STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-10201
	)	
Judith Champagne	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
H. Foods/Choice of Vermont	)	Commissioner
	)	
	)	Opinion No. 21-01WC

Expedited Hearing Held in Montpelier on June 5, 2001
Record Closed on June 20, 2001

APPEARANCES:

Thomas C. Nuovo, Esq. for the claimant
Christopher Callahan, Esq. for the employer

ISSUE:

Did the claimant incur an injury in the course of her employment with H.Foods/Choice of Vermont on October 29, 1999?

Exhibits:

Joint Exhibit I:	Medical Records
Claimant's 1a:	Videotape of the deposition of David Judkins
Claimant's 1b:	Transcript of deposition of David Judkins
Claimant's 2a:	Videotape of deposition of Dr. Roy (held by defendant)
Claimant's 2b:	Transcript of deposition of Dr. Roy
Claimant's 3:	Medical records with July 25, 2000 cover letter
Claimant's 4:	Medical records with July 11, 2000 cover letter
Claimant's 5:	Fee agreement with attorney
Defendant's A:	Dr. Roy's out of work note dated May 21, 1999
Defendant's B:	Dr. Ciongoli's curriculum vitae

FINDINGS OF FACT:

1. In October 1999 claimant Judy Champagne was an "employee" and H. Foods/Choice Foods her "employer" as those terms are defined in the Workers' Compensation Act and Rules.

2. Claimant started working for Thomas Herman, the founder of Choice Foods of Vermont, in April 1990 performing numerous and different tasks as the business grew and evolved. She was the person responsible for producing recipes. She also helped with the production side by packaging products and with the managerial side by answering phones and scheduling employees. As Mr. Herman sold one business and started another, he kept the claimant working with him by rehiring her each time. The businesses were all involved in making gourmet sauces, salsas and other condiments.

3. Some of claimant's tasks at Choice of Vermont were physically demanding. For example, she stirred large vats by hand until the business acquired an automatic kettle with an agitator. To heat the product thoroughly, the stirring needed to be constant.

4. After the product was cooked, it was poured into a five-gallon bucket from a spigot at the bottom of the kettle. Claimant then carried the bucket about 45 feet by hand, lifted it over her head and poured it into a hopper. Buckets were typically completely filled, that is within four inches from the top of the bucket, in an attempt to minimize the number of trips to the hopper. It took several trips to fill the hopper, a large funnel-shaped container.

5. For most of the time she worked there, claimant filled jars from the hopper then capped them. However, at some point before October 1999 the employer obtained a capping machine, which eliminated the need for hand capping.

6. On Friday October 29, 1999 when she was walking from the kettle to the hopper, with a bucket that weighed about ten pounds, claimant slipped on the floor then caught herself to prevent a fall ("hopper incident"). David Judkins, another employee, witnessed that incident. Claimant then went home.

7. Claimant did some carpentry work over the weekend following the hopper incident.

8. On November 3, 1999 claimant went to see her primary care physician, Dr. Roy, with a complaint of a lump on her back after slipping at work.

9. A November 6, 1999 Copley Hospital Emergency Department note reflects the claimant's complaint of an exacerbation of back pain two weeks earlier when she bent over to pick something up. She had run out of pain medication at the time of that visit, having taken three rather than the prescribed two doses per day. Oxycontin 40 milligrams twice a day for a week was prescribed. She was instructed to do no lifting at work. The examination at that visit revealed radicular symptoms with pain radiating to the right leg.

10. Claimant worked for a few weeks after her injury, although not to her previous full capacity. For example, she no longer carried buckets that had been filled completely. Generally, she "babied" her back, seeking help for the heaviest work.

11. In November 1999, at her doctor's recommendation, claimant took time off from work. At first she did light duty work at home by recording recipes on her computer. When she had no more light work to do, she tried to go back to her regular job. But her employer told her she could not return without a note from her doctor. She has not worked since.

12. On a referral from her primary care physician, Dr. Anthony Lapinsky, an orthopedic surgeon, examined the claimant on December 6, 1999. Claimant's neurologic findings on examination were normal. Strength, reflexes and sensation to light touch were intact, range of motion in her lower extremities was full. She had pain in the gluteus maximus near the sacrum on internal rotation of the hip. Dr. Lapinsky recommended cessation of narcotic medication, behavioral pain management and active aerobic exercise.

13. From December 1999 to March 2000, the claimant attended prescribed physical therapy, but only sporadically.

14. Claimant sought vocational rehabilitation services, but none were available through workers' compensation because the insurance carrier had denied this claim. Other VR services are unavailable to her because a worker's compensation claim is pending.

15. On August 9, 2000 Dr. Roy wrote a letter stating his opinion that the claimant's lower back pain was markedly aggravated in October 1999 when she slipped at work while carrying a bucket of liquid. In his opinion the pain was different in quality from what she had prior to that incident.

16. On October 19, 2000 Dr. Kenneth Ciongoli examined the claimant at the defendant's request. At that time she walked with an antalgic gait and got in and out of a chair slowly. She had diminished sensation in parts of her left leg. He diagnosed a lumbosacral strain syndrome with an L5-S1 distribution of the pain she reported.

Past Medical History

17. Claimant was under the care of Dr. Roy for back pain at least since 1993 for which he initially treated her with nonsteroidal anti-inflammatory medications. In 1995 Dr. Roy prescribed Vicodin for increased and persistent pain. Claimant remained employed full time during this period in what the doctor recorded was heavy work.

18. In the spring of 1998 the claimant fell off a retaining wall and bruised her lower back and right hip after which she described her pain as a constant 8 on a scale from 1 to 10. She continued to work.

19. In August 1998 claimant complained that her lower back was "swollen again" and that she had tingling in her right buttock and leg. Her doctor prescribed Vicodin again, but cautioned that narcotics were not the best for her pain. Later that year her doctor prescribed Percodan. Throughout 1998 she was treated with narcotics for low back pain.

20. A September 29,1998 CT scan of the lumbosacral spine was normal.

21. In early 1999 Oxycontin was added to her treatment regime for back pain.

22. In March of 1999 claimant fell on the ice. Soma was added to her treatment that still included Vicodin. On March 24, 1999 the claimant had an epidural for back pain, for which she did not have good pain relief. She was using 5 to 6 Vicodin a day at that time and taking Oycontin at bedtime. In May she fell and her medication dosages were increased. Claimant continued to work full-time.

23. In May 21, 1999 Dr. Roy wrote that she was not to lift more than 10 pounds at work and was to do no repetitive bending, stooping or squatting. In June Vicodin was decreased, although Oxycontin continued. She reported that physical therapy was not helpful. Dr. Roy diagnosed chronic back pain with no radiculopathy.

24. A July 14, 1999 lumbosacral MRI was negative.

25. On October 8, 1999 Dr. Roy diagnosed persistent low back pain and the need to start decreasing pain medication. On October 24, 1999 he decreased her Oxycontin from 20 to 10 mg. twice a day.

Post Injury Events

26. After the reported hopper incident on October 29, 1999, Dr. Roy told her to double up on the 10-mg dose of Oxycontin for a few days.

27. After the claimant stopped working, she continued to treat with Dr. Roy who gradually tapered her medications.

28. In November 2000 the claimant was in a single vehicle accident in which her truck rolled over and was totally destroyed. She was restrained, but not with a lap belt. In his office note, Dr. Roy described the accident as causing an exacerbation of her pain.

Attorney Fees and Costs

29. Claimant submitted evidence that her attorney worked 68.5 hours on this case and incurred $736.92 in costs.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395 (1984); *Goodwin v. Fairbanks, Morse Co*., 123 Vt. 161 (1963). Sufficient competent evidence must be submitted verifying the character and extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). Where the causal connection between an accident and an injury is obscure and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc*., 137 Vt. 393 (1979).

2. There must be created in the mind of the trier of fact something more than a mere possibility, suspicion or surmise that the alleged injury was the cause and the inference from the facts proved must be the more probable hypothesis, with reference to the possibility of other hypotheses. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. Although the parties frame the issue for decision as one of aggravation versus recurrence, I find such an analysis unnecessary because the evidence does not support the claimant's contention that the hopper incident caused an injury.

4. Claimant's medical records are replete with incidents that prompted her to seek medical care and pain medication. She fell off a retaining wall in 1998 and fell on the ice in March 1999. Each visit prompted an office visit and a change in her medication. Within two days of the incident alleged here, she attributed back pain to a bending over incident two weeks earlier when she visited an emergency room and received a prescription for Oxycontin. Had the hopper incident been as severe as she now claims, she undoubtedly would have reported it at that time of the emergency room visit.

5. Objective tests on this claimant have consistently been negative, further undercutting her claim of an injury.

6. Given all the evidence, claimant has failed to prove that she incurred an injury in the course of her employment on October 29, 1999.

ORDER:

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

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