

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

M. J.	)	Opinion No. 56-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
McCullough Crushing, Inc.	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. W-04390

Pretrial conference held on May 24, 2005  
Hearing held in Montpelier on August 12, 2005  
Record closed on August 30, 2005

**APPEARANCES:**

Heidi Groff, Esq., for the Claimant  
Jeffrey W. Spencer, Esq., for the Defendant

**ISSUES:**

Is the claimant’s left shoulder injury causally related to his work activities?

**EXHIBITS:**

Joint 1:	Medical Records
Joint 2:	Time record
Claimant 1:	Deposition of Linda DeForge
Claimant 2:	Deposition of Alan Herring
Claimant 3:	Statement of Alan Herring
Defendant 1:	Drawing by claimant of his residence
Defendant 2:	Videotape of claimant’s residence

**FINDINGS OF FACT:**

1. At all times relevant to this claim, claimant was an employee and McCullough Crushing his employer within the meaning of the Workers’ Compensation Act.
2. McCullough Crushing is a business run by Scott and Fred McCullough.

3. Defendant first hired the claimant in 1994. At that time, the claimant was a truck driver. However, this position changed 2 years ago, when he went to work on a crusher. Claimant has had two previous workers' compensation claims with the defendant: catching a chain binder in the face and a back injury. Neither of these injuries resulted in lost time from work.
4. While the claimant worked on the crusher, his primary responsibilities were "running loader," generally making sure that the stones went through the crusher and did not jam in it. However, if stones did become stuck, claimant would use a sledgehammer to crush the stones plugging up the crusher's jaw.
5. In the Spring of 2004, claimant had injured himself while riding his girlfriend's four-wheeler around his property. He had to push the vehicle off of him, and was mad about the situation. He discussed this incident with his co-workers, including Dot Davy, who does not recall claimant mentioning that he had hurt his knee, though he did mention hurting his back. His co-workers do not recall the claimant ever mentioning that he hurt his right shoulder when he rolled over on the ATV.
6. On September 13, 2004, claimant drove down from the defendant's office in Middlesex, Vermont, to a worksite in Canaan, New Hampshire. Claimant's primary responsibility that day was to drive the truck down to the worksite with one of his co-workers.
7. At the worksite, claimant's co-workers were working with a crusher. Claimant decided to help out his co-workers, and at one point began to pound on the bow wheel. While pounding, he felt a tear in his shoulder, but decided to keep on working. None of his co-workers witnessed this incident.
8. After this incident, the claimant accompanied his co-workers to West Lebanon to buy parts for the machinery. Claimant did not mention the incident in the truck or on the way back to Middlesex. Claimant did mention the incident to a co-worker, Alan Herring, the day after it occurred. He also mentioned to another co-worker, Aaron Phelps, that he had injured his shoulder in Canaan.
9. Claimant did not report this incident to any of his co-workers or the defendant, believing the pain would resolve on its own. When asked why he did not report it, claimant thought that the pain was his arthritis and nothing too serious. Claimant noted that he is "not a whiner" and just wanted to get the work done.
10. Throughout the rest of September, October and November 2004, claimant continued working without making any report of the pain. Claimant took medication for the pain throughout this time. Mr. Phelps saw the claimant "always" taking medication, although he did not know specifically what the medication was for. Claimant continued to do the work assigned to him, on occasion asking for help with shoveling, as well as changing screens that weighed 50- 100 pounds.

11. On November 24, 2004, claimant went to the Barre Health Center. He reported that he “was using a sledge hammer with unusually heavy labor and really fairly massive effort on September 13 at his work place, which is a stone crushing facility. He has been hurting ever since. He really can’t continue to function with this pain. It is difficult for him to function at work.” Claimant was diagnosed with a rotator cuff tear to his right shoulder.
12. On December 1, 2004, claimant reported the right shoulder injury to Scott McCullough. This was shortly before the scheduled lay-off for the season.
13. Claimant underwent surgery on January 27, 2005 and a second surgery on May 24, 2005.
14. Claimant, in his spare time, has cut wood for himself and his cousin. Claimant states that he did not cut wood during the 2004-2005-winter season, due to his shoulder pain. Claimant also has a few trucks on his property, occasionally doing maintenance work on them.
15. Claimant seeks to have his right shoulder injury deemed compensable. He also seeks attorneys’ fees based on a contingency fee agreement, as well as costs of litigating this claim.

#### **CONCLUSIONS OF LAW:**

1. The sole issue presented is whether the claimant suffered a work related injury to his right shoulder.
2. In worker’s compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1962). The claimant 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).
3. 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 inference from the facts proven must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
4. Claimant argues that he suffered a work related injury in September 2004. Specifically, claimant argues that while he worked on a crusher at a work site in New Hampshire, that the pounding on the crusher caused his left shoulder injury.
5. Defendant argues that although the claimant suffered a left shoulder injury, this shoulder injury is not work related. Defendant argues that nobody saw the incident, that the claimant never reported it until 3 months later and that the claimant felt no pain during this time. Furthermore, defendant notes that it is more probable that the claimant obtained the shoulder injury while riding an ATV.

6. This case presents another situation where nobody witnessed the incident complained about by the claimant, and where the claimant failed to report the incident when it happened. In such instances the trier of fact must weigh carefully the credibility of witnesses, the initial medical reports, explore any inconsistencies or not so hidden motivations. *Fanger v. Village Inn*, Opinion 05-95WC (1995).
7. This case demonstrates the need to weigh several considerations in a late-reported case: 1) are there medical records contemporaneous with the claimed injury and/or a credible history of continuing complaints? 2) Does the claimant lack knowledge of the workers' compensation reporting process? 3) Is the work performed consistent with the claimant's complaints? and 4) Is there persuasive medical evidence supporting causation? *Hobbs v. Vermont Department of Economic Development*, Opinion No. 25-04WC (2004) (citing *Seguin v. Ethan Allen Inc.* Opinion No. 28-02WC (2002)).
8. The claimant in this case did not consult a medical professional until three months after the accident. Neither did the claimant complain to anyone at the worksite about the pain he felt in his left shoulder. However, the claimant did complain to a co-worker, Aaron Phelps, soon after the accident about the pain he was feeling in his left shoulder. Furthermore, Mr. Phelps saw the claimant take medication on numerous occasions, although he did not know what it was for. This corroborates claimant's explanation of how he dealt with the pain, that he took medication to alleviate the pain. Although the claimant is familiar with the workers' compensation process and how to make a report of injury, his explanation that he is a "workaholic" who decided to work through the pain is credible.
9. Despite the fact that the claimant injured himself in the previous spring with his girlfriend's four-wheeler, the facts indicate that it is more probable than not that the claimant's work duties caused his shoulder injury. Although his co-workers remember him mentioning that he had hurt his knee and back, none recall the claimant mentioning that he hurt his left shoulder. Furthermore, his main duties at work were described as a truck driver. However, this position changed to one that required strenuous use of his arms and shoulder.
10. In sum, it is more likely than not that claimant picked up the heavy hammer and helped coworkers at the Canaan site, with the resultant shoulder injury.

**ORDER:**

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to:

1. Adjust claimant's claim for his right shoulder injury;
2. Pay statutory Interest under 21 V.S.A §664 from the date each benefit became due;
3. Pay litigation costs of \$936.01 and attorney fees of 20% of the total award, or \$9,000, whichever is less.

Dated at Montpelier, Vermont this 8<sup>th</sup> day of September 2005.

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Patricia A. McDonald  
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.