

B. Y. v. Wright & Morrissey, Inc.

(August 4, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

B. Y.

Opinion No. 35-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Wright & Morrissey, Inc.

For: Thomas W. Douse
Acting Commissioner

State File Nos. W-05133; U-04855

Hearing Held in Montpelier on April 11 and 12, 2006

Record closed on July 6, 2006

APPEARANCES:

Sheila M. Ware, Esq., for Claimant

William J. Blake, Esq., for Defendant

ISSUE:

Whether the osteoarthritis in Claimant's right hip that necessitated a hip replacement is causally related to his September 11, 2003 work related accident.

EXHIBITS:

Joint I:

Medical Records

Claimant:

1. Photograph of Gradall Machine
3. VHAP charges

Defendant:

- A. Medical Records
- B. Dr. Johansson's curriculum vitae
- C. Dr. Backus's curriculum vitae

FINDINGS OF FACT:

1. At all times relevant to this action, Claimant was an employee and Defendant Wright and Morrissey his employer within the meaning of the Workers' Compensation Act.
2. St. Paul Travelers provided workers' compensation insurance to Defendant.
3. Claimant has worked in the construction industry his entire working life.
4. The incident at issue occurred on September 11, 2003 when Claimant was forty-three years old. At that time he was working for Wright and Morrissey with no restrictions, although he had intermittent twinges of right hip pain for which he took over the counter medications. That discomfort never kept him out of work.
5. Claimant tried manually to remove a large steel girder truss (I-beam) from the tines of a forklift. In the process, the I-beam that weighed between 500 and 1,000 pounds snapped, driving him to the ground. He landed on his right side, with the beam across his left knee and thigh.
6. Coworkers responded to Claimant's cry of pain, lifting the beam from one end to allow Claimant to crawl out from under it.
7. After work on September 11, Claimant went home. He spent the first week after the accident at home elevating and icing his leg, and then sought medical attention.
8. Early post injury treatment focused on his left knee. For months, Claimant walked with a limp, favoring his left side.
9. In January of 2004, Claimant had surgery on this left knee, surgery that was not as successful as he had hoped.
10. By June of 2004, Claimant was complaining of bilateral knee pain and mild hip pain. The note from that visit, nine months after the accident, is the first indication of hip pain. Studies revealed advanced osteoarthritis in Claimant's hip, but treatment focused on his left knee.
11. By September of 2004, Claimant was released to medium duty work. He returned to work at Wright and Morrissey.
12. Claimant's right hip pain worsened; it started awakening him from sleep. Dr. Howe concluded that his full time work was aggravating the hip pain. He suggested a total hip replacement when Claimant could no longer tolerate the pain.
13. Claimant continued to work; the pain continued to worsen.

14. At a defense requested examination in December 2004, before any claim for the hip had been made, Dr. Verne Backus analyzed the knee problem and noted that Claimant also had right hip pain.
15. Claimant was laid off from work in March or April 2005.
16. In May 2005, Claimant filed a claim for injury to his right hip, which was denied by the carrier as not causally related to a work related injury.
17. A July 2005 x-ray of Claimant's hip was unchanged from the one done a year earlier.
18. Claimant's hip condition continued to worsen. Dr. Howe advised him not to work because of the hip condition. Although the total hip replacement (THR) surgery recommended by Dr. Howe was scheduled for August 2005, it was not performed at that time because this claim had been denied. Ultimately Claimant qualified for VHAP that paid for his total hip replacement, which was performed in December 2005.
19. Claimant's osteoarthritis is worse in his right hip than in the left, not unusual with this condition even in the absence of trauma.
20. Although it is unusual for one in his 40s to need a total hip replacement, there are people of that age who have such advanced osteoarthritis that a joint replacement is needed. Claimant is in that category.

Expert Medical Opinions

21. Dr. Cove, Claimant's treating physician, treated him before and after the work-related injury. He has no record of Claimant's complaints of hip pain before the accident at issue.
22. Dr. James Howe, treating orthopedic surgeon, opined that Claimant's work related injury in September 2003 aggravated his right hip osteoarthritis and accelerated the need for the hip replacement surgery. That opinion is based on Dr. Howe's 30-year expertise in orthopedics, the relative young age of this Claimant and his personal treatment of the Claimant. The opinion is also based on two erroneous assumptions: 1) that Claimant had had hip pain from the day of the accident, when such complaints did not appear in the medical records for nine months; and 2) that his hip was asymptomatic before the accident.
23. Dr. Mark Bucksbaum also offered an opinion in support of this claim. He opined to a reasonable degree of medical certainty that Claimant's right hip osteoarthritis and need for a hip replacement was accelerated by the work related accident. He based that opinion on his examination of the Claimant, his interview of the Claimant, the Claimant's medical history and the nature of Claimant's family history of osteoarthritis. He opined that, because of the work related injury, Claimant needed the hip replacement surgery 15 to 20 years before he otherwise would have needed it. Crucial to the history that Claimant provided Dr. Bucksbaum was that he had hip pain from the outset.

24. Dr. Johansson performed an independent medical examination of the Claimant for the defense in August of 2005. The purpose of that examination was to assess the left knee injury. Claimant never mentioned hip pain to Dr. Johansson; the doctor did not examine the hip. Later, based on his review of medical records, Dr. Johansson opined that the advanced osteoarthritic condition in Claimant's hip was due to the natural progression of the arthritis, not to the work related injury. He based that opinion on the absence of medical records reflecting hip pain for nine months after the injury.
25. Dr. Verne Backus also offered an opinion in support of the defense in this case, based on his review of the medical records. He opined that Claimant would have had immediate hip symptoms after the work related accident if that accident had aggravated the underlying osteoarthritis. He pointed to the nine-month gap in treatment in support of his opinion that there was no causal connection.

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). 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. This Claimant must prove that it is more likely than not that the need for the hip replacement in 2005 was caused by his 2003 work related injury. See *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. In this as in most workers' compensation cases, the subject matter is beyond the ken of a layperson and, therefore, requires expert medical testimony. See *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
4. All medical experts in this case are well qualified to offer opinions. On such a record, the treating surgeon with the experience Dr. Howe has had would normally be given deference. However, in this case, his ultimate opinion cannot be accepted because it is based on two faulty assumptions. Claimant's hip was not symptom free before the work related incident, as Dr. Howe had assumed. Nor were the post accident hip symptoms immediate, as he also assumed.
5. In fact, the experts are in agreement on the importance of immediate symptoms to establish a causal connection, or at least symptoms closer in time to the incident than what we have here.

6. Claimant argues that he had hip pain from the outset, but focused on the more severe knee injury at first, which is understandable. However, if the hip pain were related to the work related accident, it is unlikely that nine months would have passed before the Claimant mentioned “mild” hip pain. That delay combined with pre-accident hip symptoms provides support to the defense position that it is more likely that the disease followed its natural progression, not that the accident accelerated its progression. On this record, Claimant fails to meet his burden under *Burton*, 112 Vt. 17.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 4th day of August 2006.

Thomas W. Douse
Acting 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.