

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

	)	State File No. P-15612
	)	
Georgina Perez	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Travelers Insurance as Insurer	)	Commissioner
for Ames Department Stores, Inc.	)	
	)	Opinion No. 42S-02WC

**RULING ON MOTION FOR STAY**

Defendant moves for a stay of the October 28, 2002 decision in which this Department held that Claimant incurred a work-related injury and ordered the defendant to adjust the claim. Claimant opposes the motion. Ronald A. Fox, Esq. represent Claimant Georgina Perez. William C. Dagger, Esq. represents the Defendant, Travelers as Insurer for Ames Department Stores, Inc.

Any award or order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner, any appeal notwithstanding. 21 V.S.A. § 675. To prevail on its request in the instant matter, Defendant must demonstrate: (1) it is likely to succeed on the merits; (2) it would suffer irreparable harm if the stay were not granted; (3) a stay would not substantially harm the other party; and (4) the best interests of the public would be served by the issuance of the stay. *In re Insurance Services Offices, Inc.*, 148 Vt. 634, 635 (1987). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A. § 675(b); *Austin v. Vermont Dowell & Square Co.*, Opinion No. 05S-97WC (May 29, 1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (Sept. 20, 1988)). The granting of a stay should be the exception, not the rule. *Bodwell v. Webster Corporation*, Opinion No. 62S-96WC (Dec. 10, 1996).

After weighing all the evidence, this Department held that the more probable hypothesis was that Claimant's work-related incident accelerated the progression of her arthritis and, hence, was compensable under *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941). Defendant has not shown that a jury is likely to find otherwise. Nor has it proven that it will suffer irreparable harm if the stay is not granted, with medical bills subject to Rule 40 and attorney fees being the only outstanding payments at this point. The best interest of the public would be best served by prompt execution of an order that is part of what should be a speedy and inexpensive process. See, *Morrisseau v. Legac*, 123 Vt. 70 (1962); WC Rule 7.0000. It is unlikely that the Claimant in this action would suffer irreparable harm were the stay granted, but satisfaction of that single criterion is not sufficient for the Defendant to prevail on this motion.

THEREFORE, the defense motion to stay the order is DENIED.

Dated at Montpelier, Vermont this 30<sup>th</sup> day of December 2002.

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R. Tasha Wallis  
Commissioner

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Ames Dept. Stores, Inc.	)	Commissioner
	)	
	)	Opinion No. 42-02WC

Hearing held in Montpelier on April 22, 2002  
Record closed on May 17, 2002

**APPEARANCES:**

Ronald A. Fox, Esq. for the Claimant  
William C. Dagger, Esq. for the Defendant

**ISSUES:**

1. Did Claimant's left hip osteoarthritis arise out of and in the course of her employment with Ames Department Stores, Inc.?
2. If so, to what benefits is Claimant entitled?

**EXHIBITS:**

Claimant's Exhibit 1:	Medical records
Claimant's Exhibit 2:	Chronology of office visits by date
Claimant's Exhibit 3:	List of office visits by provider
Claimant's Exhibit 4:	Transcript of deposition of Robert LaFiandra, M.D.
Claimant's Exhibit 5:	Transcript of deposition of Benjamin Rosenberg, M.D.
Claimant's Exhibit 6:	Illustrations from Atlas of Human Anatomy by Frank H. Netter, M.D. (4 pages)
Defendant's Exhibit A:	Employee's Injury Report
Defendant's Exhibit B:	Hand written note from Claimant to Bev
Defendant's Exhibit C:	Ames Accident/Incident Documentation
Defendant's Exhibit D:	Ames Claim Report
Defendant's Exhibit E:	Handwritten letter to Ms. Greene (2 pages)
Defendant's Exhibit F:	Recorded Statement

## **FINDINGS OF FACT:**

1. At all times relevant to this action, Claimant was an employee and Ames Department Store, Inc. (Ames) her employer within the meaning of the Workers Compensation Act.
2. Claimant began working for Ames in April 1985. In October 1999, she worked in the lay-away department where duties involved walking up and down a flight of stairs many times a day to store items placed on lay away. In the process she handled merchandise weighing up to 50 pounds.
3. On or about October 20, 1999 Claimant incurred a work-related injury while moving a box containing a ready-to-assemble entertainment center. The injury occurred when she and coworker, Dannette Grant, were rearranging a stock room to make room for incoming freight. The two women were moving a box, which was almost six feet tall, about two feet wide and five inches deep. It was heavy, was standing on end and had plastic strapping around the middle. Claimant placed a hand on either side of the box and intended to push off on her left foot in order to move the box. In the process, she felt a pop in her left groin followed by a warm rushing sensation and weakness in her groin and upper thigh. Claimant finished her shift.
4. In response to supervisor Gingras's comment about her limping the next day, Claimant advised that she had hurt her leg the day before. Although she was still working, Claimant stopped doing the heavier work and minimized her time on stairs. She was allowed to do paperwork and had assistance with lifting heavy objects.
5. Claimant remained on the job for the duration of the busy Christmas season and did not see a physician for the injury until December 17, 1999 when she visited Dr. Robert LaFiandra for what was then believed to have been a groin strain. Dr. LaFiandra clearly documented Claimant's complaint of pain in her left thigh and groin and that she injured herself at work on October 19 or 20 when pushing a piece of furniture at work.
6. The Employer's First Report of Injury was signed on January 28, 2000 for a pulled left groin while moving furniture during the Christmas rush.
7. On a form completed on February 14, 2000 Claimant reported the she "[h]urt left groin when with a fellow worker was rearranging stockroom to hold lay-away furniture."
8. Ames accepted the claim for left groin strain and paid for medical treatment related to it.

9. Claimant has since been diagnosed with osteoarthritis in her left hip, which Ames denied as not related to the October 1999 injury.
10. Claimant continued to treat with Dr. LaFiandra for symptoms that were not resolving despite conservative treatment with anti-inflammatory medications and physical therapy. He then referred Claimant to Dr. Benjamin Rosenberg, an orthopedic surgeon, who also documented that Claimant's left hip and thigh pain began in October 1999 when she was moving a piece of furniture at Ames. Dr. Rosenberg took x-rays and diagnosed "early degenerative arthritis of the left hip, symptomatic following hip strain."
11. Defendant denied the compensability of any problem with the Claimant's hip.
12. Dr. Rosenberg explained that hip arthritis manifests itself with pain and stiffness in the hip as well as pain in the groin. He opined that the Claimant strained her hip at work and that the strain was sufficient to accelerate a pre-existing asymptomatic osteoarthritis.
13. Dr. LaFiandra has been a primary care internist for more than 30 years, during which time he has treated numerous patients with osteoarthritis. In June 2000, based on a history from the Claimant, his knowledge of her as a patient of several years and his knowledge and experience with the disease, he related her osteoarthritis to her work related incident of the previous October. In August 2000 he authorized her to go to work with restrictions on lifting, crouching and climbing.
14. Claimant's left hip osteoarthritis worsened over the next several months. By February of 2001 she noticed difficulty with simple activities such as getting up from a chair, going down stairs, getting in and out of a car and putting on shoes and socks. X-rays confirmed significant progression in the osteoarthritis in the left hip.
15. At the Defendant's request, Claimant presented to Dr. John Johansson for an independent medical examination. Dr. Johansson's practice is a non-surgical, orthopedic one with Champlain Sports Medicine. After reviewing her medical records and examining the Claimant, Dr. Johansson agreed that she has osteoarthritis, but does not believe it is related to her groin strain of October 1999. The only association between the two conditions in his opinion is that the groin strain prompted her to seek medical treatment that uncovered an underlying, previously asymptomatic, osteoarthritis. Based on x-rays, he opined that Claimant had osteoarthritis for at least six months to a year before it was diagnosed.
16. Claimant submitted evidence her attorney worked 71.70 hours on this case and expended \$489.75 in necessary costs.

## **DISCUSSION:**

1. Claimant argues that the work-related groin strain in October 1999 accelerated the onset of previously asymptomatic osteoarthritis. Her treating physicians, an internist who has treated her for years and an orthopedic surgeon who diagnosed the osteoarthritis, support that argument. Contrarily, defendant urges the Department to draw a sharp distinction between a groin strain and the osteoarthritis, which it argues are related only by the timing of a diagnosis, and deny this claim.
2. Dr. LaFiandra has known Claimant since 1995. He is an experienced internist, was the first physician to have treated the Claimant after her injury and referred her to an orthopedist when conservative treatment failed. He had all relevant medical records. Although he initially diagnosed only a groin strain, his observations over time led him to the diagnosis of osteoarthritis. His conclusion regarding causation is supported by his knowledge and experience with osteoarthritis generally and this claimant's experience specifically. Claimant was essentially asymptomatic prior to the October 1999. Her symptoms since that time are all in the left side and have progressed significantly, although there is no evidence that a comparable process has occurred on the other side of her body, adding further evidence to support Dr. LaFiandra's opinion. Dr. Rosenberg, the orthopedist to whom Dr. LaFiandra referred the Claimant concurs that Claimant's left hip strain aggravated a previously asymptomatic condition.
3. Dr. Johansson supports the defense position that Claimant's osteoarthritis pre-existed her October 1999 injury and that the work related injury had no impact on the arthritis. He examined the Claimant on referral from defense counsel, strictly in the context of this litigation. He reviewed all medical records, but examined the Claimant only once and did not have the opportunity to observe her over time.

## **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). She 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. If a pre-existing condition is aggravated or accelerated as a result of a work injury, then the condition is compensable. See, *Campbell v. Heinrich Savelberg, Inc.* 139 Vt. 31(1980).

4. When evaluating and choosing between conflicting medical opinion, this Department has traditionally considered several factors: whether the expert has had a treating physician relationship with the claimant; 2) the professional education and experience of the expert; 3) the evaluation performed, including whether the expert had all medical records in making the assessment; and 4) the objective bases underlying the opinion. *Yee v. International Business Machines*, Opinion No. 38-00WC (Nov. 9, 2000); see also *Tatro v. Town of Stamford*, Opinion No. 25-00WC (Aug.9, 2000).
5. In this case, the first factor supports the opinions of Dr. Lafiandra and Dr. Rosenberg who have had a treating physician relationship with this Claimant and observed her over time. Both are well qualified to give opinions in this case, with Dr. Rosenberg being the only orthopedic surgeon whose opinion has been offered. All physicians performed thorough evaluations, with none having any advantage over another with regard to the third criterion. The final criterion supports the opinions of Dr. LaFiandra and Dr. Rosenberg with the objective considerations including the Claimant's pre-injury state, post injury failure to improve, the anatomical proximity between the groin strain and hip osteoarthritis, and rapid progression of symptoms following the work-related incident.
6. On balance, therefore, the convincing lay and medical evidence combine to convince this trier of fact that the more probable hypothesis is that the work-related incident in October 1999 accelerated the progression of the Claimant's osteoarthritis. Therefore, under the law of *Burton*, 112 Vt. 17 and its progeny, Claimant has met her burden of proving a compensable claim.
7. As a prevailing Claimant, Ms. Perez is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law pursuant to 21 V.S.A. § 678(a) and WC Rule 10. The time spent litigating this case was reasonable when considering the expertise of counsel, necessity of expert depositions and hearing preparation and the costs submitted were necessary for the success in this matter. As such, Claimant is awarded the fees and costs requested.

**ORDER:**

Based on the Foregoing Findings of Fact and Conclusions of Law, Ames Department Store and Its Insurer are ORDERED to adjust this claim, including the payment of:

- 1) Permanent partial disability benefits once a rating has been established;
- 2) Medical bills associated with her left hip osteoarthritis;
- 3) Attorney fees of \$ 6,453 (71.7 x \$90.00 per hour) and \$489.75 in costs.
- 4) Interest at the statutory rate on unpaid compensation beginning 30 days after this decision is sent.<sup>1</sup>

Dated at Montpelier, Vermont this 28<sup>th</sup> day of October 2002.

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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.

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<sup>1</sup> Under 21 V.S.A. § 664, “[if] the claimant prevails at the hearing, the commissioner’s findings shall include the date on which the employer’s obligation to pay compensation under this chapter began.”