdomen-related health issues having no connection to his employment. On June 23, 2020, Claimant and Ms. Valz exchanged emails referring to a workers' compensation claim, and Ms. Valz sought information from Claimant so she could complete an Employer's First Report of Injury (Form 1). *Defendant's Exhibit C.*

Communications with Medical Providers

15. In the spring of 2020, Claimant was traveling from his Burlington home to his job in South Burlington by bus. When he got home from work, he would remove all of his clothing and place the items in a five-gallon bucket in his clawfoot bathtub to soak. He would then wash his clothes by hand in the bathtub. He did this every evening after work, as he was concerned about Covid-19.

16. On May 14, 2020, Claimant presented via telemedicine to family medicine practitioner Wayne Warnken, MD, for intermittent abdominal pain in his lower left quadrant. Claimant reported the onset of pain two weeks previously, "at home while lifting laundry." (JME 0001). This medical record does not mention Claimant's work activities. (JME 0001-0004).

17. Claimant followed up with Dr. Warnken in person on May 22, 2020 for left lower quadrant discomfort. (JME 0009). This medical record does not mention Claimant's work activities, either. (JME 0009-0015).

18. On June 2, 2020, Claimant was evaluated by physical therapist Ben Corcoran. (JME 0021). Mr. Corcoran's office note states: "Noted lower abdominal pain with work duties involving lifting. *Initially* noted with hand washing clothes in the tub during the pandemic." (JME 0021) (emphasis added). Mr. Corcoran credibly testified that his office note accurately recorded what Claimant told him during the office visit.

19. On June 10, 2020, Claimant saw naturopathic doctor Sam Russo, ND, at Community Health Centers. Based on his conversation with Claimant, Dr. Russo noted that Claimant's abdominal pain "[s]tarted when lifting 5 gal bucket of laundry out of tub." (JME 0028, 0030). This medical record does not mention Claimant's work activities. (JME 0028-0032). Dr. Russo credibly testified that his office note accurately recorded what Claimant told him during the office visit.

20. On June 17, 2020, Claimant returned to Dr. Warnken for his abdominal pain. Dr. Warnken identified the injury as a "doing laundry in tub bending injury." (JME 0039). This medical record does not mention Claimant's work activities. (JME 0035-0041).

21. On July 1, 2020, Dr. Russo again noted that Claimant's symptoms began when he was doing laundry at home in the bathtub. (JME 0045). There is no record that Claimant mentioned his work activities to Dr. Russo during this visit, either. (JME 0042-0047).

22. Claimant then saw orthopedist David Knight Lisle, MD, on July 2, 2020, ten days after notifying Defendant of a work injury. Dr. Lisle's medical record notes that Claimant reported washing his clothes at night and started to have "more pain" while he was loading a pallet at work. (JME 0052).

23. Claimant provided consistent accounts to Dr. Warnken, therapist Corcoran, and Dr. Russo that he experienced the onset of abdominal pain from washing laundry in the

bathtub. The accounts attributing Claimant's abdominal condition to washing laundry are closer in time to the onset of pain than his later accounts of a work injury. Further, between late April 2020 and late June 2020, Claimant reported no work injury to Defendant, despite having multiple conversations with management about his medical condition, medical appointments, and limited ability to work during this time. Even Claimant's July 2, 2020 account to Dr. Lisle is not inconsistent with his attribution of the onset of pain to washing his clothes at night. Accordingly, I find that Claimant's abdominal pain began while he was doing his laundry at home around April 28, 2020.

24. Defendant does not have any policy or other requirements for employees to follow concerning the washing of their laundry during the pandemic or otherwise. Defendant just generally requires cleanliness and "reasonable clothing" for work, according to Mr. Achilles' credible testimony.

Medical Opinions

25. Neither party offered expert medical testimony at the hearing concerning the causal relationship between Claimant's abdominal/groin condition and his employment for Defendant. Claimant relies on the written medical opinions of Dr. Lisle and Dr. Sumner as recorded in the medical records to establish causation.

David Knight Lisle, MD

26. Based on a referral from his primary care physician, Claimant saw orthopedic physician David Knight Lisle, MD, on July 2, 2020 for left lower abdominal and groin pain. (JME 0052). Dr. Lisle's record notes that Claimant "does a lot of heavy lifting" without specifying whether the lifting was at home or at work. Claimant told Dr. Lisle that he was washing his clothes at night and that he was loading a pallet when he started to have "more" pain. (JME 0052). Claimant told Dr. Lisle that he tried to get his condition covered by workers' compensation insurance, but his claim was denied. (JME 0053).

27. Claimant saw Dr. Lisle again on September 18, 2020. (JME 0064). Dr. Lisle reviewed an MRI study and assessed Claimant with left-sided groin pain with no MRI evidence of a hernia. Dr. Lisle wrote:

> [Claimant] was under the impression that he was checked for inguinal hernia however no results in his chart. This appears to be a left inguinal hernia. This hernia would more likely than not be a direct result from his work related injury.

(JME 0065).

28. Although Dr. Lisle wrote in his medical record that Claimant's hernia[1] was work-related, he did not provide any basis for his opinion beyond this bare assertion. In the absence of any explanation from Dr. Lisle as to the basis of his conclusion, I cannot rely on his opinion to establish a causal connection between Claimant's work activities and his abdominal/groin condition.

Austin Sumner, MD

29. On April 28, 2021, at the suggestion of his primary care provider, Claimant saw occupational medicine physician Austin Sumner, MD, for an opinion on the causal relationship between his abdominal and groin condition and his employment. In contrast to his reports to his treating providers in 2020, Claimant reported to Dr. Sumner in April 2021 that he sustained a work-related abdominal and groin injury on April 28, 2020, while loading a heavy pallet at work. (JME 243).

30. Specifically, Claimant told Dr. Sumner that he was injured on the morning of April 28, 2020, as he was lifting a wide bundle of boxes. When he lifted the bundle, he felt discomfort in his left groin, which became worse over the course of the day. (JME 243). In Dr. Sumner's opinion, to a reasonable degree of medical certainty, the mechanism of lifting an awkward-shaped bundle of boxes with his hands out to his sides and rotating is a "reasonable mechanism" for Claimant to have strained his rectus abdominis muscle. Thus, in Dr. Sumner's opinion, this act of lifting and twisting on April 28, 2020, caused Claimant's abdominal injury. (JME 246).

31. However, Claimant did not report to Dr. Sumner that he initially experienced the onset of abdominal and groin symptoms at home while lifting wet laundry in the bathtub, nor that he had reported this mechanism of injury to three other medical providers close in time to the onset of his pain. Further, Claimant did not provide Dr. Sumner with all of the relevant treatment records reflecting his attribution of symptoms to lifting a five-gallon bucket of laundry. Dr. Sumner did not have this information when he offered his opinion and, because he did not testify at the formal hearing, he had no opportunity to explain whether these facts would have affected his opinion.

32. Further, Claimant did not testify that he suffered an acute injury on April 28, 2020, when he lifted a wide bundle of cardboard boxes and made a twisting motion. On the contrary, he testified that he thought he injured himself while washing laundry in the bathtub, but that, on further reflection over a period of two months, he concluded that he lifted more weight at work than at home and that therefore the cumulative effect of his work duties must have caused his abdominal/groin injury. Thus, Dr. Sumner's

[1] In October 2020, Claimant saw surgeon Edward Borrazzo, MD, for left inguinal pain. Dr. Borrazzo did not feel a hernia on examination and, based on Claimant's MRI study, did not think that Claimant had a hernia. Dr. Borrazzo thought that Claimant had a ligament or muscle strain that would heal over time. (JME 0073). Claimant nevertheless opted for diagnostic laparoscopy on October 20, 2020, and based on those findings, Dr. Borrazzo confirmed that Claimant did not have a hernia. (JME 0086).

opinion that Claimant suffered an acute injury on April 28, 2020 while lifting wide boxes and twisting is also at odds with Claimant's hearing testimony.

33. To be persuasive, Dr. Sumner's opinion must be based on a firm foundation. Instead, his opinion is based on an account provided by Claimant that is not consistent with the other accounts that Claimant provided, either in his hearing testimony or to his other medical providers. As the accounts to his other providers were closer in time to the onset of pain, I find those accounts more credible. Accordingly, I find that the account of his injury that Claimant provided to Dr. Sumner one year after the onset of symptoms was inaccurate. As a result, Dr. Sumner's opinion does not rest on a firm foundation and lacks persuasiveness.

Claimant's Unemployment Benefits Claim

34. Claimant filed a claim for unemployment benefits in the summer of 2020. On October 8, 2020, a claims adjudicator found that his employment ended due to a certified health condition and that he was ineligible for benefits because he was currently unable to work. *See* Defendant's Exhibit B, page 5.

35. Claimant appealed that determination, and a hearing was held on February 10, 2021. The administrative law judge found that Claimant's employment ended due to a certified health condition but that he was released to perform light duty work on October 29, 2020. Accordingly, she ruled that Claimant remained ineligible for unemployment benefits through October 31, 2020, after which his claim would be allowed, provided he continued to meet all other eligibility requirements. *See Defendant's Exhibit B*, pages 1-4.

36. Thereafter, Claimant filed for unemployment benefits weekly, certifying each time that he was able and available to work, as required by 21 V.S.A. § 1343(a)(3).

37. Claimant received unemployment benefits from November 1, 2020 through September 4, 2021, when the pandemic-related extension of unemployment benefits expired. Later that month, he began employment as a Samsung experience consultant at Best Buy.

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, *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. Where the causal connection between employment and injury is obscure, and a layperson could have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395-96 (1979).

Relationship Between Claimant's Abdominal/Groin Injury and his Work Activities

3. Claimant alleges that he sustained an abdominal or groin injury arising out of and in the course of his employment. In support of his claim, he relies on the medical opinion of Dr. Sumner that lifting wide cardboard boxes and twisting on the morning of April 28, 2020 was a "reasonable mechanism" for sustaining an acute abdominal injury. As set forth in Finding of Fact No. 33 *supra*, however, I have found that the account that Claimant provided to Dr. Sumner was not persuasive. Therefore, Dr. Sumner's opinion does not establish a causal relationship between Claimant's abdominal condition and his employment for Defendant. *See S.D. v. Fletcher Allen Health Care*, Opinion No. 08-07WC (February 28, 2007); *R.O. v. Buttura & Sons*, Opinion No. 52-08WC (December 15, 2008), at ¶ 2, citing *Magill v. Mack Molding Co., Inc.*, Opinion No. 58-05WC (September 9, 2005). Without a persuasive medical opinion, Claimant cannot establish causation. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395-96 (1979). Further, "merely stating a conclusion to a reasonable degree of medical certainty does not necessarily make it so, even if no more credible opinion is offered." *Meau v. The Howard Center*, Opinion No. 01-14WC (January 24, 2014).

4. Accordingly, Claimant has not met his burden of proof that he sustained a compensable abdominal/groin injury causally related to his employment with Defendant.

Compensability of Injury Sustained While Washing Laundry at Home

5. In the alternative, Claimant contends that an injury sustained while doing laundry at home is compensable as a workers' compensation claim.

6. An injury is compensable only if it both "arises out of" and occurs "in the course of" employment. 21 V.S.A. § 618; *Miller v. Int'l Business Machines Corp.*, 161 Vt. 213, 214 (1993). An injury occurs in the course of employment "when it occurs within the period of time when the employee was on duty at a place where the employee may reasonably be expected to be while fulfilling the duties of [the] employment contract." *Miller, supra* at 215, quoting *Marsigli Estate v. Granite City Auto Sales, Inc*., 124 Vt. 95, 98 (1964). An injury arises out of employment "if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed the claimant in the position where claimant was injured." *Cyr v. McDermott's, Inc*., 2010 VT 19, ¶ 10; *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993), quoting 1 A. Larson, *Workmen's Compensation Law* § 6.50 (1990) (emphasis in original). Thus, compensability is a two-pronged test, requiring both (1) a causal connection (the "arising out of" component), and (2) a time, place and activity link (the "in the course of" component) between the claimant's work and the accident giving rise to the injuries. *Cyr, supra* at ¶ 9; *Miller, supra* at 214.

7. Claimant alleges a work-related injury sustained while he was washing his laundry at home after work. Washing laundry is a routine personal activity. The fact that employees are expected to wear clean clothes to work does not change this personal activity into a work activity. Further, although Defendant expected its employees to wear "reasonable clothing" to work, it did not have any specific policy or directive to employees concerning the washing of laundry during the pandemic or otherwise, nor did it exercise any control over the conditions of Claimant's washroom or his methods of washing laundry. Thus, Claimant's home laundry washing did not "arise out of" his employment.

8. As to the second prong of the compensability test, Claimant washed his laundry at home, after his workday had ended. Thus, this activity did not occur in the course of his employment, either. Claimant's claim that a laundry injury is compensable therefore fails to meet either prong of the statutory requirements for a compensable injury. *See, e.g., Reynolds v. The Be-Neat Tank Cleaning Corp.*, 425 So.2d 881 (La. Ct. App. 1983) (injury sustained while washing work clothes in a laundromat after work hours not compensable because it was a personal activity, not a work activity, and occurred outside of regular working hours).

Interaction Between Workers' Compensation Benefits and Unemployment Benefits

9. Claimant avowed that he was able and available to work every week from November 1, 2020 through September 4, 2021 in connection with his receipt of unemployment benefits. *See* Finding of Fact No. 36 *supra*. Defendant contends that, if Claimant were entitled to workers' compensation benefits, this avowal would result in his ineligibility for temporary disability benefits for this time period, as receipt of such benefits is dependent on an injured worker's being unable to work.

10. Whether the receipt of unemployment benefits defeats a claim for temporary disability is a fact-specific determination. For example, in *Erickson v. Kennedy Brothers, Inc.*, Opinion No. 36-10WC (December 14, 2010), the Commissioner wrote:

> Defendant argues that because Claimant was receiving unemployment compensation for these time periods she is disqualified from receiving temporary total disability benefits. I agree that by asserting that she was available for and able to work for unemployment compensation purposes, *see* 21 V.S.A. § 1343(a)(3), Claimant cast doubt on any claim that she was at the same time temporarily totally disabled for workers' compensation purposes.

11. Similarly, in *Savage v. Int'l Cheese Company, Inc.*, Opinion No. 60-95WC (November 30, 1995), the Commissioner held that the claimant was not entitled to temporary disability benefits because she applied for and received unemployment benefits based on her avowed fitness to work. *See also Rhodes v. Whitney Blake Co. of Vermont,* Opinion No. 93-95WC (March 12, 1996) (claimant who applies for and receives unemployment benefits based on an avowed fitness to work is not entitled to

temporary disability benefits after that point unless there is a change of circumstances). *But cf. Clay v. Precision Valley Communication*, Opinion No. 38-02WC (August 28, 2002) (avowed fitness to work in an unemployment claim is a factor in determining that a claimant is not entitled to disability benefits, but this factor might not always bar receipt of disability benefits); *McKiernan v. Standard Register Co*., Opinion No. 47-09WC (December 2, 2009) (claimant who received unemployment benefits was not ineligible to receive temporary disability benefits because his physician had not prohibited all forms of work).

12. In any event, a claimant cannot collect both temporary disability benefits and unemployment benefits for the same period of time. To the extent that a claimant is eligible for temporary disability benefits for a period during which he or she received unemployment benefits, the claimant must repay the latter. *McKiernan*, *supra*, Conclusion of Law No. 7.

13. In this case, Claimant has not established his entitlement to any workers' compensation benefits, including temporary disability benefits. Accordingly, no ruling on the interplay between temporary disability and unemployment benefits under the circumstances presented here is required.

ORDER:

Based on the above Findings of Fact and Conclusions of Law, Claimant's claim for workers' compensation benefits causally related to his employment with Defendant is hereby **DENIED**.

Dated at Montpelier, Vermont this 22nd day of February 2022.

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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.