

J. K. v. Joe Knoff Illuminating

(July 7, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

J. K.

Opinion No. 28-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Joe Knoff Illuminating

For: Thomas W. Douse
Acting Commissioner

State File No. P-16619 (II)

APPEARANCES:

Josef J. Knoff, pro se, Claimant
William J. Blake, Esq., for the Defendant

ISSUE:

Whether the cervical spine surgery Dr. Phillips proposes to treat Claimant is causally related to employment with Josef Knoff Illuminating.

EXHIBITS:

Claimant:

- A. Dr. Phillips's opinion letter (February 13, 2006)
- B. Dr. Wepsic's opinion letter (September 18, 2000)
- C. Cervical Spine x-ray report (February 16, 2000)
- D. Northwestern Medical Center Pain Clinic Report (July 28, 2000)
- E. MRI Cervical Spine report (February 18, 2000)
- F. Dr. Levy's opinion letter (December 18, 2005)
- G. Dr. Levy's letter (December 27, 2005)
- H. Dr. Levy's letter (February 27, 2006)
- I. Transcript of deposition of Dr. Levy (April 14, 2006)
- J. Dr. Archambault's report of office visit (April 11, 2000)
- K. Dr. Roomet's letter (May 12, 2000)
- L. Dr. Penar's office note (June 5, 2000)
- M. Dr. Johansson's Independent Medical Examination (November 14, 2000)
- N. MRI Cervical Spine report (November 14, 2000)
- O. Dr. Wepsic's report on cervical spine x-ray and MRI (December 8, 2000)
- P. Dr. Wepsic's letter (December 8, 2000)
- Q. Vocational Rehabilitation Plan Amendment for self employment (unsigned, undated)
- R. Memorandum from WC Specialist (March 20, 2001)
- S. Department policy re: TTD when Disability not continuous (August 14, 2000)

- T. Dr. Johansson's impairment rating (February 10, 2001)
- U. Dr. Johansson's progress note (May 27, 2003)
- V. Notice of Reliance Insurance Company's liquidation and referral to State Guarantee Fund
- W. Dr. Manchester's office note (May 20, 2003)
- X. Vermont Center for Occupational Rehabilitation note (June 5, 2003)
- Y. Dr. Wing's Independent Medical Examination Report (July 16, 2003)
- Z. Dr. Manchester's November 3, 2003 note
- AA. Dr. Manchester's November 3, 2003 letter
- BB. Attorney William J. Blake's Notice of Appearance (July 6, 2004)
- CC. Dr. Backus's Independent Medical Examination (July 26, 2004)
- DD. Claims Examiner Reid's letter to Claimant regarding preauthorization
- EE. Meridian Medical fax re: acupuncture (June 7, 2005)
- FF. Office note of Dr. Johansson (March 31, 2005)
- GG. Office note of Dr. Johansson (April 14, 2005)
- HH. Dr. Phillips's report (July 7, 2005)
- II. MRI Cervical Spine (September 9, 2005)
- JJ. Dr. Phillips's report (September 13, 2005)
- KK. Fax from James Reid to Attorney Blake (October 12, 2005)

Defendant:

1. Medical Records 2000 to 2006
2. Curriculum vitae of Richard L. Levy, M.D.

CLAIM:

Payment for a C7 foraminotomy and all medical and rehabilitation costs associated with the proposed surgery by Neurosurgeon Joseph M. Phillips, M.D., Ph.D.

FINDINGS OF FACT:

1. Claimant was a self-employed owner and manager of Illuminating Consulting Service and Supply (ICSS), also known as Josef Knoff Illuminating, for fifteen years.
2. Many of Claimant's duties involved overhead work and climbing while retrofitting lighting fixtures, work he did for fifteen years.
3. Before February of 2000, Claimant did not have cervical symptoms of any kind.
4. On February 1, 2000, Claimant suffered neck pain while working at an ICSS job site. Diagnostic tests revealed degenerative disc disease as well as a C5-6 herniated disc and suggestion of a disc at C6-7.
5. A cervical spine x-ray taken on February 16, 2000 revealed marked to severe degenerative changes with disc space narrowing and osteophyte formation.

6. Dr. Stewart Manchester wrote a letter to the insurance adjuster on February 17, 2000, stating that Claimant's right-sided neck and arm pain was caused by overhead work with his head extended.
7. A February 18, 2000 MRI revealed a herniated disc at C5-6 and a suggestion of a small central to left C6-7 disc.
8. Claimant's complaints increased after he removed snow from his roof in February 2000, as reflected in Dr. Jacques Archambault's note of February 22, 2000.
9. By March of 2000 Dr. Archambault noted that Claimant began to have symptoms on his left side. The doctor also noted that Claimant had arthritic changes at C5-6 and C6-7 as well as a bulge on the right at C5-6 and on the left at C6-7.
10. In May of 2000, Dr. Andres Roomet interpreted clinical and electrophysiologic data as showing that Claimant had minimal C7 radiculitis, among other problems, although Claimant had no deficits.
11. In June of 2000, Claimant was seen by Dr. Paul Penar who noted degenerative changes at C4 through C7 and the presence of a disc herniation at C5-6. Claimant declined Dr. Penar's offer to operate at C5-6 because of potential risks.
12. In July 2000, Dr. William Roberts at the Northwestern Medical Center Pain Clinic noted that Claimant had a "significant symptom complex related to a C6-7 cervical spine disc herniation."
13. A November 2000 MRI was first read as revealing a C5-6 herniation, but not one at C6-7. However, on December 8, 2000 Dr. James Wepsic interpreted that study as one revealing a disc complex at C5-6 and a "smaller protrusion at C6-7 to the left of midline." In a letter to a medical case manager, Dr. Wepsic described, "moderate compression on the left at C6-7." At that time Claimant had left sided symptoms.
14. Claimant treated at Green Mountain Physical and Occupational Medicine for pain relief. In February 2001, Dr. John Johansson placed Claimant at medical end result, a conclusion that Claimant did not dispute.
15. Claimant sold ICSS and embarked on an e-commerce business, MyNaturals.com in 2002 or 2003.
16. On May 20, 2003, Claimant saw Dr. Manchester who described an "exacerbation of his previous Worker's Compensation injury."
17. In 2003, when most of his work was at a computer, Claimant underwent a new course of treatment, including physical therapy, massage therapy, and pool therapy.
18. On July 16, 2003, Dr. Daniel Wing at Occupational Health and Rehabilitation, performed an Independent Medical Examination. Dr. Wing related Claimant's neck pain and bilateral arm weakness to his 2000 work related injury and suggested that

foraminotomy may be indicated. Finally, Dr. Wing recommended that Claimant's workstation be evaluated.

19. On July 26, 2004, Dr. Verne Backus performed an Independent Medical Examination. Although Dr. Backus could not find that Claimant's computer work aggravated his work-related condition, he opined that such a conclusion might be made if further diagnostics show objective changes.
20. In March and April of 2005, Claimant participated in a three-week program with Dr. Johansson for cervical disc syndrome with left arm pain. Because Claimant did not improve during that program, Dr. Johansson recommended a neurosurgical consult.
21. In the summer of 2005, Claimant began treating with Dr. Joseph Phillips, neurosurgeon. Dr. Phillips noted that most of Claimant's symptoms were in the left shoulder, radiating to the arm, whereas some time before, most symptoms were on the right side.
22. A September 2005 MRI revealed that the C5-6 herniated disc had resolved. While no herniation could be seen at C6-7, the foramen had narrowed due to spurring.
23. Dr. Phillips offered to perform a C7 foraminotomy to treat the left sided radicular complaints, surgery that is the subject of this dispute.
24. Dr. Phillips concluded that the osteophytes causing Claimant's symptoms now are the result of the injury he sustained in 2000. He supported his opinion with Claimant's records and history showing a C6-7 disc herniation with protrusion to the left, seen by Dr. Wepsic, which set in motion a process that resulted in foraminal stenosis, creating Claimant's current clinical picture. He explained that the development of the spurring "is nature's way of trying to achieve some stability and prohibition of movement at that level."
25. The defense asked neurologist and diagnostician, Dr. Richard Levy, to review Claimant's medical records and offer an opinion regarding any causal link between Claimant's work at ICSS and the proposed surgery. Dr. Levy found no evidence to support that causal link, although he agreed that overhead work with hyperextension of the neck involves the cervical vertebrae, particularly C5-6 and C6-7. He agreed that such overhead work could accelerate changes in the neck. Factors that contribute to narrowing in the spine include certain occupations. Overall, however, on the facts of this case, Dr. Levy concluded that Claimant's current problems are the result of the natural progression of cervical spondylosis, not to a work-related injury or to any other single inciting event.

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). 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).

2. 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. Under the Workers' Compensation Act, the employer must furnish "reasonable surgical, medical and nursing services in an injured employee," 21 V.S.A. § 640(a), if that treatment is causally related to a work-related injury.
4. In considering conflicting expert opinions, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (Aug. 4, 1997); *Gardner v. Grand Union Op. No. 24-97WC* (Aug. 22, 1997).
5. In this case, there is no real advantage as the treating physician. Dr. Phillips, as Claimant's surgeon, treated him for a short time. Dr. Levy only examined him once. Both experts have equal qualifications in the aspects of neurology: Dr. Phillips as a neurosurgeon, Dr. Levy as a neurologist. Both reviewed relevant records. The crucial difference lies in the objective support for the opinion as to whether or not the surgery was causally related to the 2000 work injury. The documents and opinion letters of Dr. Manchester, Dr. Archambault, Dr. Penar, Dr. Roberts, Dr. Wing, and especially Dr. Wepsic all support causation for Claimant's surgery. These physicians were not subject to cross-examination. However, they provided a basis for Dr. Phillips's opinion that the osteophyte formation was the product of a herniated disc. The moderate compression on the left at C6-7, a finding by Dr. Wepsic, had most likely set the osteophyte formation in motion. Also, Dr. Backus opined that this condition was caused by work, but he could not say, without conducting further diagnostics, that Claimant's computer work was aggravated by this injury. Overall, Dr. Phillips's opinion was amply supported by the findings of other surgeons, thus outweighing the objective support for Dr. Levy's opinion against causation. Taken all of these factors into consideration, the advantage of the third factor weighs heavily in Claimant's favor. Therefore, this is a compensable claim.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to pay for Claimant's C7 foraminotomy and all medical and rehabilitation costs associated with the proposed surgery.

Dated at Montpelier, Vermont this ____ day of July 2006.

Thomas W. Douse
Acting 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.