STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Sandra MacMillan	)	Opinion No. 52-03WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Westaff, Inc. and Rhino Foods	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File Nos. P-22635; S-02268

Hearing held in Montpelier on June 17, 2003
Record Closed on July 23, 2003

APPEARANCES:

William B. Skiff, Esq., for the Claimant
Jennifer K. Moore, Esq., for Defendant, Westaff, Inc. and The Travelers
Christopher J. McVeigh, Esq., for Defendant, Rhino Foods and CNA

ISSUES:

1. Did claimant sustain a compensable back injury on or about May 8, 2000?

2. Did claimant sustain and aggravation or recurrence on or about July 16, 2001?

3. What is the correct calculation of claimant's compensation rate?

EXHIBITS:

Claimant's Exhibit 1:	Medical Records
Claimant's Exhibit 2:	Packet of miscellaneous documents
Defendant CNA Exhibit A:	Records from Dr. Johansson
Defendant CNA Exhibit B:	Records Packet

CLAIM:

1. Temporary total disability benefits from January 4, 2002 until June 1, 2003
2. Medical and hospital benefits
3. Permanent partial disability benefits, to be determined
4. Attorney fees and costs

FINDINGS OF FACT:

1. Claimant worked at the Rhino Foods Factory in Burlington as an employee of Westaff Inc. in May of 2000. She worked on "the line" panning and depanning cookies and performing other tasks associated with the production of cookies.

2. On May 8, 2000, Claimant slipped and fell down four or five concrete steps, landing on a hard surface. She was taken by ambulance to the hospital emergency room where it was noted that she was unable to walk at the time of arrival. She complained of low back and left hip pain. A lumbar spine film revealed mild, diffuse degenerative disc disease, but no fracture.

3. As a result of the fall, claimant was out of work for approximately six weeks. Her average weekly wage at the time was $136.40.

4. Claimant was released to return to work without restrictions on June 28, 2000.

5. In August of 2000, Rhino Foods hired the claimant to do the same work she had been doing while employed by Westaff. By that time, the symptoms from claimant's fall a few months earlier had resolved.

6. On July 16, 2001, claimant hurt her back while lifting and twisting with a pan full of cookies. Her back pain was right-sided, intense and debilitating. She sought medical treatment, engaged in physical therapy and eventually was referred to Dr. John Johansson for treatment.

7. A radiologist interpreted a July 26, 2001 MRI as normal.

8. In September 2001 claimant reported left-sided pain. On September 4, 2001 Dr. Johansson diagnosed claimant with sacroiliac joint strain. He injected her hip on the left side and, by September 26, 2001, reported improvement.

9. By October 2001 claimant reported that her left-sided pain had resolved, but that she still had pain on her right side, a complaint Dr. Johansson elicited during his examination of the claimant.

10. Claimant's last visit to Dr. Johansson was on January 8, 2002 when he noted her continued reports of right sacroiliac pain and the failure of injections to resolve her symptoms.

11. Despite treatment, claimant's back pain persisted. Nevertheless, Dr. Johansson released claimant to return to work, and she did so, on October 21, 2001. CNA Insurance ended her temporary disability payments at that time and has not resumed payments since.

12. At the time of claimant's 2001 injury, her average weekly wage was $120.84.

13. According to a note from Dr. Johansson, claimant had reached medical end result by November 21, 2001 with no permanent partial impairment. At that time, she was working three hours a day, three days a week. Dr. Johansson determined that she had the capability of returning to light to medium work with a 25 pound lifting capacity.

14. Claimant stopped working on January 8, 2002 because she could no longer tolerate the back pain.

15. Also in January 2002, claimant treated with her primary care physician, Dr. Mark Pitcher who ordered diagnostic tests. Based on his examination and those tests, he diagnosed mild osteoporosis and bilateral sacral insufficiency fractures revealed on a pelvic MRI. The fractures were picked up on MRI, but not on plain x-ray films.

16. Dr. Pitcher and Dr. Johansson agree that generally the most likely cause of insufficiency fractures is trauma.

17. In March of 2002 claimant was diagnosed with osteoporosis based on a bone density study. The slow healing of the fractures in this case is likely due to the fact that osteoporosis slows healing.

18. Next, claimant was referred to the Spine Institute where she saw Dr. Stanley Grzyb who ordered a bone scan that failed to reveal any pathology within claimant's pelvis or lumbar spine. Usually a bone scan will reveal evidence of an insufficiency fracture.

19. On October 7, 2002, claimant underwent a functional capacity evaluation at Work Recovery Services, with the result that she was capable of full sedentary work. The therapist who performed the evaluation, Erica Galipeau, noted that claimant's perceived abilities fell below her demonstrated objective abilities.

20. On or about October 15, 2002, claimant received notice that she had an obligation to conduct a good faith effort to look for work within the physical work capacities demonstrated on FCE. She did not conduct such a search. Still outstanding at that time was an August opinion from Dr. Pitcher that she could not work. And, on October 22nd, Dr. Pitcher clearly acknowledged the results of the FCE but stated unequivocally that claimant was not medically cleared for work. He later explained that with work she would have risked reinjury.

21. On June 2, 2003, claimant elected to take early retirement. She does not seek temporary disability benefits after that date.

22. Dr. Pitcher opined that the pelvic fractures are due to the claimant's work-related injuries of May 8, 2000 and July 16, 2001. He opined that the twisting incident in 2001 resulted in an injury to an already injured area. In reaching his conclusions, Dr. Pitcher was mindful of her medical history, the type of work she did and the results of radiologic studies. And he applied his knowledge of stress fractures.

23. Further, Dr. Pitcher opined that claimant has not yet reached medical end result for the fractures due to slow healing. He also testified that claimant is not capable of working at this time because working would aggravate the condition and slow the healing process.

24. Although Dr. Johansson is not sure of the most likely cause of the sacral fractures, he does not believe that the lifting and bending work at Rhino Foods caused them. Nor does he believe that the fractures account for her current condition.

25. In Dr. Johansson's opinion, if the sacral fractures were the cause of the pain claimant now has, the pain would be localized at the site of the fractures and would not radiate.

26. Because the claimant's average weekly wage was below the statutory minimum, she seeks her net income as her compensation rate. When first calculated by this Department, two thirds of her average weekly wage was used as the compensation rate, although that was later corrected.

27. Claimant submitted support for her claim for attorney fees based on 49.60 hours at $90.00 per hour and necessary costs totaling $2,274.77. However, the costs do not seem to be in compliance with the Rule 40 fee schedule for the testimony of medical experts.

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, Morse Co*., 123 Vt. 161 (1962). 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).

2. Without doubt, claimant suffered two work related injuries, one under each of the defendants' watches, the first with a fall on May 8, 2000, the second with lifting and twisting on July 16, 2001. The issues for decision are whether either of those injuries contributes to her present condition and, if so, which.

3. Because the medical issues involved are beyond the ken of a layperson, expert testimony is required. See *Lapan v. Berno's Inc*., 137 Vt. 393 (1979).

4. Claimant's treating physician and internal medicine expert, Dr. Pitcher, credibly established that claimant's condition is work related. With his testimony, claimant has met her burden of proving causation. The question then becomes whether the 2000 or 2001 incident accounts for her current condition.

5. Even if the 2000 fall down the stairs would explain the insufficiency fractures, the most likely cause because it is the only direct trauma involved, claimant recovered from that fall and returned to full duty within months afterwards. It was only after the lifting incident in 2001 that claimant developed debilitating pain.

6. Therefore, a clear temporal relationship between claimant's current condition and the lifting and twisting incident in 2001 has been established. It was only after the lifting and twisting incident that claimant was rendered disabled with symptoms that have persisted. In addition to the temporal relationship, which under *Norse v. Melsur Corp*., 143 Vt. 241 (1983) would alone be insufficient to prove causation, is the credible testimony from Dr. Pitcher that the 2002 twisting incident injured an already injured area. That claimant has taken longer to heal than what is considered normal cannot be a bar to her claim, especially in light of her osteoporosis.

7. "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. WC Rule 2.110. "Recurrence" means the return of symptoms following a temporary remission. Rule 14.9242. See also *Trask v. Richburg Builders*, Opinion No. 51-98WC (1998).

8. Under these standards, I must conclude that claimant's condition results from an aggravation, for which Rhino Foods is liable.

9. Next, is the question whether claimant is entitled to temporary disability benefits from January 8, 2002 through June 1, 2003.

10. CNA argues that she had a duty to seek sedentary work consistent with a functional capacity evaluation when it sent her a notice to that effect and, because she failed to seek such work, is not entitled to temporary disability benefits after that date.

11. However, I accept the opinion of Dr. Pitcher that claimant remained disabled because she would have risked reinjury with a return to work. Given the slow healing she demonstrated, that conclusion is reasonable.

12. Next, CNA argues that claimant's compensation rate should be calculated as two thirds of her average weekly wage. Claimant seeks a ruling that the correct rate is her weekly net income. The applicable statutory provision states that "[f]or the purpose of determining temporary total or temporary partial disability compensation where the employee's average weekly wage computed under section 650 of this title is lower than the minimum weekly compensation, the employee's weekly compensation shall be the employee's weekly net income." 21 V.S.A. § 601 (19). Given this clear statutory language, claimant's compensation rate is her weekly net income.

13. Finally, as a prevailing claimant, Sandra MacMillan is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678 (a). With the disputed issues and necessary work in this case, 49.60 attorney hours were reasonable. However the request for costs must be amended to conform with Rule 40.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, CNA is ordered to adjust this claim, including:

1. Basing claimant's compensation rate on her weekly net income;
2. Paying claimant temporary total disability benefits from January 2002 until June 2003;
3. Paying attorney fees of $4, 464 ($90.00 x 49.60).

Claimant is granted 30 days from the date this order is sent to amend the request for costs.

Dated at Montpelier, Vermont this 17th day of December 2003.

_____

Michael S. Bertrand
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.