Scott Myrick v. Ormund Bushey & Sons (October 5, 2010)

**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

Scott Myrick

v.

Ormond Bushey & Sons

Opinion No. 31-10WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Valerie Rickert
Acting Commissioner

State File No. Z-1465

## OPINION AND ORDER

Hearing held in Montpelier, Vermont on May 9 and May 26, 2010
Record closed on August 25, 2010

**APPEARANCES**:

Christopher McVeigh, Esq., for Claimant
Steven Wright, Esq., for Defendant

**ISSUES PRESENTED**:

1. Did Claimant suffer a compensable injury arising out of and in the course of his employment for Defendant on November 8, 2006?

2. If yes, are the costs related to Dr. Bucksbaum's proposed treatment plan compensable under 21 V.S.A. §640(a)?

3. Is Claimant's claim for workers' compensation benefits barred for failure to make a timely claim under 21 V.S.A. §656(a)?

**EXHIBITS**:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Supervisor's Report of Accident
Claimant's Exhibit 3: November 2, 2006 memo

Defendant's Exhibit A: Photograph of excavator
Defendant's Exhibit B: Photograph of excavator
Defendant's Exhibit C: Photograph of excavator
Defendant's Exhibit E: Daily time sheets, 11/8/06-11/16/06
Defendant's Exhibit F: Claimant's handwritten diagram of accident site

**CLAIM**:

Medical benefits pursuant to 21 V.S.A. §640(a)
Costs and attorney fees pursuant to 21 V.S.A. §678

**FINDINGS OF FACT**:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

3. Claimant worked for Defendant as a construction superintendent. His duties included supervising work crews and generally overseeing and directing activities at the construction site.

*The November 2006 Backhoe Incident*

4. On the morning of November 8, 2006 Claimant was supervising a crew that was engaged in the process of installing water and sewer service in a new housing development.

5. Claimant testified that he was in a trench, watching as Rick Lafountain, the backhoe operator, worked to prepare it for laying some pipe. According to Claimant, the pipe to be laid was from the main sewer line to a newly constructed house. Because it measured only 4 inches in diameter and weighed only 5 or 6 pounds, once the trench was prepared the pipe could be lowered into place and laid by hand. The trench, which measured approximately 15 feet long, 6 feet wide and 8 to 10 feet deep, already had been dug. Claimant testified that Mr. Lafountain's task was merely to use the backhoe to remove a bit more dirt from the trench so that the drainage stone underlying the pipe could be installed.

6. Claimant testified that as he was climbing up the bank to exit the trench, the backhoe's "stick" brushed him from behind and pushed him down.[1] Claimant described being pushed into the bank for a few seconds, "like a frog squatting to jump." Claimant then scrambled up out of the hole.

7. Claimant testified that immediately after exiting the trench he felt pain and pressure in the area of his hips and groin. He stretched and squatted in an attempt to relieve the pain. Claimant testified that as he did so, Dean Henry, Defendant's co-owner and Claimant's supervisor, asked what had happened and if he was ok. Claimant recalled responding, "That SOB [Mr. Lafountain] hit me with the backhoe."

[1] A backhoe is comprised of three parts: the boom, the stick and the bucket. The boom extends out from the tractor and attaches to the stick, which attaches to the bucket.

8. Both Mr. Lafountain and Mr. Henry gave testimony that conflicted somewhat with Claimant's version of events. Mr. Lafountain testified that his task that day involved installing the main sewer line, not a smaller line. The main sewer line was both larger and heavier, and could not be installed by hand. Mr. Lafountain recalled that the pipe had been attached to the bucket of his backhoe with a chain and then lowered into the trench where Claimant was standing. He testified that he was in the process of maneuvering the pipe very slowly into its proper position when apparently he brushed Claimant from behind with the stick of his backhoe.

9. Mr. Lafountain testified that as he was operating the backhoe, he saw Claimant coming up out of the trench, behind the stick. Mr. Lafountain was not aware at the time that he had hit Claimant, and only heard about it later in the day through the jobsite "rumor mill." When he did, he confronted Claimant, who told him that the stick had barely brushed him.

10. It is unclear from whom Mr. Lafountain learned that he had hit Claimant with his backhoe. Although Claimant testified that he told Mr. Henry what had happened immediately after the incident, Mr. Henry denied that he was even at the jobsite on that day.

*Medical Treatment and Expert Opinions*

11. Claimant continued to work following the backhoe incident. That evening he visited his chiropractor, Dr. Sweetland, who manipulated his back and hips, but this did not relieve his symptoms. Thereafter, Claimant continued to complain of pain in his hips and a pinching sensation in his groin area. Dr. Bicknell, Claimant's primary care provider, documented these complaints, along with Claimant's assertion that they related back to the backhoe incident, during office visits in January and February 2007.

12. In September 2008 Claimant underwent an independent medical examination with Dr. Bucksbaum. Dr. Bucksbaum is board certified in physical medicine, and also holds a degree in biomechanical engineering.

13. Dr. Bucksbaum attributed Claimant's groin pain to adductor tendonitis, an inflammation that causes tenderness at the point where the thigh muscle attaches to the pelvis. According to Dr. Bucksbaum, adductor tendonitis is almost exclusively a traumatically caused injury. It usually results from some type of sideways twisting motion, causing both lateral force and rotation about the hip.

14. Dr. Bucksbaum testified to the required degree of medical certainty that Claimant's adductor tendonitis was causally related to the November 2006 backhoe incident. In his opinion, both the mechanism of injury and Claimant's symptoms thereafter were consistent with this conclusion. In particular, Dr. Bucksbaum described how adductor muscle tendonitis can cause the tendon to become frayed or torn, which in turn causes the type of pinching sensation Claimant has described.

15. Dr. Bucksbaum acknowledged that in many cases adductor pain is soft tissue in nature and usually resolves within six to twelve weeks. In cases where the tendon pulls away from its anchoring structure, however, the condition can become chronic and will not heal spontaneously. This, Dr. Bucksbaum believes, is what has occurred in Claimant's case.

16. As treatment, Dr. Bucksbaum has recommended a series of ultrasound-guided cortisone injections, followed by progressive physical therapy. If these therapies prove unsuccessful, surgery might be necessary.

17. At Defendant's request, in November 2009 Claimant underwent an independent medical examination with Dr. Wieneke, an orthopedic surgeon. Dr. Wieneke diagnosed Claimant with "mild adductor origin pain" in his right hip. In his opinion, it was not possible to relate this condition back to the November 2006 backhoe incident. According to Dr. Wieneke, had the November 2006 incident caused a soft tissue injury to Claimant's adductor muscle, this would have healed within a matter of weeks.

18. Dr. Wieneke did not suggest an alternative cause for Claimant's adductor pain, nor did he address Dr. Bucksbaum's assertion that a condition such as Claimant's typically is traumatically caused.

19. Claimant testified that his symptoms have persisted since the date of injury. They interfere with both recreational and daily living activities. According to Claimant, prior to Dr. Bucksbaum's evaluation he was told that the injury would simply heal with time. Claimant testified that Dr. Bucksbaum was the first to diagnose the injury as adductor tendonitis, and the first to propose a treatment plan specifically directed at that condition.

*Claimant's Report of the Backhoe Incident to Defendant*

20. The week following the backhoe incident, on November 15, 2006 Claimant submitted a "Supervisor's Report of Accident" to Jill Morway, Defendant's co-owner and office manager. Among her duties, Ms. Morway is responsible for processing employee workers' compensation claims. Claimant testified that he submitted the report at the same time that he delivered his weekly time sheets to the office. He acknowledged that company policy required employees to report all injuries within 24 hours. Claimant testified that he thought he had fulfilled this requirement at the scene by telling Mr. Henry, his supervisor, what had happened.

21. In the report Claimant described the November 6, 2006 incident as having occurred when "the back of the excavator hit me while installing stone." Claimant listed four witnesses to the event, but not Mr. Henry. He also indicated that he had sought medical care with Dr. Sweetland.

22. Ms. Morway testified that when she received the report she questioned Claimant as to why he hadn't submitted it earlier. Just a few days before the incident she had distributed a memo to all employees, including Claimant, reminding them of Defendant's 24-hour injury reporting policy. Ms. Morway recalled that Claimant told her that he was "fine," that he had not missed any time from work and that therefore she did not need to report the injury to either the Department or to Defendant's insurance carrier.

23. The "Supervisor's Report of Accident" form contains the following pre-printed admonition at the top:

> EVERY ACCIDENT SHOULD BE INVESTIGATED AND THE CAUSES CORRECTED SO THAT MORE ACCIDENTS WILL NOT OCCUR. DO NOT OVERLOOK THE SO-CALLED "UNIMPORTANT" CASES, BECAUSE EXCEPT FOR "CHANCE" THEY COULD ALSO HAVE BEEN SERIOUS. IT IS ONLY BY THOROUGH INVESTIGATION THAT MANY OF THE REAL CAUSES CAN BE DETERMINED AND CORRECTED.

24. Despite this cautionary message, Ms. Morway admitted that beyond asking Claimant what had happened, she did not conduct any further investigation of the backhoe incident.

25. On April 29, 2008 Claimant filed a Notice of Injury and Claim for Compensation (Form 5) with the Department in which he asserted his right to workers' compensation benefits as a result of the November 2006 backhoe incident.

**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, 399 (1984). He or she 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). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. Defendant argues here that Claimant has failed to sustain his burden of proving that he suffered a work-related injury on November 6, 2006. Defendant points to the conflicting testimony as to the details of the backhoe incident in support of its assertion that Claimant's version of events is not credible. It further asserts that the medical evidence does not support a causal relationship between Claimant's current symptoms and a work injury dating back to 2006. Last, Defendant argues that Claimant's claim for workers' compensation benefits was not timely filed, and that therefore it is barred under 21 V.S.A. §656(a).

3. I find Claimant's testimony sufficiently convincing to establish that he was in fact struck by the stick of Mr. Lafountain's backhoe on November 6, 2006. To the extent that there was conflicting testimony as to certain aspects of his story, it was not so significant as to undermine Claimant's version of events. I conclude that the incident happened essentially as Claimant said it did.

4. I also conclude that the medical evidence is sufficient to establish, to the required degree of medical certainty, that as a result of the November 6, 2006 backhoe incident Claimant suffered an injury, namely, bilateral adductor tendonitis. I accept Dr. Bucksbaum's opinion as more credible in this regard than Dr. Wieneke's. I also accept Dr. Bucksbaum's treatment plan as reasonable, necessary and causally related to the work injury.

5. Last, I conclude that there is no legal basis for barring Claimant's claim on the grounds that it was not timely filed. It is true that the statute requires that a claim for workers' compensation benefits be made within six months after the date of injury, 21 V.S.A. §656(a), and that Claimant did not do so. The statute also provides, however, that such a failure "shall not be a bar to proceedings . . . if it is shown that the employer . . . had knowledge of the accident . . . ." 21 V.S.A. §660(a).

6. Case law in Vermont defines an "accident" as "an unlooked-for mishap or an untoward event which is not expected or designed." *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31, 35 (1980), quoting *Giguere v. E.B. & A.C. Whiting Co.*, 107 Vt. 151, 157 (1935). The backhoe incident that Claimant reported when he filed the "Supervisor's Report of Injury" on November 15, 2006 meets that definition. As the form itself stated, upon receiving the report it was incumbent on Defendant to properly investigate, no matter whether the accident was "unimportant" or "serious."

7. Defendant could have taken any number of appropriate actions in order to do so. It could have interviewed the witnesses Claimant had identified on the report. It could have questioned Claimant more closely as to whether his symptoms persisted. It could have sought further information from Dr. Sweetland, whom Claimant had identified on the report as a treating physician. It could have referred Claimant to a physician of its own choosing in order to verify what, if any, injury he had sustained. Defendant took none of those steps. For that, it has only itself to blame, not Claimant.

8. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit his itemized claim.

**ORDER:**

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Medical costs associated with reasonable and necessary medical treatment for Claimant's November 6, 2006 work injury, including treatment for bilateral adductor tendonitis as diagnosed by Dr. Bucksbaum, pursuant to 21 V.S.A. §640(a);

2. Additional workers' compensation benefits to which Claimant proves his entitlement as causally related to his November 6, 2006 work injury; and

3. Costs and attorney fees as determined to be reasonable in accordance with 21 V.S.A. §678.

**DATED** at Montpelier, Vermont this 5th day of October 2010.

_____
Valerie Rickert
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.