

J. C. v. Eveready Battery Company

(April 3, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

J. C.

Opinion No. 12-07WC

v.

By: Phyllis Severance Phillips, Esq.
Hearing Officer

Eveready Battery Company

For: Patricia Moulton Powden
Commissioner

State File No. T-12816

OPINION AND ORDER

Hearing held in Montpelier on February 2, 2007

Record closed on March 4, 2007

APPEARANCES:

Claimant, *pro se*

John Valente, Esq. for Defendant

ISSUE PRESENTED:

Whether Claimant's ongoing chiropractic treatment is compensable under 21 V.S.A. §640(a).

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records

Claimant's Exhibits:

Claimant's Exhibit 1: Billing statement from Todd Faxvog, D.C.

Claimant's Exhibit 2: Receipt for postage

Claimant's Exhibit 3: Excellent Attendance awards for 2003 and 2004

Claimant's Exhibit 4: Photographs

Claimant's Exhibit 5 (admitted following the hearing): Diagrams of stretching/strengthening exercises

CLAIM:

Medical benefits under 21 V.S.A. §640(a)

Costs under 21 V.S.A. §678

FINDINGS OF FACT:

1. Claimant has been employed by Defendant for more than 36 years. On January 13, 2003 she suffered a repetitive stress injury to her neck and left shoulder, arm and hand, causally related to her job as a forklift operator for Defendant. The forklift was not ergonomically designed and in order to operate it Claimant had to turn and twist her neck, shoulders and arms continuously.
2. Defendant accepted Claimant's injury as compensable and paid benefits accordingly.
3. Claimant treated for her injury with Verne Backus, M.D. Her symptoms included cervical pain radiating into her left shoulder, with numbness down her left arm and into her left fingers. Dr. Backus diagnosed a left C-6 radiculopathy and prescribed conservative treatment, including physical therapy, anti-inflammatories, nerve testing and epidural steroid injections.
4. Dr. Backus also referred Claimant to Nancy Binter, M.D., a neurosurgeon, for consideration of surgical treatment options. Dr. Binter examined Claimant in June 2003 and recommended further conservative management, including work hardening and increased strength training. At Dr. Binter's referral, during the summer of 2003 Claimant attended a work conditioning program on a twice-weekly basis for four weeks. At the end of the program, she was released to return to her forklift driving job for up to 8 hours per day.
5. Concurrent with the treatment directed by Dr. Backus, Claimant also treated with Todd Faxvog, D.C., a chiropractor. Dr. Faxvog's modalities included cervical adjustments, manual cervical traction, electric muscle stimulation, hot packs and deep tissue massage.
6. The frequency of Dr. Faxvog's treatments has varied. During the spring of 2003 he treated Claimant at least 2 or 3 times each week. Treatment frequency then tapered off to once or twice per month until January 2004. At that point, treatment frequency spiked again, and Claimant resumed chiropractic visits on at least a weekly basis until April 2004. In May 2004 treatment frequency diminished to about two times per month and remained at that level throughout 2004. Treatment frequency in 2005 was approximately one visit every 3 or 4 weeks. Treatment frequency in 2006 was approximately one visit every 4 to 6 weeks.
7. Claimant's symptoms improved with conservative treatment. In May 2004 she was reassigned to a new position, one that was far less stressful to her neck. This too helped ameliorate her condition. Her symptoms have never fully resolved, however, and she feels knots and pain in her neck every day.
8. In May 2004 Dr. Backus determined that Claimant had reached end medical result. He recommended that Claimant taper off her chiropractic treatments to stop "over a relatively short period of time."

9. In July 2004 Dr. Backus rated Claimant with a 16% whole person permanent impairment referable to her cervical spine injury. Dr. Backus' ultimate diagnosis was chronic left C-6 radiculopathy superimposed on cervical spondylosis, particularly at that level. He prescribed ongoing chronic pain medications and reiterated his recommendation that Claimant continue to taper off her chiropractic treatment.
10. Claimant returned to see Dr. Backus in March 2005. She continued to suffer from neck and shoulder pain, and felt unable to taper off Dr. Faxvog's chiropractic treatment beyond every other week. Dr. Backus referred her to Mary Flimlin, M.D., a physiatrist, for possible chronic pain treatment recommendations.
11. Dr. Flimlin examined Claimant in July, August and December 2005, and again in April 2006. Her treatment recommendations included chronic pain medications, a possible TENS unit trial and continued aerobic exercise and home exercise program for stretching and strengthening.
12. As to ongoing chiropractic treatment, Dr. Flimlin advised that chiropractic interventions should include only manual traction with deep tissue massage and myofascial release, but no cervical adjustments. Regarding frequency of chiropractic treatment, Dr. Flimlin concurred with Dr. Backus' recommendation that it be tapered off gradually, first to once monthly and then to every other month. As of April 2006, Dr. Flimlin advised that chiropractic treatment be discontinued altogether within 3 to 4 months.
13. In January 2006 Donald Kinley, M.D., an orthopedist, performed a medical records review at Defendant's request. Dr. Kinley opined that Claimant's treatment to date had been reasonable, but that further passive therapy, including chiropractic manipulation, would not be of any benefit. Rather, Dr. Kinley believed that Claimant should be on an active aerobic exercise program that would allow her to strengthen her cervical spine and upper extremities.
14. Dr. Faxvog testified on Claimant's behalf at the hearing. He explained that his treatment is palliative, not curative. The focus is on stretching rather than strengthening. In Dr. Faxvog's opinion, stretching the neck muscles increases their mobility and prevents them from splinting so that the nerve root will not be compressed.
15. Although there may be other things that Claimant could do to increase cervical mobility and decrease pain, according to Dr. Faxvog chiropractic treatment is the one thing that has given her the most relief.
16. Dr. Faxvog anticipates that Claimant likely will need ongoing chiropractic care for the foreseeable future. Without it, she is likely to suffer more flare-ups of neck pain and these ultimately may require her to miss work as a result. Dr. Faxvog's goal is to relieve Claimant's pain and maintain her symptoms at a manageable level so that she can continue to work.

17. At Defendant's request, in May 2006 Claimant underwent an independent medical evaluation with John Johansson, D.O., an osteopath. Osteopathic physicians perform a variety of manual therapy techniques, some of which are similar to chiropractic adjustments. Dr. Johansson testified on Defendant's behalf at the hearing.
18. Dr. Johansson diagnosed Claimant with chronic cervical degenerative disc disease with subjective elements of C6 radiculopathy but no clinical correlation. In Dr. Johansson's opinion, Claimant's current symptoms relate to a combination of her work injury and ongoing and advancing degenerative disc disease.
19. According to Dr. Johansson, repeated chiropractic manipulations are not medically indicated for patients with degenerative disc disease and, in fact, are potentially harmful. Repetitive manipulations result in over-stretched ligaments and lax facet joints. Lax facet joints can complicate an underlying degenerative disc condition and cause further problems.
20. Contrary to Dr. Faxvog's opinion that Claimant's symptoms are best addressed by techniques that increase cervical mobility, Dr. Johansson believes that the most effective long-term treatment must focus on strengthening rather than stretching. According to Dr. Johansson, when a muscle is weak it is more easily fatigued. Muscle fatigue leads to muscle tightness, which leads to knotting up and decreased mobility. Chiropractic adjustments that stretch the muscle may provide short-term symptom relief, but are harmful in the long term. Strengthening the muscle addresses the underlying cause and therefore is both more effective and less harmful over time.
21. Dr. Johansson would recommend heat and medications for short-term relief of Claimant's symptoms.
22. Claimant has a home exercise program, as prescribed by her physical therapists in accordance with both Dr. Backus' and Dr. Binter's treatment recommendations. The program involves both stretching and strengthening exercises. Claimant testified that she does stretching exercises two or three times per week. It is unclear to what extent she performs the strengthening exercises.
23. Claimant has never missed any time from work as a result of her injury. She does not have any modified-duty work restrictions. Her work station at her current job assignment has been ergonomically designed and does not require her to maintain positions that aggravate her symptoms. Outside of work, Claimant continues to be active, and engages in activities such as cross-country skiing, snow shoeing and swimming. In all of these activities, and with prolonged sitting or driving as well, Claimant is never pain-free, but the pain is not disabling.
24. With both Dr. Kinley's and Dr. Johansson's reports as support, Defendant filed its notice of intention to discontinue payment for Claimant's ongoing chiropractic care on September 21, 2006. The Department approved the discontinuance on October 2, 2006. Since that time, Claimant has incurred a total of \$1,142.77 in charges for chiropractic treatment. Claimant testified that but for the discontinuance she would continue to treat with Dr. Faxvog every 6 to 8 weeks.

25. Claimant introduced evidence of costs totaling \$4.05.

CONCLUSIONS OF LAW:

1. Under Vermont's Workers' Compensation Act, an employer is obligated to provide reasonable surgical, medical and nursing services when an injury arises out of and in the course of employment. 21 V.S.A. §640(a). Chiropractic treatment is included in that obligation. *Quinn v. Emery Worldwide*, Opinion No. 29-00WC (September 11, 2000); *Smith v. Whetstone Log Homes*, Opinion No. 70-96WC (Nov. 25, 1996) and cases cited therein.
2. Once a claimant has established that she is entitled to benefits under the Act, the burden shifts to the employer to establish the propriety of either ceasing or denying further compensation. *Merrill v. University of Vermont*, 133 Vt. 101 (1974). At issue here, therefore, is whether the medical evidence supports Defendant's position that it is no longer responsible for Claimant's chiropractic care.
3. Palliative care is compensable under the Act even after a claimant has reached end medical result if it is reasonable and necessary and causally related to the compensable work injury. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 532 (1996); *Gagne v. Verdelle Village*, Opinion No. 35-04WC (Aug. 25, 2004); *Quinn v. Emery Worldwide, supra*.
4. In determining what is reasonable under §640(a), the decisive factor is not what the claimant desires or what she believes to be the most helpful. Rather, it is what is shown by competent expert evidence to be reasonable to relieve the claimant's symptoms and maintain her functional abilities. *Moyer v. Miller Building Systems*, Opinion No. 22-01WC (July 20, 2001); *Colbert v. Starr Farm Nursing Home*, Opinion No. 5-01WC (Feb. 26, 2001); *Quinn v. Emery Worldwide, supra*.
5. To evaluate the expert evidence and choose between conflicting expert opinions, the Department traditionally looks to the following factors: (1) the nature of treatment and length of time there has been a patient-provider relationship; (2) whether accident, medical and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination; and (5) the qualifications of the experts, including professional training and experience. *Quinn v. Emery Worldwide, supra*; *Morrow v. Vt. Financial Services Corp.*, Opinion No. 50-98WC (Aug. 25, 1998).

6. In the context of the current claim, examining these five factors does not yield any clear-cut result. All of the experts provided evidence that was clear, thorough and objectively supported by relevant treatment records. All are well qualified in their respective fields, whether orthopedic, chiropractic, neurological or osteopathic. With the exception of Dr. Kinley, whose opinion was based on a medical records review only, all conducted comprehensive examinations of Claimant. Last, as to patient-provider relationship, Drs. Faxvog, Backus and Flimlin all maintained one with Claimant. Given that both Drs. Backus and Flimlin shared the opinions of Drs. Kinley and Johansson as to ongoing chiropractic care, one cannot either add or subtract weight from the latter opinions solely because they were not treatment providers.
7. The disputed issue here derives from a professional difference of opinion as to the efficacy of long-term chiropractic care and repetitive chiropractic manipulations as a reasonable, necessary and effective option for controlling pain and maintaining functionality. Dr. Faxvog believes strongly that the best palliative treatment for Claimant should include chiropractic adjustments to stretch the neck muscles and increase mobility. In contrast, Drs. Backus, Flimlin, Kinley and Johansson believe that the long-term focus of Claimant's palliative care should be on strengthening the muscles so as to reduce fatigue, decrease tightness and increase mobility in that way.
8. Dr. Johansson's testimony that by stretching ligaments that are already lax, repetitive chiropractic manipulations cause long-term harm to patients with degenerative conditions such as Claimant's is persuasive. A palliative treatment that provides temporary relief of symptoms and maintains functionality is reasonable, but only if it does not cause further harm over time. *Quinn v. Emery Worldwide, supra.*
9. It is clear from the medical records and from her own testimony that Claimant has never invested fully in the muscle strengthening approach advocated by Drs. Backus, Flimlin, Kinley and Johansson. Her efforts in that regard have been temporary, sporadic and short-lived. In contrast, her devotion to Dr. Faxvog's passive stretching technique has become so strong that she now views his treatment as both essential and irreplaceable. While it is her right to choose the treatment approach with which she feels most comfortable, under the circumstances it is not Defendant's responsibility to fund it.
10. Defendant has sustained its burden of proof that it is not liable under 21 V.S.A. §640(a) to continue to pay for Claimant's chiropractic treatment.

ORDER:

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, Claimant's claim for medical benefits under 21 V.S.A. §640(a) is **DENIED**.

Because Claimant has not prevailed, her claim for costs associated with this action is **DENIED**.

Dated at Montpelier, Vermont this 3rd day of April 2007.

Patricia Moulton Powden
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.