

S. S. v. Consolidated Memorials

(January 9, 2007)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

S. S.

Opinion No. 49-06WC

v.

By: Margaret A. Mangan  
Hearing Officer

Consolidated Memorials

For: Patricia Moulton Powden  
Commissioner

State File No. U-12011

Hearing held in Montpelier on July 27, 2006

Record closed on August 30, 2006

**APPEARANCES:**

Heidi Groff, Esq. for the claimant

Corina Schaffner-Fegard, Esq. for the defendant

**ISSUES:**

1. Are the Claimant's left knee and hip injuries causally related to his accepted right foot injury which occurred at work on July 16, 2003, or was there a non-work related aggravation?
2. To what benefits is the Claimant entitled?
3. Whether the Claimant's alleged inability to work more hours was a material misrepresentation of his work capacity sufficient to terminate benefits and or require reimbursement for benefits paid.

**EXHIBITS:**

Joint I: Medical Records

Claimant's I: Preservation Testimony and C.V. of Dr. Lynch, MD

Defendant's I: Surveillance videotape from 2003

Defendant's II: Surveillance videotape from 2004

Defendant's III: Surveillance videotape from 2005

**STIPULATED FACTS:**

1. At all relevant times, the Claimant was an employee as defined under the Vermont Statutes.
2. At all relevant times, the Defendant was an employer as defined under the Vermont Statutes.
3. The Claimant suffered a work related fracture to his right foot on July 16, 2003.

**FINDINGS OF FACT:**

1. During high school, the Claimant had surgery on his left knee as the result of a football injury, but he did not have any further difficulties until after the July 16, 2003 work injury.
2. By July 2003, the Claimant had been employed by Consolidated Memorials as a sawyer for approximately nine years.
3. The job of sawyer includes running granite saws, programming saws, cleaning saws, standing for long periods, climbing ladders, heavy lifting, and other similar tasks. This position also requires that the sawyer be on-call twenty-four hours per day.
4. On July 16, 2003, the Claimant sustained a work related injury to his right foot after tripping on a hose while coming down some stairs and landing on the outside of his right foot. The Claimant continued working until the end of his shift that day.
5. On July 22, 2003, the Claimant saw Dr. Bean at Green Mountain Orthopaedic Surgery. At this visit, the Claimant complained of significant soreness and swelling in his right foot. Dr. Bean noted that both feet showed signs of possible untreated preexisting deformities and degenerative changes in his feet. The Claimant's feet also showed pseudoarthrosis at the base of the fourth and fifth Metatarsal, along with evidence of an acute fracture at the Claimant's old fifth nonunion. At this time, the Claimant was fitted with a short-leg fiberglass walking cast.
6. Dr. Bean's office released the Claimant to light duty office work for two hours per day beginning on July 28, 2003. Then, on July 31, the Claimant was released to work for 8 hours per day on light duty.

7. On August 22, 2003, Dr. Bean noted that the Claimant was finding it difficult to work “light duty” and, while the radiographs showed that the Claimant’s foot was beginning to heal, it had not healed to a point where the cast could be removed. At that time, the Claimant was given a walking cast with a toe plate and taken out of work until the next follow-up visit.
8. On September 19, 2003, Dr. Bean performed a follow up examination. After the Claimant’s cast was removed, Dr. Bean noted that the fracture site was remarkably tender and that the Claimant could not tolerate weight bearing on that side at all because of the level of discomfort. The radiograph indicated that while the fracture site had some early bone forming in the gap, the shaft was particularly sclerotic at the slowest healing portion of the bone. This information, combined with the clinical examination, led Dr. Bean to believe that an increase in weight bearing or function would be problematic. The Claimant was then put back in a short-leg cast and given a bone stimulator. The Claimant was again taken out of work until November 1, 2003.
9. On October 8, 2003, the Claimant was observed driving to an auto body shop and stopping at a gas station. There, the Claimant was observed walking with a device on his foot.
10. Around October 21, 2003, the Claimant shot a deer out of his tree stand during archery season. He walked 300 yards without the aid of crutches or other assistance to get to the tree stand. He also climbed twelve feet up, carrying his archery equipment, to access the tree stand.
11. On October 24, 2003, the Claimant again visited Dr. Bean. The motion and pain at the fracture sites continued. The radiographs showed no significant bone healing despite frequent use of the bone stimulator. Dr. Bean ordered more months of bone stimulation and limited weight bearing. He did not release the Claimant back to work at this time.
12. On November 13, the Claimant was observed driving his truck.
13. On the morning of November 14, 2003, the Defendant’s private investigator observed the Claimant shoveling snow from his driveway, driving, and running errands.

14. Regardless of this observed activity, on November 21, 2003, Dr. Bean noted marked improvement as a result of increased use of a bone stimulator. The radiograph showed interval healing although the fracture site was still quite visible. Manipulation of the fracture site was still painful and the foot remained very sensitive. Dr. Bean hypothesized that the slow healing was due to the foot's altered morphology. Dr. Bean then added that the Claimant's foot should have a complete union in, at most, two months. At this time, Dr. Bean released the Claimant to work on December 1, 2003. This note read, "computer program limit walking."
15. On December 22, 2003, Dr. Bean noted that the Claimant's foot might be somewhat less sensitive and, although there was tenderness and percussion over the fracture sites, the Claimant tolerated bending and manipulation of the fracture fairly well. Radiographs showed that the fracture site was improving at a glacial pace. Dr. Bean stated that continued standing was not possible, and the Claimant had no standing work capacity. However, Dr. Bean noted that a fully seated sedentary job would have been appropriate.
16. On February 02, 2004, the Claimant again saw Dr. Bean. At this visit, Dr. Bean found that there had been minimal improvement, the injury should be classified as a "nonunion," and a change in treatment was required. Dr. Bean surmised that bone grafting and plates would be the appropriate course for treating the Claimant's foot, but believed that a second opinion was reasonable. Dr. Bean also noted that the Claimant could not stand fulltime because the bones in his foot had not healed.
17. On February 6, 2004, the Claimant saw Dr. Lynch for a second opinion. Dr. Lynch noted that the Claimant had developed nonunions during the six months he had been casting. He also remarked that the Claimant had some ability to mobilize in the cast. Upon physical examination, Dr. Lynch noticed the Claimant's pre-existing foot deformity and found that the Claimant had been "loading hard" on the lateral border of his foot. It was Dr. Lynch's impression that the use of the bone stimulator had not really improved the condition of the Claimant's foot. He also surmised that surgery would likely be required.
18. The Claimant next saw Dr. Lynch on February 25, 2004. Dr. Lynch described plans for future surgery on the Claimant's foot.
19. On March 5, 2004, Dr. Lynch performed surgery on the Claimant's injured right foot. The surgery consisted of a calcaneal slide and posterior tibial tendon lengthening, an open reduction with bone grafting, as well as plates and screws being added to the foot.
20. During a follow up visit on March 18, 2004, the Claimant reported to Dr. Lynch's office that he was doing well and having minimal pain. However, he found the need to elevate his foot after being upright after a period of time.

21. On March 25, 2004, the Claimant saw Dr. Bean to discuss his left knee and left hip. The Claimant reported that pain, snapping and clicking in his left knee and hip had gotten progressively worse during the prior year. Radiographs revealed a bone spurring and loss of medial joint space. In his assessment, Dr. Bean believed that the left knee and hip problems were caused by osteoarthritis that was exacerbated because of the Claimant's need to wear a short-leg cast. Dr. Bean recommended that the Claimant treat the above symptoms, and try to delay joint replacements because of the Claimant's young age.
22. On April 6, 2004, the Claimant saw Dr. Lynch for a post-surgery follow up. At this time, the Claimant reported some trouble sleeping due to the pain in his foot, and also that he felt insecure without the cast. Dr. Lynch replaced the cast that day. The Claimant also complained of increasing stiffness and pain in his left knee and hip. After examining the left hip, Dr. Lynch found that there was almost no rotational motion, and the hip made a creaking catching sound. It was Dr. Lynch's impression that the Claimant might be able to return to work in 4-6 weeks if the foot was feeling better and the hip was not too troublesome.
23. On April 30, 2004, Dr. Lynch noted that the Claimant's wounds were healing nicely and there was no sign of infection. Dr. Lynch also noted that the calcaneal slide and posterior tibial tendon lengthening appeared to have been effective. However, the Claimant was experiencing "marked hypersensitivity" in his right foot. Dr. Lynch believed that this hypersensitivity was a result of coming out of the cast. The Claimant was placed in an air cast walker boot. The Claimant was also given a prescription to alleviate the pain in his right foot, left knee, and left hip.
24. On June 30, 2004, Dr. Lynch recorded that the Claimant was able to bear weight on both legs with bilateral air cast walker boots with rocker-bottom soles. However, the Claimant's hypersensitivity persisted and he was having difficulty putting weight on the right foot without shoes or support.
25. On July 29, 2004, Dr. Lynch noted that the Claimant was still experiencing hypersensitivity and pain. X-rays showed that one nonunion had healed and the other was healing. Dr. Lynch stated that the Claimant needed to continue to desensitize and begin wearing shoes.
26. On September 28, 2004, the Claimant went back to work for the Defendant for seven hours, but found the assigned work intolerable and phoned Dr. Lynch. Dr. Lynch's office then faxed an out-of-work note to the Defendant. The note stated that the Claimant was not to return to work until November 2, 2004.

27. In response to a letter sent from the Claimant dated October 1, 2004, Dr. Bean indicated that there was no causal connection between the symptoms in the Claimant's left hip and knee and his work injury to the right foot. However, Dr. Bean also stated that he thought that the altered gait resulting from the long casting may have a relationship to the Claimant's hip and knee symptoms.
28. In response to a letter sent from the Claimant dated October 1, 2004, Dr. Lynch stated that he believed that the arthritis was causally related to the Claimant's original work injury. Dr. Lynch also opined that, while the arthritis may have preexisted, the long casting resulted in an abnormal gait that aggravating the Claimant's arthritis. In his testimony, Dr. Lynch also added that the Claimant's prolonged period of deconditioning was a large part of the reason that the preexisting arthritis became symptomatic.
29. On the morning of October 2, 2004, the Defendant's private investigator observed the Claimant driving in his truck on a rural road. The Claimant saw the investigator and informed the investigator that he was going to be hunting in his nearby tree stand. After exiting the woods, the Claimant drove away in his truck, and made one stop before returning home.
30. On October 8, 2004, Dr. Lynch again released the Claimant to return to light duty work for three-to-four hours per day, three days per week. The Claimant stated that he could spend two to four hours a day on his feet and could walk a couple of hundred yards in reasonable comfort. To strengthen and rehabilitate, Dr. Lynch encouraged the Claimant to walk, hunt or stand.
31. On November 18, 2004, at Dr. Lynch's request, the Claimant underwent a Functional Capacity Evaluation. The FCE determined that the Claimant had a maximum light level work capacity. The physical therapist that performed the evaluation was concerned about the Claimant's poor balance skills, need for support when standing, and high pain levels.
32. On December 16, 2004, the Claimant saw Dr. McClellan at the request of his nurse case manager. Dr. McClellan determined that the left hip and knee symptoms most probably stemmed from pre-existing osteoarthritis that was aggravated by the gait disturbance brought on by his work related injury to his right foot. Furthermore, Dr. McClellan found that the Claimant would have substantial difficulty doing any substantive walking or carrying because his gait disturbance would aggravate his pain and underlying hip and knee condition. Dr. McClellan determined that the Claimant had a sedentary and part time work capacity.
33. On January 11, 2005, Dr. Davignon performed an IME on the Claimant. It was Dr. Davignon's opinion that the lengthy casting could have changed his gait pattern, causing the aggravation in the left hip and knee.

34. On February 1, 2005, Dr. Lynch listed that the Claimant had persistent pain consistent with chronic regional pain syndrome, degenerative joint disease of the left hip, degenerative joint disease of the left knee, persistent disability and limitation secondary to all of the above. The Claimant was also now describing symptoms of foraminal encroachment or spinal stenosis. Dr. Lynch noted that the Claimant's spinal problems and degenerative arthritis were likely related to chronic repetitive stress over time in someone with a propensity for arthritis. The Claimant continued working three days a week during this period.
35. On March 7, 2005, Dr. Lynch noted multiple levels of some degree of spinal stenosis with no clear foraminal encroachment. The Claimant continued to suffer chronic pain in his right foot, and was easily fatigued. Dr. Lynch described the left hip as the major problem. There was some discussion of joint replacement. The Claimant continued to work at light duty three days per week, for four hours each day.
36. In a letter dated March 25, 2005, Dr. Davignon wrote that the radiographic findings of the Claimant's hip and knees were a pre-existing condition which could have been aggravated by compensatory mechanisms of his gait pattern and could cause the symptoms he was experiencing. Dr. Davignon also noted that the Claimant's symptoms could progress due mostly to age related findings of osteoarthritis than injury.
37. In a letter dated May 2, 2005, Dr. Davignon stated that he could not say that the radiographic changes in the Claimant's hip and knee, and the impending joint arthroplasty of the hip and knee, were more likely than not related to the original work injury.
38. On May 20-21, 2005, the private investigator hired by the Defendant observed the Claimant walking at an antalgic gait, driving his truck on various errands, assisting another person carry three, eight-foot tables then place the tables in the bed of his truck, attaching a fishing boat to his truck, putting the fishing boat into the water, and fishing for long periods of time. At this time, the Claimant was still working at light duty three days per week, for four hours each day.
39. On May 25, 2005, the Department entered an Interim Order, ordering the Defendant's insurance carrier to pay benefits related to the Claimant's left hip and knee injuries.
40. After reviewing the 2003 and 2005 surveillance, Dr. Davignon noted that the Claimant continued engaging in the filmed activities even though his gait became progressively more pronounced. Dr. Davignon opined that these activities certainly could have aggravated the left hip and knee symptoms. Dr. Davignon also surmised that it would not have been unreasonable for the Claimant to have gradually progressed to a full-time work schedule.
41. On July 13, 2005, Dr. Lynch performed a successful left total hip replacement. On November 2, 2005, Dr. Lynch performed a left total knee replacement. As a result of these procedures, the Claimant has improved functioning, improved range of motion, and decreased pain.

42. Dr. Glick, an orthopedic surgeon, stated that hunting and fishing were not non-weight bearing and that he would have advised the Claimant against those activities. Furthermore, Dr. Glick opined that the Claimant's extracurricular activities were likely to aggravate the left knee and hip symptoms. Dr. Glick did not view the videotapes or the Claimant's diagnostic films.
43. After viewing most of the tapes, Dr. Lynch stated that he did not see anything in the videos that the Claimant should not have been doing during the time he was treating the Claimant. Dr. Lynch also noted that the later films showed that "his hip was bothering him badly because of his antalgic gait and his tendency to lurch to the left, and the hips are usually more troublesome up and around and walking." He also noted that when viewing videos taken on consecutive days that the claimant was visibly limping worse the second day. Dr. Lynch also noted that while "walking and moving and doing things were part of any rehab activity," the first tapes were made during the time before he was treating the Claimant.
44. Neither of the Claimant's doctors recommended that the Claimant use a cane, crutch or other supportive device.
45. The Claimant is currently receiving treatment for his ongoing back problems; however, the Claimant has reached a medical end result for his right foot, left hip, and left knee.
46. The Claimant is requesting attorney fees and costs. Claimant's Counsel has a 25% Fee Agreement with the Claimant and an approved Attorney Lien. The Claimant has included an itemized list of litigation costs totaling \$ 1,891.80.

#### **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 (1962). 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. To qualify for workers' compensation benefits, the personal injury must arise out of and in the course of employment. See 21 V.S.A. § 618 (a)(1).
3. 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 Holden & Martin Lumber Co.*, 112 Vt. 17 1941. 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. *J.G. v. Eden Park Nursing Home*, Opinion No. 52-05WC (2005) (citing *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979)).



## Causation

4. The Workers' Compensation Act, having benevolent objectives is remedial in nature and must be given liberal construction; no injured employee should be excluded from coverage under the Act unless the law clearly intends such exclusion or termination of benefits. *S. H. v. State of Vermont*, Opinion No. 19-06WC, (2006) (citing *Montgomery v. Brinver Corp.*, 142 Vt. 461 (1983)).
5. An employer takes each employee as is and is responsible under workers' compensation for an injury which disables one person and not another. *Paton v. State of Vermont, Dep't of Corrections*, Opinion No. 47-04WC (2004) (citing *Morrill v. Bianchi*, 107 Vt. 80 (1935); *Perkins v. Community Health Plan*, Opinion No. 39-98WC (1998); and *Winckler v. Travelers & Foley Rail Co.*, Opinion No. 29-01WC (2001)).
6. "Recurrence" means the return of symptoms following a temporary remission. WC Rule 14.9242.
7. Larson's Workers' Compensation Law § 10.syn Synopsis to Chapter 10 provides in the section captioned "Range of Compensable Consequences" as follows:

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. More specifically, the progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause.

*J.D. v. Agency of Human Servs.*, Opinion No. 11-06 WC (2006).

8. The Claimant has shown that his left knee and hip injuries are causally related to the July 16, 2003 work injury, rather than the result of any intervening cause. Although the Defendant has put forth some evidence that the Claimant's own activities may have caused left hip and knee symptoms, this evidence raises no more than an inference that anything but the work-related foot injury caused the underlying arthritis to worsen.
9. There has been insufficient evidence to show that the Claimant's own conduct delayed the healing process or prolonged the casting. The Defendant makes much of the seven days, fanned out over a period of roughly three years, where the Claimant was shown to have been hunting, fishing, shoveling snow, driving, or running errands. However, this small amount of documented activity spread over a much longer period is insufficient to amount to a non-industrial, intervening event. Furthermore, even if there were undocumented periods where the Claimant was engaged in similar activities, Claimant had been encouraged by his physicians to participate in his normal activities, none of which rose to the level of a work capacity.

10. The expert medical evidence also supports this conclusion. When qualified medical experts disagree, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all the relevant records. *J.C. v. Richburg Builders*. Opinion No. 37-06WC (2006). (citing *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (1997); *Gardner v. Grand Union*, Opinion No. 24-97WC (1997)).
11. The Department has traditionally given greater weight to the treating physician's opinion. *Searles v. Price Chopper*, Opinion No. 68S-98WC (1998) (citing *Mulinski v. C&S Wholesale Grocers*, Opinion No. 34-98WC (June 11, 1998)). While all of the medical experts in this case are qualified to give credible medical testimony, Dr. Lynch has treated the Claimant for his foot injury beginning in February 2004, and performed the right foot, left hip and left knee surgeries on the Claimant. As such, Dr. Lynch's opinion carries the most weight with the Department.
12. While the Defendant's medical experts believed that the Claimant's activities were not non-weight bearing and would have advised against them, neither of the Claimant's treating physicians prohibited these activities. In fact, Dr. Lynch *recommended* that the Claimant go hunting and spend more time standing to strengthen and rehabilitate. Also, after viewing the surveillance video, Dr. Lynch stated that he did not see any activity that would have been prohibited while the Claimant was under his care. While it seems ill advised for an individual with a sedentary work capacity to engage in some of these activities, it would be unreasonable to penalize a Claimant for following the advice of his physician.
13. Although there were varying medical opinions in this case, not a single medical expert could testify with a reasonable degree of medical certainty that the Claimant's left hip and knee injuries were caused by the Claimant's extracurricular activities.

#### Material Misrepresentation

14. The Defendant has fallen far short of the clear and convincing evidence standard required to prove material misrepresentation. See *Harrington v. Department of Employment and Training*, 152 Vt. 446, 448-49 (1989). The Claimant's treating physicians, as well as the Defendant's medical experts concurred that the Claimant had a sedentary to light, part-time work capacity. Hence, the Claimant did not have a work capacity beyond the sedentary to light capacity represented by the Claimant.

Attorney Fees and Costs

Based on 21 V.S.A. § 678(a) and Rule 10, Claimant is awarded Attorney fees of 20% of the total award or \$9,000, whichever is less.

**ORDER:**

THEREFORE, based on the above Findings of Fact and Conclusions of Law, the Defendant is ORDERED to adjust this claim, including payment of:

1. Medical benefits for the Claimant's left hip and knee injuries;
2. Temporary total disability benefits;
3. Interest from the date each benefit became due;
4. Litigation costs of \$1,891.80;
5. Attorney fees of 20% or \$9,000.00, whichever is less.

Dated at Montpelier, Vermont this 9<sup>th</sup> day of January 2007.

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Patricia Moulton Powden  
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.