STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. R-12978
	)	
Sharon Frye	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Scenic View Community	)	Commissioner
Care Home	)	
	)	Opinion No. 45-02WC

Hearing held in Montpelier on June 5, 2002
Record closed on July 8, 2002

APPEARANCES:

Sharon Frye, pro se
Keith Aten, Esq. for the defendant

ISSUE:

Did Sharon Frye suffer an injury arising out of and in the course of her employment at Scenic View?

EXHIBITS:

Claimant's Exhibits:

1. Jacqueline Eldred's statement (copy)
2. Notes from Dr. Rogers
3. Note of Dr. Binter 10/23/02
4. Payroll 1998
5. Payroll 1999
6. Statement of Donna La Plume
7. Statement and affidavit of Davina Andrews
8. Affidavit of Michelle Garey
9. Statement of Jacqueline Eldred (original)

Defendant Exhibits:

A. Medical Records
B. Transcript of deposition of Delia Lemieux
C. Transcript of deposition of LaDonna Dunn
D. Transcript of deposition of Rosemary Croizet
E. Transcript of deposition of Gerald Croizet
F. Physician Notes from Dr. Nancy E. Binter
G. Physician Notes from Dr. Jacques Archambault

FINDINGS OF FACT:

1. Official notice is taken of all Department forms and the exhibits are admitted into evidence.

2. Claimant Susan Frye was an "employee" and Scenic View Community Care Home (Scenic View) her "employer" within the meaning of the Workers' Compensation Act and Rules at all times relevant to this action. Lyne Limoges is a registered nurse and owner of Scenic View.

3. Guard Insurance provided workers' compensation insurance for Scenic View at the time of the alleged injury at issue.

4. Scenic View is a community care home for elderly residents who need assistance with daily living skills.

5. Sometime in 1997 Claimant fell from a horse and hurt her back. Whatever injury may have resulted from that fall did not affect the Claimant's gait or her abilities to lift or bend.

6. Claimant kept her horse at a farm where she sometimes did chores. However, she did not do heavy lifting at the farm, did no work at all there after January 1999 and at no time hurt her back doing chores there.

7. Claimant was hired as a Scenic View employee on June 13, 1997 to assist residents with such activities as personal care, bathing and cooking. She worked the second shift from approximately 1:30 p.m. to 8:30 p.m. In 1997 there were eight residents at Scenic View, all but one of whom were independent. Within a year, the number of residents grew to thirteen to fifteen and several required considerable assistance.

8. Claimant was trained to assist a resident in and out of a bathtub by standing on the back rim of the tub with one foot on each back corner. She then was to bend and lift or lower that resident into or out of the tub by reaching under the resident's arms. Grab bars were not installed until after claimant injured herself. Residents often bathed in the evening.

9. At the end of 1998 Claimant injured her back while helping a resident who slipped in the bathtub. She missed some time from work as a result.

10. By 1999 her duties more than doubled and she hurt her back again while helping a resident get out of the tub. In 2000, Claimant cared for a woman who weighed over 200 pounds and was paralyzed on one side. In the process of providing that care, Claimant's back pain worsened to the point where she sought medical care.

11. Jacqueline Eldred, also employed at Scenic View recalls inquiring about the Claimant's absence from work and learning directly from Lyne Limoges that Ms. Frye had hurt herself while giving a bath to a resident.

12. Ms. Limoge and the Claimant were friends. In that spirit, Ms. Limoges advised the Claimant that if ever asked how she hurt her back, to "say anything" other than that it happened at work. Claimant complied initially, convinced that the pain would resolve.

13. Because the Claimant did not have health insurance and needed to pay for health care out of pocket, she went to Canada where an office visit was $10.00. On April 26, 2000 she saw Dr. Bouchard who advised her to stay out of work for three days. However, Claimant returned to work sooner than that because Scenic View was short staffed.

14. In May or June of 2000 Claimant learned that she qualified for VHAP for health care and excitedly told Ms. Limoges that she could finally afford medical care and would see Dr. Rogers. Ms. Limoges expressed concern about what Claimant would tell Dr. Rogers and suggested that she not say anything about a work-related injury because her rates would increase. Claimant complied with her employer's request. At the hearing, Ms. Limoges was unable to recall a conversation about not filing a claim.

15. On May 6, 2000 Claimant again hurt her back while lifting a resident at scenic view. The resident, MLC, who was at Scenic View from January to June 2000 testified that when she arrived at Scenic View, Claimant was not limping, but she was by the time the resident left, having injured her back twice while caring for her in the handicap bathroom. The first time Claimant helped her to stand is when she lost her footing. Claimant clearly hurt her back and had to sit. The second time, MLC explained that Lyne Limoges was also present. Claimant tried to stabilize the resident while transferring her from her wheelchair and in the process wrenched her back, was in terrible pain and could not get up. Lynn Limoges, with the assistance of LaDonna Dunn, helped the Claimant to her vehicle and drove her home. Later, MLC overheard Ms. Limoges on the phone telling someone that the Claimant had hurt her back and needed to go home.

16. Claimant returned to Dr. Bouchard on June 3, 2000 in extreme pain. Dr. Bouchard referred her to a physician in the United States.

17. On July 7, 2000 claimant reported to Dr. Rogers that she had hurt her back at work, but did not want him to document that in his notes. She also said she had fallen two years earlier and had hurt her back. Dr. Rogers referred the Claimant to a neurosurgeon, Dr. Binter, to whom Claimant repeated a history where a connection to work was not mentioned. The next year, on May 10, 2001, Claimant asked Dr. Rogers to amend the note to reflect her reporting that the back injury occurred at work. Dr. Rogers remembered an earlier conversation about a work related injury although he did not remember the details.

18. In her October 20, 2000 note, Dr. Binter commented that Claimant was vague about the onset of pain, but that her husband related it to her work.

19. In October 2000 Claimant reported to a physical therapist that she had injured her back at work in March 2000 and in a fall from a horse a few years earlier.

20. On December 25, 2000 Claimant injured her back at work again and had to go home. As a result, her employer called another person to cover Claimant's shift and filed a First Report of Injury. When Claimant later learned from Dr. Rogers that she would need to take 3 weeks off from work, she explained to her employer that she would need to file a claim because otherwise she would have no source of income. In the earlier incidents where she missed only a day or two, lost time was not a financial challenge.

21. Davina Andrews worked at Scenic View from January 2000 until June of 2001. A few times during that time, Ms. Limoges called her on her days off because the Claimant had hurt her back at work.

22. Claimant has a herniated disc for which she has received and will continue to need treatment. In early 2001 in response to physician's orders that she work light duty, claimant was assigned to office work at Scenic View. In the Spring of 2001, her employment there ended.

DISCUSSION:

1. Claimant attributes her herniated disc to a series of work related incidents involving heavy lifting. The employer points to claimant's inconsistent reports to physicians and her later requests that notes be amended as evidence of her lack of credibility. Furthermore, the defendant emphasizes that Claimant told others she had fallen from a horse and did farm chores.

2. While it is unfortunate that she was not forthright with physicians when she first complained of back pain, I accept Claimant's explanation that she wanted to protect a cash strapped employer from increased insurance rates. Claimant's testimony was credible and, with regard to most of the work related instances, firmly corroborated. Furthermore, her work was physically strenuous and the later incidents complained of correspond with her appointments with physicians. Although she had fallen from a horse, she did not have symptoms afterwards that affected her gait or ability to work. The weight involved in the few chores she did on the farm paled in comparison to the lifting Claimant did on the job and even those chores ended before the incidents in the year 2000 that required medical care.

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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

3. With her credible testimony, objective description of her work, corroboration from residents and co-workers, and medical evidence, Claimant has met her burden of proving that her work at Scenic View is the most probable explanation for her herniated disc.

4. As, such the Scenic View or its insurer must adjust this claim and pay all applicable benefits.

ORDER:

THEREFORE, Based on the Foregoing Findings of Fact and Conclusions of Law, defendant is ORDERED to adjust this claim.

Dated at Montpelier, Vermont this 20th day of November 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.