

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

)	State File No. S-02382
)	
David J. Birchmore)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
Green Mountain Chipping)	Commissioner
)	
)	Opinion No. 01-03WC

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

APPEARANCES:

David J. Birchmore, Claimant, pro se
Andrew C. Boxer, Esq. for the Defendant

ISSUES:

1. Was Claimant David Birchmore struck with a bale of hay while working with David Villeneuve on March 30, 2001?
2. Was Claimant David Birchmore an “employee” and Green Mountain Chipping his “employer” within the meaning of the Workers’ Compensation Act on March 30, 2001?

EXHIBITS:

Claimant’s Exhibits:

1. Report of 3/20/01 cervical spine film
2. Report of 10/25/01 cervical spine MR w/o contrast
3. Report of 1/27/00 C-Spine AP and Lat x-ray
4. Package of pay stubs
5. Time cards
6. Furlough conditions 2/01
7. Medical records
8. Check Green Mountain Chipping to Office of Child Support 4/20/01
10. Vermont Parole Board letter of 7/5/01
11. GA/Reach/Food Stamp Exemption Medical Reports

Defendant's Exhibits:

- A. Certificate of Insurance
- B. Insurance Policy, Concord Group
- C. Business card

CLAIM:

Claimant alleges that he was a statutory employee of Green Mountain Chipping and that he was injured in the course of that employment on March 30, 2001 when he was struck in the head and face while working with David Villeneuve loading hay. He claims he fell backwards, was knocked out and suffered injuries for which defendant is liable under the Workers' Compensation Act.

FINDINGS OF FACT:

1. Claimant and David Villeneuve, President of Green Mountain Chipping, had a business relationship prior to the incident alleged in this case. Claimant held himself out as a self-employed painter and did some painting jobs for Villeneuve from December 1999 to April 2000 when Claimant was incarcerated.
2. Green Mountain Chipping is a business involved with logging, chipping and haying. Villeneuve sold some of the hay.
3. One condition of Claimant's release in February 2001 was that he seek employment. He approached Villeneuve for work.
4. Villeneuve hired Claimant to do odd jobs for which he paid \$15.00 per hour. The jobs included trailer repairs and clean up. Claimant worked 40 to 45 hours per week, kept time sheets and was reprimanded if he arrived late for work. Villeneuve paid the Claimant time and a half for more than 40 hours worked in a week and garnished child support payments from weekly checks.
5. Claimant supplied his own tools and supplies for painting jobs. Claimant consistently reported to health care providers that he was self-employed.
6. On March 30, 2001 Claimant and Villeneuve worked together to move bales of hay.
7. Claimant's uncorroborated testimony that he was struck with a bale of hay is not credible.

8. On March 30, 2001, Claimant asked Lynn Bolduc for a ride home. En route, he asked her to take him to the emergency room at Fletcher Allen Health Care. He mentioned that he might have a hay shaft in his eye, but said nothing to her about losing consciousness or hurting his head or neck.
9. A March 30, 2001 emergency department note reflects Claimant's complaint that he had been struck in the face/head with hay bale with a possible loss of consciousness of 20 seconds. He complained of eye pain, neck pain radiating to the right shoulder and right hand numbness. He was prescribed 30 ibuprofen pills and 10 percocet tablets. The next day, he returned to FAHC complaining that his pain was getting worse and that the medication was not enough.
10. Over the next few days, he returned to FAHC several times with complaints of increased pain. The report of the time he believed he lost consciousness also increased. And each time he requested more pain medication.
11. On April 2, 2001, Villeneuve sent the claimant home until he could show proof that he had liability insurance.
12. Claimant continued to work for Villeneuve after his injury, until July 2001. Only after he learned that Villeneuve had no more work for him did the Claimant report an injury to his shoulder from the March 30 hay bale incident.
13. On August 22, 2001, Claimant filed a Form 5 Notice of Injury and Claim for Compensation with this Department.

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

3. Claimant has failed to meet his burden of proving that work for Green Mountain Chipping on March 30, 2001 caused any injury to him, even though he sought medical attention that day. The alleged incident was not witnessed, although David Villeneuve worked alongside Claimant on March 30, 2001. Claimant never told Lynn Bolduc that a bale of hay hit him, although he asked her to drive him to the hospital. Claimant continued to work until July 2001 when he was let go. Only then did he report that the alleged injury was work-related, further undermining this claim. On balance, therefore, the credible facts fail to support the allegation that Claimant suffered a compensable injury.
4. With this determination that Claimant did not suffer an injury as alleged, it is not necessary to address the employee-employer issue.

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

Dated at Montpelier, Vermont this 2nd day of January 2003.

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.