

Hunter v. Cersosimo Lumber (November 19, 2001)

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

State File No. M-07705

Henry Hunter

By: Margaret A. Mangan
Hearing Officer

v.

For: R. Tasha Wallis
Commissioner

Cersosimo Lumber/Liberty Mutual

Opinion No. 42-01WC

Hearing held in Brattleboro on May 24, 2001

Record closed on May 30, 2001

APPEARANCES:

Joseph C. Galanes, Esq. for the claimant

Eric A. Johnson, Esq. for the defendant

ISSUE:

1. Did the claimant suffer an injury at work on October 5, 1998 or is this claim a fabrication?
2. Did the claimant misrepresent his work capacity during the period of temporary total disability? If so, does he forfeit his claim to permanent partial disability and future medical benefits?

OFFICIAL DEPARTMENT FORMS:

1. Form 1, Employee's Claim and Employer First Report of Injury, for October 5, 1998 injury, reported October 9, 1998 and filed October 15, 1998.
2. Form 25, Wage Statement, filed February 17, 1999
3. Form 27, Notice of Intention to Discontinue Payments, approved November 22, 1999
4. Form 6, Notice and Application of Hearing filed by claimant on February 29, 2000.

EXHIBITS:

Joint I:	Medical Records
Joint II:	Time Cards
Defendant's A:	CD ROM: Racing
Defendant's B:	Written Results
Defendant's C:	Videotape: 8/22/99
Defendant's D:	Videotape: 8/29/99
Defendant's E:	Total Race Results
Defendant's F:	Absentee Reports

FINDINGS OF FACT:

1. At all times relevant to this action, Claimant Henry Hunter was an employee as that term is defined in the Vermont Workers' Compensation Act (Act).
2. At all times relevant to this action, Cersosimo Lumber Company, Inc. was an employer within the meaning of the Act.
3. Claimant began working at Cersosimo Lumber on or about August 17, 1998. He last worked at Cersosimo on October 9, 1998. He has not worked since.
4. As a precondition to his employment, the claimant underwent a physical examination at which time he reported that he had suffered a previous cartilage injury to his right knee and had occasional soreness. He was cleared for work. Although scheduled to work 40 hours per week, he typically worked only about 30 hours. The missed days were usually on a Friday or Monday.
5. In his first few weeks of employment, the claimant told coworkers Tom White and Myron Vose that he had injured his knee while riding a motorcycle and needed to have it worked on by a doctor. He showed them a swollen knee.
6. On Monday October 5, 1998 the claimant was guiding a strip of lumber onto a conveyor. A three inch by five inch by seven foot (3" x 5" x 7') piece of lumber called a "bunk" slid off the conveyor and struck the claimant on the left forearm. Claimant was standing on an 8" platform at the time.
7. Claimant noticed pain in his left forearm at that time. He did not report an injury that day. And he worked for several days afterwards.
8. Two days later, on October 7, 1998, the claimant loaded about a half cord of wood into his truck without difficulty.

9. Coworkers observed nothing unusual about the claimant's gait during the week claimant alleges he injured his knee.
10. On Friday, October 9 claimant's supervisor learned that the claimant had hurt his arm and wanted to go home.
11. On the following Monday, October 12, 1998, claimant advised his employer that he could not work. He was then directed to Dr. Bresnahan who saw the claimant that day. The doctor's notes reflect a history of a board hitting against the claimant's left arm and the twisting of the claimant's right knee a week earlier. The doctor's notes describe the claimant's right knee as being mildly tender, but having "no real swelling." Dr. Bresnahan referred the claimant to Dr. Jeffrey Hayer, an orthopedic surgeon in Greenfield, Massachusetts with whom the claimant had treated in the past.
12. On October 18, 1998 the claimant raced his motorcycle at Monson, Massachusetts.
13. At a visit to Dr. Hayer on November 2, 1998 the claimant reported a twisting injury at work. At that time, the examination of the knee showed "pronounced effusion" and an x-ray demonstrated profound arthritic damage. Dr. Hayer ordered an MRI, which revealed a subacute tear of the lateral meniscus, superimposed on degenerative arthritis. That tear occurred within three months, probably within a few weeks, of the visit to Dr. Hayer.
14. Cersosimo's insurance carrier, Liberty Mutual, investigated the claim by hiring an investigator to visit the site of the accident and interview several witnesses. Following the investigation, Liberty Mutual began paying medical benefits and temporary total disability benefits.
15. The claimant had a history of right knee problems and a preexisting osteoarthritis in that knee prior to October of 1998. Yet, at his deposition he denied having had knee problems before he started working for Cersosimo.
16. Medical records indicate that claimant initially told a physical therapist that he had no prior knee injuries, a statement she challenged and he retracted when she observed surgical scars on the knee.
17. Claimant is an avid motorcyclist who competes in hill races in Massachusetts, New York, Maine and Pennsylvania.
18. Since the claimant left his job on October 9, 1998 he was videotaped riding his motorcycle in various hill-climbing events. He never told any of his physicians about his cycling activities until after the videotapes had been disclosed and his benefits terminated.
19. The videotapes show the claimant riding up hills without difficulty and leaping off his bike during one crash sequence. He is depicted bending over, raking dirt and kick-starting his bike.

20. Claimant often missed physical therapy appointments on Fridays and Mondays on race weekends.
21. On June 28, 1998 the claimant crashed his motorcycle while driving up a rutted portion of track at a race in Caroga Lake, New York. On September 13, 1998 he crashed his motorcycle during a race at Monson, Massachusetts. On October 18, 1998, nine days after he left his job, the claimant participated in another race in Monson.
22. Claimant has videotapes of his racing activities that he has not produced despite requests.
23. Claimant wore a knee brace until March or April of 1999. Yet when he saw Dr. Wieneke for an insurance ordered medical examination in June of that year he was using a cane, wearing a brace and limping noticeably. He exhibited pain behaviors such as wincing, shrugging and short outcries that Dr. Wieneke determined were out of proportion to the examination.
24. On August 6, 1999 the claimant reported to his physical therapist that his activities of daily living were compromised by a decreased ability to walk, climb stairs, squat and run.
25. During that same month he was videotaped riding his motorcycle aggressively up sharp terrain. At one point, he leaped off the motorcycle as it shot from under him.
26. Dr. Wieneke determined that the claimant's presentation in his office was markedly different from what he observed on videotape.
27. On August 20, 1999 the claimant reported to a physical therapist that his knee was "killing" him. Two days later he traveled to Monson, Massachusetts where he participated in a hill climbing competition. The day after the race he was a "no show" for his physical therapy appointment.
28. On August 27, 1999 the claimant called and cancelled his physical therapy appointment because he had too much pain in his leg. On August 29, 1999 he participated in a hill climbing competition in Greenfield, Massachusetts. A videotape from that day shows him walking, bending, twisting, jump-starting and riding his bike. At a physical therapy appointment the next day he reported "increased soreness," although he did not mention the race the day before.
29. On September 8, 1999 claimant reported that his knee was very sore from the prescribed stationary "biking" and that standing and walking "really hurts." He cancelled his September 10, 1999 appointment because of an increase in his pain, despite his therapist's urging that he attend if only for pool exercises. On September 12, 1999 the claimant participated in a race in Monson, Massachusetts. When he returned to his therapist at the next appointment he mentioned that he had missed the pool therapy because of another commitment.

30. On September 17, 1999 the claimant reported that his knee really hurt and that it “bothers me to stand on it.” He then participated in a race in Tyler Hill, Pennsylvania on September 19, 1999. He missed his physical therapy appointment the next day.
31. Claimant continued to complain of a sore knee. He raced in Enfield, New Hampshire on October 3, missing the physical therapy appointments scheduled the Friday before and Monday after.
32. Claimant finished first overall in his class for the season in his motorcycle races.

Medical Testimony

33. Based on his physical examination, MRI, surgical findings and history of a twisting injury, Dr. Hayer concluded that the claimant suffered an acute injury that tore the cartilage in his knee and that the injury was superimposed on an underlying osteoarthritic condition. That conclusion is based on solid and persuasive evidence. When he examined the claimant, he noted marked swelling in the knee. He personally reviewed the MRI scan and observed the site during surgery. However, he also testified that the twisting injury occurred in the course of the claimant’s employment, a conclusion I cannot accept given this claimant’s less than credible history.
34. Dr. Hayer recalls that the claimant limped at each of the visits to him. That observation is at odds with lay observations and videotape evidence and is best explained by the claimant’s propensity toward exaggerating his condition when with physicians.
35. Considering the claimant’s lost range of motion, slight varus deformity and radiologic findings, Dr. Hayer concluded that the claimant has a 20% impairment to his right lower extremity, which equates to 8% whole person.
36. Dr. Kuhrt Wieneke, a board certified orthopedic surgeon, testified for the defendant in this case. He issued his initial report and opinion after taking a history from the claimant, reviewing his medical records and examining him, and then supplemented that opinion following his review of the videotapes. Dr. Wieneke diagnosed the claimant as suffering from a pre-existing degenerative condition of his knee and bilateral meniscal tears. In his opinion the meniscal tears predated the time of the alleged injury and were caused by the degenerative condition, not a specific injury.
37. Dr. Wieneke based his opinion on the complex nature of the tears, the severe maceration noted and the data gleaned from the MRI and operative reports. Furthermore, he explained that the bilateral nature of the tears suggests a degenerative process rather than an isolated event.

38. Dr. Wieneke, using the Fifth Edition of the AMA Guides to Permanent Impairment, assessed the claimant's impairment at 10% of the lower extremity, which equates to 4% of the whole person. He attributes the entire permanency to the claimant's pre-existing degenerative condition.

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). 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. 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 v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. The carrier in this claim paid benefits based on an initial investigation, although it never entered into a formal agreement with the claimant (Form 21) to pay temporary total disability benefits. Therefore, the burden is on the claimant to prove that a work-related accident occurred. If it is found that the claimant did not suffer an injury that arose out of and in the course of his employment as he alleges, the burden then falls to the defendant to prove that the claimant willfully made a "false statement or representation for the purpose of obtaining any benefit or payment ..." 21 V.S.A. § 708(a). Because the alleged conduct is analogous to civil fraud, the higher standard of clear and convincing evidence applies. See, *In re Smith*, 169 Vt. 162 (1999) (citing *Harrington v. Department of Employment and Training*, 152 Vt.446, 448-49 (1989); *Lyndonville Sav. Bank & Trust Co. v. Peerless Ins. Co.*, 126 Vt. 436, 439 (1967)).
4. From the beginning of this claim, virtually all-medical treatment providers assumed the claimant suffered a work-related injury. That was because the claimant told them that he had suffered immediate knee pain after falling off a platform after being struck by a piece of falling lumber.
5. However, once patterns emerged and more information became available, the credibility of the initial claim came into question.

6. Claimant's version of a work-related incident is not credible enough to be accepted without corroboration. No one witnessed the incident. He worked for a few days afterward. The initial physical examination revealed only slight swelling in the knee. Claimant claimed he was unable to work, yet raced his motorcycle. And it was after such a race that Dr. Hayer noted marked effusion in the knee. It would be no more than speculation to conclude that he suffered a work-related injury.
7. If the claimant had a traumatic tear of his meniscus as Dr. Hayer has opined, it is more likely that it was torn after he left the employ of Cersosimo Lumber.
8. Furthermore, there is clear and convincing evidence through the race results and videotapes that the claimant's abilities far exceeded what he portrayed to his physicians who excused him from work for medical reasons. Not until he was aware that the defense had the tapes did the claimant even tell his care providers that he was racing a motorcycle.
9. The evidence clearly shows that the claimant willfully misrepresented his condition. He was never entitled to the benefits paid and is not entitled to future benefits.

ORDER:

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

Dated at Montpelier, Vermont this 19th day of November 2001.

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 court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.