STATE OF VERMONT
DEPARTMENT OF LABOR

Wayne LaHaye

v.

Kathyôs Caregivers

Opinion No. 05-18WC

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. HH-53523

OPINION AND ORDER

Hearing held in Montpelier on November 17, 2017
Record closed on December 26, 2017

APPEARANCES:

Charles L. Powell, Esq., for Claimant
Keith J. Kasper, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant at an end medical result for his September 9, 2015 compensable low back injury and, if so, what is his permanent impairment, if any?

2. Is Claimantôs left hip condition causally related to his compensable work injury?

3. Was Claimantôs hip replacement surgery a reasonable medical treatment?

4. Is Claimant at an end medical result for his hip injury and, if so, what is his permanent impairment, if any?

5. Did the *Employer's Notice of Intention to Discontinue Payments* filed on August 17, 2016 comply with the applicable provisions of the Vermont WorkersôCompensation statute and rules?

6. Did Defendant accept the compensability of Claimantôs left hip injury by failing to challenge causation in a timely manner?

EXHIBITS:

Joint Exhibit I:	Medical records; Mark LaHaye deposition (August 25, 2017); Wayne Moschetti, MD deposition (August 31, 2017); Cintya Alves, RN deposition (September 6, 2017)
Joint Exhibit II:	Stipulation, November 17, 2017
Joint Exhibit III:	Amended Stipulation, December 18, 2017

Defendantôs Exhibit A: *Curriculum vitae*, Verne Backus, MD, MPH

CLAIM:

Temporary and permanent disability benefits pursuant to 21 V.S.A. §§ 642, 646 and 648;
Medical benefits pursuant to 21 V.S.A. §640(a); and
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 his employer as those terms are defined in the Vermont Workersô Compensation Act. *Joint Exhibit II,* Stipulation, ¶¶ 1-2.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Departmentôs file relating to this claim, including the following: *Agreement for Temporary Compensation* (Form 32) approved by the Department on November 13, 2015; *Employer's Notice of Intention to Discontinue Payments* (Form 27) filed on August 17, 2016 and approved by the Department on September 26, 2016; and *Denial of Workers' Compensation Benefits* (Form 2) pertaining to Claimantôs request for preauthorization for a total hip replacement filed on July 13, 2016.

3. Claimant is a 60-year-old man who resides in Sharon, Vermont. He grew up in Maine, worked on a dairy farm after high school, and then began working as a clam digger and lobsterman. In 1980 he moved to New Hampshire and took a highway job with Pike Industries. The following year, he began a twenty-year career with White River Paper Company. He subsequently worked as a salesman and delivery driver for a gourmet coffee company.

4. In 2006 Defendant hired Claimant as a full-time caregiver for a series of clients.

5. Prior to his work injury, Claimant engaged in hunting, fishing, golfing and gardening. He enjoyed cooking family dinners and playing with his grandchildren. He credibly testified that he had no history of back pain, buttock pain or hip pain before September 9, 2015.

6. At the time of his injury, Claimant had an average weekly wage of $968.04, resulting in an initial compensation rate of $645.36. *Joint Exhibit II*, Stipulation, ¶ 4. At all relevant times, he had no dependents. *Id.*, ¶ 5.

Claimant's Work Injury and Subsequent Medical Course

7. Claimant cared for the same client for several years. She was a resident of Hanover, New Hampshire, but she spent two months every summer in Maine. Claimant prepared her meals, did her laundry, helped her bathe and generally provided the care she needed.[1] Every July, he would help her move to Maine, and every September, he would help her move back to New Hampshire.

8. On September 9, 2015, Claimant sustained a work-related injury while lifting a cooler. *Joint Exhibit II*, Stipulation, ¶ 3. Claimant and his client were preparing for their return from Maine. He packed her belongings and placed them in his SUV, leaving room for a large cooler. He then placed her refrigerated food items into the cooler, which weighed about 30 pounds fully loaded. Claimant dragged the cooler outside and over to his SUV; the client was already inside the vehicle, waiting to get underway. Claimant bent over and picked up the cooler. As he rose, he pivoted to one side to place the cooler inside his vehicle. As he did so, he experienced severe pain in his back, buttocks, leg and groin. The pain was so severe that he fell to his knees.

9. After a moment, Claimant managed to stand up and continue working. He had a 103-year-old woman in his vehicle who needed to get home, and there was no one to help him. Accordingly, he drove three hours to the clientôs home in New Hampshire and then called Defendant to report his injury. Defendant suggested he see a chiropractor.

10. The next day, Claimant saw chiropractor James McGlinn. Dr. McGlinn could not perform any manipulations due to swelling, so he recommended that Claimant return for treatment the next week. When Claimant returned, Dr. McGlinn noted that his back was ñstill very badò and suggested he see a medical doctor.

11. Claimant went to the Dartmouth-Hitchcock Emergency Department on September 14, 2015, complaining of low back and buttock pain. Staff administered pain medications. Claimant then found a primary care physician at Dartmouth-Hitchcock Medical Center, internal medicine physician Gregory Rosic, MD. Dr. Rosic described pain in Claimantôs low back, left leg and buttock. He diagnosed severe muscle strain and referred him to physical therapy.

12. On September 21, 2015, physical therapist Andrew Casey of Cioffredi & Associates evaluated Claimant for pain in his low back and left gluteus. Mr. Casey noted that Claimant had pain donning and doffing footwear and rising from a seated position. On September 24, 2015, Mr. Casey recorded that Claimant engaged in increased muscle guarding of his left piriformis muscle.[2]

13. On September 27, 2015, Claimant was in his kitchen preparing a family dinner. He pivoted to his left to reach the silverware drawer. That twisting motion reproduced the sharp groin pain that he first experienced on September 9, 2015 while lifting the cooler.

[1] The client received 24-hour care and had other caregivers in addition to Claimant.

[2] The piriformis muscle connects the lower spine to the femur. Its function includes rotating the hip.

14. On September 30, 2015, medical case manager Cintya Alves, R.N. contacted Claimant. He told her about his pain, and she recorded his statement in her case managerôs notes: ñPain is worse on lower back and left hip, but not reaching below the knee.ò *Joint Exhibit I*, at P542. Ms. Alves credibly testified that there was no discussion indicating that Claimantôs hip pain might have come from a separate injury or incident. *Id.*, at P682.

15. Claimantôs medical records document his symptoms not long after the cooler incident:

- Physical therapy notes on September 21, 2015 include: ñdifficulty sitting and standing . . . donning/doffing his pants, socks and shoes, performing sit-to-stands.ò *Joint Exhibit I*, at P29.

- Dr. Rosic noted on October 2, 2015 that Claimantôs left hip was very sore after walking a short distance. *Joint Exhibit I*, at P40.

- Physical therapy notes on October 5, 2015 include: ñPatient reports that his lower back and hip feel very sore.ò *Joint Exhibit I*, at P44.

- The physical therapist noted on October 28, 2015 that Claimant ñcanôt stand up for more than ten min[utes] before hip and back hurt.ò *Joint Exhibit I*, at P61.

- The physical therapist noted on November 17, 2015 that Claimant ñhad discomfort in the left hip all session.ò *Joint Exhibit I*, at P77.

- The physical therapist noted on December 22, 2015 that Claimant ñcontinues to have increased left glute/hip pain with step ups.ò *Joint Exhibit I*, at P118.

All of these symptoms indicate hip pathology. *See* Finding of Fact Nos. 18, 47, 51 and 56 *infra***.**

16. Despite four months of physical therapy, Claimantôs pain increased. In January 2016, Dr. Rosic ordered a pelvic x-ray, which showed degenerative changes in both hips and a loose body in the left hip. On February 19, 2016, Dr. Rosic released Claimant to return to work on light duty, but Defendant did not have any suitable work within those restrictions.

17. In March 2016 Claimant saw an occupational medicine physician assistant, Jean Strawbridge, at Dartmouth-Hitchcock Medical Center. She noted continuing low back and hip pain. On her recommendation, Claimant underwent a left sacroiliac (SI) joint injection, which provided no pain relief.

18. In April 2016 Claimant saw orthopedic physician Adam Pearson, MD at Dartmouth-Hitchcockôs Spine Center. Dr. Pearson noted left buttock and groin pain, and severe left hip pain on internal rotation and flexion. He noted:

> [H]is physical exam points to the left hip as the source of his pain. His symptoms of startup pain and difficulty with stairs and donning and doffing his footwear on the left are more consistent with a hip problem than a spine problem . . . . I am going to refer him to see one of the hip providers in Orthopaedics. They may choose to pursue a left hip joint injection to see if that gives him some relief, both for diagnostic and therapeutic purposes. In the event they think the hip is not the source of his symptoms, he could always consider a left L2-L3 transforaminal epidural steroid injection, also for diagnostic and therapeutic purposes.

Joint Exhibit I, at P186. Dr. Pearsonôs office note reflects the difficulty of distinguishing between low back pain and hip pain. Even after concluding that Claimant likely had hip pain, he left open the possibility that the pain generator was his back, not his hip.

19. Claimant underwent a diagnostic left hip injection in May 2016. The injection provided good pain relief.

20. On May 26, 2016, Claimant saw occupational medicine physician Karen Huyck, MD, at Dartmouth-Hitchcock. Dr. Huyck recommended that he follow up on his hip injection with the orthopedics department. She also recommended a pain medicine evaluation of his low back to see whether he should undergo diagnostic lumbar spine medial branch blocks. *Joint Exhibit I*, at P208-10.

21. Claimant followed up on the hip injection with orthopedic surgeon Wayne Moschetti, MD, on June 13, 2016. Dr. Moschetti diagnosed hip pathology and recommended a hip replacement. On September 8, 2016, he identified ñsevere osteoarthritisò in Claimantôs left hip, and on September 14, 2016, he performed a successful total hip replacement. *Joint Exhibit I*, at P335 and P344-48.

22. In December 2016 Claimant saw pain management physician David Dent, D.O., at Dartmouth-Hitchcock for his low back pain. Dr. Dent performed diagnostic lumbar spine medial branch blocks in January 2017, which identified areas of Claimantôs lower spine as pain generators. Dr. Dent then performed a radiofrequency ablation procedure in March 2017, which successfully relieved Claimantôs low back pain.

23. On July 6, 2017, Claimant returned to work part time for a different employer, delivering firewood and mowing football and soccer fields with a gang reel mower.[3] Between that date and the hearing date, he earned $3,882.34 from this employment. *Joint Exhibit II*, Stipulation, ¶ 8. On September 6, 2017, vocational rehabilitation services were closed at Claimantôs request. *Joint Exhibit II,* Stipulation, ¶ 9.

[3] A gang reel mower is a professional grade mower with multiple reels, allowing a large field to be mowed more quickly than with a single reel mower.

24. In September 2017 Claimant saw Dr. Huyck again. She noted that the beneficial effects of the radiofrequency ablation had diminished over the previous six months and recommended that he undergo a repeat procedure. Claimant underwent another radiofrequency ablation in November 2017 and credibly testified that it improved his pain and function.

Expert Medical Opinions Regarding Claimant's Low Back Injury

25. The parties presented conflicting expert testimony as to whether Claimant has reached an end medical result for his accepted low back injury and, if so, the extent of his permanent impairment.

(A) Karen Huyck, MD

26. Dr. Huyck earned a Ph.D. in cellular and molecular biology at the University of Vermont in 2003 and graduated from the UVM College of Medicine in 2004. She also-holds a Masterôs Degree in Public Health from Harvard University. She is board certified in occupational and environmental medicine and has a clinical and research practice at Dartmouth-Hitchcock Medical Center. In her clinical practice, she evaluates and treats injured workers, performs functional assessments and permanent impairment ratings, and assists with return to work planning. Dr. Huyck is one of Claimantôs treating physicians.

27. Dr. Huyck placed Claimant at an end medical result for his back and hip injuries on November 9, 2017. Her practice is not to determine end medical result status separately for each injured body part, but rather to determine when a patient has reached an end medical result for his entire work-related injury.

28. Dr. Huyck testified that if a patient has been disabled from work for a substantial period of time from a musculoskeletal injury such as the one Claimant suffered to his low back, she generally delays assessing end medical result until the patient has been back to work for at least three months. Her purpose in doing so is to see whether the patientôs condition will still respond to the same treatments once he or she is working. If so, then she will place the claimant at an end medical result three months thereafter. If not, then she will further delay making an end medical result determination.

29. Applying this methodology to Claimantôs circumstances, Dr. Huyck testified that he returned to work in July and underwent another successful radiofrequency ablation on October 26, 2017. She therefore concluded that even after returning to work, Claimantôs low back condition was still responding to the same treatment. She thus determined that he was at an end medical result by November 9, 2017.[4]

[4] Dr. Huyckôs practice is to wait two weeks after a radiofrequency ablation to determine whether the procedure was successful. Claimant reported to her on November 9, 2017 that he obtained a good result from the October 26, 2017 procedure.

30. Dr. Huyckôs opinion concerning end medical result for Claimantôs back injury did not reference the standard set forth in the Vermont Workersô Compensation Act. Further, she did not explain how her methodology would work in a situation where the patientôs prospect for returning to work was unknown, or where his or her condition reached a substantial plateau well before returning to work. These omissions render her opinion incomplete and unclear.

(B) <u>*Mark Bucksbaum, MD*</u>

31. Dr. Bucksbaum graduated from St. Georgeôs University School of Medicine in 1984 and completed a residency in physical medicine and rehabilitation at the Albert Einstein College of Medicineôs Montefiori Center in 1988. He is board certified in physical medicine and rehabilitation and is also a board certified independent medical examiner. Dr. Bucksbaum is the Medical Director of the Pain Management Clinic at Cox Medical Center in Springfield, Missouri.

32. At Claimantôs request, Dr. Bucksbaum performed independent medical examinations of him on July 26, 2016 and April 21, 2017. Each examination included an interview, a medical records review and a physical examination.

33. In July 2016 Dr. Bucksbaum noted that Claimant was still experiencing significant low back pain, and he anticipated that Claimant would undergo additional physical therapy and/or interventional procedures. Therefore, in Dr. Bucksbaumôs opinion, Claimant was not at an end medical result at that time. I find this analysis credible.

34. Dr. Bucksbaum saw Claimant again in April 2017. He noted in his report that Claimant had undergone a successful radiofrequency ablation procedure in March 2017 and concluded that his condition was stable, with no further recovery or restoration of function expected. He accordingly placed Claimant at an end medical result for his low back condition on April 21, 2017. In his opinion, Claimant would need ongoing pain management treatment for his low back injury, but such treatment would not be inconsistent with his end medical result status. *Joint Exhibit I*, at P507. I find Dr. Bucksbaumôs opinion on this issue to be well-founded, clear and credible.

35. Dr. Bucksbaum assessed Claimantôs lumbar spine with a six percent whole person permanent impairment under the *AMA Guides to the Evaluation of Permanent Impairment (5th ed.)* (ñ*AMA Guides"*). Using the diagnosis-related estimate (DRE) methodology, he placed Claimantôs spine injury in DRE Category 2, as set forth in Table 15-3 of the *AMA Guides*. This category provides for a range of impairment from five to eight percent, with five being the minimum core rating for this category. Dr. Bucksbaum started with the core rating and added one percent based on the moderate impact of Claimantôs injury on his activities of daily living. I find this analysis clear and persuasive.

(C) Verne Backus, MD

36. Dr. Backus graduated from Dartmouth Medical School in 1993 and is board certified in occupational medicine. He completed his residency at Harvard, where he also obtained a Masterôs Degree in Public Health. Dr. Backusô current practice focuses on independent medical examinations.

37. At Defendantôs request, Dr. Backus performed an independent medical examination of Claimant on July 19, 2016. The examination included an interview, a medical records review and a physical examination.

38. Dr. Backus found Claimant to be at an end medical result for his back injury on July 19, 2016 based on his conclusion that Claimant had reached a plateau and that no further treatment for his low back injury was likely to alter that plateau. He testified that any subsequent treatment that Claimant received since July 2016 did not change his opinion.

39. Dr. Backusô opinion failed to take into account the substantial improvement in pain and function that Claimant realized from the March 2017 radiofrequency ablation. Accordingly, I find that his opinion is not well-supported by Claimantôs medical history.

40. Dr. Backus rated Claimant with a five percent whole person impairment referable to his lumbar spine based on the *AMA Guides*. He used the same methodology as Dr. Bucksbaum, placing Claimant in DRE Category 2. Within that category, Dr. Backus assessed the minimum five percent impairment, finding that the ñmajorityò of the pain limiting Claimantôs activities derived from his hip, not his low back.

41. Although Dr. Backusô overall methodology is clear and well-founded, he failed to take into consideration Claimantôs continuing low back pain in determining the precise rating under DRE Category 2. Dr. Backusô testimony that the ñmajorityò of Claimantôs pain and disability stemmed from his hip condition implicitly concedes that at least some of his pain and disability were related to his low back injury. Dr. Backus failed to account for that pain and the resulting mild or moderate disability. This omission weakens his opinion.

42. Defendant has paid Claimant permanent partial disability benefits in accordance with Dr. Backusô five percent whole person impairment rating referable to his spine. *Joint Exhibit II*, Stipulation, ¶ 7.

Expert Medical Opinions Regarding the Cause of Claimant's Left Hip Condition

43. The parties presented conflicting expert testimony as to whether Claimantôs left hip condition was causally related to the September 2015 cooler-lifting incident.

(A) Dr. Bucksbaum

44. In Dr. Bucksbaumôs opinion, Claimantôs left hip condition is causally related to the September 2015 work injury to a reasonable degree of medical certainty. He identified the mechanism of injury as the twisting motion Claimant undertook when he lifted the cooler and pivoted to place it in his vehicle. Dr. Bucksbaum explained that the bodyôs piriformis muscle, which rotates the hip, connects from the lumbar spine to the femur. Thus, a twisting motion involves both the lower back and the hip. I find this explanation credible.

45. Dr. Bucksbaum further testified that, although diagnostic imaging showed pre-existing degenerative joint disease in both hips, Claimantôs condition was asymptomatic prior to the September 2015 injury. Thus, in his opinion, the twisting injury aggravated Claimantôs underlying condition. Dr. Bucksbaumôs written report identified four factors that he considered in his analysis:

- There was a specific new incident as opposed to a gradual worsening of a condition.
- [Claimant] was asymptomatic with respect to his left hip prior to the 9/9/2015 work injury and did not actively treat prior to the injury in question.
- The left hip injury in question does not represent a natural progression of the underlying condition. As Dr. Backus noted, the expected age for his condition leading to surgery is 70-79. [Claimant] is 58 years old.
- [Claimant] was working on an unrestricted full-time basis with respect to his low back and left hip prior to the 9/9/2015 work injury. He has been unable to return to work since the 9/9/2015 work injury.[5]

Joint Exhibit I, Dr. Bucksbaumôs April 21, 2017 report, at P588.

46. Dr. Bucksbaum emphasized that both of Claimantôs hips had underlying degenerative joint disease that was asymptomatic before September 2015. Following the work incident, only his left hip became symptomatic. In his opinion, this indicates a causal relationship between the twisting injury and the left hip. Further, imaging studies identified a loose body in the left hip joint that had broken off Claimantôs femur. In his opinion, that also is not typical of a natural progression.

[5] Dr. Bucksbaum first identified these factors in his July 2016 report. *Joint Exhibit I*, at P564. At that time, Claimant was unable to return to work due to his injury. The fact that he later returned to work did not change Dr. Bucksbaumôs analysis.

47. Dr. Bucksbaum testified that it is often hard to differentiate between hip pain and back pain. Even though Claimantôs treating physicians focused on his lower back for months, he had symptoms indicative of a hip injury from the beginning, including difficulty with donning and doffing footwear, left hip pain with sidestepping, start-up pain when rising from a chair, and difficulty with stairs. Thus, there was also a temporal relationship between the cooler-lifting incident and Claimantôs hip symptoms. I find Dr. Bucksbaumôs analysis to be clear, well-documented and persuasive.

(B) *Dr. Huyck*

48. In Dr. Huyckôs opinion, it is more likely than not that Claimantôs left hip condition is causally related to the September 2015 lifting incident at work. *Joint Exhibit I,* at P511. In her opinion, twisting injuries commonly affect both the backôs facet joints and the hip joint, and she agreed with Dr. Bucksbaumôs causal analysis, as set forth in his July 2016 report.

49. Dr. Huyck further testified that she applies the Bradford Hill criteria[6] in determining causation of medical conditions. For musculoskeletal injuries, the four most relevant criteria are a reliable patient, a clear mechanism of injury, a temporal relationship and plausibility.

50. Dr. Huyck found Claimant to be a reliable reporter of his symptoms. She found the twisting incident, with its impact on the facet joints and the hip joint, to be a strong mechanism of injury. With regard to plausibility, she opined that there is no better explanation for Claimantôs unilateral hip pathology.

51. Due to the delay in diagnosing Claimantôs hip injury, Dr. Huyckôs testimony focused largely on the temporal relationship between the work incident and Claimantôs hip symptomology. She referenced the September 21, 2015 physical therapy notes, which document symptoms consistent with hip pain, including left gluteal pain, difficulty with stairs, discomfort when donning and doffing footwear, and start-up pain when rising from a chair. She also cited tenderness in the left gluteal area and markedly decreased left hip flexion strength as symptomatic of hip pathology. Thus, Dr. Huyck found sufficient evidence of hip pathology shortly after Claimantôs injury to satisfy the temporal relationship criterion as well.

[6] English statistician Austin Bradford Hill developed a set of nine criteria to provide epidemiologic evidence of causal relationships. *See, e.g.*, Robyn M. Lucas & Anthony J. McMichael, *Association or Causation: Evaluating Links Between 'Environment and Disease,'* 83 Bulletin of the World Health Organization 792 (Oct. 2005), http://www.who.int/bulletin/volumes/83/10/792.pdf.

52. I find Dr. Huyckôs testimony on the causation of Claimantôs hip injury logical, clear and persuasive.

(C) Wayne Moschetti, MD

53. Dr. Moschetti graduated from the Boston University School of Medicine in 2007. He completed a four-year residency in orthopedic surgery at the Dartmouth-Hitchcock Medical Center and a fellowship in hip and knee arthroplasty at Brigham and Womenôs Hospital in Boston. He is board certified in orthopedic surgery. Dr. Moschetti is an Assistant Professor of Orthopedics at Dartmouth Medical School and a practicing orthopedic surgeon at Dartmouth-Hitchcock Medical Center, where he focuses his surgical practice on hip and knee replacement. He performs on average 450 to 500 surgeries per year, with about 150 to 200 of those being primary hip replacements. He is one of Claimantôs treating physicians.

54. Dr. Moschetti first saw Claimant in June 2016 for evaluation of left hip pain. In his opinion, it is common for people to have problems differentiating between hip pain and back pain. He testified: ñI tell everybody sometimes hip pain looks like back pain, and sometimes back pain looks like hip pain.ò *Dr. Moschetti deposition*, August 31, 2017, at 6. He explained that physicians use diagnostic injections to differentiate between hip and back pain. In Claimantôs case, a hip injection provided significant pain relief, thereby identifying his left hip as a pain generator.

55. Dr. Moschetti performed Claimantôs hip replacement surgery in September 2016. He acknowledged that Claimant had preexisting hip arthritis but opined that the twisting injury of September 2015 could well have exacerbated his underlying arthritis condition. More specifically, when Claimant twisted, he probably dislodged or worsened a flap of cartilage at the femoral head of the hip joint, causing groin and buttock pain, as well as pain with hip rotation.

56. Dr. Moschetti testified that he agreed with Dr. Huyckôs causation analysis. He pointed to Claimantôs long-standing complaints of groin pain and his difficulty with shoes and socks, both of which are hip pathology complaints. Dr. Moschetti further testified that Claimant was substantially younger than the typical hip replacement patient, indicating that his hip condition was more than just the natural progression of his underlying arthritis.

57. I find that Dr. Moschettiôs opinions provide additional credible support for Dr. Bucksbaumôs and Dr. Huyckôs causation analyses.

(D) Dr. Backus

58. In Dr. Backusôopinion, Claimantôs left hip condition is not work related because ñ[h]e didnôt present with a hip injury. He presented with a back injury.ò *Dr. Backus' testimony*, November 17, 2017, at 148. Further, multiple evaluations during the acute stages of Claimantôs injury attributed his pain to his low back.

59. Dr. Backus conceded that the causation of Claimantôs pain gets ñconfusingò because there is an ñoverlap in distribution of pain from hip conditions or back conditions.ò However, he concluded that the lifting incident caused only back pain because Claimantôs hip pain did not appear in the medical records until ñsometime later.ò *Id.,* at 149.

60. Dr. Backus testified that it was unlikely a twisting motion would cause hip arthritis because arthritis develops over decades. He further testified that it was even unlikely that a patient could aggravate an arthritic hip from twisting, although he did not explain why.

61. Finally, Dr. Backus addressed Claimantôs positive FABER test.[7] The FABER test puts stress on the hip joint and the SI joint; a positive test result can indicate either SI joint or hip pathology. Dr. Backus testified that he does many examinations in patients with positive FABER test results; only ñvery rarelyò is the positive result from hip pathology. *Dr. Backus' testimony*, November 17, 2017, at 153.

62. Dr. Backusôtestimony was incomplete and unpersuasive. He did not adequately explain why a twisting injury cannot aggravate an underlying arthritic condition. Moreover, while it may be rare for a patient with a positive FABER test to have hip rather than back pathology, the possibility still remains. Finally, a patient cannot be expected to identify his own pain generator in a complex medical case; that Claimant initially presented with a back injury does not exclude a hip injury. All of these factors significantly weaken Dr. Backusôopinion.

Expert Medical Opinions Regarding Whether Hip Replacement Surgery Was Medically Necessary

63. The parties presented conflicting expert testimony as to whether Claimantôs hip replacement surgery was medically necessary.

(A) Dr. Moschetti

64. Dr. Moschetti testified that Claimant was experiencing debilitating hip pain that interfered with his activities and ability to work. He explained that Claimant had tried and exhausted all reasonable conservative treatments for his hip condition, including exercise, a significant course of physical therapy, aqua-therapy, heat and ice, bracing, walking aids, injection therapy, anti-inflammatory medication and a TENS unit, all without obtaining substantial improvement in his pain and functioning.

65. Dr. Moschetti described the treatment options as a ñladder,ò with conservative treatments at the lower rungs and surgery as the last rung. Because Claimant had exhausted all reasonable conservative treatments without success, Dr. Moschetti concluded that hip replacement surgery was medically reasonable, as the best option for reducing Claimantôs pain and restoring normal hip function. I find his analysis credible.

[7] The FABER test (for Flexion, ABduction and External Rotation) is a screening test during which the physician positions the patientôs leg in a certain way to see where the associated pain occurs.

(B) Dr. Bucksbaum

66. Dr. Bucksbaum testified that performing surgery to address intractable, debilitating pain is a long-established principle of medicine. In Claimantôs case, conservative treatment did not alleviate his pain or improve his function. Moreover, the success of his diagnostic hip injection indicated that surgery would probably provide a good result. Thus, Dr. Bucksbaum agreed with Dr. Moschetti that hip replacement surgery was a reasonable and necessary treatment. I find his analysis credible.

(C) Dr. Backus

67. Dr. Backus addressed the prospect of hip replacement surgery in his July 2016 independent medical examination report. He referred to a January 2016 imaging study that characterized Claimantôs hip arthritis as ñmild,ò and wrote that surgery would not be reasonable and medically necessary until Claimant had ñmoderate to severeò osteoarthritis. *Joint Exhibit I*, at P245. He further wrote that hip replacements are most commonly done on patients between the ages of 70 and 79 who have moderate to severe hip arthrosis. *Id.* In support of his opinion, he cited the *ACOEM Occupational Medicine Practice Guidelines*, but he did not testify or otherwise explain their specific application in this case.

68. In Dr. Backusô opinion, it is reasonable to follow the evidence-based treatment guidelines unless there is a reasonable explanation for an exception to those guidelines. In his opinion, replacing Claimantôs hip joint was not within the evidence-based treatment guidelines, and his treating provider offered no explanation for deviating from them.

69. Dr. Backusô report also mentioned two treatment options that his providers had not tried: viscosupplementation and arthroscopic options. He did not explain what these options are or why they might be more appropriate for Claimant than hip replacement surgery.

70. I find Dr. Backusô opinion on this issue incomplete and unpersuasive. In particular, he did not consider that Claimant had debilitating pain from his hip joint, regardless of whether his arthritis was categorized as mild, moderate or severe. He also overlooked Dr. Moschettiôs description of Claimantôs left hip arthritis as ñsevereò in September 2016, just prior to surgery. *See Joint Exhibit I*, at P335.

Expert Medical Opinions Regarding the Status of Claimant's Left Hip Condition

(A) Dr. Moschetti

71. Dr. Moschetti testified that it usually takes one year following hip replacement surgery for a patient to reach an end medical result. Based on his education and his experience as an orthopedic surgeon who performs 150 to 200 primary hip replacement surgeries annually, I find his testimony persuasive.

72. When Dr. Moschetti testified by preservation deposition in August 2017, it had not yet been one year since Claimantôs hip replacement surgery. Accordingly, he did not offer testimony concerning Claimantôs end medical result status.

(B) Dr. Huyck

73. Dr. Huyck testified that she generally assesses end medical result following hip replacement surgery after the patient has a one-year post-operative visit with his orthopedist. Following that protocol, Dr. Huyck placed Claimant at an end medical result on November 9, 2017.

74. Dr. Huyckôs methodology of determining end medical result one year after hip replacement surgery is consistent with Dr. Moschettiôs methodology. I find her opinion clear and persuasive.

(C) Dr. Bucksbaum

75. In Dr. Bucksbaumôs opinion, recovery from hip replacement surgery takes at least one year. When he last saw Claimant in April 2017, it was too soon to place him at an end medical result for his left hip condition.

76. Dr. Bucksbaum nevertheless assessed the impairment of Claimantôs hip on April 21, 2017. Although Claimant had not yet reached an end medical result as of that date, Dr. Bucksbaum rated him with a 15 percent whole person impairment relative to his hip condition. *See Joint Exhibit I*, at P509. He based this impairment rating on Claimantôs having achieved a ñgood resultò from his hip replacement surgery, as set forth in Table 17-33 of the *AMA Guides*.

77. Defendant did not present expert medical testimony as to whether Claimant was at an end medical result for his left hip condition and did not dispute Dr. Bucksbaumôs fifteen percent impairment rating. *See Employer's Proposed Findings of Fact and Conclusions of Law*, at 23. Defendant thus agrees that if Claimantôs hip condition is found to be compensable, he is entitled to an award of permanent partial disability benefits based on this assessment. *Id.*

Defendant's Notice of Intention to Discontinue Payments

78. On August 17, 2016, Defendant filed an *Employer's Notice of Intention to Discontinue Payments* (Form 27), signaling its intent to terminate Claimantôs temporary total disability benefits and any treatment related to his left hip condition. Defendant supported its Form 27 with Claimantôs medical records and Dr. Backusô July 2016 report. Dr. Backusôreport stated that Claimantôs hip condition was not work-related and that he was at an end medical result for his low back injury. *Joint Exhibit II*, Stipulation, ¶ 6.

79. As set forth in Finding of Fact No. 14 *supra*, Claimant told medical case manager Alves that he had ñhip painò on September 30, 2015, and she recorded that statement in her notes. Defendant did not disclose those notes with its Form 27.

80. Dr. Backus did not receive or review the medical case managerôs notes prior to writing the report upon which Defendantôs Form 27 was based. *Joint Exhibit III*, Amended Stipulation, ¶ 14. Accordingly, he did not take into consideration the fact that Claimant reported ñhip painò to Ms. Alves on September 30, 2015.

81. Defendant disclosed the case managerôs notes on August 24, 2016, one week after filing the Form 27.

Defendant's Rejection of Claimant's Hip Injury as Not Causally Related to the Work Incident

82. Since September 2015, Claimantôs medical records have documented symptoms consistent with either a low back injury or a left hip injury. *See* Finding of Fact Nos. 18, 47, 51 and 56 *supra*. On May 11, 2016, Claimant underwent a diagnostic hip injection to determine whether his pain was originating from his hip or his back. Finding of Fact No. 19 *supra*. Claimant followed up with Dr. Moschetti on June 13, 2016, at which time Dr. Moschetti diagnosed a hip condition and began treatment specifically directed at that condition. Finding of Fact No. 21 *supra*.

83. In October 2015 Claimant signed an *Agreement for Temporary Compensation* (Form 32), which by its terms provided temporary disability benefits for his ñlumbar strain.ò The Agreement did not reference a hip injury under ñbody part injured/injuries accepted.ò

84. On February 1, 2016, Defendant filed a *Denial of Workers' Compensation Benefits* (Form 2), denying payment for Claimantôs pelvic CT scan as not causally related to his accepted low back injury. On July 13, 2016, Defendant filed another *Denial of Workers' Compensation Benefits*, denying a preauthorization request for a total hip replacement as not being reasonable, necessary or causally related to Claimantôs work injury. On August 17, 2016, Defendant filed an *Employer's Notice of Intention to Discontinue Payments* (Form 27) related to any treatment of Claimantôs hip injury, again on the grounds that his hip condition was not causally related to the workplace lifting incident.

CONCLUSIONS OF LAW:

1. In workersô 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, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), 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*, *supra* at 19; *Morse v. John E. Russell Corp*., Opinion No. 40-92WC (May 7, 1993). A claimant cannot meet his burden of proof with speculative testimony. *Daignault v. State of Vermont Economic Services Division*, Opinion No. 35-09WC (September 2, 2009).

2. The parties presented conflicting expert medical testimony on several issues. In such cases, the Commissioner traditionally uses a five-part test to determine which expertôs 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).

Claimant's Low Back Injury: End Medical Result and Permanent Impairment

3. Claimant offered opinions from Dr. Bucksbaum and Dr. Huyck on his low back injury. Defendant offered Dr. Backusô opinion. Relying primarily on the third factor set forth in *Geiger*, I conclude that Dr. Bucksbaumôs opinion is the most persuasive.

4. Dr. Bucksbaum found that Claimant reached an end medical result for his low back injury on April 21, 2017. He convincingly opined that, following radiofrequency ablation, Claimantôs low back condition was stable, with no further restoration of function expected. In contrast, Dr. Backusô opinion that Claimant reached an end medical result in July 2016, prior to having radiofrequency ablation, failed to account for the substantial gains in pain relief and functioning that the procedure afforded.

5. I also find Dr. Bucksbaumôs opinion more persuasive than Dr. Hucykôs because Dr. Huyck did not refer to the standard for end medical result set forth in the workersô compensation statute, nor did she fully explain her methodology.

6. I further conclude that Claimant has a six percent whole person impairment referable to his low back injury based on Dr. Bucksbaumôs impairment rating. I find his rating more persuasive than Dr. Backusô because Dr. Bucksbaum took into consideration the impact of Claimantôs low back injury on his activities of daily living, as provided by Table 15-3 of the *AMA Guides*, while Dr. Backus did not.

Causation of Claimant's Left Hip Condition

7. Claimant offered opinions from Dr. Bucksbaum, Dr. Huyck and Dr. Moschetti as to the cause of his left hip condition. Defendant offered Dr. Backusô opinion. Relying primarily on the third factor set forth in *Geiger*, I conclude that the opinions of Dr. Bucksbaum and Dr. Huyck are the most persuasive.

8. Dr. Bucksbaum clearly identified four factors supporting his conclusion that Claimantôs left hip condition was related to the September 2015 workplace lifting incident. He also convincingly explained the mechanism of injury. His testimony was clear, thorough and supported by Claimantôs medical records and by the credible testimony of Dr. Huyck, who applied the Bradford Hill criteria to her analysis.

9. In contrast, Dr. Backusô opinion that Claimantôs hip injury was not causally related to the work incident overlooked the fact that hip pain and back pain are hard to distinguish. Further, his opinion was vague, conclusory and unconvincing.

10. I therefore conclude that Claimantôs left hip condition was causally related to his September 2015 workplace lifting incident.

Reasonableness of Hip Replacement Surgery

11. Vermontôs workersô compensation statute obligates an employer to furnish only those medical treatments that are determined to be ñreasonable.ò 21 V.S.A. §640(a). The Commissioner has discretion to determine what constitutes ñreasonableò medical treatment given the particular circumstances of each case. *MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009). A treatment can be unreasonable either because it is not medically necessary or because it is not causally related to the compensable injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010); *Veillette v. Pompanoosuc Mills Corp.*, Opinion No. 23-12WC (September 14, 2012).

12. Unless the employer is seeking to discontinue a previously accepted medical treatment, the claimant has the burden of proving that a proposed medical treatment is reasonable under 21 V.S.A. §640(a). *Merriam v. Bennington Convalescent Center*, Opinion No. 55-06 (January 2, 2007). In determining what is reasonable, the decisive factor is not what the claimant desires but what is shown by competent expert evidence to be reasonable to relieve the claimantôs symptoms and maintain his or her functional abilities. *Quinn v. Emery Worldwide,* Opinion No. 29-00WC (September 11, 2000).

13. The experts disagreed as to whether Claimantôs hip replacement surgery was a reasonable and medically necessary treatment. Applying the *Geiger* factors, I conclude that Dr. Moschettiôs opinion is the most persuasive. His status as Claimantôs treating physician merits serious consideration of his opinion on appropriate treatment. He is a well-qualified orthopedic surgeon with substantial experience in hip replacements, performing 150 to 200 such procedures per year. His treatment recommendation is based on his own experience with similar patients. Thus, I accept Dr. Moschettiôs opinion that hip replacement surgery was a reasonable and necessary treatment for Claimantôs left hip condition.

14. Dr. Backusô reliance on the ACOEM practice guidelines was not sufficiently persuasive to overcome Dr. Moschettiôs professional judgment. Dr. Backus characterized Claimantôs osteoarthritis as ñmild,ò based on the radiologistôs interpretation of a January 2016 imaging study. He then testified that it was not reasonable or necessary to perform a hip replacement because Claimantôs osteoarthritis was neither moderate nor severe, as the guidelines suggest. However, Dr. Backus failed to adequately address Claimantôs severe pain and dysfunction, which were not responsive to more conservative treatment options. Accordingly, his citation to the general treatment guidelines in this instance does not outweigh Dr. Moschettiôs opinion as to the appropriate treatment for Claimantôs hip condition.

15. I therefore conclude that hip replacement surgery was a medically necessary treatment for Claimantôs work-related left hip condition. It therefore constitutes reasonable medical treatment in accordance with 21 V.S.A. §640(a).

Claimant's Left Hip Condition: End Medical Result and Permanent Impairment

16. Claimant offered opinions from Dr. Bucksbaum, Dr. Huyck and Dr. Moschetti as to the status of his left hip condition. Defendant offered no evidence on this issue.

17. Dr. Bucksbaum, Dr. Huyck and Dr. Moschetti agree that it generally takes one year following hip replacement surgery for a patient to reach an end medical result. Based on their respective qualifications, I find their opinions on this issue persuasive.

18. Dr. Huyck saw Claimant on November 9, 2017, approximately one year after his hip replacement surgery. At that visit, she concluded that no additional treatment was likely to improve his condition and determined that he reached an end medical result for his left hip condition on that date. Based on Dr. Huyck's training and experience, I accept her opinion and conclude that Claimant reached an end medical result for his left hip injury on November 9, 2017.

19. Dr. Bucksbaum assessed Claimant with a 15 percent whole person impairment referable to his left hip condition under the *AMA Guides*. Defendant does not dispute this impairment rating. Finding of Fact No. 77 *supra*. I therefore conclude that Claimant has a 15 percent whole person impairment referable to his left hip condition.

Defendant's Form 27 and Failure to Disclose the Medical Case Manager's Notes

20. The Vermont workers' compensation statute requires notice to the Commissioner and to the injured worker when the employer intends to discontinue benefits. The applicable provision provides as follows:

> Unless an injured worker has successfully returned to work, an employer shall notify both the Commissioner and the employee prior to terminating benefits under either section 642 or 646 of this title. . . . All relevant evidence, including evidence that does not support discontinuance in the possession of the employer not already filed, shall be filed with the notice.

21 V.S.A. §643a.

Similarly, Workers' Compensation Rule 12.1110 provides in part:

> Notwithstanding the provisions of Rule 3.2700, the *Employer's Notice of Intention to Discontinue Payments* must be accompanied by all relevant evidence in the employer's or insurance carrier's possession that pertains directly to the specific benefit(s) for which discontinuance is sought, including both supporting and countervailing evidence.

21. The Commissioner has adopted a form called the *Employer's Notice of Intention to Discontinue Payments* (Form 27) for employers to use when they intend to discontinue payments to an injured worker. Under the statute and the rule cited above, the employer must include "all relevant evidence" when it files Form 27.

22. In support of its August 2016 discontinuance, Defendant here provided Claimantôs medical records and Dr. Backusô July 2016 report. It failed to disclose the medical case managerôs notes, however, which reported that Claimant was complaining of hip pain within just a few weeks after his accident at work. Claimant contends that Defendantôs failure to include the case managerôs notes invalidates its August 2016 notice and requires reinstating his temporary disability and medical benefits retroactive to that date.

23. A medical case managerôs role is to plan and coordinate health care services for an injured worker. The case managerôs duties may include interviewing the injured worker, assisting in the development, implementation and coordination of a medical care plan, and evaluating treatment results. *See Workers' Compensation Rule 2.2900.* A case manager may attend medical appointments with the injured worker and take notes about the providerôs assessment and treatment plan. However, the case manager does not provide any medical care, and his or her notes are not medical records.

24. The statute and the rule cited above require disclosure of ñall relevant evidence,ò not just relevant medical records. Accordingly, if a case managerôs notes include relevant evidence, the employer must disclose them with its Form 27 filing.

25. In many instances, the case managerôs notes will just duplicate what the doctors wrote in the medical records. In other instances, the case managerôs notes may include information that does not relate to a contested issue. Case manager notes that merely duplicate other evidence or do not pertain to the partiesô dispute are not ñrelevant evidenceò and do not need to be routinely disclosed with the Form 27.

26. To fulfill its affirmative duty to disclose ñall relevant evidence,ò therefore, the adjuster should review medical case manager notes and determine first, whether they pertain to a disputed issue and second, whether their content is relevant or merely duplicative. If the notes contain unique or contrary evidence relevant to the partiesô dispute, the employer must disclose them with the Form 27.[8]

27. The case manager notes here included Claimantôs statement to the effect that he had hip pain within a few weeks of the workplace incident. Although the contemporaneous medical records included references to symptoms that indicated hip pain, there were few references that stated simply ñhip pain.ò A doctor reviewing Claimantôs medical records would understand that references to groin pain and similar symptoms are indicators of hip pathology, but an adjuster, attorney or self-represented claimant might not. Thus, the case managerôs notes were not merely duplicative of the medical records in this instance. Further, whether Claimant sustained a hip injury in the September 2015 workplace incident was a contested issue. Thus, the case managerôs notes had relevant content in the context of the partiesô dispute and should have been disclosed.

[8]Case manager notes are also discoverable outside of the Form 27 process. *See, e.g., M.P. v. Hancor Holdings, LLC*, Opinion No. 43-05WC (July 18, 2005) (medical case managerôs notes discoverable under Vermont Rule of Civil Procedure 26(b)(1)).

28. In the narrow circumstances of this case, however, Defendantôs failure to disclose the case managerôs notes was harmless error. Dr. Backus, a qualified occupational medicine physician, should have understood the medical recordsô references to groin pain and other symptoms as indicating hip pathology. Also, Defendant disclosed the case managerôs notes on August 24, 2016, one week after filing the Form 27. Accordingly, the Departmentôs specialist had access to them prior to approving the Form 27 on September 26, 2016. I therefore conclude that the Departmentôs acceptance of Defendantôs Form 27 was not erroneous and that Claimantôs entitlement to continued benefits is appropriate to determine on the merits.

Defendant's Delay in Disputing Compensability of Claimant's Hip Condition

29. Claimant contends that Defendant knowingly paid for medical treatment for his hip condition between September 2015 and May 2016, including a diagnostic hip injection on May 11, 2016. He therefore contends that Defendant accepted his hip injury as compensable and waived its right to challenge causation.

30. As the expert testimony established, it is often difficult to distinguish between back pain and hip pain. Finding of Fact Nos. 47 and 54 *supra*. The purpose of the May 2016 diagnostic injection was to determine whether Claimantôs pain stemmed from a back injury or a hip injury; Claimantôs physician did not diagnose a hip injury until June 2016. Finding of Fact No. 21 *supra*. In July 2016, Defendant filed a Form 2, denying Claimantôs request for hip replacement surgery, and in August 2016, it filed the Form 27, denying any other treatment for the hip condition as not causally related to the accepted workplace injury.

31. A waiver is the voluntary relinquishment of a known right. *Hilliker v. Synergy Solar, Inc.*, Opinion No. 12-16WC (August 9, 2016). To establish a waiver, ñthere must be shown an act or an omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right in question.ò *Holden & Martin Lumber Co. v. Stuart*, 118 Vt. 286, 289 (1954).

32. Defendant did not know that Claimant had an alleged work-related hip condition until June 2016. I thus conclude that its failure to challenge the causal connection between the work incident and Claimantôs hip condition before then does not act as a waiver of its right to challenge causation.

Conclusion

33. Claimant reached an end medical result for his low back injury on April 21, 2017, with a six percent permanent impairment referable to that injury.

34. Claimant also sustained a left hip injury in the September 2015 workplace incident, for which he received a reasonable and medically necessary hip replacement. He reached an end medical result for his hip injury on November 9, 2017, with a 15 percent whole person impairment referable to that injury.

ORDER:

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

1. Medical benefits covering all reasonable medical services and supplies for Claimantôs work-related left hip condition, including the hip replacement surgery performed on September 14, 2016;

2. Temporary total and/or temporary partial disability benefits retroactive to the date of discontinuance (August 25, 2016) and payable through the date of end medical result (November 9, 2017), with interest calculated in accordance with 21 V.S.A. §664;

3. Permanent partial disability benefits based on an additional one percent impairment referable to Claimantôs low back injury and permanent partial disability benefits based on a 15 percent whole person impairment referable to his left hip injury; and

4. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 26th day of March 2018.

_____
Lindsay H. Kurrle
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.