

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Rebecca Collins

Opinion No. 22-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

State of Vermont

For: Anne M. Noonan
Commissioner

State File No. AA-03636

OPINION AND ORDER

Hearing held in Montpelier, Vermont on March 29, 2011

Record closed on April 29, 2011

APPEARANCES:

Kelly Massicotte Esq., for Claimant

William Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Was Claimant's right hip injury causally related to her April 13, 2009 work accident?
2. If yes, to what workers' compensation benefits is she entitled?

EXHIBITS

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Dr. Weiss consultation, June 16, 2009

Claimant's Exhibit 2: *Curriculum vitae*, George White, M.D.

Claimant's Exhibit 3: Excerpted sections of *AMA Guides to the Evaluation of Permanent Impairment, 5th ed.*

Defendant's Exhibit A: Deposition of John Johansson, D.O., November 30, 2010

Defendant's Exhibit B: *Curriculum vitae*, John Johansson, D.O.

Defendant's Exhibit C: Medical records prior to April 13, 2009

Defendant's Exhibit D: M. Groh and J. Herrera, *A Comprehensive Review of Labral Tears*, Current Review of Musculoskeletal Medicine 2:105-117 (2009)

Defendant's Exhibit E: Denial of Workers' Compensation Benefits (Form 2)

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642

Temporary partial disability benefits pursuant to 21 V.S.A. §646

Permanent partial disability benefits pursuant to 21 V.S.A. §648

Medical benefits pursuant to 21 V.S.A. §640

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.
3. Claimant works for Defendant as a probation and parole officer. Her duties include supervising convicted offenders on parole, probation and house arrest status. This often involves conducting field checks on offenders at their homes.
4. Claimant is a physically active person. She enjoys running, golf, tennis hiking, biking and other activities.

Claimant's April 13, 2009 Work Injury

5. On April 13, 2009 Claimant traveled in her car to Milton, Vermont to perform a field check at a client's home. Upon arrival she parked in the driveway, which was somewhat slanted, then exited the car and proceeded to the house. She knocked on the door, and as she was waiting for the client to open it she glanced back and saw that her car was rolling backwards down the driveway. Claimant ran to her car and positioned herself behind it, with her left shoulder against the rear end and her right leg braced as an anchor, but the car kept rolling. Over the next few moments, she tried repeatedly to re-anchor her right leg, but as the car picked up speed its force continued to jerk her down the driveway. Finally she stepped aside and watched as the car rolled across the road, through a ditch and into a neighbor's yard.
6. Claimant was understandably shaken by this incident. Nevertheless, she retrieved her car and drove back to her office. Her right leg was hurting and shaking, in what she described as a "weird body sensation." Claimant reported the incident to her supervisor, worked the remainder of the day, then went home and iced her ankle, which seemed to be hurting the most.
7. The next day Claimant presented to her primary care provider, Dr. Dill, complaining of right ankle pain. Dr. Dill diagnosed a right ankle sprain and prescribed ice, elevation and an air cast for up to one month. She also advised Claimant not to run for two weeks.

8. Dr. Dill's office note does not reflect that Claimant complained of any pain in her right hip at the time of her April 14th examination. Claimant does not recall if she did so or not. She was focused on her right ankle at the time because that was where she was experiencing the most pain.
9. In keeping with Dr. Dill's advice, Claimant refrained from running until early May. By then her ankle pain had improved and so she resumed her routine. With running, however, Claimant noticed that she was experiencing a deep, sharp pain in her right hip and groin.
10. Claimant's hip pain continued through May and June 2009. During this time she self-treated with ice and ibuprofen. She also altered her exercise routine by running more slowly and for less distance. Regardless of her activity level, however, her pain did not abate. Getting into and out of her car was painful, as was walking up and down inclines and arising from a sitting to a standing position.
11. Claimant did not play golf at all in May 2009. In June she played three or four times. Her hip bothered her when she did so, but the activity did not make it any better or worse.
12. On June 16, 2009 Claimant consulted with a pulmonologist, Dr. Weiss, for treatment of a persistent cough. According to Dr. Weiss' office note, Claimant reported that she had been experiencing right hip pain for the past five weeks, which significantly increased whenever she coughed. This disclosure dates the onset of Claimant's hip pain back to mid-May 2009, approximately four weeks after the April 13, 2009 incident and within a week or so of when she resumed running.
13. On July 6, 2009 Claimant returned to see Dr. Dill. This time she reported that she had been experiencing right hip pain since the April 13th incident with her car. Claimant reported that she did not think golf aggravated her hip, but that she was a "cripple" when she ran. Dr. Dill recommended an orthopedic evaluation.
14. Coincidentally, on the same day that she saw Dr. Dill Claimant also had a previously scheduled appointment with her orthopedist, Dr. Frenzen, who was following her for an unrelated issue. Dr. Frenzen suspected that the mechanism of Claimant's April 2009 injury, which involved torque, or rotation against resistance, might have caused a labral tear in her hip.
15. Diagnostic imaging studies confirmed Dr. Frenzen's suspicions. The studies revealed that that the labrum in Claimant's hip – the rim of cartilage that provides support and stability to the joint – had either torn or separated from the acetabulum, or socket part of the hip. Claimant underwent surgery to repair the separation on October 15, 2009. Thereafter, she was totally disabled from working through November 10, 2009. At that point she returned to work part-time (four hours per day). On December 2, 2009 she returned to full-time, full-duty work.

Expert Medical Opinions as to Causation

16. Both parties presented expert medical testimony as to the causal relationship, if any, between the April 2009 incident and the labral separation in Claimant's hip. Dr. White concluded that such a relationship existed. Dr. Johansson concluded that Claimant's recreational activities were a more likely cause.
 - (a) Dr. White
20. Dr. White is board certified in occupational medicine. He has performed thousands of independent medical evaluations, for both claimants and employers. He also is well experienced in rating permanent impairment. Dr. White saw Claimant for an independent medical examination on August 30, 2010. He also reviewed her medical records and diagnostic imaging studies.
21. To a reasonable degree of medical certainty, Dr. White concluded that Claimant's right hip injury was causally related to the April 2009 incident. His opinion was based primarily on the mechanism of her injury on that day. Even as she attempted to use her right leg as an anchor, the car kept rolling backwards. This forced her to constantly reposition her leg as it was jerked repeatedly out of place.
22. Dr. White found support for his causation theory in the surgical findings. These revealed only one localized area of injury in Claimant's right hip, in the upper front part of the joint. Had the hip been arthritic, there likely would have been evidence of degeneration throughout the joint.
23. Dr. White discredited Claimant's exercise activities, either running or golf, as causative factors. Based on his review of the sports medicine literature, neither golfers nor runners are at increased risk for labral injuries to the hip. Tears of this type are not easily recognized, and symptoms can be vague and difficult to diagnose. It is neither unusual nor inappropriate, therefore, for a person to continue to engage in exercise even with a labral tear. As Dr. White noted, Mike Lowell, a professional baseball player, played an entire season with a tear in his labrum. A recreational athlete will not inflict further damage by continuing with activities to the extent that he or she can tolerate the discomfort.
24. Dr. White also was not troubled by the fact that Claimant did not complain of hip pain until some weeks after the April 2009 incident. Initially she felt the most pain in her ankle, and thus was distracted from her hip pain until the ankle began to improve. In Dr. White's experience, this type of reaction is not uncommon among patients. Once she became aware of her hip symptoms, Claimant gave a consistent history of her complaints to other providers. Given this history, and with no prior history of right hip pain or injury, the April 2009 incident thus became the most likely causative event.
25. I find Dr. White's analysis as to the causation of Claimant's labral separation to be credible in all respects.

26. According to Dr. White, surgery is the treatment of choice for labral injuries of the type Claimant suffered. He determined that Claimant had reached an end medical result as of the date of his examination, August 30, 2010. Dr. White rated the extent of Claimant's permanent impairment at 8% whole person.

(b) Dr. Johansson

27. Dr. Johansson, an osteopath, is board certified in family medicine. His current practice is approximately 75% clinical work and 25% forensic work. At Defendant's request, Dr. Johansson saw Claimant for an independent medical examination on December 1, 2009. He also reviewed Claimant's medical records, though he acknowledged that this was not a "totally comprehensive review."

28. According to Dr. Johansson, the medical evidence does not support a causal relationship between the April 2009 incident and Claimant's hip injury to the required degree of medical certainty. In reaching this conclusion, Dr. Johansson pointed to two factors – first, the fact that Claimant did not complain of hip pain until some time after the April 2009 incident, and second, the fact that she was an avid runner, golfer and recreational athlete. According to Dr. Johansson, these activities provided a more likely explanation for Claimant's labral separation than the April 2009 incident.

29. As to the first factor, Dr. Johansson pointed to Dr. Dill's July 6, 2009 office note, almost three months after the April 2009 incident, as documenting Claimant's first complaint of hip pain. In fact, however, Dr. Weiss' June 16, 2009 note provides the first indication of hip pain. Given the emphasis that Dr. Johansson placed on the timing of Claimant's first report of hip pain, for him to have missed this reference is troublesome.

30. Dr. Johansson also found significant the fact that even after the April 2009 incident Claimant still was able to engage in running, hiking and golf activities. In support of his opinion that these activities most likely caused or contributed to Claimant's labral separation, Dr. Johansson referenced a medical journal article that examined the cause of such injuries.¹ According to the authors of that article, the area of the hip in which Claimant's tear occurred is subjected to greater stress than other regions, which explains why more tears occur there. At the same time, however, the authors conceded that trauma can cause tears in that region as well. With that in mind, I find that the article fails to provide substantial guidance as to the cause of Claimant's tear.

31. Dr. Johansson acknowledged that the mechanism of injury that Claimant described in conjunction with the April 2009 incident could cause the labral separation that her surgery later revealed. He maintained that Claimant's recreational activities were a more likely cause, however.

32. Dr. Johansson did not perform a permanent impairment rating referable to Claimant's hip injury.

¹ M. Groh and J. Herrera, *A Comprehensive Review of Labral Tears*, Current Review of Musculoskeletal Medicine 2:105-117 (2009).

Procedural History of Current Claim

33. Upon learning of the April 2009 incident, Defendant accepted Claimant's right ankle sprain as compensable and paid medical benefits accordingly.
34. Claimant did not file a claim for benefits referable to her hip injury until mid-August 2009. She attributed the delay first, to her attempts to self-treat her symptoms and second, to being distracted by other personal issues with which she was struggling during that summer. I find her explanation in this regard to be credible.
35. In September 2009 Defendant denied the compensability of Claimant's hip injury as not causally related to the April 2009 incident. Claimant appealed the denial. Upon reviewing the available medical evidence, on September 30, 2009 the Department determined that Defendant's denial was not reasonably supported. It ordered Defendant to pay temporary total disability and medical benefits accordingly.
36. In early October, Defendant noticed Claimant's deposition. Claimant was unrepresented at the time; she had contacted her current attorney but had not yet received definitive word back as to whether the attorney would take the case. Claimant telephoned Defendant's attorney a day or two before the scheduled deposition and asked that it be rescheduled until she could confirm legal representation. It is unclear whether Defendant's attorney responded. Shortly thereafter, Claimant's current attorney decided to take the case. She also contacted Defendant's attorney as to rescheduling the deposition but again, it is unclear whether Defendant's attorney responded.
37. Claimant did not appear for the noticed deposition. On those grounds, Defendant filed a Notice of Intention to Discontinue Payments (Form 27), in which it sought to discontinue all workers' compensation benefits effective October 16, 2009. As the Department did not rule on the discontinuance, Defendant terminated benefits accordingly.
38. In December 2009 Defendant filed a second Form 27, this time discontinuing medical benefits on the basis of Dr. Johansson's conclusion that Claimant's hip injury was not causally related to the April 2009 incident. The Department approved this discontinuance effective December 29, 2009.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she 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). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. The disputed issue in this claim is one of causation. Claimant asserts that her right hip injury resulted from the April 13, 2009 incident. Defendant argues that the injury was caused by the physically active lifestyle she has maintained for some time.
3. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).
4. Both of the experts here were independent medical examiners, not treating physicians. Both examined all of the pertinent records, and both were qualified to render opinions as to causal relationship.
5. Dr. Johansson admitted that his review of Claimant's medical records was not "totally comprehensive," and this might explain why he missed Dr. Weiss' June 16, 2009 reference to Claimant's report of hip pain. Dr. White's evaluation contained no such gaps. On those grounds I conclude that it was more comprehensive.
6. I conclude as well that Dr. White's opinion was clearer, more thorough and better supported than Dr. Johansson's. He appropriately analyzed the mechanism of Claimant's injury in the context of her non-contributory medical history. He also reviewed the medical literature and found no studies establishing any connection between labral tears and either running or golfing. Having done so, he persuasively established the causal connection between the April 2009 incident and Claimant's hip injury.
7. I conclude that Claimant has sustained her burden of proving that her right hip injury was caused by the April 2009 incident and is therefore compensable.
8. As for Defendant's discontinuance of benefits on account of Claimant's failure to attend her noticed deposition, neither the statute nor the rules justify this. The statute does allow for benefits to be suspended when a claimant fails to attend an independent medical examination. 21 V.S.A. §655 and Workers' Compensation Rule 14.5500. Even were I to interpret this section to encompass a claimant's failure to attend a deposition, however, the circumstances here would not justify Defendant's discontinuance. Claimant's failure here occurred at a very early stage of the proceedings, with prior notice to Defendant's attorney and with no demonstrable prejudice resulting.
9. As Claimant has prevailed on her claim for benefits, she is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e) Claimant shall have 30 days from the date of this opinion to submit her claim.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Temporary total disability benefits from October 15, 2009 through November 11, 2009, in accordance with 21 V.S.A. §642;
2. Temporary partial disability benefits from November 12, 2009 through December 2, 2009, in accordance with 21 V.S.A. §646;
3. Permanent partial disability benefits as compensation for an 8% whole person impairment referable to the right hip, in accordance with 21 V.S.A. §648;
4. Interest on the above amounts calculated in accordance with 21 V.S.A. §664;
5. Medical benefits covering all reasonable and necessary medical services and supplies causally related to treatment of Claimant's right hip injury, in accordance with 21 V.S.A. §640; and
6. Costs and attorney fees in amounts to be determined in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 8th day of August 2011.

Anne M. Noonan
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.