STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-02559
Sue Ferguson	)	
	)	By: Margaret A. Mangan
	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Fireman's Fund (Northland Job Corps)	)	
	)	Opinion No. 01R-02WC

RULING ON MOTION FOR RECONSIDERATION

Claimant, by and through her attorney, Heidi Groff, Esq. of Biggam, Fox and Skinner, moves for reconsideration of the February 5, 2002 opinion denying her claim. She also moves to amend the caption to conform the pleadings. The defendant, by and through its attorney, Barbara E. Cory, Esq. of Dinse, Knapp & McAndrew, P.C., filed an opposition to the request to reconsider.

This Department held that the claimant had not met her burden of proving that her current back problems arose out of her fall at Northland Job Corps in 1999. The decision was based on an evidentiary hearing and review of the medical records. Important to the ultimate decision was the finding that the claimant worked full-time, full-duty without seeking medical care from February 1999 when she fell until June 1999 when she sought medical care. Even on June 25 when she saw her primary care physician, she did not mention a fall. Claimant's history of seeking medical often belies her assertion that she was in pain for a four-month period, self treated and chose not to see a doctor until June of 1999. The crux of the opinion was rejection of her testimony on this crucial issue.

"The weight of the evidence and the credibility of the witnesses are for the trier of facts to determine…" *Taylor v. Henderson and Smith*, 112 Vt. 107, 111 (1941). The medical testimony in support of this claim was based on a history I rejected as not credible. Therefore, the foundation for their opinions crumbled. And the burden of proof was not sustained.

THEREFORE, the claimant's motion to reconsider is DENIED.

However, her motion to amend the caption to include the insurer is GRANTED as reflected in the caption that appears above.

Dated at Montpelier, Vermont this 25th day of February 2002.

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R. Tasha Wallis
Commissioner

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Northland Job Corp.	)	
	)	Opinion No. 01-02WC

Hearing Held in Middlebury on July 17, 2001
Record Closed on August 1, 2001

APPEARANCES:

Heidi S. Groff, Esq. for the claimant
Barbara E. Cory, Esq. for the defendant

ISSUE:

1. Did the claimant suffer a work-related injury in February or March 15, 1999 while working at Northland Job Corps?

2. If so, is she entitled to temporary total disability benefits?

3. Has the claimant suffered a permanent impairment as a result of a work-related injury?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	Injury/Occ. Illness/Accident Report, February 8, 1999
Claimant's Exhibit 2:	Injury/Occ. Illness/Accident Report undated
Claimant's Exhibit 3:	Short-term Disability Form with 3 parts
Claimant's Exhibit 4:	Copy of prescription card
Claimant's Exhibit 5:	CV of Dr. Fagelman
Defendant's Exhibit A	Leave of Absence Form
Defendant's Exhibit B:	Transcript of deposition of Dr. Roomet with exhibits
Defendant's Exhibit C:	Transcript of deposition of Kelly Smith, P.A.

FINDINGS OF FACT:

1. On February 8 and March 15, 1999 the claimant was employed at the Northland Job Corps as a licensed practical nurse.

2. On February 8, 1999 the claimant fell near the entrance of the infirmary on a slippery floor. No one witnessed that fall. Claimant continued to work, then reported the incident to her supervisor, Paula Smith, when Ms. Smith arrived. The two women filled out and signed an accident report. That form was never received in the Human Resource Department, as it should have been. Consequently the workers' compensation carrier was not notified.

3. The claimant continued to work after the fall. She did not seek medical care. In fact, at no point until the following summer did she report the fall to any health care provider.

4. On June 29, 1999 the claimant sought medical care from Dr. Donald Bicknell, her primary care doctor, with the complaint that she could not void.

5. After seeing Dr. Bicknell and then consulting with the Human Resource Department, claimant filled out a short-term disability form in July of 1999.

6. In the summer of 1999, the initial accident form could not be found. Therefore, the claimant filled out another one on which she estimated that the fall had occurred around March 15, 1999.

7. Dr. Bicknell attributed the claimant's inability to void to a back problem. He took her out of work and prescribed pain medication.

8. Claimant then returned to live in New York State and with that move, transferred her care to Dr. Riga Pemba.

9. On a form the claimant alleges was for another patient with the same name, Dr. Pemba stated that the condition was related to a sickness and not to employment. In a letter in December of 1999 Dr. Pemba related the claimant's condition to her fall at work the previous March.

10. Dr. Pemba referred the claimant to Dr. Frederic Fagelman, a Board Certified Neurosurgeon at Glens Falls Hospital in Glens Falls, New York. He reviewed all the medical records that comprise Joint Exhibit I. Therefore, he was aware of the claimant's history of a 1990 motor vehicle accident. He was aware that the claimant had not sought medical care from the time of the alleged fall in February of 1999 until she saw Dr. Bicknell in June of that year. And he accepted as fact the claimant's history that she had taken Motrin in the interim.

11. Claimant's consistent history, his own examinations of the claimant, the medical records and his training and experience led Dr. Fagelman to conclude with a reasonable degree of medical certainty that claimant's fall in February of 1999 caused her current back condition.

12. Dr. Fagelman saw the claimant on January 26, 2000, May 3, 2000 and September 6, 2000. At each of those visits the claimant's pain remained constant. Her neurological examinations were all essentially normal, although they revealed decreased range of motion and pain with the straight leg test. A January 26, 2000 MRI scan demonstrated a small disc herniation. A second scan, on February 1, 2000, revealed a more central herniation at the L5-S1 level, which Dr. Fagelman suspected was her main problem.

13. The discogram Dr. Fagelman ordered was inconclusive. That is because it was never completed due to the claimant's pain.

14. Claimant is at what Dr. Fagelman described as the "top end" of narcotic dosage, although he does not believe she has a drug problem with the Percocet she is taking.

15. Claimant's back condition is not at a medical end result, although it is likely that she would have reached a plateau by now had she received the rehabilitation and work hardening ordered by her physicians.

16. In July of 2001 Dr. Pemba wrote that the claimant had been totally disabled since June 30, 1999 as a result of the 1999 work-related injury. Dr. Fagelman also opined that the claimant's low back condition is a direct result from her fall at work in February or March of 1999.

17. Because this claim has been denied, claimant has not had the spinal injections, pain management, work hardening or other physical therapy that her physicians have recommended.

18. Dr. Andres Roomet, a Board Certified Neurologist, performed an examination of the claimant for the defendant and testified by deposition in this case. He saw the claimant on February 14, 2000 and on March 23, 2001. At the first visit, he determined that claimant's neurological examination was normal and that she had subjective pain. He concluded that the claimant's disability was not total. In his opinion, her disability was moderate at worst, but that she should not do repetitive bending, lifting or carrying.

19. In response to a question regarding causation, on March 8, 2000 Dr. Roomet wrote, "Her symptoms are causally related to the alleged slip and fall, based upon her subjective history." He recommended rehabilitation or work hardening.

20. Based on claimant's old medical records reflecting a history of back pain, Dr. Roomet later altered his original opinion when he testified that it was not a 1999 fall that accounted for claimant's back problems.

Prior Medical History

21. In 1990 the claimant was in a motor vehicle accident that resulted in headaches, neck pain and back pain. She then treated with Dr. Johansson on and off until 1995.

22. After 1995 and before the fall that is at issue here, the only treatment the claimant received was from Dr. Bicknell. She was seen twenty-nine times between 1995 and June of 1999. On only one of those visits, on January 30, 1998, did the claimant complain of back pain, and that was with the complaint of body aches especially in the lower back and legs.

23. Claimant's average weekly wage for the twelve weeks before the accident is unknown. Fireman's Fund, the workers' compensation insurer, has not filed a Form 25 (Wage Statement).

24. Claimant submitted evidence that her attorney worked 132.80 hours litigating this claim and incurred $2,484.78 in necessary costs. The hours are reasonable in light of the time necessary in conducting discovery, taking preservation deposition testimony, trying this case, conducting legal research and drafting proposed findings and legal conclusions.

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. Causation is the crucial issue for consideration in this case. Defendant argues that the claimant's lower back condition was not caused by her work at Northland Job Corps.

4. The evidence is clear and undisputed that the claimant fell at work on February 8, 1999. She and her supervisor completed an accident report that disappeared for reasons no one has explained, until this litigation ensued. When the claimant was asked to complete another report in July of 1999 she erroneously, but understandably, remembered and recorded a March date.

5. Less definitive is what happened to the claimant during the months between February and June 1999. She worked during that time. Although she testified that she had back pain and took over-the-counter Motrin to treat that pain, her failure to seek medical care in the interim belies that contention, especially in light of medical records portraying an individual who has sought medical care for treatment of her symptoms.

6. All the physicians whose opinions form the record in this case are well qualified by education, training and experience. The treating doctors, Dr. Fagelman and Dr. Pemba, have the advantage of a close relationship with the claimant and the opportunity to have observed her over time. Dr. Roomet has the advantage of distance and objectivity. All reviewed relevant medial records.

7. All the physicians based their opinions on the subjective history provided by the claimant that she had back pain from the time of her fall in February until she saw a doctor in June. That is a history I cannot accept because she continued to work and did not seek care in the interim. Without the underlying premise that the claimant had back pain in the months between February and June 1999, the opinions linking the fall to the claimant's current condition break down and cannot support this claim.

8. While the credible evidence proves the fact of a fall, it does not prove an injury as a result.

ORDER:

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

Dated at Montpelier, Vermont this 5th day of February 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.