

J. G. v. State of Vermont, Aging and Disabilities (January 29, 2004)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

J. G. Opinion No. 05-04WC

v.

*By: Margaret A. Mangan
Hearing Officer*

*Vermont Department
of Aging and Disabilities*

*For: Michael S. Bertrand
Commissioner*

State File No. S-07248

*Hearing held in Montpelier on October 15, 2003
Record Closed on November 18, 2003*

APPEARANCES:

*Heidi S. Groff, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant*

ISSUE:

*Was claimant's condition subsequent to the approval of the Form 22 in
September of 2002 caused by her work and, if so, is she entitled to
additional workers' compensation benefits?*

EXHIBITS:

Joint Exhibit. I: Medical Records

Claimant's Exhibit 1: Dr. Gennaro's Curriculum Vitae

Defendant's Exhibit A: Claimant's time and expense records

Defendant's Exhibit B: Ergonomic Assessments

CLAIM:

An additional award of permanency benefits in the amount of 20% whole person (25% less previously paid 5%);

Six weeks of temporary total disability benefits from November 25, 2002 until six weeks postoperatively;

Payment of all medical bills associated with the November 25, 2002 surgery and related medical treatment thereafter;

Attorney fees and costs.

STIPULATION:

On or about October 15, 2001, claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act (Act).

On or about October 15, 2001, defendant was the employer of claimant within the meaning of the Act.

On or about October 15, 2001, claimant suffered a personal injury by accident arising out of and in the course of her employment with defendant.

On October 15, 2001, claimant had an average weekly wage of \$596.60 resulting in an initial compensation rate of \$397.73.

Claimant returned to work on October 16, 2001.

Claimant separated from her employment for reasons unrelated to her work injury on September 5, 2002.

The parties agree to and the department approved a Form 22 settlement in the amount of 5% of the cervical spine on September 20, 2002.

Claimant underwent cervical surgery on November 25, 2002.

Claimant was again found to be at medical end result by Dr. Gennaro with a 25% whole person impairment rating on February 24, 2003.

No dispute exists as to the qualifications of any of the claimant's treating or evaluating physicians.

The parties agree to the issues and exhibits listed above.

FINDINGS OF FACT:

Claimant began working for the State of Vermont Department of Vocational Rehabilitation in May of 2001 as a vocational rehabilitation Reach-Up Case Manager. Prior to her work there, she had not experienced neck, right shoulder or right arm pain. Claimant worked at a workstation that had ergonomic problems.

Initially, 70% of the claimant's time at work was spent in the office and 30% outside of the office. After July of 2001, her workload shifted to about 60% office work and 40% travel time. In the office, she worked at her desk and computer station and with the phone.

In late summer of 2001, claimant began experiencing right arm numbness and neck pain that she related to her work.

An ergonomic assessment of her workstation and recommendations for improving the station were made in November of 2001. The problems were with the heights of keyboard, mouse, chair and desk. The changes were not implemented until May of 2002.

On October 10, 2001, claimant was seen at Berlin Family Health with the complaint of 5 weeks of right shoulder pain, without history of injury. Then she went to her primary care provider, Lise Kowlaski, M.D., for right arm pain and numbness.

When claimant's symptoms did not respond to conservative treatment, Dr. Kowalski referred her for a neurosurgical consultation.

On October 15, 2001, while at work, claimant walked into an area where a desk was standing on its side. She walked into the desk, with its leg striking her eye. Afterwards, feeling dazed, she was taken to the Central Vermont Hospital Emergency Department where she was awake and alert on arrival. Her right eye was swollen, but not bleeding. Although a concussion was initially suspected, she was diagnosed only with a contusion of the right orbit. A CT scan of the head was negative.

On November 7, 2001, Dr. Nancy Binter, neurosurgeon, noted that claimant had decreased reflexes and decreased strength in the right upper arm. She ordered an MRI, taken on November 23, 2001, that revealed a C5-6 disc with impingement on the cervical cord and C6 nerve roots.

Dr. Binter diagnosed C6 radiculopathy secondary to disc herniation and determined that claimant was a candidate for an anterior C5-6 discectomy with a fusion.

Claimant chose to delay any decision about surgery.

Beginning in January 2002, claimant began taking courses at a college through a distance-learning program, which required her to use her computer at home. She made ergonomic adjustments at home based on the recommendations made for her work computer station.

In a March 21, 2002 note, a physical therapist documented claimant's decision not to opt for the recommended surgery at that time. She also noted that claimant was able to reduce her symptoms by decreasing her movements which in turn reduced her flexibility.

On April 2, 2002, the physical therapist noted that claimant's neck was a little better, although she had mild tingling in the right shoulder blade when she sat too long.

In a May 8, 2002 progress note, the physical therapist documented slower than expected progress and, although she still had limitations in extension and flexion, claimant was ready to obtain a cervical home treatment unit.

On May 9, 2002, Dr. Kowalski noted that claimant had no symptoms of nerve compression, but did still have muscular restriction in her neck.

On July 10, 2002, Dr. Kowalski wrote that claimant's "radiculopathy has resolved." However, on July 23, 2002, Dr. Kowalski noted that claimant's neck was painful and in a note that is not completely legible referred to a cervical disc and computer work.

On October 23, 2002, Dr. Kowalski wrote a letter in which she described the "recurrence of right arm radiculopathy."

A second MRI was performed on October 24, 2002 revealing no change from the one of November 2001 in the central and right-sided disc protrusion at C5-C6.

Because conservative treatment had not succeeded, claimant opted for the previously recommended surgery, which Dr. Binter performed on November 25, 2002. The carrier denied payment for that surgery.

Claimant has been a student and does computer work at home.

Postoperatively, claimant's condition improved.

Expert Medical Opinions

Victor Gennaro, D.O., Board Certified Orthopedic Surgeon, took a history and examined the claimant on February 24, 2003. Before rendering an opinion, he reviewed all relevant medical records, radiologic films, ergonomic assessments and claimant's deposition transcript.

Based on his evaluation, Dr. Gennaro concluded that claimant's work before October 15, 2001, including computer work and driving, aggravated an underlying cervical degenerative disease resulting in right arm radicular symptoms. Further, in his opinion, she temporarily exacerbated her condition when she struck her head on October 15, 2001. After that incident, her condition quieted down, but did not abate.

Dr. Gennaro agreed with Dr. Backus that claimant had reached a medical end point for the October 15, 2001 injury by August of 2002.

Although Dr. Gennaro conceded that claimant could have independently developed symptoms of her preexisting condition, he opined that her work activity accelerated that process.

The surgery Dr. Binter performed was reasonable, necessary and causally related to the work she had been doing before October 2001.

Dr. Backus initially evaluated the claimant for the defendant on January 31, 2002 when claimant described an injury as a combination of ergonomics (reaching at her work station) and a blow to her head. He concluded that there was a causal relationship between the claimant's complaints and her work, although she had a large pre-existing component to her problem. He identified both her desk work and the incident where she struck her eye on the table leg as causative agents, with the desk work setting in motion local irritation in the cervical muscles or nerve root that started a radicular process and the table leg incident aggravating an already flared condition.

Based on his review of records, history from the claimant and physical examination, Dr. Backus concluded that it would have been reasonable to have elected the surgery recommended by Dr. Binter or to have followed a conservative course. If her symptoms persisted, he opined that the surgery could become medically necessary in the future.

However, at the formal hearing, Dr. Backus testified that it was claimant's preexisting condition, and not her work, that necessitated the surgery.

Richard Levy, M.D., evaluated the records in this case for the defendant. In his opinion, claimant's preexisting condition could have been precipitated by any number of events, including coughing, but not her work.

Attorney Fees and Costs

Claimant submitted support for her request for litigation costs of \$1,116.94 and attorney fees of \$4,734.00 based on 52.6 hours at \$90.00 per hour.

CONCLUSIONS OF LAW:

In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. Egbert v. Book Press, 144 Vt. 367 (1984).

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).

Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's Inc., 137 Vt. 393 (1979).

The defense implicates the claimant's use of a computer at home as causing an aggravation and need for the surgery in November of 2002. However, no expert testimony has been offered on that subject, and since it is beyond the ken of a layperson, will not be accepted. See id.

Claimant has proven an initial work related injuries based on ergonomics and aggravated by the blow to her head. MRI evidence from 2001 clearly documented a disc herniation for which surgery was

recommended. Claimant's decision to try conservative treatment first was certainly reasonable.

It is possible, as in this case, for one to reach medical end result for an injury and still require surgery in the future, after which another permanency assessment is warranted. See Bertrand v. McKernon Group, Opinion No. 20-03WC (2003). Just such a sequence occurred here. In the interim, her symptoms waxed and waned.

On the record of this case, however, it is not the symptoms, but the second MRI, that is the crucial evidence. It showed the same central and right-sided C5-6 disc herniation in 2002 that had been seen a year earlier. Intervening events neither improved nor worsened that underlying condition, although claimant no longer was satisfied with conservative measures. The surgery, indicated by the central and right-sided C5-6 disc herniation, that could have been performed in 2001 for her work-related condition was delayed for a year. Such a delay does not render it non-compensable. Therefore, the defendant is liable for the surgery and related expenses.

As a prevailing claimant, she is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678(a); WC Rule 10.000. Claimant prevailed due to the efforts of her attorney and expended the hours claimed because of the defense mounted, discovery needed and hearing time involved. Therefore, a fee based on 52.6 hours is reasonable. Costs incurred were necessary to the success in this claim and are awarded within the parameters of the Rule 40 fee schedule, which limits the charge for expert medical testimony to \$300 for the first hour and \$75 for each additional 15 minutes.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to pay:

Medical benefits for claimant's cervical injury, including the cervical surgery of November 25, 2002 and subsequent treatment;

Temporary total disability benefits from the date of surgery for the six-week postoperative period;

Permanent partial disability benefits based on 20% whole person impairment (25% less 5% previously paid);

Interest on payments from the date each became due, 21 V.S.A. § 664;

Attorney fees of \$4,734.00 and costs within the limits of Rule 40.

Dated at Montpelier, Vermont this 29th day of January 2004.

*Michael S. Bertrand
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.