

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

)	State File No. P-274
)	
Timothy Massey)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
Wal-Mart)	Commissioner
)	
)	Opinion No. 08-01WC

Hearing Held in Montpelier on September 21, 2000.
Record Closed on October 9, 2000.

APPEARANCES:

James Jamele, Esq. for the claimant.
Glenn S. Morgan, Esq. for the defendant.

ISSUES:

1. Were claimant's hernias and the surgery to correct them the direct and natural result of his heavy lifting at Wal-Mart?
2. Were claimant's hernias and the surgery to correct them the direct and natural result of surgery for gun shot wound and inevitable without any contribution from the claimant's work at Wal-Mart?
3. If the claimant's hernias and the surgery to correct them arose out of and in the course of his employment with Wal-Mart, for what period of time, if any, was he disabled as a result? Did an intervening event(s) sever the causal link between the work-related injury and subsequent disability?

EXHIBITS ADMITTED:

Joint Exhibit I:	Medical Records.
Defendant's Exhibit A:	Form 5, dated filed August 20, 1999.
Defendant's Exhibit B:	Form 1, dated June 28, 1999, filed July 7, 1999.
Defendant's Exhibit C:	Form 10/10S.
Defendant's Exhibit D:	Associate's statement.
Defendant's Exhibit E:	Employee Questionnaire.
Defendant's Exhibit F:	Errata Sheet.
Defendant's Exhibit G:	3 x 5-index card (note by Greg Blair).

FINDINGS OF FACT:

1. The claimant began working at the Wal-Mart Store located at the Berlin Mall on November 11, 1998, before the store officially opened. At first, he did light carpentry and other work on the third shift to prepare the store for its opening. After the store opened, he continued on the third shift with duties that included unloading from trucks items weighing up to fifty pounds.
2. In 1989 the claimant had two surgical procedures for a gun shot wound to the abdomen. When he first noticed pain while working at Wal-Mart, he told Sherri Savage that he had discomfort at the site of the gunshot wound. In response, Ms. Savage offered the claimant light duty which he accepted. At that time, the claimant did not attribute the discomfort to work.
3. The claimant testified he began to notice abdominal pain while he was lifting cases of soda. He also testified he told Tom, his supervisor, that he had pain while lifting. Claimant continued to work.
4. On March 30, 1999 the claimant sought treatment for his pain at the Central Vermont Hospital (CVH) Emergency Department where David W. Butsch, M.D. treated him and recorded his tentative diagnosis of a hernia. Dr. Butsch instructed the claimant to avoid heavy lifting, not to work for 36 hours, to see him the following week, and to take prescribed pain medication as needed. The nursing note of that ER visit documents the claimant's report that "he does a lot of lifting at work." However, at that point no report of a work-related injury was filed.
5. The claimant returned to work, but his condition did not improve. Surgery to repair the hernia was recommended but put off because the claimant's mother passed away. Then, on May 24, 1999 Dr. Butsch repaired the hernia.
6. Not until after the May 24, 1999 surgery did the claimant officially report he had suffered a work-related injury. The claimant testified that his sister reported his claim to Wal-Mart sometime before the surgery, but Wal-Mart never processed the forms. With the lack of reliable corroborating evidence on this subject, I cannot accept the claimant's testimony about his sister's report, testimony that standing alone was not credible.
7. Wal-Mart denied this claim on the basis that the 9-year-old gun shot wound was the sole cause of the injury and it had no responsibility.
8. The claimant testified that he tried to go back to work, but was unable to perform his duties, which prompted Dr. Butsch to excuse him from work. However, the claimant also testified that he returned to Wal-Mart on light duty status, worked only a few days, then quit because "things were out of hand." He explained that he was upset with Wal-Mart's denial of the claim. I find that the claimant quit, not because he was unable to do the light duty work made available to him, but because he was angry with his employer.

9. The claimant testified that since the time of the injury he has tried unsuccessfully to find employment because of his injury.
10. Before the incident at issue in this case, the claimant had no problems with hernias.
11. On August 11, 1999, the claimant began working for E.F. Wall, but left that job in October 1999 because of transportation problems. Greg Blair, who has been with E.F. Wall for 20 years, testified that claimant justified leaving his job there for family reasons. On the errata sheet following his deposition, the claimant stated he might also have had hernia problems when he left E.F. Wall. He now works for Green Mountain Insulation.
12. The claimant seeks the payment of medical bills for treatment related to the hernia and temporary total disability benefits from March 30, 1999 to August 11, 1999 when he returned to work. The parties agree that the claimant has no permanent impairment.
13. David W. Butsch, M.D. is a general surgeon who trained at Roosevelt Hospital and Columbia in New York and has practiced in Vermont for 25 years. Abdominal surgery is his area of expertise. He testified that when he saw the claimant on March 31, 1999 for abdominal pain, he suspected either a hernia or peptic ulcer disease. When he diagnosed an incisional hernia on April 6, 1999 he expected to find a small incisional hernia from a defect in the previous scar. At the time of the May 24, 1999 surgery, he detected multiple defects in the claimant's previous surgical incision, which he repaired. He also inserted mesh.
14. Dr. Butsch testified to a reasonable degree of medical certainty that claimant's hernias were caused by the lifting he did at Wal-Mart. He based his opinion on his surgical experience, the history the claimant gave him, specifically that the claimant was lifting at work and had abdominal pain, and what he described as "perfectly logical cause and effect." Although the hernias occurred in the incisions created to repair the gunshot wound, the hernias were not due to the gunshot wound. The injury and surgery of eight years earlier may have weakened the abdominal area, but did not cause the hernias.
15. Almost a year after the first hernia repair, the claimant continued to complain of abdominal pain. Therefore on April 12, 2000, Dr. Butsch operated again. He excised a prominent area of scar tissue, thereby removing the source of nerve irritation and the claimant's pain.
16. Dr. Butsch testified the claimant's problem has been rectified and he should be able to return to work shortly.
17. Testifying for the employer was Milo F. Pulde, M.D., a board-certified internist. He is the medical director at Brigham and Women's Hospital and assistant professor at Harvard Medical School. Although he does not perform surgery, he explained that he "co-manages" patients with incisional hernias. He did not examine the claimant and opined that an examination would not have helped him form an opinion in this case. During his testimony he gave a detailed account of the records he reviewed, specifically noting that the March 1999 CVH note made no reference to a specific injury. Yet, as noted above, the nursing note from the emergency department visit in March of 1999 specifically referred to the claimant's

lifting at work. Dr. Pulde also referred to visits the claimant had in 1997 and 1998 for diffuse right lower quadrant pain and epigastric pain, implying that the claimant had signs of a hernia years ago. Yet, there is no suggestion in the notes to which he referred that the claimant's symptoms in 1997 and 1998 were related to a hernia.

18. Next, Dr. Pulde testified that factors contributing to the development of an incisional hernia are male gender, obesity, and smoking, suggesting that this claimant developed the hernia because he smokes. It is intraabdominal pressure, not physical exertion, Dr. Pulde explained, that causes hernias. Finally, he concluded that there is no relationship between the claimant's work at Wal-Mart and his need for a hernia repair. On cross-examination he conceded that it is possible that heavy lifting contributed to this claimant's hernia, although it is not probable.

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, Morse Co.*, 123 Vt. 161 (1963). He 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). This claimant has met his burden.
2. Although the claimant's testimony was not entirely credible in all aspects, his contemporaneous medical records, the description of his work duties and the expert opinions proffered in this case lead to the unmistakable conclusion that the claimant suffered incisional hernias out of and in the course of his employment with Wal-Mart. That the claimant's gun shot wound and related surgery made him more susceptible to the development of hernias is not a bar to this claim. It is "black letter law that an employer takes each employee as is, and is thus responsible under our workers' compensation law for an accident or trauma which disables one person but which might not disable another." *Petit v. No. Country Union High Sch.*, Opinion No. 20-98WC (Apr. 28, 1998); "[C]ompensation is not based on any implied warranty of perfect health or immunity from latent and unknown tendencies to disease which may develop into positive ailments if incited into activity by accidental injury received in the performance for the work for which he is hired." *Morrill v. Bianchi*, 107 Vt 80, 87-88 (1935).
3. Claimant's treating surgeon, Dr. Butsch, who has performed countless hernia repairs over his clinical career, supports this claim unequivocally. Although Dr. Pulde offered alternative explanations for how the hernias happened, those theories are consistent with the principle that a defendant takes a claimant as is. Furthermore, Dr. Pulde conceded that lifting could have caused the hernias in this claimant. Therefore, the more probable conclusion given all of the evidence is that the claimant's work caused his hernias.
4. Next, the claimant argues that he is entitled to temporary total disability benefits from March 30, 1999 to August 11, 1999. Because he has proven causation, he is entitled to temporary total disability benefits until he returned to work on light duty status in June 1999, but not beyond that time. That is because he left work voluntarily and not because he was unable to do the work. "The general rule is that a claimant who voluntarily quits his job for reasons having nothing to do with the injury is not entitled to temporary total disability

compensation." *Andrew v. Johnson Controls*, Opinion No. 3-93 (June 13, 1993) (citations omitted). The reason underlying the rule is that it is not the work injury that leads to a loss of earnings. To avoid harsh results, exceptions to this general rule have been carved out for a claimant who can demonstrate: 1) a work injury; 2) a reasonably diligent attempt to return to the work force; and 3) the inability to return to the work force or that a return at a reduced wage is related to her work injury and not to other factors. *Id.* at 9.

5. By the claimant's own testimony, light duty work was available to him at Wal-Mart. He left the job because he was angry at the denial, not because he could not do the work. The claimant has failed to prove that he made a reasonably diligent attempt to return to work before August of 1999.
6. Because the claimant has proven causation, he is entitled to medical benefits associated with the treatment of his hernias.
7. The employer's obligation to pay benefits began when it clearly had notice of the claim, on June 28, 1999, the date of the First Report of Injury (Form 1).

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, Wal-Mart is ORDERED to pay the claimant:

1. Medical benefits associated with the treatment of his hernias;
2. Temporary total disability benefits from March 30, 1999 until June, 1999, the precise date to be determined by the parties;
3. Interest at the statutory rate from June 28, 1999 until paid.

Dated at Montpelier, Vermont this 1st day of March 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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.