

Frank Ainsworth v. Wolcott Store Inc.

(August 7, 2009)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Frank Ainsworth

Opinion No. 30-09WC

v.

By: Jane Dimotsis, Esq.  
Hearing Officer

Wolcott Store, Inc.

For: Patricia Moulton Powden  
Commissioner

State File No. Y-54382

**OPINION AND ORDER**

Hearing held in Montpelier on May 6, 2008

Record closed on June 20, 2008

**APPEARANCES:**

Steven Robinson, Esq., for Claimant

John Valente, Esq., for Defendant

**ISSUES PRESENTED:**

1. Was Claimant's right hip replacement surgery causally related to his July 5, 2006 work injury?
2. If yes, to what workers' compensation benefits is he entitled?

**EXHIBITS:**

Joint Exhibit I: Medical records

**CLAIM:**

Medical benefits pursuant to 21 V.S.A. §640(a)

Temporary total disability benefits pursuant to 21 V.S.A. §642

Permanent partial disability benefits pursuant to 21 V.S.A. §648

Interest pursuant to 21 V.S.A. §664

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 and correspondence contained in the Department's file relating to this claim.
3. Claimant has worked as a cashier and stock clerk in Defendant's store for more than ten years. His duties include stocking shelves, running the cash register and cleaning the store.
4. Claimant's relevant prior medical history includes alcohol abuse, elevated liver function tests and fatty liver. Claimant had no history of right hip or buttocks pain prior to July 5, 2006.

### *Claimant's Work Injury and Ensuing Medical Treatment*

5. On July 5, 2006 Claimant was stocking a cooler at work. He bent down to lift a case of soda, twisted and felt a pop in his right hip. Thereafter, Claimant felt soreness and pain in his right hip and buttock. He continued working, however, and did not immediately seek medical treatment.
6. Over the next few weeks Claimant's pain gradually worsened. He began limping and found it hard to get up out of a chair. Because of his worsening symptoms, in August 2006 Claimant sought treatment with his primary care provider, Dr. Kiely. Of note, Claimant had seen Dr. Kiely two times in July for an unrelated medical problem, and had not mentioned any right hip or buttocks pain on either occasion.
7. Dr. Kiely initially diagnosed a muscle strain, and later suspected bursitis. Claimant's buttock pain abated with conservative treatment, but his right hip pain continued. X-rays taken in October 2006 revealed a declivity in Claimant's right femoral head that was suspicious for avascular necrosis.
8. Avascular necrosis is a condition involving the loss of blood supply to the hip. As the cells in that area lose nutrition and die, the top of the thigh bone, or femoral head, can collapse. The cause of avascular necrosis can be either traumatic or idiopathic. Alcoholism and liver disease are also significant risk factors.
9. Dr. Kiely expressed uncertainty as to whether there was any clear correlation between the x-ray findings suggesting avascular necrosis and Claimant's ongoing pain, and therefore referred him to Dr. Huber, an orthopedic surgeon, for further evaluation.
10. Dr. Huber first evaluated Claimant in March 2007. MRI testing confirmed his diagnosis of bilateral avascular necrosis, stage III-IV in the right hip (meaning that the femoral head had already collapsed) and stage I in the left hip (meaning that the femoral head was still intact but was at risk for collapse in the future).

11. Once the femoral head collapses, the only viable treatment is hip replacement surgery, which Dr. Huber performed on Claimant's right hip in July 2007. Where the disease has not yet progressed to causing the bone to collapse, however, as was the case with Claimant's left hip, a surgical procedure can be performed to support the underlying bone, increase blood flow to the area and save the femoral head. Claimant underwent this procedure on his left hip in January 2008.<sup>1</sup>
12. Dr. Huber estimated that ordinarily he would have expected Claimant to recover sufficiently from his right hip replacement surgery so as to be able to return to work within three to six months. In fact, at his November 9, 2007 follow up visit, approximately four months post-surgery, Dr. Huber reported that Claimant had progressed well and had no significant complaints in his right hip.
13. Unfortunately, Claimant's ability to return to work was delayed by his impending left hip surgery. At this point, all indications are that he has recovered well from that surgery. As of the date of the formal hearing, Claimant had not yet returned to work, although he was anxious to do so.

Expert Medical Opinions as to Causation

14. At Defendant's request, Claimant underwent an independent medical evaluation with Dr. Glassman in June 2007. Dr. Glassman is board certified in physical medicine and rehabilitation. His medical practice involves overseeing the care of injured workers with both acute and chronic conditions. He also performs independent medical evaluations to determine whether an injury or condition has been occupationally caused. Dr. Glassman is not an orthopedic surgeon and does not perform surgeries as part of his practice.
15. Dr. Glassman acknowledged that Claimant suffered a right hip strain as a result of his work activities on July 5, 2006. According to Dr. Glassman, however, this hip strain probably resolved shortly thereafter. In his opinion, it neither caused nor contributed to the collapse of Claimant's right femoral head, which was attributable instead to the natural progression of his pre-existing avascular necrosis. Dr. Glassman testified that the ongoing pain Claimant felt after August 2006 most likely was due to his underlying disease, not to any work-related hip strain. By extension, therefore, Dr. Glassman felt that Claimant's need for right hip replacement surgery was not work-related.
16. In support of his opinion, Dr. Glassman noted that Claimant's prior medical history included both alcoholism and fatty liver, two of the primary risk factors for developing the disease. Dr. Glassman also remarked that when avascular necrosis develops traumatically, it usually results from a fracture or dislocation, not from the type of lifting and twisting injury Claimant suffered.

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<sup>1</sup> Claimant acknowledges that his left hip surgery was in no way causally related to his July 2006 work injury, and is making no claim for workers' compensation benefits directly related thereto.

17. Dr. Huber disagreed with Dr. Glassman's analysis. Dr. Huber's training and experience contrasts in important respects from Dr. Glassman's. Dr. Huber is a board certified orthopedic surgeon. The focus of his practice is sports medicine, and he performs hip replacement surgeries regularly. By the same token, however, Dr. Huber typically is more concerned with diagnosing and fixing an injured joint rather than determining when or how it became so.
18. Dr. Huber acknowledged that it is impossible to discern, with any degree of medical certainty, when or how Claimant first developed avascular necrosis. In Dr. Huber's opinion, however, the lifting and twisting activity in which Claimant engaged at work on July 5, 2006 involved the type of trauma that ultimately caused his right femoral head to collapse. As a result, surgical hip replacement became necessary.

Procedural Posture of Claim

19. Defendant accepted Claimant's right hip strain as work-related and paid medical benefits accordingly. As Claimant did not miss any time from work until May or June 2007, shortly before his right hip surgery, no agreement for temporary total disability compensation was ever proposed, signed or approved.
20. On June 29, 2007 Defendant filed a Form 2 Denial of Workers' Compensation Benefits on the grounds that Claimant's avascular necrosis was not causally related to the previously accepted right hip strain injury. Shortly thereafter Defendant filed a Form 27 Discontinuance Notice, terminating its responsibility for medical benefits related to Claimant's avascular necrosis, including his right hip replacement surgery, effective July 6, 2007. The current appeal followed.

**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. Although the initial burden of proving compensability rests with the injured worker, once an employer accepts a claim as compensable the burden is on it to show that any subsequent discontinuance of benefits is proper. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974). That is the case here. Defendant contends that the injury it accepted as compensable – a right hip strain – had resolved by the time the condition that ultimately required surgery – the collapse of the femoral head in his right hip – occurred. In the end, however, whether the July 2006 work injury was appropriately diagnosed as a hip strain or not, Defendant has the burden of proving that it neither caused nor contributed to the need for hip replacement surgery.
3. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).
4. I find Dr. Huber's causation opinion to be more compelling than Dr. Glassman's, and I conclude, therefore, that Defendant has not sustained its burden of proof on the issue. In discounting the impact of Claimant's work-related injury, Dr. Glassman apparently concludes that it was mere coincidence that the femoral head in Claimant's right hip collapsed within weeks after suffering a painful right hip strain. I am not convinced of that. Rather, I agree with Dr. Huber's opinion that the mechanism of Claimant's work injury probably created sufficient trauma to cause the bone to collapse.
5. I conclude, therefore, that Claimant's right hip replacement surgery was causally related to his July 2006 work injury. Defendant is responsible for paying the associated medical expenses.
6. Defendant also bears responsibility for temporary total disability benefits covering the time Claimant was unable to work as a result of his right hip injury and hip replacement surgery. Although the evidence did not establish a specific date on which Claimant stopped working prior to his right hip surgery, it appears that the parties will be able to readily determine this fact.
7. Determining the appropriate end date for Claimant's causally related temporary total disability is more problematic, however. The issue is complicated by the fact that Claimant's return to work following his right hip surgery was delayed as a consequence of his decision to undergo left hip surgery. The latter surgery was undertaken to treat a condition that Claimant acknowledges was not work-related, and for which Defendant ought not to bear any responsibility, whether for medical benefits or for indemnity payments.

8. I find it appropriate that Defendant's responsibility for temporary total disability benefits should terminate as of November 7, 2007. Dr. Huber's examination on that date suggested that Claimant had recovered well from his right hip surgery by that time. Based on Dr. Huber's formal hearing testimony, it is reasonable to expect that Claimant would have been released to return to work at that point had his left hip surgery not already been planned.
9. Last, Defendant bears responsibility for whatever permanent partial disability is attributable to Claimant's right hip replacement. This has yet to be determined, however.
10. Claimant has submitted a request for costs totaling \$610.42 and attorney fees totaling \$9,000.00. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded. As for attorney fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded as well.

**ORDER:**

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

1. All reasonably necessary medical costs causally related to Claimant's right hip replacement surgery and associated treatment;
2. Temporary total disability benefits commencing on the date Claimant stopped working in anticipation of right hip replacement surgery and ending on November 7, 2007, plus interest on this amount in accordance with 21 V.S.A. §664;
3. Permanent partial disability benefits in an amount to be determined;
4. Costs totaling \$610.42 and attorney fees totaling \$9,000.00.

**DATED** at Montpelier, Vermont this 7<sup>th</sup> day of August 2009.

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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.