

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Cynthia Thompson

Opinion No. 28-15WC

v.

By: Phyllis Phillips, Esq.
Administrative Law Judge

Greensboro Hospital

For: Anne M. Noonan
Commissioner

State File No. GG-55308

OPINION AND ORDER

Hearing held in Montpelier on April 3, 2015

Record closed on May 20, 2015

APPEARANCES:

Steven Robinson, Esq., for Claimant

Erin Gilmore, Esq., for Defendant

ISSUES PRESENTED:

Did Claimant suffer a low back and sciatic nerve injury causally related to her employment for Defendant on or about October 22, 2014?

EXHIBITS:

Joint Exhibit I:

Medical records

Claimant's Exhibit 1:

Deposition of Julie Gregonis, March 6, 2015

Claimant's Exhibit 2:

Deposition of Gloria Mercier, January 12, 2015

Claimant's Exhibit 3:

Deposition of Deborah Schauer, March 6, 2015

Claimant's Exhibit 4:

Schedule and timesheet records

Claimant's Exhibit 5:

Employee Incident/Accident Report

Claimant's Exhibit 6:

Resident Care Plan

Claimant's Exhibit 7:

Various medical records

Claimant's Exhibit 8:

Paul Fischer written statement

Claimant's Exhibit 9:

Gloria Mercier written statement

CLAIM:

All workers' compensation benefits to which Claimant establishes her entitlement as causally related to her alleged October 22, 2014 lower back injury

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.
3. Claimant has worked as a Licensed Nursing Assistant (LNA) since 2003. She has worked at various local nursing homes since that time, including a brief stint at Defendant's Greensboro Nursing Home in 2010. More recently, she returned to work for Defendant, again as an LNA at the nursing home, in October 2014.
4. Defendant's nursing home is comprised of two wings, with a total capacity of 30 beds. LNAs are scheduled over three shifts, with a charge nurse overseeing them. At various points during the day, each wing is typically staffed with two LNAs; at others, there might be only one LNA per wing, with either a third LNA or the charge nurse to "float" as needed. For example, on the second shift, which runs from 2:15 to 10:30 PM, two LNAs per wing might be scheduled through the dinner hour, but once the residents have been cared for and put to bed for the night, at the charge nurse's discretion one or two LNAs might be allowed to leave early.
5. Claimant has no prior history of injury to, or treatment for, low back pain. Before starting work for Defendant, she was required to undergo a physical screening which tested, *inter alia*, her capacity for lifting. Claimant was deemed fit for duty with no restrictions.
6. Claimant also has no prior history of work-related injuries resulting in lost time. She suffered two minor injuries while working for a previous facility, but on both occasions her employer initiated medical care with its own designated treatment provider, such that Claimant was for the most part uninvolved in the workers' compensation process.

Claimant's Alleged Injury and Subsequent Medical Course

7. Claimant's first day of work for Defendant was Monday, October 20, 2014. Per Defendant's orientation protocol, she was assigned to work with Paul Fischer,

another LNA. Mr. Fischer has worked as an LNA at Defendant's nursing home since 2009.¹

8. By having Claimant work with an established LNA during her orientation period, Defendant's training protocol was designed primarily to allow her to become familiar with each resident's particular needs and habits. As a licensed LNA with experience, she was presumed already to know how to perform certain functions safely, such as turning or transferring residents. Thus, as Defendant's Director of Nursing, Julie Gregonis, credibly and emphatically asserted in her deposition testimony, during the orientation period Claimant was expected not merely to watch but to actively participate alongside the LNA to whom she was assigned in providing direct care to the residents.
9. Consistent with this training protocol, Claimant credibly recalled that both on Monday, October 20th, when she shadowed Mr. Fischer on the second shift, and on Tuesday, October 21st, when she worked the second shift alongside another LNA, she provided direct, physical care to at least some of the residents with whom she interacted. This included rolling, lifting and transferring residents as necessary to prepare them for meals or bed.
10. On her third day of work, Wednesday, October 22nd, Claimant was again assigned to work the second shift with Mr. Fischer. According to her credible testimony, at around 4:15 or 4:30 PM Mr. Fischer asked if she felt capable of attending to a particular resident's care (referred to here as Resident 12B) by herself. Claimant had not yet had occasion to interact with Resident 12B, and was not familiar with his personal care plan. This is a written, multi-page document in every resident's chart that specifies the degree of assistance required for bathing, dressing, toileting, mobility and other daily living activities. A resident might be independent in some activities, and require assistance from either one or two staff members in other areas.
11. Although she was unfamiliar with the level of assistance Resident 12B needed, Claimant did not consult his personal care plan, a violation of Defendant's general protocol. Instead, she inquired of Mr. Fischer whether Resident 12B was a "one- or two-person assist." According to Claimant's credible testimony, Mr. Fischer replied that Resident 12B was a one-person assist. He then instructed her how to coax the resident into helping her turn him in bed so that she could bathe him and change his clothes before dinner.
12. In fact, according to his personal care plan, Resident 12B "requires extensive assist of one to two staff members with all bathing, dressing and hygiene," and is a two-person assist for turning and positioning. Notwithstanding this directive, Mr. Fischer credibly testified that as an LNA he sometimes exercised discretion to deviate from a resident's care plan so long as he could do so safely. According to

¹ As of the formal hearing, Mr. Fischer had changed positions, and now works as Defendant's social services director.

Ms. Gregonis, to the extent such deviations might violate state regulations this would have negative ramifications for the facility, however.

13. Claimant credibly testified that she entered Resident 12B's room, closed the door for privacy, set up her towels and washbasin and commenced bathing him. After washing his front, she attempted three times to turn him as Mr. Fischer had instructed, but he resisted. Claimant began to feel a burning pain in her back, but continued her care. Shortly thereafter, Mr. Fischer knocked on the door and inquired whether she needed any assistance. Claimant replied that she did. Mr. Fischer entered the room, and together they were able to turn Resident 12B so that she could finish washing and dressing him. Then they repositioned him in bed and left the room.
14. Mr. Fischer's recollection of events differed from Claimant's in important respects. In the written statement he gave almost two weeks later, he recalled that he and Claimant had entered Resident 12B's room together, that the resident was "easily cued" to turn in bed, and that because Claimant was still in her orientation period he asked her just to observe, not to participate. His formal hearing testimony was to similar effect.
15. I have no reason to doubt that Mr. Fischer testified to the best of his recollection, both in his written statement and in his formal hearing testimony. Nor do I have any reason to suspect that he intentionally misrepresented the facts. At the same time, he acknowledged that he had not given a second thought to Claimant's October 22, 2014 interaction with Resident 12B until Defendant began its investigation of the circumstances surrounding her workers' compensation claim and asked him to recall it in writing. Claimant had not mentioned to him that she had hurt herself, and therefore nothing about the events of that day would have stood out for him as memorable. With that in mind, I find that by the time he gave his written statement, his memory may already have faded.
16. After leaving Resident 12B's room, Claimant worked the rest of her shift. As the night went on, the burning pain in her back began to radiate into her left leg. Claimant had never experienced this type of radiating pain before and did not understand that it was in any way related to the low back pain she had felt while tending to Resident 12B. She did not report her symptoms to her supervisor, because she thought they would resolve with rest.
17. Claimant had the next day off. She spent the day trying to get comfortable, but her low back and left leg pain continued unabated. During a telephone conversation with a friend that evening, Claimant described her leg symptoms, which the friend suggested might be emanating from her sciatic nerve. Claimant had never suffered from sciatica, and still did not understand that her left leg and low back symptoms were related.

18. Claimant worked the second shift as scheduled on both Friday, October 24th and Saturday, October 25th. By this time, she was limping, and had to stop frequently to rub her low back and leg. While chatting with two co-employees prior to starting her Saturday shift, one of them inquired why she was limping. Based on the information she had gleaned from her friend, Claimant replied that she thought it was her sciatic nerve. Upon hearing this, the other co-employee, Gloria Mercier, recommended an exercise that had helped alleviate the sciatic nerve pain she had experienced when she was pregnant.
19. In the written statement she gave approximately ten days later, after Defendant had begun its workers' compensation claim investigation, Ms. Mercier recalled Claimant stating that her sciatic nerve "gets this way sometimes," an apparent reference to a prior history of such problems. The medical records dating back to May 2009 do not reflect any prior complaints of, or treatment for, low back or sciatic pain, however, *see* Finding of Fact No. 5 *supra*. Lacking credible corroboration, I find that Ms. Mercier either misunderstood or inaccurately recalled the conversation.
20. Claimant worked the Saturday, October 25th evening shift with Jessica Cross, another LNA, on one wing, while Mr. Fischer and Ms. Mercier, who often worked together, worked the other wing. Both Mr. Fischer and Ms. Mercier clocked out early that evening, at 9:00 PM rather than 10:30 PM. Having left before the last rounds of the shift had occurred, they did not remove the soiled linens and garbage from their wing, as typically occurs prior to each shift change. Instead, Claimant and Ms. Cross realized that they would have to do so. Throughout the shift, Claimant's leg pain continued unabated.
21. Claimant worked the second shift on Sunday, October 26th. At some point during the day, she spoke with Ms. Gregonis, the Director of Nursing, about the fact that Mr. Fischer and Ms. Mercier had both left early the night before, leaving Claimant and Ms. Cross to clean up the garbage and linens on their wing. In the course of their conversation, Ms. Gregonis noticed that Claimant was rubbing her left leg; Claimant stated that it was her sciatic nerve. Claimant still did not comprehend that her leg pain was at all related to the low back pain she had experienced while moving Resident 12B five days earlier, and therefore did not mention that incident to Ms. Gregonis.
22. Claimant had a scheduled day off on Monday, October 27th. When she awoke that morning, her pain was severe. She drove herself to the Copley Hospital emergency department. The medical record reflects a history of low back and left leg pain while lifting four days previously, and a diagnosis of sciatica, "likely" work-related. As treatment, Claimant was prescribed pain medications, referred to physical therapy and advised to follow up with her primary care provider.
23. Claimant followed up with Jeri Wohlberg, a family nurse practitioner at Northern Counties Health Care, her primary care provider, on Tuesday, October 28th. The

record of that visit reflects a history of having lifted a heavy patient while working the previous week, followed the next day by the abrupt onset of low back pain radiating into the left leg. Consistent with the emergency department evaluation, Ms. Wohlberg diagnosed left-sided sciatica, for which she referred Claimant to physical therapy and prescribed pain medications. In addition, she determined that Claimant was temporarily unable to work.

24. At Defendant's referral, on November 6, 2014 Claimant underwent an evaluation with Barbara Sitsch, a nurse practitioner. The history she reported was consistent both with the other contemporaneous medical records and with her formal hearing testimony, that is, that she noted low back pain shortly after twice attempting to roll a patient in bed. Ms. Sitsch diagnosed a lumbar/sacral strain with radiculopathy. She released Claimant to return to work with restrictions, which Defendant was unable to accommodate.
25. Claimant's sciatic pain had mostly resolved by mid-November 2014, but her low back pain continued. After undergoing a course of physical therapy, she was referred to the Spine Center for further evaluation. No evidence was submitted as to her current medical condition.

Claimant's Report of Injury and Defendant's Investigation

26. Claimant credibly testified that until she sought treatment, first at the hospital emergency department on October 27th, and then with her primary care provider on October 28th, she did not understand that sciatic nerve pain likely accounted for both her back and her left leg symptoms, and therefore that both were likely related to her lifting on Resident 12B five or six days earlier. As soon as she comprehended the link, on October 28th she telephoned Ms. Gregonis to report her injury as work-related and to advise that she would not be able to work her scheduled shifts for at least the next three days.
27. Based on the information Claimant relayed, which I find was consistent with her formal hearing testimony, Ms. Gregonis completed an incident report. Thereafter, an office assistant faxed the report, along with an Employer's First Report of Injury (Form 1), to Defendant's workers' compensation insurance adjuster. Later, the adjuster requested written witness statements, which the office assistant solicited from Mr. Fischer and Ms. Mercier, *see* Finding of Fact Nos. 14 and 19 *supra*. Citing both the statements and Claimant's delay in reporting her injury, Defendant denied her claim for workers' compensation benefits on the grounds that "the loss did not occur as Claimant states it did."
28. In her formal hearing testimony, Claimant acknowledged her responsibility to report a work-related injury to her supervisor. She cited various reasons why she delayed doing so for six days after the October 22nd incident. She had bills to pay and needed the work, and as it was the first week of her new job, she was understandably reluctant to acknowledge that she had hurt herself. Instead, she

hoped that with rest, her symptoms would gradually resolve. As noted above, she also did not comprehend that the incident with Resident 12B had caused not only low back pain, but also radiating left leg pain, which she had never experienced before. I find Claimant's testimony in this regard entirely credible.

29. Claimant also acknowledged that she had been fired from two previous nursing home LNA jobs under circumstances suggesting dishonesty – one in which a co-worker had lied to protect her after she had bruised a patient's hand, and the other after she failed to report a co-worker for violating a rule. Although this history is admittedly troubling, I find nonetheless that Claimant's testimony as to the October 22nd incident was credible.

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 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 v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. The disputed issue here is whether Claimant's low back and sciatic nerve injury arose out of and in the course of her employment, as she alleges occurred while attempting to turn Resident 12B in bed on October 22, 2014. Noting that the alleged incident was both unwitnessed and late-reported, Defendant challenges Claimant's version of events, essentially asserting that it did not occur as she claims it did.
3. It is true that a claimant may have difficulty sustaining his or her burden of proof when he or she delays filing a workers' compensation claim for a significant period of time after an alleged injury, particularly if it is unwitnessed. In such instances, the trier of fact must evaluate the factual evidence carefully so as to explore any inconsistencies, investigate possible intervening causes and evaluate "hidden or not-so-hidden motivations." *Jurden v. Northern Power Systems, Inc.*, Opinion No. 39-08WC (October 6, 2008); *Russell v. Omega Electric*, Opinion No. 42-03WC (November 10, 2003), citing *Fanger v. Village Inn*, Opinion No. 5-95WC (April 20, 1995).
4. In prior cases, the Commissioner has enumerated four questions to assist in this process. First, are there medical records contemporaneous with the claimed injury and/or a credible history of continuing complaints? Second, does the claimant lack knowledge of the workers' compensation reporting process? Third,

is the work performed consistent with the claimant's complaints? And fourth, is there persuasive medical evidence supporting causation? *Jurden, supra*; *Larrabee v. Heavensent Farm*, Opinion No. 13-05WC (February 4, 2005), citing *Seguin v. Ethan Allen*, Opinion No. 28S-02WC (July 25, 2002).

5. Here, the contemporaneous medical records document a consistent history and mechanism of injury, with no evidence of either prior complaints or intervening events. The work performed – lifting on a patient in order to turn him in bed – presents a well-known risk of low back injury, and the medical records in fact reflect this causal relationship, albeit in a somewhat cursory fashion. At least from the medical perspective, therefore, I conclude that if the incident with Resident 12B occurred as Claimant claims it did, then more likely than not it resulted in the low back and sciatic nerve pain from which she suffered thereafter.
6. What inconsistencies exist in Claimant's story arise from the statements of her co-employees, Ms. Mercier and Mr. Fischer. As I already have found, without corroboration from prior medical records, Ms. Mercier's recollection that Claimant mentioned having suffered from sciatic nerve pain in the past carries little, if any, weight.
7. The inconsistencies posed by Mr. Fischer's testimony are somewhat harder to explain. Viewing his testimony as a whole, however, I have reason to believe that his memory of Claimant's interaction with Resident 12B on October 22, 2014 was likely inaccurate. As a consequence, I conclude that his version of events is less credible than Claimant's.
8. I acknowledge both that Claimant was at least somewhat familiar with the workers' compensation process and that she had a history suggesting at least some level of dishonesty with prior employers. Having had full opportunity to evaluate her truthfulness at formal hearing, in this case I conclude that she was a credible and forthright witness, that she had no hidden motivation to misrepresent the circumstances surrounding her injury and that in fact it occurred exactly as she said it did.
9. I conclude that Claimant has sustained her burden of proving that she suffered a low back and sciatic nerve injury while engaged in the course and scope of her employment for Defendant on October 22, 2014. She is therefore entitled to workers' compensation benefits causally related thereto.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. All workers' compensation benefits to which Claimant proves her entitlement as causally related to her October 22, 2014 low back and sciatic nerve injury; and
2. Interest, costs and attorney fees, in amounts to be established, in accordance with 21 V.S.A. §§664 and 678.

DATED at Montpelier, Vermont this _____ day of _____, 2015.

Anne M. Noonan
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.