STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-16936
	)	
	)	By: Margaret A. Mangan
Andrew Kish	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
LMS Construction	)	
	)	Opinion No. 19-02WC

Hearing held in Montpelier, Vermont on December 5, 2001
Record Closed on January 16, 2002

APPEARNCES:

Kerry G. Spradlin, Esq. for the claimant
William A. O'Rourke, Esq. for the defendant

ISSUES:

1. Did the claimant incur an injury in January 1999 that arose out of and in the course of his employment with LMS Construction?

2. If so, is he entitled to temporary total disability benefits from November 5, 1999 to August 2000?

EXHIBITS:

Joint Exhibit A:	Medical Records
Joint Exhibit B:	Explanation of Benefits
Joint Exhibit C:	CMS Payroll Record
Joint Exhibit D:	Transcript of deposition of David a. Austin, M.D.
Defendant's Exhibit 1:	Form 5 (filed in this Department on March 31, 2000)

STIPULATION OF THE PARTIES:

1. In January 1999 claimant was an "employee" and LMS Construction his "employer" as those terms are defined in the Workers' Compensation Act.

2. Claimant was accepted for S.S.I payments beginning June 20, 2000.

FINDINGS OF FACT:

1. As part of his job duties, claimant was responsible for maintenance, including painting, of all LMS vehicles. He usually worked alone in the garage although occasionally he would be called out to various job sites.

2. This claim is based on the claimant's assertion that he cut his leg while working one morning in January of 1999. He does not remember the precise date of the incident, which can be explained by the physical nature of his job and his attempt to minimize the incident. The event was not witnessed, not unusual since he arrived early and often worked alone. The accident was not reported the day it occurred because the claimant thought the problem would resolve.

3. More troubling, however, are the differing specific descriptions of precisely what happened—tripping while climbing onto a bulldozer compared with slipping on ice and sliding into the machine—which cast doubt on the veracity of the claimant's assertion that he scratched his leg at work. Claimant worked the rest of the day.

4. When he noted an infection developing in his leg, claimant used some antibiotics from a relative and continued working. Eventually, he showed the reddened, swollen leg to his sister, Kathleen Bruno. Ms. Bruno then called Dennis Smith, whom she knew, to express her concern and report that her brother needed treatment.

5. On February 13, 1999, claimant went to the emergency department at the Rutland Regional Medical Center (RRMC) where the physician documented a bruise injury at work two to three weeks before. He was diagnosed with cellulitis in the left leg. The next day he was admitted to the hospital for intravenous antibiotic treatment.

6. By April 12, 1999 claimant was working half time according to Dr. Austin's note.

7. In July 1999 claimant again sought medical treatment at the emergency department. At that time, both of his legs were swollen, a condition noted to have been on going for three to four months. He consulted with a vascular surgeon.

8. On July 29, 1999 Dr. Frederick Bagley saw the claimant for his vascular problem, noting that both legs were swollen, "with the left much, much worse than right." Edema on the right was described as 3-4+ and that on the left, about 6+, "really a massive elephantiasis type leg with venous stasis changes and several stasis ulcers throughout the leg."

9. Claimant followed the various treatment recommendations of his physicians including the use of a diuretic, wearing a special stocking and elevating his left leg. He was able to work half days, but had throbbing pain at the end of any full day of work. He fashioned a stool with wheels that allowed him to sit down while working and move around in the garage area.

10. Claimant worked on cars and small engines at his home before, during his employment with LMS and after he was laid off. While working on a car at his home on November 2, 1999 he dropped a battery on his left great toe, causing a fracture that prompted him to seek treatment at RRMC the next day.

11. On November 5, 1999 claimant was laid off from work at LMS. He was told that there was not enough work for him.

12. Also in November 1999 claimant sought another opinion from Dr. Laird at the Dartmouth Hitchcock Medical Center (DHMC), where he was diagnosed as having chronic lipedema and venous stasis with no evidence of cellulitis.

13. The first official report of the work-related injury was the Form 5 filed in this Department on March 31, 2000.

14. By April of 2000 the claimant was again admitted to RRMC with pyoderma of cellulitis type. His records documented a fifteen-month period of leg infection after injury and a historically infected wound that had proven resistant to various therapies. His leg was red, swollen and draining with attempts at compression with support hose failing.

15. Dr. Austin wrote in his note of April 25, 2000 that the claimant had been unable to work for the previous four to five months because of the swelling in his leg. However, he was unaware at the time that claimant had worked until he was laid off the previous November.

16. At his deposition, Dr Austin testified that the original injury was a possible explanation for his condition in April of 2000, as was the "lack of attention for medical care for that year and a half, year and a quarter, that I didn't see him." He also suggested that another cause could have been recurrent infections that may not have been attended to.

17. Claimant reached a medical end result for his cellulitis condition in August 2000.

18. On September 27, 2000 Dr. Austin wrote that the claimant could not work because of the pain in his lower back. At that time, the status of the skin on his left leg was considered good.

19. Claimant submitted evidence that his attorney worked 29.6 (twenty-nine and six-tenths) hours on this case. He also submitted a claim for $155.00 in costs, without an itemization.

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. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc*., 137 Vt. 393 (1979). 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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. Persuasive testimony and medical records suggest a possibility that the claimant sustained an injury to his leg while working at LMS, an injury that led to substantial medical complications. Equally possible is that an injury he sustained while working at home was the causative agent.

4. Dr. Austin's opinion that the claimant had been totally disabled from the time of the initial injury was based on the inaccurate premise that he had never returned to work when, in fact, he had been working full time at the time he was laid off. When was asked to explain the cause of the claimant's condition in April of 2000, Dr. Austin could only speculate that the 1999 work injury accounted for it. He also suggested that lack of adequate care was another possible cause.

5. Under *Burton* 112 Vt. 17, speculation regarding causation is an insufficient basis for an award.

6. Finally, I reject the claimant's testimony that he reported the injury to his employer within the requisite six months pursuant to 21 V.S.A.§ 656. Therefore, even if the requisite showing of causation had been made, with Dr. Austin's testimony suggesting lack of adequate care, claimant would have difficulty proving that the employer was not prejudiced by the lack of notice. § 660; *Larabee v. Citizens Telephone* Co., 106 Vt. 44 (1934).

ORDER:

THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 19th day of April 2002.

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R. Tasha Wallis
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.