STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. R-01284
Jon Moran	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
City of Barre	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 33-02WC

Hearing held in Montpelier, Vermont on July 2, 2002
Record closed July 18, 2002

APPEARANCES:

Gary D. McQuesten, Esq. for the claimant
Frank Talbott, Esq. for the defendant

ISSUE:

Did claimant's current back injury arise out of and in the course of his employment with the City of Barre?

EXHIBITS:

Joint Exhibit I	Medical Records of Jon Moran
Joint Exhibit II	Andrew Supernault, deposition transcript, May 28, 2002
Joint Exhibit III	John D. Matthew, M.D., deposition transcript, May 24, 2002
Claimant's 1	Employee Time Off Request for "Jack Moran", Nov. 30, 2002
Defendant's A	Employee Data Calendar for Jon P. Moran, July 2001-June 2002
Defendant's B	Employee Data Calendar for Elizabeth L. Somaini, July 2001-June 2002

FORMS:

Form 25 dated August 8, 2000
Form 21 approved October 13, 2000
Form 2 dated December 26, 2001
Form 1 dated July 19, 2000

STIPULATIONS:

1. The claimant worked for the City of Barre until December 14, 2001.

2. On January 3, 2000, the claimant experienced a work injury when he fell on a stage and felt discomfort and pain in his lower back and buttocks region.

3. The claimant was out of work for only one day on account of the January 3, 2000 incident.

4. Only July 10, 2000, the claimant experienced another work injury when he bent over to lift a garage door.

5. The claimant was out of work for three weeks, from July 10, 2000 to July 31, 2000 because of the July 10, 2000 work injury.

6. The claimant worked at the City of Barre from July 31, 2000 until December 14, 2001, as a supervisor.

FINDINGS OF FACT:

1. Exhibits are admitted and stipulated facts are accepted as true.

2. Notice is taken of all departmental forms on file.

3. Claimant Jon Moran was an employee of the City of Barre, and the City of Barre was claimant's employer under the meaning of the Workers' Compensation Act, 21 V.S.A. § 601 *et seq*., for the period including January 3, 2000 through December 14, 2001.

4. At all times relevant to this claim, Legion Insurance Co. was the workers' compensation carrier for the City of Barre.

5. Prior to his employment with the City of Barre, claimant worked as a lumberyard counter person, was self-employed as a store/deli owner, and worked at Unifirst as a service manager. He was initially employed by the City of Barre as a maintenance person, which included indoor and outdoor work such as event set-up and care of recreational fields. In July 2000 claimant transferred to the cemetery department where his work included grave digging, landscape maintenance and setting gravestones.

6. Claimant treated with Dr. Crose in December 1984 for lower back and leg pain subsequent to a fall. Claimant had a positive SLR test on the right side. Dr. Crose diagnosed lumbar sprain/strain and prescribed aspirin, heat and bed rest.

7. James M. Garand, D.C. is a chiropractic physician in practice for 30 years. Claimant saw Dr. Garand on a single occasion in 1987 for lower back pain radiating into his left leg, which Dr. Garand diagnosed as muscular strain. Claimant again saw Dr. Garand on a single occasion in 1994 for lower back pain without leg pain.

8. Claimant did not treat for back pain between 1994 and 2000.

9. Claimant treated twice with Dr. Garand after his January 3, 2000 work injury. Dr. Garand found lower back pain and spasm from L3 to S1, bilaterally but with greater pain on the right side. SLR and Lasague tests were negative bilaterally. Dr. Garand diagnosed lumbosacral sprain and right sacroiliac strain, treated with chiropractic manipulation and physiotherapy, and released claimant to return to work on January 4th.

10. Claimant treated with Dr. Garand from July 10 through July 31, 2000 after his work injury involving the garage door. SLR and Lasague tests were negative bilaterally throughout this period, but claimant did report right leg cramping on occasion. Dr. Garand diagnosed bilateral lumbar strain with associated spasms from L1 to S1. He treated claimant with chiropractic manipulation and physiotherapy and released claimant to return to light duty work on July 31, 2000.

11. Claimant returned to work on July 31, 2000 as the Assistant Facilities Manager for the City of Barre.

12. Claimant was in the habit of arriving at work considerably before his 7:00 a.m. shift began, in order to have morning coffee with one or more other city supervisors. At about 9:00 a.m. each day, claimant typically took a coffee break with the employees he supervised.

13. Claimant did not treat for back pain from July 2000 to December 2001.

14. On Thursday, December 6, 2001, claimant experienced a sharp lower back pain while toweling off following a shower at home.

15. Claimant had received previous approval to take a vacation day on Friday, December 7, 2001. He went deer hunting that day and over the following weekend.

16. Claimant's back continued to bother him for several days, but he did not take any time off from work and he did not seek medical treatment. Claimant told Wesley "Jamie" Davis, an employee under his supervision and a personal friend, that his back hurt a little following the towel incident. Peter O'Grady, Superintendent of Streets and Sewers for the City of Barre and a personal friend of claimant, suggested to claimant on Monday or Tuesday December 10th or 11th that he go home because he looked so bad.

17. Claimant considered calling Dr. Garand for an appointment to treat his back pain on one day early in the week following the toweling incident. Claimant spoke with Elizabeth Somaini, assistant to the City Manager of Barre, about his back pain. She informed him that treatment would not be covered by workers' compensation as the incident had occurred at home. Claimant felt "all better" by the end of the day and decided not to seek treatment. He was symptom free on Thursday, December 13.

18. On Friday, December 14, 2001, claimant arrived at work at approximately 5:30 a.m. and had coffee with Mr. O'Grady. Mr. Davis also saw claimant early that day. Both men noted that claimant was "fine" before his 7:00 a.m. shift started.

19. On Friday, December 14, 2001, claimant experienced back pain at work while rising hurriedly from a chair in order to speak with an employee who was departing the premises. Claimant described his back as popping and the pain as like being jabbed with a knife. Mr. O'Grady observed claimant leaning on a file cabinet and in apparent pain that morning. Claimant recalled the incident as having occurred between 9:00 and 10:00 a.m., and after his morning coffee break. Mr. O'Grady recalled seeing claimant in pain at approximately 8:30 to 9:00 a.m.

20. Andrew Supernault, a maintenance foreman for the City of Barre and an employee under claimant's supervision, testified that on a December date he could not recall, he saw claimant shortly after 7:00 a.m. and that claimant was "walking around all right" at that time. At some point after 9:00 a.m. coffee break that morning Mr. Supernault again saw claimant, who was then in apparent pain, walking slowly and "grabbing at everything he could put his hands on to get himself to the truck." Claimant told Mr. Supernault that his back was hurting and he had to see a doctor. Mr. Supernault did not see claimant at work again after that incident.

21. Claimant treated with Dr. Garand on December 14th. Dr. Garand's office note reflects that he saw claimant at 9:00 a.m. Dr. Garand found lower middle back pain from L4 to S1 with increased pain on palpation, but without leg pain. He was unable to perform SLR, Lasague or range of motion tests due to claimant's pain. He treated claimant with chiropractic manipulation and anticipated claimant's return to work on December 17th.

22. Dr. Garand saw claimant on Sunday, December 16th. He found continuing pain in the L4-S1 area, with reduced spasm and absence of leg pain. SLR and Lasague tests were negative bilaterally.

23. Claimant attempted to return to work on Monday, December 17, 2001, but was unsuccessful. He treated with Dr. Garand that day with complaint of increased lower back pain extending into his left leg. SLR and Lasague tests were both positive on the left side.

24. On December 18th, claimant reported numbness in his left thigh. SLR and Lasague tests were both positive for the left side. On December 20th, claimant reported some improvement in his pain, but SLR and Lasague tests continued positive on the left side. On December 21st and 24th, claimant reported improvement in both his leg and lower back pain. SLR and Lasague were bilaterally negative on both dates.

25. Claimant was again unsuccessful in an attempt to return to light duty half-day work on Wednesday December 26, 2001. He again complained to Dr. Garand of increased back pain and intermittent pain extending into his left leg. SLR and Lasague were bilaterally negative.

26. Claimant improved steadily and attempted yet another return to work on January 7, 2002. He left after a few hours and returned to Dr. Garand, reporting renewed lower back and left leg pain. Dr. Garand recommended that claimant contact his primary care physician because claimant was not improving as Dr. Garand had hoped.

27. On January 8, 2002 claimant still reported extreme pain to Dr. Garand. SLR and Lasague tests were both positive for the left side. Claimant's lower back pain continued on his January 10th and 14th appointments with Dr. Garand. Claimant reported an inability to sit at all, numbness in his left leg and pain extending to his foot. SLR and Lasague tests on the 14th were positive on the left side.

28. Dr. Garand testified that claimant's December 14th injury was a "reoccurrence" of his July, 2000 work injury, based on the same area of the spine being involved, the similarity of claimant's symptoms, and because repeated trauma to the same area over a period of time can weaken a disc to the point where it herniates. He opined that the toweling incident of December 6th was not a new injury.

29. John D. Matthew, M.D. is certified in family practice and internal medicine and has been claimant's primary care physician since 1984. Claimant saw Dr. Matthew on January 10, 2002. Claimant's SLR test was positive and Dr. Matthew observed an antalgic gait. Dr. Matthew prescribed prednisone and Vioxx and scheduled claimant for an MRI on January 11th.

30. An MRI of claimant's lumbar spine taken January 11, 2002 showed minor degenerative disc bulging at L4-5 and a very small herniation projecting to the left at L5-S1, abutting but not clearly impinging the first sacral nerve root.

31. On January 16th claimant saw Jeremy Orr, a physician's assistant in Dr. Matthew's office. Claimant reported continuing pain and his ambulation continued guarded, but his SLR test was negative. Percocet was prescribed and a spinal epidural was recommended.

32. After reviewing the MRI report, Dr. Matthew diagnosed lumbar radiculopathy caused at least in part by a bulging disc. He anticipated that additional testing would also indicate involvement at higher levels of the spine. Dr. Matthew opined to a reasonable degree of medical certainty that claimant experienced either an initial or worsened disc herniation when he stood up from his chair at work on December 14th. He opined further that claimant experienced a muscle pull from the toweling incident.

33. On January 25, 2002, on Dr. Matthew's referral, Bradford Watson, M.D. treated claimant with an epidural steroid injection at L4-5. Claimant did not experience improvement as a result of this procedure.

34. On January 30th, Dr. Matthew referred claimant to Central Vermont Hospital for aquatic therapy. Claimant entered into a regular program of therapy in the late winter of 2002.

35. Claimant saw Henry H. Schmidek, M.D. at the Dartmouth-Hitchcock Spine Center on March 19, 2002 for a neurosurgical consult. Dr. Schmidek found a "questionably positive" SLR test on the left side. He recommended continued physical therapy and analgesics rather than surgical intervention.

36. On June 10, 2002, on Dr. Matthew's referral, claimant saw Martin Krag, M.D. at the Fletcher Allen Spine Institute. Dr. Krag obtained AP and lateral lumbar x-rays of claimant that showed mild disc height decreases at L3-4, L4-5 and L5-S1, and anterior osteophytes at those three levels. An SLR test was negative. Dr. Krag opined that claimant's pain is much more likely to be musculoligamentous or tendinous than discogenic, and that intensive rehabilitation had a high likelihood of producing significant improvement while surgical treatment had a low likelihood.

37. John Johansson, D.O. is an osteopathic physician with 15 years of experience in the non-surgical treatment of work and sports injuries. Dr. Johansson performed an IME of claimant on April 2, 2002. He noted that claimant had a slight antalgic gait, favoring his left leg, and recorded a positive SLR test on the left side. He diagnosed discogenic sciatic neuritis and testified that claimant's pain is from disc/nerve irritation caused by the herniation at the L-S junction.

38. Dr. Johansson determined that claimant's December 2001 injury was an aggravation of his work injuries of 2000, because the condition had quieted down in the interim, and it was clearly worse now. He indicated that increased pain, the presence of leg pain and positive SLR test results constituted an aggravation of the 2000 injuries.

39. Dr. Johansson opined that rising from a chair probably puts more pressure on a disc than toweling off while bending and rotating does, although both activities can produce a sudden onset disc problem. He noted that claimant's condition improved in the eight days between the toweling incident and the chair incident and concluded that the toweling incident "started a process" that was then "extended" by the chair incident.

40. Dr. Johansson testified that he doesn't recall what claimant told him about when claimant's left leg pain began relative to the toweling incident, and that his handwritten notes of the exam do not mention anything about left leg pain. Nonetheless, Dr. Johansson's dictated notes state:

> Claimant states that when he was toweling off, bending and rotating, he felt a sharp sudden pain and strain in his low back and started developing left leg pain. He then went back to work. That occurred on December 12, 2001 and on December 14, 2001 he was experiencing a considerable amount of pain and once he got out of the chair had further increasing pain.

41. Claimant's payroll records indicate that he came back to work on Monday December 10th, reflecting only the pre-arranged day off for hunting.

42. Dr. Johansson testified that when a disc bulge occurs there is typically lower back pain, with or without radiating leg pain. Leg pain often develops within two or three days of the herniation and often improves over time. He testified that claimant's rigorous hunting and work activities following the toweling incident did not contraindicate a disc injury at that time. However, he agreed that claimant's medical scenario following the chair incident on December 14th, as reflected in Dr. Garand's notes, was consistent with a herniation occurring on that date.

43. Dr. Johansson agreed with Dr. Krag's conservative treatment approach.

44. Claimant submitted evidence that his attorney expended 23.30 hours in pursuit of this claim and incurred $769.65 in expenses.

CONCLUSIONS OF LAW:

1. Claimant Jon Moran seeks compensation for his lower back injury on the theory that the toweling incident was an activity of daily living that precipitated a recurrence of his 2000 work related injuries. Alternatively, he posits that the December 14, 2001 chair incident resulted in either a new injury or an aggravation of his work-related lower back injuries from 2000. Defendant City of Barre contends that toweling incident of December 6, 2001 was a new injury or an aggravation of the 2000 injuries, and the chair incident was a recurrence of the toweling incident.

2. The first question raised is whether the burden of proof falls on the claimant or the defendant. 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 as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). Once it has been established that a claimant is entitled to benefits under the Workers Compensation Act, 21 V.S.A. § 601 *et seq*., however, the burden shifts to the defendant to establish the propriety of denying further compensation. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974), *Sicotte v. Brattleboro Retreat*, Opinion No. 71-96WC (Nov. 25, 1996). Under the defendant's theories, the burden of proof would fall to the claimant, and, conversely, the claimant's primary theory would place the burden on the defendant.

3. Under most circumstances, showering and toweling off would be considered activities of daily living, not intervening events sufficient to break a causal link with an established compensable injury. *See Verchereau v. Meals on Wheels*, Opinion No. 20-88WC (lifting a bag of groceries a "routine activity"); *Correll v. Burlington Office Equipment*, Opinion No. 64-94WC (shoveling an "ordinary activity"). However, "where a claimant has been stable in regard to his symptoms for a long period of time, he has the burden of producing medical evidence that confirms the connections with the original injury and establishes the lack of a causal connection with any intervening event." *Rondini v Ran-Mar Corp*., Opinion No. 27-02WC, (June 12, 2002); *Weeks v. New England Telephone*, Opinion No. 62-95WC (Sept. 18, 1985). Here, although defendant was liable for claimant's July 2000 back injury and all "direct and natural" results of that injury, claimant had stopped treating medically for back pain for over sixteen months and had successfully returned to work for that period. Under this particular set of circumstances, it is reasonable that it fall to the claimant to prove that his current injury arose out of and in the course of his employment with the City of Barre.

4. Where the causal connection between an accident and an injury is obscure, and a lay-person would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Jackson v. True Temper Corporation*, 151 Vt. 592 (1989). 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).

5. In the workers' compensation context, "The terms 'aggravation' and 'recurrence' are 'legal rather than purely medical terms. To determine which applies requires close consideration of medical evidence, but ultimately the determination is a legal one.'" *Tatro v. Town of Stamford*, Opinion No. 25-00WC (Aug. 9, 2000) (quoting *Momaney v. Geka Brush Manufacturing*, Opinion No. 44-99WC (Nov. 17, 1999)). If claimant's work contributes even slightly to the causation of a disabling condition, the incident constitutes an aggravation of an earlier injury rather than a recurrence. *Lavigne v. General Electric Lockheed Martin*, Opinion No. 12-97WC (June 17, 1997) (*citing Snodgrass v. E. F. Wall*, Opinion No. 15-92WC (September 2, 1992)).

6. "Aggravation" is defined as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." Rule 2.1110, Vermont Workers' Compensation and Occupational Disease Rules (2001). This has been explained as "a destabilization of a condition which had become stable, although not necessarily fully symptom free." *Cote v. Vermont Transit*, Opinion No. 33-96WC (June 19, 1996).

7. A recurrence is defined as "the return of symptoms following a temporary remission. Rule 2.1312, Vermont Workers' Compensation and Occupational Disease Rules (2001). In prior cases the Department has explained this to be a continuation of a problem that had not been previously resolved or become stable. *Cote*, *supra*.

8. The factors that this Department has traditionally considered as supporting a finding of aggravation, with the final factor receiving greatest weight under *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997) are:
    1) whether there is a subsequent incident or work condition which destabilized a previously stable condition;
    2) whether the claimant had stopped treating medically;
    3) whether the claimant had successfully returned to work;
    4) whether the claimant had reached an end medical result; and
    5) whether the subsequent work contributed independently to the final disability.

Trask v. Richburg Builders, Opinion No. 51-98WC (Aug. 35, 1998).

9. Three medical experts agree that an incident in December of 2001 independently contributed to claimant's current back injury. The matter of contention is whether the pertinent incident occurred on December 6th or December 14th. In evaluating their opinions, I am mindful that there is not exact correlation between the terminologies of law and of medicine. In this instance there is, however, sufficient coincidence in the causation concepts expressed by each of the experts to identify the chair incident as the more probable cause of claimant's injury.

10. Dr. Garand, who has treated claimant intermittently for 15 years, pinpoints the chair incident rather than the toweling incident as the immediate cause of claimant's condition, terming it a "reoccurrence" of the July 2000 injury. Dr. Matthew, claimant's primary care physician, labeled the herniation a new injury. By way of amplification, he related that claimant's lower back was previously weakened and made more susceptible to herniation by the series of previous lower back injuries. Of the two incidents, toweling and rising from a chair, Dr. Matthew finds the latter by far the more probable cause of the herniation. Of particular note, Dr. Johansson, testifying on behalf of the defense, indicated that the toweling incident "started something" in claimant's lower back, but acknowledged that the chair incident "extended" any condition that may have resulted.

11. Defendant argues that the toweling incident was a new injury that was *not* aggravated by the chair incident. The medical testimony most favorable to the defense, that of Dr. Johansson, contradicts this contention and places liability on the defendant. Dr. Johansson testified that the chair incident "extended" whatever process began with the toweling incident, and he found the presence of radiating leg pain and positive SLR tests to be indicators of an aggravation. Contemporaneous medical records reflect that these two conditions emerged subsequent to the chair incident and, more specifically, to claimant's first attempted return to work following the chair incident. When he attributed the aggravation of claimant's 2000 work injuries to the toweling incident, Dr. Johansson understood that claimant's radiculopathy commenced between that incident and the chair incident. Further, that opinion is based on an understanding that claimant did not return to work until the sixth day following the toweling incident. These bases, while supportive of Dr. Johansson's conclusion, are shown by the record to be inaccurate.

12. There is no record of any injury as a result of the toweling incident, and claimant did not miss any scheduled work time or seek any medical care in the subsequent week. Credible testimony indicates that, while claimant experienced lower back pain that continued for a number of days following the toweling incident, that pain had resolved before the chair incident. Even if the toweling incident were sufficient to break the causal link with claimant's July 2000 work injury, defendant's medical expert places the more probable cause of claimant's condition on the later work-related event.

13. Claimant has established through credible medical evidence that 1) he injured his back at work on December 14th; 2) that injury resulted in a herniated disc; and 3) the herniated disc is causing claimant's current back pain. Despite Dr. Krag's opinion that the pain is more likely musculoligamentous or tendinous than discogenic, I find that the claimant has established sufficient causal connection between the December 14th chair incident and his current condition. Whether that incident is termed a new injury or an aggravation of the July 2000 work injuries is inconsequential to the outcome. Claimant has fulfilled his burden of proving that his current injury arose out of and in the course of his employment with the City of Barre.

14. Having prevailed in this case, claimant is entitled to an award of costs as a matter of law and attorney's fees as a matter of discretion. 21 V.S.A. §678 (a). The 23.30 hours claimed are reasonable for the legal work involved in this case, entitling claimant to $ $2097.00 (23.30 x $90). The costs of $769.65 were necessary in the successful pursuit of this claim.

ORDER:

THEREFORE, based on the forgoing Findings of Fact and Conclusions of Law, the City of Barre is ORDERED to:

1. adjust this claim, and
2. pay claimant $2097.00 in attorney fees and $769.65 in expenses.

Dated at Montpelier, Vermont this 31st day of July, 2002

_____

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.