

Morrisseau v. State of Vermont, Agency of Transportation (05/17/04)

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

Donald Morrisseau

Opinion No. 19-04WC

v.

*By: Margaret A. Mangan
Hearing Officer*

*State of Vermont
Agency of Transportation*

*For: Michael S. Bertrand
Commissioner*

State File No. S-12984

*Expedited hearing held in Montpelier on March 19, 2004
Record closed on April 20, 2004*

APPEARANCES:

*Christopher McVeigh, Esq., for the Claimant
Nicole Reuschel-Vincent, Esq., for the Defendant*

ISSUE:

*Is gastric bypass surgery a reasonable medical treatment causally
related to claimant's work-related knee condition?*

EXHIBITS:

Joint 1: Medical Records

*Claimant's 1: Deposition of Stephen J. Incavo, M.D.
Claimant's 2: Email from Victor Gennaro, D.O.
Claimant's 3: Windham Group 1/2/03*

*Defendant's A: Deposition of John R. Johansson, D.O.
Defendant's B: Curriculum Vitae of Dr. Gennaro*

FINDINGS OF FACT:

1. *Claimant injured his left knee while working on June 1, 2000 when he slipped and fell from the running board of a truck. In the process, he caught his foot and twisted and hyperextended his knee.*
2. *Prior to that incident, claimant never had knee problems. He was able to perform physically demanding work.*
3. *After self treatment failed to resolve his symptoms, claimant consulted with Dr. Joseph Abate, an orthopedic surgeon, who performed arthroscopic knee surgery on November 2, 2000.*
4. *Claimant returned to work as a highway maintenance worker in January 2001, but his knee pain persisted.*
5. *Two months later, in March of 2001, Claimant saw another orthopedic surgeon, Dr. James Howe, who expressed concern that any procedure for claimant's knee would be hampered by the claimant's weight. He recommended that claimant commit himself to weight loss.*
6. *Claimant weighed approximately 350 pounds at the time of his injury, a weight that has been fairly consistent for several years. In fact, he has had a problem with his weight for most of his life. His attempts at weight loss have not succeeded. Before the work related injury in 2000, he had discussed many weight reduction options with physicians.*
7. *Although claimant tried medications and diet for weight loss prior to his work-related injury, he never followed medical advice to exercise or to maintain a notebook of his diet. As early as 1998, a surgical option for weight loss was proposed to the claimant.*
8. *In May of 2001 Dr. Davignon placed claimant at a medical end result for his work related injury with a 7% whole person impairment.*
9. *Claimant saw Dr. Bergman in October of 2001 with complaints of sleep apnea, depression, fatigue and the inability to sleep. He did not complain of knee pain at that time.*

10. *Claimant did not treat for knee pain from May 14, 2001 until January 11, 2002, when he returned to Dr. Bergman with a complaint of knee pain after umpiring at a youth baseball game. Dr. Bergman planned to "get him exercising," a plan claimant never realized.*
11. *Next, claimant saw Dr. Incavo, an orthopedic surgeon, to whom he mentioned his desire to have gastric bypass surgery. Dr. Stephen Incavo performed an osteotomy to shift the weight bearing pressure on the claimant's knee in June of 2002.*
12. *Dr. Incavo later opined that weight reduction will significantly relieve the claimant's knee pain and that gastric bypass surgery is a reasonable procedure with a strong likelihood of achieving the weight reduction goal.*
13. *Dr. Incavo opined that reducing the claimant's weight will slow the progression of his osteoarthritic knee condition and increase claimant's functioning and work capacity. However, he also theorized that there is an 80% chance that claimant's left knee pain will return within five to ten years of the gastric bypass surgery.*
14. *By June of 2003, claimant had reached a medical end result for the osteotomy. He had at least a sedentary work capacity at that time. The parties agreed to a Form 22 permanent partial disability payment. There is no evidence to suggest that his work capacity will change with weight reduction.*
15. *Claimant's knee condition is such that he will eventually need a total knee replacement. He will do better after that procedure if he can lose weight.*
16. *Dr. Verne Backus, who reviewed claimant's medical records and offered an opinion for the defense in this case, agreed that claimant's size will have a negative impact on any surgical outcome in this case.*
17. *Claimant's primary care physician, Dr. James Bergman, opined that claimant will not lose a significant amount of weight without external intervention. He based that opinion on claimant's previous unsuccessful attempts at weight reduction through diet and medication. Dr. Bergman recommended gastric*

18. *Next, Dr. Bergman referred claimant to Dr. Laurie Spaulding, a surgeon who performs gastric bypass surgery. After their first meeting, Dr. Spaulding gave claimant "homework" to do before the second meeting and impressed upon him the importance of healthy eating habits. When he arrived at the second meeting without the completed assignment, he was sent home.*
19. *Despite that initial problem and after a thorough screening, Dr. Spaulding concluded that claimant is a candidate for the surgery.*
20. *However, there is no evidence to suggest that claimant has implemented the healthy eating patterns Dr. Spaulding suggested.*
21. *Dr. John Johansson conducted a physical examination of the claimant and provided an opinion on the reasonableness of the proposed surgery for the defendant in this matter. He noted that claimant experienced significant pain in his left knee.*
22. *In Dr. Johansson's opinion, gastric bypass surgery is not related to claimant's work-related knee injury. However, he noted that weight loss would help claimant's cardiovascular, pulmonary and general medical health.*
23. *Orthopedist Dr. Gennaro reviewed claimant's medical records and offered an opinion at the defendant's request. At the hearing, he acknowledged that he performs total knee replacements for morbidly obese patients.*
24. *In this case, Dr. Gennaro opined that there is little to be gained for claimant's knee with the proposed gastric surgery because weight loss will not improve the condition he now has and, with his well-established pain syndrome, it will not improve the pain.*
25. *After meeting with Dr. Spaulding and considering the risks and benefits of gastric bypass surgery, claimant has decided to undergo the procedure.*

26. *Claimant has never tried commercial, non-surgical approaches to weight loss.*
27. *Prior to the work-related injury, claimant had been diagnosed with depression. He smokes, contrary to medical advice. Smoking has been shown to contribute to chronic pain.*
28. *Claimant's work related injury did not cause or worsen his weight problem.*
29. *Claimant's attorney has submitted evidence of 146.8 hours worked on this case and \$3,225.44 in expenses incurred.*

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, 123 Vt. 161 (1963), including the right to reasonable medical and surgical treatment. 21 V.S.A. § 640(a).*
2. *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. See Egbert v. Book Press, 144 Vt. 367 (1984). Similarly, he must establish a causal connection between the work related injury and the desired surgical treatment.*
3. *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).*
4. *Reasonable medical treatment is what competent medical evidence proves will relieve symptoms from a work-related injury or restore a claimant's functioning capacity. McGraw v. Numaco, Inc. Opinion No. 48-02WC (2002). The determination is one made at the time the treatment recommendation is made. Jacobs v. Biebel Builders, Opinion No. 17-03 WC (2003).*

5. *In this case, claimant's need for weight reduction predated any work related injury. The "surgical option" of gastric bypass was proposed years ago, long before the work-related injury. Claimant has reached a medical end result for the work related injury and has a work capacity. The suggestion that he will need a total knee replacement is a prediction for the future, not an immediate concern.*
6. *Weight loss for this claimant is clearly desirable for many reasons. It will help his overall health, relieve his sleep apnea, and take pressure off all weight bearing joints, including his knee. However, it cannot be concluded that gastric bypass to achieve that goal is reasonable, and therefore chargeable to defendant, when less invasive, methods were never attempted. Nor has the requisite causal connection been made.*
7. *The medical evidence does not support the claimant's theories of a likelihood of pain relief after the surgery or of a causal relationship between the proposed surgery and the work-related injury. The prospect of pain relief postoperatively is speculative at best. And, given the emergence of other health problems, it is likely that the goal of the proposed surgery is to relieve those other, more threatening, conditions.*
8. *In sum, the proposed surgery is not compensable because it is not causally connected to the claimant's work-related injury and is not reasonable under 21 V.S.A. § 640(a).*

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim for weight reduction surgery is DENIED.

Dated at Montpelier, Vermont this 17th day of May 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.