M. H. v. I.R.O.C., Inc. (February 6, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

M. H.	Opinion No. 05-08WC
v.	By: Jane Gomez-Dimotsis Hearing Officer
I.R.O.C., Inc	For: Patricia Moulton Powden Commissioner
	State File No. X-59722

OPINION AND ORDER

Hearing held in Montpelier on October 4, 2007
Record closed on October 22, 2007

APPEARANCES:

Mark Kolter, Esq. for Claimant
Keith Kasper, Esq. for I.R.O.C., Inc. and First Comp. Insurance

ISSUES:

Whether the Claimant's Deep Vein Thrombosis (DVT) and left thigh hemorrhage arose out of his work related injury and are compensable. Also, what is the correct whole person impairment?

EXHIBITS:

Joint Exhibit 1 – Medical Records
Claimant's Exhibit 1 – 4
Deposition Testimony of Dr. Christopher Rickman

CLAIM:

Claimant seeks payment of all medical benefits associated with his deep vein thrombosis and left thigh hemorrhage, an award of permanency in the amount of 5% whole person and if successful, an award of attorney's fees and the costs of litigation. All compensation benefits payable for the left hip fracture itself have been paid except for the 3% whole person impairment found by Dr. Bucksbaum for the continued risk of DVT. The permanency

impairment rating was 2% for the hip impairment, which is included the Claimant's request for a total of 5% whole person permanent impairment.

STIPULATED FACTS:

1. On March 5, 2006, Claimant was an employee of Defendant within the meaning of the Workers' Compensation Act.

2. On March 5, 2006, Defendant was the employer of Claimant within the meaning of the Workers' Compensation Act.

3. On March 5, 2006, Claimant suffered a personal injury by accident arising out of and in the course of his employment with Defendant resulting in a broken left hip.

4. On March 5, 2006, Claimant had an average weekly wage of $576.92 resulting in an initial compensation rate of $384.63.

5. On March 5, 2006, and at all times relevant thereafter, Claimant had one dependant.

6. Claimant underwent surgery at Boston Medical Center for his broken left hip on March 9, 2006.

7. On May 11, 2006, Claimant was laid off by Defendant due to a lack of funding for his position.

8. Claimant was found to be at medical end result by Dr. Tornetta and a Form 27 filed effective July 31, 2006.

9. On August 17, 2006, Claimant suffered a deep vein thrombosis (DVT) in his left thigh, resulting in hospitalization.

10. On November 17, 2006, Claimant was evaluated at Claimant's request by Dr. Mark Bucksbaum for a permanency evaluation resulting in a finding of medical end result and a permanent impairment of 2% whole person for the loss of range of motion for the left hip fracture and a 3% whole person impairment rating for Claimant's DVT and left thigh hemorrhage.

11. On November 20, 2006, Claimant was again hospitalized due to a left thigh hemorrhage resulting in further surgery.

12. The sole issue for resolution in this matter is whether Claimant's DVT and left thigh hemorrhage were caused by the March 6, 2006 work related injury.

FINDINGS OF FACT:

1. The Department takes judicial notice of all forms filed in this case.

2. Claimant has been wheelchair-bound and a T-10 paraplegic for the past twenty years due to a motorcycle accident in 1988.

3. On March 5, 2006, Claimant was wheeling from the parking lot to his place of work when his wheelchair was suddenly halted by a snow hidden threshold between the parking lot and the sidewalk.

4. The impact caused Claimant to fall out of his wheelchair and land on his hip.

5. At the time, Claimant heard a pop, but felt no pain due to his paralysis.

6. Claimant got into his chair and began his work day but began to feel ill. He secured a replacement for himself at work and left. He remained in bed for two days and then went to North Country Hospital Emergency Room where he was diagnosed with an intertrochanteric fracture, a broken left hip.

7. Claimant was referred to the Boston Medical Center for surgery to repair his hip. Surgery was performed on March 9, 2006. Orthopedic hardware was installed in his femur.

8. Claimant was prescribed Lovenox as a prophylaxis for DVT until March 21, 2006 when he was advised to take aspirin. Claimant discontinued this practice after several weeks.

9. Claimant experienced significant swelling for at least two months after the surgery and could not fit in his wheelchair and thus, was bedridden until May. He never regained his full activity level prior to the DVT and resulting bleed.

10. In June, Claimant was able to return to his wheelchair full-time.

11. On July 18, 2006 Claimant's doctor in Boston declared him at medical end result and released him to return to work full-time.

12. No further prophylaxis for DVT was prescribed to Claimant at that time.

13. On August 13, 2006 Claimant noticed his left leg was beginning to swell again and was hot to the touch. This is less than a month after being found at medical end result.

14. On August 17, 2006, Claimant called the local hospital and spoke with a nurse who suggested that he might be suffering from DVT and Claimant went to the emergency room where an ultrasound test confirmed DVT.

15. Claimant was prescribed Lovenox and Coumadin, blood thinners, to help resolve the problem. Claimant remained on Coumadin until November 21, 2006. On the 21st of November, Claimant experienced an arterial bleed or left thigh hemorrhage. His local hospital did not have the correct blood to keep the Claimant alive so he was airlifted to Dartmouth Hitchcock Medical Center. Both Dr. Bucksbaum and Claimant's treating physician of two years, Dr. Christopher Rickman, found the bleed the direct result of taking blood thinners for the DVT. Surgery to stop the bleed was performed and Claimant was given a Greenfield filter which is inserted to filter blood clots before they reach major organs, thus, eliminating the need for blood thinners.

16. There are numerous medical records from Dartmouth Hitchcock Medical Center regarding the hematoma or blood clot in the Claimant's thigh. All the records state that the clot was the result of blood thinners taken after the DVT which occurred after surgery. In addition, Dr. Christopher Rickman clearly stated in his deposition that no one can be sure exactly how long after surgery the elevated risk for a DVT lasts.

17. The parties' experts presented opposing medical opinions as to what caused the DVT. Claimant's primary treating physician, Dr. Christopher Rickman, through his deposition testimony, stated that the DVT was caused by the hip fracture, the repair of the fracture and his long period of immobility following surgery. The Claimant did not possess other risk factors for DVT, such as being a smoker or a family history of DVT. He did, as we know, have one pre-existing factor in that he was in a wheelchair due to his paraplegia. Dr. Rickman is certified in internal medicine and is very familiar with Claimant's case. He saw him regularly for the two years prior to the fracture and after. He was very clear that the DVT was the result of the fracture and the hemorrhage was caused by the treatment for the DVT which are blood thinners.

18. Dr. Rickman did his internship at Dartmouth Hitchcock Hospital and received his medical degree from the University of Pennsylvania. His opinions were given to a degree of medical certainty.

19. The immobility and inactivity after the surgery of the hip fracture is a known risk factor for DVT. Dr. Rickman was also familiar with the Claimant's activity level prior to his fracture which he described as above average. The Claimant was very active at his employment which involved sporting events, such as wheelchair basketball and other sports. He also enjoyed riding his ATV and snowmobile. He was able to lift himself from his wheelchair to the examining table. He had a 60 to 70 hour a week work schedule. He was also active with his son, and did housework like vacuuming, dishes, bathroom cleaning and floor washing.

20. The Claimant appears fit and to have the upper body of a body builder.

21. Unfortunately, his hip surgery left him largely on bed rest for months. Although by June he was out of bed and back in his wheelchair, and by August he was able to resume some of his activities. The Claimant was never able to fully resume his prior activity level.

22. Dr. Mark Bucksbaum is specifically trained and experienced in managing medical care for patients with paraplegia as well as a Certified Independent Medical Examiner. Dr. Bucksbaum is a biomedical engineer as well as being certified in physical medicine and rehabilitation, the specialty that trains doctors to deal with all areas related to patients with spinal cord injuries. Also, due to his bioengineering training, he is a specialist in fluid dynamics which, to him, is the essence of this case.

23. Dr. Bucksbaum performed a detailed permanency evaluation and physical examination of the Claimant on November 17, 2006. He found the DVT to be a direct result of his compensable injury. In his testimony, Dr. Bucksbaum listed an unbroken chain of events which he stated came together to cause the Claimant's DVT. In addition to the risk factors already related, Dr. Bucksbaum pointed to the insertion of hardware in Claimant's hip as a contributing fact to Claimant's DVT. Dr. Bucksbaum opined that any device placed in the thigh puts additional pressure on surrounding blood vessels. He stated the callous which developed over the hardware in the Claimant's thigh also added to the risk for DVT, as did the prolonged swelling from surgery and post injury recuperation. Dr. Bucksbaum opined that six of the seven risk factors for DVT were present in the Claimant's case and were all related to the work injury. Dr. Bucksbaum believed one of the reasons the Claimant had been able to avoid blood clots after almost twenty years since the onset of his paraplegia was the high activity level he maintained prior to his surgery for his work related accident. The seventh risk factor was that Claimant had paraplegia and was in a wheelchair.

24. Dr. Bucksbaum stated that the fracture had occurred in the same compartment of the injured left thigh as the DVT implying the relationship between the fracture and the deep vein thrombosis.

25. Dr. Backus, the expert Defendant hired to do a medical record review, is also a highly qualified certified Independent Medical Examiner. He does not, however, have the same level of expertise as Dr. Bucksbaum dealing with spinal cord injury patients. He opined that the fact that Claimant was wheelchair-bound immobilized his legs which caused his DVT. Immobilization is a major risk factor for DVT. He did not consider the hip fracture sustained at work or other risk factors from Claimant's surgery as a cause of Claimant's injury. Dr. Backus did not consider the high level of activity that Claimant engaged in prior to his work injury particularly significant when made aware of it during his testimony. Dr. Backus did not physically examine the Claimant because he believed a physical evaluation after a DVT would provide no further insight into the causation issue.

26. Dr. Bucksbaum determined that Claimant had a permanency rating of 2% for loss of motion and a 3% rating for a condition requiring perpetual maintenance and treatment through medication or a device. He determined the whole person permanency impairment was 5% based of the AMA Guides. Dr. Backus did not address this issue except to say that he did not believe that the Claimant had suffered further risks due to the surgery beyond the three-month period. He did, however, admit that it is conceivable that some alteration of his physiology from the fracture and surgery decreased activity level or something particular to his physiology could have contributed to his risk for DVT.

27. Of particular note to Dr. Backus was that the DVT occurred more than five months after his work-related injury. Dr. Backus opined that the literature regarding this issue introduced through Dr. Bucksbaum did not support a significant increased risk for DVT approximately five months after surgery. According to Dr. Backus's reading of the literature, after three months recuperation from surgery, there is a decreased risk for DVT. Dr. Backus also disagreed that the surgical hardware increased Claimant's risk for DVT and, as previously stated, he did not believe that the previous high activity level of the Claimant was significant, since he could not move his legs. He discounted any increased blood circulation that the exercise provided. The article introduced by Dr. Bucksbaum did not refer to the insertion of hardware as a risk factor. Dr. Rickman also agreed in his deposition that he was not aware that the insertion of hardware itself would have increased the risk for DVT, but he believed, more importantly, it was the surgery and trauma that increased the risk.

28. All of the doctors gave their opinions to a degree of medical certainty. The Department recognizes that all of the doctors are qualified to give expert opinions in this case.

29. Of significance to Dr. Rickman, the treating physician was the fact that the Claimant had no problem with blood clots prior to his surgery for almost twenty years. All the doctors agreed that lack of physical activity and immobility, such as a bed rest and the surgery itself, are all factors that could contribute to DVT. A major point of disagreement was whether the length of time after the surgery impacted the likelihood of the Claimant having DVT and the bleed and therefore, their relationship to the work injury.

30. The article introduced by Dr. Bucksbaum was not written by him but used to explain the risk factors for DVT. The article, John Heit et al, *Risk Factors for Deep Venous Thrombosis and Pulmonary Embolism,* 160 Archives of Internal Medicine, 811-13 (March 20, 2007), stated that DVT mainly affects veins in the lower leg and thigh and quantified risk percentages. Dr. Backus stated the study referred to was limited to 90 days after surgery and there was no life long risk associated with the risk except the Claimant being in a wheelchair. The major risks listed are prolonged sitting, bed rest, recent surgery – particularly of the hip, and fractures. Dr. Bucksbaum added additional factors he felt were important based on his experience and expertise. He also stated that the point of the article was to quantify lifetime risk factors. He stated the 90 day limitation was for those participating in the study and did not limit the results of the study to 90 days. The Department finds him credible on these issues due to his expertise, training and experience caring for persons with paraplegia.

31. Dr. Bucksbaum measured range of motion and thigh measurements in his examination. He found Claimant's left thigh larger than the right due to the hardware inserted and callous which formed over the injury site. Dr. Bucksbaum noted that the Claimant was at risk for hemorrhage due to his use of blood thinners after his DVT. At the time of his examination, three days prior to the Claimant's bleed, Dr. Bucksbaum recommended having a Greenfield filter inserted as opposed to using blood thinners. The filter prevents blood clots from reaching vital organs.

32. Dr. Christopher Rickman, the Claimant's treating physician stated that "without the fracture (from the work injury), he (the Claimant) would not have developed deep vein thrombosis. Without deep venous thrombosis, he (the Claimant) would not have had a spontaneous bleed which required hospitalization and transfer to a tertiary care center" in his letter dated March 20, 2007.

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 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 trier of fact may not speculate as to an obscure injury which is beyond the ken of laymen. *Laird v State Highway Dept*., 110 Vt. 981 (1938). If the Claimant's injury is obscure, expert testimony is needed as the sole means of laying a foundation for an award. *Lapan v. Berno's Inc.,* 137 Vt. 393 (1979).

4. Expert medical testimony is required to make the causal connection between employment, an injury and the benefits sought. *Martin v. Woodridge*, Op. No. 11-97WC (June 13, 1997).

5. When determining the weight to be given to expert opinions in a case, the Department has looked at several factors: (1) whether the expert has had a treating physician relationship with the claimant; (2) the professional's qualifications, including education and experience; (3) the evaluation performed, including whether the expert had all the relevant medical records in making the assessment; and (4) the objective basis underlying the opinion. *Yee v. International Business Machines*, Op. No. 38-00WC (November 9, 2000).

6. In this case, factors 1and 2 are most relevant. Dr. Rickman is the treating physician and saw him regularly for at least two years. Therefore, the Department does give Dr. Rickman's opinion some additional weight. Dr. Rickman was very clear that he believed the DVT and results from that condition were as a result of the Claimant's compensable accident. Dr. Mark Bucksbaum agreed and gave detailed testimony as to why he held this belief. Dr. Bucksbaum's testimony is also given some additional weight since he specializes and is certified in the care of paraplegics and is a biomedical engineer. He agreed with Dr. Rickman that Claimant's DVT and hemorrhage were the direct result of his work injury. Only Dr. Backus disagreed and his familiarity with the patient was through records only. This, in itself, is not critical to the case because it was not necessary to physically review the patient months after the injury had occurred in this type of case but Dr. Backus did not seem as aware of all of the facts as the other doctors. Thus, the treating physician and Dr. Bucksbaum's opinions are found to be the most credible and comprehensive.

7. Although Defendant raises some arguments about Dr. Bucksbaum's testimony being unsupported by an article submitted by him on DVT, Defendant's argument is not persuasive. First, Dr. Bucksbaum is an expert in this area of medicine and is found to be credible. Regardless of whether the hardware put in place had any negative effect, both Dr. Rickman and Dr. Bucksbaum credibly determined that Claimant's subsequent problems after his compensable fall were the result of the fall. Dr. Backus disregarded the entire trauma that Claimant underwent simply because the problem with DVT occurred longer than 90 days after surgery and he was wheelchair-bound prior to the accident.

8. Dr. Bucksbaum found the Claimant was at total medical end on November 21, 2006 when the Greenfield filter was installed. The Department finds him the most credible on this issue.

9. The Department finds, as did Dr. Rickman, the Claimant's treating physician and Dr. Bucksbaum, that "without the fracture (from the work injury), he (the Claimant would not have developed deep vein thrombosis. Without deep venous thrombosis, he (the Claimant) would not have had a spontaneous bleed which required hospitalization and transfer to a tertiary care center" in Dr. Rickman's letter dated March 20, 2007.

10. The Department finds, based on Dr. Bucksbaum's testimony, that the Claimant has a permanent whole person disability of 5%.

ORDER:

Based on the foregoing findings and conclusions, the Commissioner orders the claim to be adjusted as follows:

1. The Claimant will receive payment for all medical costs related to his DVT and left thigh hemorrhage which are now determined both reasonable and necessary and as a result of his work injury in the course of his employment;

2. The Claimant will receive 5% whole person impairment permanency benefits;

3. Attorney's fees for 118.45 hours will be awarded at the $90.00 per hour rate pursuant to the department's fee schedule. Paralegal costs will be awarded for 19.10 hours at the $60.00 per hour rate pursuant to the department's fee schedule. Costs will be awarded if properly adjusted. The Department's fee schedule for Independent Medical Examiners is $300.00 per hour. The rates requested are beyond the scope of the rules which the Claimant's attorney is already aware of. The request for costs should be adjusted and resubmitted to both opposing counsel and the Department within thirty days.

4. Interest is awarded pursuant to the relevant statutory rates.

DATED at Montpelier, Vermont this 6th day of February 2008.

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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.