

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

Daniel Briggs)	State File No. G-11213
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
)	
Maytag Homestyle Repair, Inc.)	For: Steve Janson
)	Commissioner
)	
)	Opinion No. 18-00WC

Hearing held in Rutland on January 6, 2000
Record closed on January 31, 2000

APPEARANCES:

Sam W. Mason, Esquire for the claimant
Keith J. Kasper, Esquire for the defendant

ISSUES:

1. Is the proposed bursa surgery by Dr. Ketterer causally related to the claimant's work-related injury?
2. If the proposed surgery is causally related to the claimant's work-related injury, is it reasonable and necessary?

THE CLAIM:

1. Temporary total disability benefits from October 16, 1998 until claimant is placed at a medical end result for his hip bursitis;
2. Payment of medical bills, including approval and payment for the proposed hip surgery;
3. Attorney fees and costs.

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	Transcript of deposition of Dr. Ketterer
Defendant's Exhibit A:	Transcript of the deposition of Dr. Katz

STIPULATION:

1. On December 11, 1993 claimant was an employee within the meaning of the Vermont Workers' Compensation Act ("Act").
2. On December 11, 1993, Maytag Homestyle Repair, Inc. was an employer within the meaning of the Act.
3. On December 11, 1993, National Grange was the workers' compensation insurance carrier for the employer within the meaning of the Act.
4. On December 11, 1993 claimant had and currently has six dependents.
5. On December 11, 1993 claimant had an average weekly wage of \$189.38 resulting in a current and final compensation rate of \$189.38.
6. The parties agree to the submission of the joint medical records and deposition transcripts of Dr. Ketterer and Dr. Katz.
7. The issue for resolution in this proceeding is the proposed bursa surgery by Dr. Ketterer and the compensability of that proposed surgery by National Grange Mutual Insurance Company, and the reasonableness and necessity of that proposed surgery.
8. The Department may take judicial notice of all records in its files on this claim particularly its prior decision in this matter.

BACKGROUND:

In *Daniel Briggs v. Maytag Homestyle Repair, Inc.*, Opinion No. 57-96WC (Oct. 5. 1996), this Department held, after evaluating conflicting medical testimony, that a proposed rib resection was compensable. The purpose of the surgery was to relieve rib pain that claimant had complained of since his December 11, 1993 work-related incident.

FINDINGS OF FACT:

1. In the prior decision, the Commissioner found that on December 11, 1993, the claimant "walked abruptly into the open door of a clothes dryer while carrying a load of sheets estimated at 77 pounds." *Id.* at 2. After that, Dr. Frost found on physical examination that the claimant had tenderness associated with the 10th and 12th ribs on the right side." *Id.* Claimant has not worked since that 1993 injury.
2. Dr. Nathaniel P. Katz, board certified in pain management, neurology and psychiatry and neurology, at the Brigham and Women's Hospital testified by deposition. As reported in the prior decision, Dr. Katz saw the claimant on a number of occasions, and determined

that the claimant consistently had positive results on Waddell's maneuvers, indicating a psychological rather than physiological basis for the pain complaints. He also noted the claimant's reluctance to undergo certain diagnostic tests, and his unwillingness to participate in certain treatment modalities. Dr. Katz opposed the rib resection surgery ordered in the prior opinion stating that "Briggs is complaining of pain essentially throughout his body and certainly his entire lifestyle is to describe his pain in very bizarre terms that extends way beyond where you could possibly have pain coming from something pressing on your intercostal nerve."

3. In January 1997 Dr. Frost performed the rib surgery ordered by this Department. Afterwards, claimant expressed joy at his "complete pain relief."
4. At claimant's January 21, 1997 visit to his surgeon, Dr. Frost noted that he had an "amazing recovery." At follow up visits over the next month, Dr. Frost did a thorough pain assessment, noting some abdominal complaints. Significantly, nothing in Dr. Frost's notes at that time would suggest that claimant had any complaints of hip pain.
5. On April 8, 1997 Dr. Frost determined that claimant was "totally asymptomatic."
6. After the rib resection surgery, claimant was working with a vocational rehabilitation counselor who also noted his initial complete pain relief following the January 1997 rib surgery. In her February 1997 note, the counselor documented her observation that claimant's gait was normal and claimant's report that he was "completely pain free." A month later the counselor noted "the client demonstrates that he is doing very well and continues to be pain free by doing side kicks out and up to the shoulder. He has also been able to rejoin the band and celebrated last week by jumping off several amplifiers." At the end of April 1997, the rehabilitation counselor noted that claimant "continues to be pain free."
7. In May 1997, for the first time, claimant complained of right hip pain. Dr. Frost opined that the pain was due to an altered gait from claimant's limping for three years. The carrier then agreed to pay for greater trochanter bursa surgery to relieve the hip pain. Dr. Richard Fabricius performed that surgery in January 1998.
8. At the hearing, claimant testified that he has had hip pain since the 1993 incident. He now seeks surgery on the lesser trochanter to relieve the pain that the greater trochanteric surgery did not relieve.
9. Dr. William Ketterer supports claimant's belief that to get long term permanent relief, the bursa should be excised. In his September 27, 1999 note, Dr. Ketterer wrote, "Given the fact that he is 39 years old and is unemployable in his current state, repeat excision would probably be worthwhile in an effort to return him to gainful employment."
10. Nothing in the medical records or in the prior decision supports claimant's assertion that he has had hip pain since the 1993 accident.

11. Dr. Ketterer, who would perform the lesser trochanteric bursa surgery if it is approved, opined in August 1999 that "if he had trochanteric pain from the time of the injury, this is from the injury. If the pain came on some time thereafter it is not related to the injury or related to the way he walks."
12. Dr. Ketterer opined that the proposed surgery has an "optimistic" 50-50 chance of improving claimant's condition. The doctor admitted that he does not know the cause of the bursa problem.
13. Dr. White testified that the cause of the current bursa problem is unknown and that there is no evidence that the current lesser trochanter bursa problem is related to any work injury.
14. Dr. Frost testified that claimant's bursa problem resulted from a traumatic injury claimant suffered at the time of the original work incident in December 1993. Although the claimant never told the doctor that he had hip pain, Dr. Frost opined that the omission was because the rib problem masked the hip pain. However, Dr. Frost agreed that the complete pain free months after the rib surgery would be inconsistent with his theory of causation. And he agreed that claimant's report of jumping off amplifiers would also be inconsistent with his theory of causation.
15. Dr. Wieneke testified that there exists no medical literature to support Dr. Frost's original causation theory of the altered gait resulting in the formation of the bursa problem. In his experience, altered gait has never been a cause of a bursa problem. In fact, bursa problems develop in people of claimant's age for no apparent reason. Dr. Wieneke concluded that there is no evidence to link claimant's bursa problem with his 1993 work-related injury.
16. Dr. Wieneke adamantly opposes the proposed surgery. He suggested that the chances of success are significantly worse than the "optimistic" 50% given by Dr. Ketterer. He opined that given claimant psychological diagnosis, symptom magnification and previous failed bursa surgery, the proposed surgery would not be successful.
17. At the hearing, claimant testified that he is convinced that the proposed surgery will relieve him of the pain that prevents him from working. During his testimony he moved freely and deftly when he demonstrated where he has had pain. That free movement stood in sharp contrast to the wincing and slow labored movements he demonstrated when the physicians were testifying about his condition.
18. Claimant submitted evidence of his contingency fee agreement with his attorney and for costs of \$125.40.

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, Morse Co.*, 123 Vt. 161 (1963). 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 Lumber Co.*, 112 Vt. 17 (1941).
2. Claimant alleges that he has had severe pain in his right hip from the date of the original accident onwards through to and including the present. The only support for claimant's allegation comes from Dr. Frost who opined that the rib pain must have masked the hip pain. However, that opinion loses its credibility in light of the pain free period after claimant's rib surgery.
3. At most, the medical evidence suggests that if the 1993 trauma were the mechanism for claimant's hip surgery, then claimant would have complained of hip pain from the outset. He did not. The evidence shows that he never complained of hip pain until May of 1997. The credible evidence is that the cause of the bursa is unknown, and certainly not traumatically induced.
4. Therefore, the claimant has failed to meet his burden of proving the causal connection between the original surgery and his current hip condition.
5. That defendant in good faith has paid some medical bills for claimant's bursa condition does not mean that it accepted the claim as to the compensability of the proposed surgery. Defendant does not seek reimbursement of funds. Payment of those bills alone does not amount to acceptance of the claim. See, *Valley v. Orleans Central Supervisory Union*, Opinion No. 55-98WC (Sept. 1998).
6. Finally, objective testing suggests that the surgery is unlikely to alleviate claimant's condition given his mental health problems and symptom magnification. Blanket assertions that the proposed surgery would be the magic that will enable the claimant to return to work is simply not credible in light of his history. The most that can be said is that the surgery probably will not harm the claimant. However, without convincing evidence that the surgery can realistically be expected to help the claimant, it cannot be considered reasonable and necessary under 21 V.S.A. § 640.
7. In sum, the hip condition for which the claimant seeks surgery is not causally related to his 1993 injury and it is not reasonable and necessary under our Worker's Compensation Act.

ORDER:

Based on foregoing Findings of Fact and Conclusions of Law, the claim for approval and payment of the proposed hip surgery, temporary total disability benefits and attorney's fees and costs is hereby DENIED.

DATED at Montpelier, Vermont, this 29th day of June 2000.

Steve Janson
Commissioner