Carlson v. Wayne's Body Shop/Alderman's Chevrolet
(October 10, 2001)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P20580
	)	
	)	By: Margaret A. Mangan
Craig Carlson	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Wayne's Body Shop and	)	
Alderman's Chevrolet	)	Opinion No 35-01WC

Hearing held in Montpelier on September 26, 2001
Record closed on October 4, 2001

APPEARANCES:

John J. Welch, Jr., Esq. for the claimant
Jeffrey W. Spencer, Esq. for Wayne's Body Shop
John W. Valente, Esq. for Alderman's Chevrolet

ISSUE:

Did the claimant sustain a compensable work-related injury in the course of his employment with Waynes' Auto Body Shop in January 2000?

EXHIBITS:

Claimant's 1:	Rutland Primary Care Form
Claimant's 2:	Records of Peter Upton, M.D.
Claimant's 3:	Records of Michael J. Kenosh, M.D.
Claimant's 4:	Transcript of deposition of Thomas Wood
Defendant's A:	Medical Records
Defendant's B:	Photograph of eye wash equipment
Defendant's C:	Statement of Darren Summers
Defendant's D:	Photograph
Defendant's E:	Photograph
Defendant's F:	Photograph
Defendant's G:	Photograph
Defendant's H:	Photograph
Defendant's I:	Payroll Records

FINDINGS OF FACT:

1. As an experienced auto body technician, the claimant has worked for Wayne's Body Shop (Wayne's) and other Rutland area body shops since graduating from high school in 1985.

2. The claimant worked for Wayne's during October 1999 until March 2000 when he quit. During that period of time, claimant was an employee and Wayne's his employer as those terms are defined in the Vermont Workers' Compensation Act and Rules.

3. Wayne Jones of Wayne's Auto at times paid or offered to pay medical bills directly for his employees who had been injured at work.

4. Claimant expected a $1.00 per hour increase in his pay in January of 2000. When that expectation was not met, he became angry and started looking for another job.

5. On the day claimant alleges he fell on the ice at work in mid to late January 2000 he worked the entire day.

6. After the alleged incident the claimant worked at Wayne's without complaint, limitation or any mention of the incident.

7. At a January 31, 2000 visit to Dr. Mark Woodbury at Ashcroft Chiropractic Center the claimant complained of upper back (interscapular) and chest pain after "falling last week." Dr. Woodbury documented his diagnoses of thoracic and lumbar sprain/strain, but made no mention of any connection to work. Claimant returned to that office on February 2, 2000 with a complaint of worsening interscapular (upper back) and chest pain.

8. The claimant had a home body shop that was full of work that needed completing. When he left Wayne's he told Gary Jones that he had projects to work on.

9. During the 2000 year, the claimant worked on about 25 cars in his home shop. He performed myriad tasks on them, including fully rebuilding wrecked vehicles.

10. A week after he left Wayne's, claimant started working for Alderman's Chevrolet (Alderman's), a job he had secured several weeks earlier. He worked at Alderman's until June 2, 2000 when Dr. Peter Upton removed him from work. From March until June 2, 2000 claimant was an employee and Alderman's his employer as those terms are defined in the Vermont Workers' Compensation Act and Rules.

11. The first reference in the medical records to an incident at Wayne's was on April 3, 2000. In a Rutland Primary Care record from that date with a hand written notation of "urgent visit" is this description of the claimant's problem: "Low back pain. Fell at work 2 months ago —not at that job now."

12. An April 20, 2000 CT of the lumbar spine revealed L5-S1 broad based bulging.

13. On May 8, 2000 Dr. Upton evaluated the claimant for low back pain and recommended conservative treatment. His note reflects the claimant's history of falling on the ice while washing a car at Wayne's in January 2000. Specifically is noted that the claimant fell on his right side and had low back pain.

14. A June 1, 2000 CT scan again demonstrated an L5-S1 bulge similar to the April study.

15. In a June 2, 2000 note Dr. Upton wrote that claimant was undergoing treatment for ruptured disc and would be out of work until further notice.

16. On June 16, 2000 the claimant filed a notice of a work-related injury (Form 5) at Wayne's Body Shop in January of that year. The form reflects his claim that he fell on the ice while washing a car outside. The Employer's First Report of Injury followed on July 7, 2000.

17. Claimant subsequently underwent considerable medical and surgical treatment for a ruptured disc and continuing back pain. He has been on narcotic pain medication, including morphine.

DISCUSSION:

1. The claimant describes his employer at Wayne's as one who discouraged employees from filing workers' compensation claims in an effort to keep his insurance premiums down. Consequently, he argues that there is no contemporaneous record of his fall on the ice because the employer never acted on his report.

2. Even if the claimant's allegations about the employer were true, he has not succeeded in carrying his burden of proving that he suffered a work related injury at Wayne's in January of 2000 or that his back condition was aggravated at Alderman's late that Spring. I do not find his report credible for several reasons. He worked the full day he allegedly fell. At his visit to the chiropractor two weeks later, when specific details of a fall would be expected, there is no mention of ice, no mention of the fall occurring while washing a car, nor any mention of it occurring at work. Claimant's testimony at the hearing was not persuasive enough in the absence of a witness or a contemporaneous medical note, to convince me that he fell at Wayne's while washing a car.

3. Although he clearly had back pain while working at Alderman's, the objective data we have –essentially unchanged CT scans in April and June 2000 --- indicate that the work he did at Alderman's may have increased his pain, but did not aggravate the underlying condition.

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 (1963). He 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. It is the combination of factors, rather than a single element that precludes a finding in favor of this claimant. There are no contemporaneous records to corroborate the facts he now alleges. No one witnessed the fall. He told at least one person that he had projects to complete at home. The claimant's testimony lacked the sincerity necessary to stand alone without corroboration. Consequently, on these facts I can find no more than a possibility that the events occurred in the way the claimant now describes them. More than that is required under *Burton* 112 Vt. 17 and its progeny.

ORDER:

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

Dated at Montpelier, Vermont this 10th day of October 2001.

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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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.