

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

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| |) | State File No. P-10252 |
| |) | |
| Marad M. Chaffee |) | By: Margaret A. Mangan |
| |) | Hearing Officer |
| |) | |
| v. |) | For: R. Tasha Wallis |
| |) | Commissioner |
| Waldenbooks, Inc. |) | |
| |) | Opinion No 27S-01WC |

RULING ON MOTION TO STAY ORDER PENDING OUTCOME OF APPEAL

Defendant by and through its attorneys, Kiel Ellis & Boxer, pursuant to 21 V.S.A. §675(b) moves to stay the enforcement of the Commissioner’s Order pending disposition of defendant’s appeal to the Washington Superior Court. Claimant by and through his attorneys, Diamond and Robinson, opposes the motion.

The test for a stay of judgment under §675(b) must be met in all four parts. Defendant must demonstrate that 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 a stay. *In re Insurance Services Office, Inc.*, 537 A.2d 134 (1987). If all four prongs of the test are not satisfied, then defendant's motion cannot succeed. See *Id.*

Underlying the decision in this case was a determination of credibility that a jury is not likely to assess differently than the hearing office. Therefore, defendant has not proven that it is likely to succeed on appeal. Nor has it shown that it would suffer irreparable harm by paying the benefits due in this case. Without proof of these two elements, the four-prong test cannot be met. Therefore, the request for a stay must be denied.

Dated at Montpelier, Vermont this 5th day of February 2002.

R. Tasha Wallis
Commissioner

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| Waldenbooks, Inc. |) | Commissioner |
| |) | |
| |) | Opinion No. 27R-01WC |

RULING ON DEFENDANT’S MOTION FOR RECONSIDERATION

Defendant, by and through its attorney, Andrew C. Boxer of Kiel Ellis & Boxer, moves for reconsideration of the Department’s August 20, 2001 decision, No. 27-01WC. Claimant, by and through his attorney, Steven P. Robinson, Esq. of Diamond & Robinson, P.C. opposes the motion.

In its Motion to Reconsider and Memorandum of Law defendant reiterates arguments made prior to the issuance of the decision in this case. Nothing new has been advanced. No error has been found. There is no basis for reconsideration.

Therefore, defendant’s Motion for Reconsideration is DENIED.

Dated at Montpelier, Vermont this 4th day of October 2001.

R. Tasha Wallis
Commissioner

Chaffee v. Waldenbooks, Inc.

(August 20, 2001)

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| Marad Chaffee |) | By: Margaret A. Mangan |
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| |) | For: R. Tasha Wallis |
| Waldenbooks, Inc. |) | Commissioner |
| |) | |
| |) | Opinion No. 27-01WC |

Hearing Held in Montpelier on February 14, 2001
Record Closed on April 2, 2001

APPEARANCES:

Steven P. Robinson, Esq. for the claimant
Andrew C. Boxer, Esq. for the insurer/employer

ISSUES:

Did the claimant suffer a hernia in the course of his employment with Walden Books?

EXHIBITS:

Claimant's 1: Trial Exhibits:

1. Medical Records
2. Personnel File
3. Time Sheets
4. Department Forms

FINDINGS OF FACT:

1. The exhibits are admitted into evidence.
2. At all times relevant to this action, the claimant, Marad Chaffee, was an "employee" and Walden Books his "employer" as those terms are defined in the Vermont Workers' Compensation Act and Rules.

3. On or about December 13, 1998 claimant began working for Waldenbooks at the Berlin, Vermont store. On March 11, 1999 the claimant became a "Senior Bookseller." During the month of November 1999 his primary responsibility was to sell books. However, he occasionally unpacked and lifted boxes. The company limit was 35 pounds.
4. The larger shipments, known as DC shipments, were delivered to the back of the store on Fridays. In October and November 1999, Jill Washburn, the Assistant Manager, unpacked the shipments, a job she usually completed the day of the delivery. In some instances, however, the unpacking continued for a few days. Boxes from those shipments were heavy, especially if filled with hardcover books, and were stacked six to seven high.
5. Neither Fontaine nor Washburn remembers asking the claimant to unpack boxes in October or November 1999. However, neither could say that the claimant did not unpack boxes.
6. A week or two before November 6, 1999 the claimant was lifting boxes when he felt a pop in his abdomen and noticed a bulge. He reported it to his superior, Dan Fontaine, then continued to work unaware that he had suffered a serious injury. Mr. Fontaine denies that the claimant ever mentioned a work-related injury to him.
7. Although Dan Fontaine did not usually work on Fridays, it was not at all unusual for him to stop into the store on his days off.
8. Mr. Fontaine and the claimant often talked about working out at a gym.
9. Claimant worked a full day on November 6, 1999. Although he focused most of his effort on selling books, he lifted some boxes of books that day.
10. During the evening of November 6, 1999 the claimant was taken by ambulance from East Montpelier to the Central Vermont Hospital's Emergency Room. Claimant told the Emergency Medical Technician (EMT) that he "had been doing heavy lifting today."
11. At the emergency room, claimant told the physician that he was at work lifting 15 to 40 pound boxes two weeks ago. And he told the nurse that the problem began two weeks earlier and had increased over the few weeks.
12. Claimant was released from the ER on November 7, 1999 with instructions to follow up with a surgeon.
13. On Monday, November 8, 1999 claimant telephoned Mr. Fontaine to say that he had a double hernia and would not make it to work that day. Fontaine put the claimant on sick time for two weeks.

14. When the claimant saw the surgeon Dr. Butsch on November 9, 1999 he reported, “while at work lifting boxes [he] noted painful lump above umbilicus—went to ER and Dr. Brown pushed it back in—still has a painful lump but it is smaller.” On November 10, 1999 the claimant had surgery to repair his hernia.
15. A few days later, the claimant went to the store to obtain a worker’s compensation form to complete and file. Mr. Fontaine told him to go to Burlington to get one, although according to Ms. Washburn, there were forms at the Berlin store. At the hearing, Mr. Fontaine conceded that he had determined the claimant was not entitled to workers’ compensation benefits because he believed the claimant had injured himself at a gym.
16. Although the claimant had gym memberships in the past, he did not have one in October and November 1999.
17. Two weeks after his surgery and before the claimant’s surgeon had released him for work, the employer terminated the claimant for “job abandonment.”
18. On December 13, 1999 the claimant filed a Form 5, Employee’s Notice of Injury and Claim for Compensation in which he wrote, “I was lifting heavy boxes everyday. Noticed one day that a pulling very sharp and painful sensation [was] coming from my abdomen.”
19. Dan Fontaine, as store manager, signed the First Report of Injury dated December 22, 1999. The form recited the claimant’s claim that while lifting heavy boxes, he noticed a pulling, sharp painful sensation in his abdomen. On that form, Mr. Fontaine mentioned nothing about claimant’s working out a gym.
20. Claimant submitted evidence that his attorney sent 51.5 hours on this case and incurred \$347.75 in costs.
21. Benefits due the claimant if this claim is found to be compensable have not yet been quantified.

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. Claimant’s assertion that he suffered a hernia in the course of his employment at Walden

Books is supported by the EMT, emergency room and Dr. Butsch's notes, although no one witnessed an accident or can recall the claimant's mentioning one. An ambulance was called to East Montpelier. Claimant did not have a gym membership at the time of the injury. All credible evidence supports the claimant's position.

4. No credible evidence was produced to substantiate the defense position that the claimant injured himself at a gym or in any non work-related way. Although Mr. Fontaine testified that the claimant told him he had been injured at a gym, Fontaine never recorded such a statement contemporaneously with its alleged occurrence. Nor did he include it on the First Report he prepared. His bias against this claimant is blatant. He refused to give the claimant a worker's compensation from, instead insisting that the claimant drive to Burlington to get one. Fontaine brought his testimony into alignment with his personal determination that this is not a compensable claim. The facts prove otherwise.
5. Having prevailed in this case the claimant is entitled to reasonable attorney fees as a matter of discretion and costs as a matter of law. 21 V.S.A. § 678. He is awarded \$347.75 in costs. At his request, fees at 20% of the total award are due 30 days after a precise determination of the benefits due has been established.

ORDER

Based on the Foregoing Findings of Fact and Conclusions of Law, I find that the claimant suffered a compensable claim at Walden Books in October or November 1999. Accordingly, the parties are ORDERED to determine and the employer is ORDERED to pay all benefits due.

Dated at Montpelier, Vermont this 20th day of August 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.