

K. C. v. Windham Northeast Supervisory Union (November 17, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

K. C.

Opinion No. 45-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Windham Northeast Supervisory Union

For: Patricia Moulton Powden
Commissioner

State File No. X-01602

Hearing held in Bellows Falls on March 21, 2006

Record closed on June 30, 2006

APPEARANCES:

J. Christopher Callahan, Esq. for the claimant

Keith J. Kasper, Esq. for the defendant

ISSUE:

Did the claimant suffer an injury at work on September 2, 2005?

OFFICIAL DEPARTMENT FORMS:

1. Form 1, Employee's Claim and Employer First Report of Injury, for September 2, 2005 injury, reported September 6, 2005 and filed on September 8, 2005.
2. Form 2, Denial of Workers' Compensation benefits by the carrier.
3. Form 6, Claimant filed written Notice and Application of Hearing in the form of a letter filed on September 28, 2005.

EXHIBITS:

Joint I: Medical Records

Defendant's A: Letter of Resignation
Employment Records
School Schedule

OTHER EXHIBITS:

Claimant's A: Witness Statements

THE CLAIM:

The Claimant seeks Temporary Total Disability Benefits, medical benefits related to her back injury, and attorneys' fees.

FINDINGS OF FACT:

1. Claimant began working for Defendant as a para-educator on August 29, 2005.
2. As a para-educator, the Claimant worked with a special needs child and was required to assist her in walking short distances and lift the child in and out of a wheelchair.
3. The Claimant's average weekly wage was \$403.98.
4. The Claimant offered a letter of resignation to the school principal on August 31, 2005.
5. Claimant agreed to continue working for the Defendant until a replacement could be found.
6. There were no witnesses to the Claimant's alleged work-related injury.
7. The school recorded no seizures in the school health records for September 2, 2005.
8. On Friday, September 2, 2005, the school schedule reflected that there were no extracurricular gym activities after lunch.
9. The Claimant worked until the end of the school day on September 2, 2005.
10. On the morning of Tuesday, September 6, 2005, the Claimant called the school to report that she would be taking a sick day. Because this was late notice, the Claimant worked for a brief time that morning until a replacement could be located.
11. After leaving the school, the Claimant was seen at Urgent Care in Bellows Falls where she was diagnosed with lower back strain.
12. The Claimant then returned to the school to fill out workers' compensation paperwork.
13. The Claimant saw Dr. Peake, her primary care physician, September 9 and again on September 16, 2005. Dr. Peake wrote notes excusing the Claimant from work after each examination.
14. After conservative treatment was unsuccessful at relieving the Claimant's pain, Dr. Peake referred the Claimant to Dr. Guglielmo at Upper Valley Neurology on September 20, 2005.
15. An MRI taken September 21, 2005 revealed that the Claimant had disk herniation at L4-5 with right L5 nerve root impingement.

16. On September 26, 2005, Dr. Guglielmo diagnosed the Claimant with significant right L5 radiculopathy secondary to a herniated right L4-5 disk. Ultimately, the Claimant and Dr. Guglielmo agreed that surgery would best resolve the Claimant's condition.
17. Dr. Guglielmo's records indicate that the Claimant said she injured her back removing the child from her wheelchair because the child was seizing.
18. Soon after Dr. Guglielmo's diagnosis, the Claimant learned that she was pregnant. Because the surgery could harm the Claimant's unborn child, the Claimant's doctors have recommended that she wait until she is postnatal before having the surgery.
19. The Claimant has not worked since September 6, 2005.

Allegations:

The Claimant alleges that: she injured her back at work on Friday, September 2, 2005 while lifting the special needs child from the floor into her wheelchair. She then wheeled the child into the lunchroom. Next, she exited the building and ate lunch alone in her car. After lunch, she reentered the building and wheeled the child from the lunchroom into the gym. Then, the Claimant wheeled the child into a classroom with other students and teachers until the end of the school day. She then drove herself home. The Claimant also testified that she experienced a very high level of pain as she performed all of the activities mentioned above. The Claimant did not report the alleged injury until the following Tuesday.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
2. 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 proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. Furthermore, in unwitnessed cases where the claimant does not report the injury for a period of time, "the trier of fact must weigh carefully the credibility of witnesses, the initial medical reports, and explore any inconsistencies and hidden or not-so-hidden motivations." *Fanger v. Village Inn*, Opinion No. 5-95WC (1995).

4. Several factors discredit the Claimant's description of events. First, there are no witnesses to the alleged accident. Second, the Claimant testifies here that she injured her back lifting the child into a wheelchair, but Dr. Guglielmo's records indicate that the Claimant said she injured her back removing the child from her wheelchair because the child was seizing. Third, the school schedule shows that there were no gym activities after lunch that day. Fourth, the Claimant spent the latter part of the school day in the company of students and teachers, supposedly in excruciating pain, yet no one noticed any outward manifestation of her discomfort. Fifth, the Claimant waited until the following Tuesday, after a long Labor Day weekend, before notifying the school of the injury or seeking medical attention. Furthermore, the Claimant had given her resignation just a few days prior to this incident.

5. The Claimant's medical evidence clearly shows that she suffers from a back injury. However, the high number of inconsistencies combined with the fact that the alleged injury was unwitnessed and not reported in a timely fashion cast a high level of doubt on whether that injury was connected to the Claimant's employment. Consequently, the Claimant has shown no more than a possibility that the injury may have happened in connection with her employment.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, the Claimant's claim for Temporary Total Disability Benefits, medical benefits related to the Claimant's back injury, and the Claimant's attorneys' fees are DENIED.

Dated at Montpelier, Vermont this 17th day of November 2006.

Patricia Moulton Powden
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.