Forrest v. Rockingham School District (May 16, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Robert Forrest	*)*	*File #: C-21035*
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	*For: Mary S. Hooper*
Rockingham School District	*)*	*Commissioner*
	)	
	)	*Opinion #: 30-96WC*

Record closed on April 25, 1996.

APPEARANCES

Bruce Lawlor, Esq., for the claimant
Glenn S. Morgan, Esq., for the defendant

ISSUE

Whether the claimant's continuing chiropractic care after reaching an end medical result is reasonable and necessary.

THE CLAIM

1. Medical and hospital benefits pursuant to 21 V.S.A. §640.

EXHIBITS

Joint Exhibit 1	*Medical Notebook*
Claimant's Exhibit I	*Depostion of Robert Forrest*
Claimant's Exhibit II	*Deposition of Vernon R. Temple, D.C.*
Claimant's Exhibit III	*Deposition of Walter J. Griffiths, M.D.*
Defendant's Exhibit A	*Depostion of Peter D. Upton, M. D.*
Defendant's Exhibit B	*Affidavit of Joyce Mons*

FINDINGS OF FACT

1. The above exhibits are admitted into evidence. Notice is taken of all forms filed with the Department in this matter. Specific notice is taken of the Form 22 approved by the Department of Labor and Industry on April 23,

1996, noting a 55% impairment of the spine occasioned by an injury on March 23, 1990.

2. The claimant has worked as a bus driver for the Rockingham Schools since the fall of 1988. In that capacity, he has had a number of injuries that damaged his spine. The first occurred on October 5, 1989, when he lifted up the hood of a bus. The second occurred on January 23, 1990, when he was assisting a handicapped child onto the bus. The third occurred on March 23, 1990, when he was thrown from the bus to the ground by an unruly student.

3. The claimant initially treated chiropractically with Dr. Vernon Temple after the first injury. He also consulted with his regular physcian, Dr. Walter Griffiths. After a few treatments with each, he ceased treating until after the January 1990, injury.

4. After the second injury, the claimant returned to treat with Dr. Temple. X-rays taken after the second injury revealed a compression fracture of the T12 vertebra. On January 26, 1990, Dr. Temple gave the claimant an out-of-work slip until further notice, and recommended that the claimant stay out at least one week. The claimant denies missing any work as a result of this injury.

5. After the third injury, the claimant continued to treat with both Dr. Vernon and Dr. Griffith. The third injury resulted in an additional compression fracture at T-9. After conservative treatment failed to return the claimant to pre-injury status, the claimant asked for a referral to an orthopedic specialist.

6. The claimant was seen by Dr. John T. Chard, an orthopedist, on August 10, 1990. He opined that the claimant would respond to physical therapy. He determined in November of 1990 that the claimant was making significant progress, and that it was important for the claimant to remain physically active.

7. The claimant was seen twice by Dr. Craig N. Anderson, D.C., at the request of the insurer. Dr. Anderson first saw the claimant on September 29, 1990, when he recommended that further chiropractic care was reasonable. When Dr. Anderson saw the claimant 20 months later, he determined that the claimant had deteriorated somewhat from his initial visit with him, and that

he had reached maximum medical improvement. He stated in his report that "[a]ny treatment from here on would be for symptomatic relief and would not be curative in nature. I do believe that chiropractic care is reasonable for the reduction of pain and the prevention of further deterioration of the patients [sic] condition."

8. At the request of the insurer, the claimant was seen by Dr. Peter Upton, a neurological surgeon, on April 11, 1994. By that time, the claimant had developed an additional compression fracture at T7. Dr. Upton indicated at that time that the claimant for unknown reasons was susceptible to compression fractures of the spine from relatively minor traumas, and that there was no evidence that the T7 fracture was due to the work injury. He indicated that there was no role for chiropractic in the treatment of compression fractures.

9. Drs. Griffith, Temple and Upton have testified by deposition in this case. Their testimony will be reviewed in that order.

10. Dr. Griffith testified that he is board certified in geriatrics. He indicated that the diagnosis of the claimant's condition was that he had a compression fracture or fractures that triggered osteoporosis and kyphoscoliosis, or curvature of the spine, both of which were clearly a consequence of the work injuries. He indicated that the appropriate treatment for these conditions would include pain killers, muscle relaxants, physical modalities such as heat or ice, electrical stimulation or chiropractic. He testified that the most important thing to do was to avoid absolute rest for extended periods of time, as this would promote the progression of the osteoporosis. It was crucial that the claimant remain as active as possible within the limits of his tolerance to avoid further deterioration. The limit of bedrest would be 24 hours for this condition.

11. Dr. Griffith indicated that there was a definite role for ongoing chiropractic in the treatment of the claimant. He indicated that chiropractic manipulation decreases muscle spasm and improves mobility, both important elements in preventing the advance of the osteoporosis. He testified that the the claimant "has a classical case of osteoporosis with compression fractures. There is really nothing atypical about his case, and chiropractic is well documented to help these cases. It is indicated. It's part of the management of this problem." He testified that, although the claimant's smoking might be a minor component in his osteoporosis, it was insignificant in the final analysis. He also indicated that the treatment for compression factors would be completely different in a younger patient in the absence of osteoporosis.

12. Dr. Temple, a diplomate of the National Board of Chiropractic Examiners and of the American Board of Chiropractic Orthopedists, testified that he has continued to treat the claimant on an as-needed basis since the date of his maximal medical improvement. He has specifically attempted to return the claimant to the baseline established at the date of end medical result. His purpose is to allow the claimant to maintain his natural range of motion in his spine, and to prevent muscle spasms. Because of the permanent impairment to the spine, there is a permanent level of dysfunction which can be minimized by continued palliative care. This is what Dr. Temple has attempted to accomplish, in the face of the expected and experienced deterioration of the claimant's spine.

13. Dr. Upton testified that the appropriate treatment of a compression fracture is to reduce the stress on the spine by bracing it and restricting its motion. Specifically, he indicated that the injured person should generally restrict his or her activity after such an injury. Dr. Upton, when asked if he had an understanding as to the nature of chiropractic treatment, responded "Vaguely." He then went on to testify that his understanding of the basic tenet of chiropractic was manipulation of the spine, which could be either relatively gentle or quite aggressive. He opined that not only was chiropractic not helpful "but it's probably contraindicated in the treatment of acute compression fractures of the spine." This opinion was based on the theory that the spine needs, first, rest, and then bracing. Dr. Upton did not believe that the claimant had been properly assessed from the beginning in this case, and that the treatment had been inappropriate. He thought that the claimant's return to bus driving in all likelihood aggravated his condition by putting stress on his spine, as any physical activity would do. Dr. Upton indicated that chiropractic might have a role in providing symptomatic relief. Dr. Upton in his testimony never discussed what, if any, role the claimant's osteoporosis played in the treatment of this condition. In fact, he never mentioned osteoporosis at all.

14. The claimant has presented of a contingency fee agreement with his attorney for 20% of the amount recovered in this action. This is reasonable. The claimant has presented no evidence with regard to costs.

CONCLUSIONS

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse Co., 123 Vt. 161 (1963). The claimant 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).

2. Where the causal connection between an accident and an injury is obscure, and a lay-person would have no well grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's Inc., 137 Vt. 393 (1979). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).

3. An employer is obligated under the Workers' Compensation Act to provide a claimant with reasonable surgical, medical and nursing services. 21 V.S.A. §640(a). The question, therefore, is whether chiropractic treatment in this particular case is reasonable. The evidence conflicts, in that both treating physicians as well as one insurance physician believe that the treatment is reasonable, while one insurance physician indicates that it is unreasonable and possibly even contraindicated.

4. Evaluation of the medical testimony, in cases predating the rules developed under the amended 21 V.S.A. §667, is guided by Rule 14 of Processes and Procedure for Claims under the Vermont Workers' Compensation and Occupational Disease Acts, the Departmental rules effective Februay 7, 1994. Among the factors to be considered in the evaluation are whether the care provider is the treating physician, whether the offerer of the opinion is a specialist in a field relevant to the claimant's condition, whether the opinion is informed by all of the medical and other records of the claimant, whether the opinion is supported by objective findings, whether the treatment is a commonly accepted one for the condition, and whether the treatment is likely to improve the claimant's condition or functioning.

5. The claimant, his treating physician and his chiropractor all agree that the chiropractic is efficient in improving the claimant's functioning, that it has the capacity to maintain the mobility in his back that is necessary for the arresting of his osteoporosis. The claimant's physician, who is board certified in geriatrics, shows special training and experience in the fields relevant to the claimant's condition. His opinion is based on the totality of the conditions faced by the claimant, rather than just one factor, the compression fractures. He is in the daily practice of dealing with issues such as the ones posed by the claimant's condition, and is experienced in diagnosis and treatment of such problems.

6. Dr. Upton's testimony, which conflicts with the reports filed by Dr. Anderson, another practitioner hired by the insurer, is replete with references to the appropriate treatment for compression fractures but is silent as to the role played by the claimant's osteoporosis. His failure to consider an important factor in the treating of the claimant is fatal to his opinion. In addition, his admitted lack of familiarity with the work and functioning of chiropractors certainly undermines any opinion he presents that chiropractic is not appropriate treatment in this case.

7. The more probable hypothesis in this case is that the ongoing treatment of the claimant with chiropractic is reasonable medical care within the meaning of the statute.

8. The claimant having prevailed is entitled to an award of costs as a matter of law and attorney's fees as a matter of discretion. As no evidence has been presented, pursuant to Rule 10(d), of the claimant's costs, none will be awarded. Attorney's fees of 20% of the benefits awarded, not to exceed $3,000.00, are awarded.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, it
is ordered that AIG Insurance Company, or in the event of its default Rockingham School District, pay:

1. Chiropractic benefits in accordance with this decision; and

2. Attorney's fees in the amount of 20% of the medical benefits awarded, not to exceed $3,000.00.

DATED at Montpelier, Vermont, this ____ day of May 1996.

_____
Mary S. Hooper
Commissioner