STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Joseph Bertrand	)	State File No. R-04720
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
McKernon Group	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 20S-03WC

SUPPLEMENTAL DECISION ON FEES AND COSTS

APPEARANCES:

Beth Robinson, Esq. for the Claimant
William J. Blake, Esq. for the Defendant

In accordance with the order in Opinion No. 20-03WCdated (April 16, 2003), Claimant submitted a modified petition for Attorney Fees and Costs which reflects that:

1. Counsel conservatively recalculated time spent on tasks for attorney and paralegal in compliance with the guidelines specified in the April decision, at the same time maintaining a logical relationship between task and time.

2. In addition, counsel deleted expenses not directly related to the dispute-giving rise to the contested hearing.

3. The changes submitted justify an award to this prevailing claimant of $5,710.50 (57.75 attorney hours at $90 /hour plus 8.55 paralegal hours at $60. hour) in fees and costs totaling $1,843.10.

ORDER:

Therefore, Defendant is ORDERED to pay Claimant attorney fees of $5,710.50 and costs of $1,843.10.

Dated at Montpelier, Vermont this 7 day of July 2003.

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.

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Expedited hearing held in Montpelier on February 24, 2003
Record closed on March 11, 2003

APPEARANCES:

Beth Robinson, Esq. for the Claimant
William J. Blake, Esq. for the Defendant

ISSUES:

1. Is the proposed cervical fusion compensable pursuant to 21 V.S.A. § 640?

2. Is Claimant entitled to additional temporary total disability benefits, and, if so for what period?

EXHIBITS:

Joint Medical Exhibit:	Medical Records
Claimant's Exhibit A:	Curriculum vitae of Joseph Corbett, M.D.
Claimant's Exhibit B:	MRI films (in custody of Claimant's counsel)
Defendant's Exhibit 1:	Curriculum vitae of Mark J. Bucksbaum, M.D.
Defendant's Exhibit 2:	Report of Mark J. Bucksbaum, M.D.
Defendant's Exhibit 3:	American Academy of Pain Management Certificate
Defendant's Exhibit 4:	American Board of Physical Medicine and Rehabilitation Certification
Defendant's Exhibit 5:	American Board of Independent Medical Examiners Certification
Defendant's Exhibit 6:	North American Spine Society Certificate
Defendant's Exhibit 7:	Letter from Acadia to Dr. Bucksbaum, dated March 25, 2002
Defendant's Exhibit 8:	Transcript of deposition of Dr. Bucksbaum

STIPULATED FACTS:

1. Claimant Joseph Bertrand was employed by The McKernon Group, within the meaning of the Vermont Workers' Compensation Act (Act), on or about August 28, 2000.

2. The McKernon Group (Employer) was an employer within the meaning of the Act on or about August 28, 2000.

3. Acadia Insurance Company was the workers' compensation carrier for the Employer on or about August 28, 2000.

FINDINGS OF FACT:

1. On August 28, 2000, while standing on a ladder about 15 to 18 feet off the ground, Claimant was ripping shingles off a roof when one unexpectedly broke loose, causing Claimant to lose his balance and fall backwards to the ground. He tried to catch himself so his right shoulder took the initial part of the blow, but he landed on his back when he hit the ground. He did not lose consciousness.

2. Prior to the fall, Claimant had no significant neck, shoulder or upper back pain.

3. Claimant went home after the fall in attempt to "blow it off." He reported to work the next day, but shoulder pain slowed him down.

4. At first he refused to see a doctor, and did so only on the urging of his supervisor. On August 31, 2000 he went to Mark Woodbury, D.C., who documented Claimant's report of back and shoulder pain. Dr. Woodbury diagnosed lumbar sprain/strain, cervical radiculitis and acromioclavicular (AC) sprain. He recommended that Claimant not work for a week and that Claimant see a medical doctor.

5. On August 31, 2000 Claimant was seen at Rutland Primary Care where he was treated for shoulder pain, but no diagnosis was made.

6. On October 10, 2000 Dr. Ayres documented Claimant's complaint of shooting pains from neck to shoulder.

7. Over the next two years Claimant saw a number of health care providers and had various treatment modalities, including exercises, physical therapy and cortisone injections, as well as surgery on his shoulder. He also had carpal tunnel surgery (CTS), although the surgeon performing that operation did not link the CTS to the work related injury.

8. Although the shoulder surgery relieved the superficial sharp pain, he became more aware of a deeper pain in his neck and shoulder.

9. Claimant saw a number of physicians in the area of neurology, neurosurgery, orthopedics and physical medicine. Various diagnoses were suggested, some centering on his neck and others on his shoulders.

10. An orthopedist, Dr. Ayres, found and documented a limited range of motion and pain with a Spurling maneuver when he saw the Claimant on May 10, 2001.

11. Various tests were performed as well, with x-rays showing degenerative changes at C5-6, spurring at C5-6 and a congenital fusion at C6-7. Specifically, a May 17, 2001 MRI revealed a C5-6 disc protrusion and degenerative changes with a protruding osteophyte. Based on that MRI Dr. Ayres referred Claimant to a neurosurgeon, Dr. Peter Upton. Dr. Upton found no comprehensive clear-cut answer to the Claimant's problems, although he opined that CTS was a part of it and for that recommended surgery. He also recommended a shoulder injection and predicted that Claimant could "end up with an anterior interbody fusion at some point in time."

12. Dr. Ayres performed a shoulder injection that failed to provide significant shoulder relief. In response, Dr Ayres wrote "It makes one wonder about the role the neck is playing."

13. On a referral from Dr. Ayres, Claimant went to the DHMC Spine Center where he saw Skihar Banarjee, a Rehabilitation Medicine specialist. Dr. Banarjee did not detect radiculopathy on physical examination. He then concluded that the Claimant's neck pain was likely related to cervical spondylosis, an asymptomatic condition that became symptomatic with the fall.

14. An arthrogram failed to detect pathology in the shoulder.

15. Claimant's neck pain and right shoulder pain continued. A diagnosis proved elusive.

16. On November 27, 2001 Claimant saw Dr. Johansson at Green Mountain Physical and Occupational Medicine for a pain management evaluation. The psychological portion of that evaluation confirmed that Claimant has a higher than average level of drive and motivation for recovery. Dr. Johansson documented the continuous complaints of neck and upper back pain since his fall as well as a suspicion that the source of his problem is the C5 nerve root, "causing a significant amount of trapezius/rhomboid and posterior scapular tightness, tenderness and pain."

17. On December 19, 2001 Dr. Corbett, Dr. Upton's partner in neurosurgery, performed the right carpal tunnel release that improved the hand numbness but the shoulder pain persisted.

18. Subsequent examinations ruled out shoulder pathology.

19. Claimant tried to return to work on light duty, but could not perform jobs with only one arm because of his pain and limitations.

20. A February 2002 EMG did not show acute or chronic cervical radiculopathy.

21. In March 2002 Dr. Corbett noted the spurring at C5-6 on the MRI, asymmetry at C-6 indicating less space for the C-6 root and Claimant's reported numbness in the thumb and index finger, in the C6-7 distribution. Typically the shoulder is in the distribution of C-5.

22. Dr. Corbett tried conservative treatment with home traction and steroids and when those measures failed, recommended a cervical spinal fusion.

23. At the request of the carrier, Dr. Mark Bucksbaum evaluated the Claimant. Concluding that the Claimant's condition would not likely change much over the next year and that he did not require acute treatment, Dr. Bucksbaum placed Claimant at a medical end result. He did not think that the proposed fusion would provide Claimant with much pain relief although he thought it would prevent future deterioration. Dr. Bucksbaum assessed an 8% whole person impairment for cervical strain superimposed on pre-existing cervical spondylosis without radiculopathy, and 6% of the whole person for the right shoulder injury.

24. Acadia paid the Claimant temporary total disability benefits from September 3, 2000 through May 24, 2002 when, pursuant to a Form 27 based on Dr. Bucksbaum's medical end result, it discontinued temporary benefits.

25. The Employer accepted and has been paying permanency based on a 14% whole person impairment. Claimant at the time accepted the medical end result determination, as he was not enthusiastic about surgery.

26. However, when the pain failed to improve and actually got worse, Claimant decided to proceed with surgery. On August 23, 2002 Claimant sought approval from the carrier for the proposed fusion, but the carrier declined to approve it.

Medical Opinions

27. Dr. Corbett testified at the hearing in support of the proposed surgery. He is a board certified neurosurgeon in practice in Rutland since 1993. In that practice which includes treatment for spine problems, he performs between 30 and 50 spinal fusions per year.

28. Based on his education, training, professional and personal experience as well as the objective testing and clinical signs with this Claimant, Dr. Corbett opined that the source of Claimant's shoulder problem is the cervical spine and most likely, the C-6 root. He acknowledged that although it is not the typical explanation for shoulder pain, it probably is so in this case given the numbness in the C-6 distribution, the persistence of shoulder pain despite shoulder specific interventions, both conservative and surgical, and specific clinical signs, such as the shooting pains from neck to shoulder he had in October 2000. After the carpal tunnel surgery, the Claimant's numbness in the non C-6 distribution (middle and ring finger) improved, but the symptoms in the thumb and index finger persisted. The negative EMG did not dissuade him because there are significant false negatives.

29. Based on his analysis of the source of the problem and the exhaustion of conservative measures, Dr. Corbett recommended a fusion at the C5-6 to relieve the Claimant's symptoms ands restore him to a work capacity. The fusion would stop motion in that area, thereby removing trauma to the nerve root that is causing the pain.

30. Because most neck motion occurs above the level of the proposed fusion, Dr. Corbett does not expect that the surgery would result in much neck restriction.

31. Dr. Mark Bucksbaum, board certified in physical medicine, rehabilitation and pain management, examined the Claimant for the Defendant in this case and reviewed his medical records. Based on his knowledge, experience, examination and review, Dr. Bucksbaum concluded that Claimant's pain results from a soft tissue injury and, as such, would not improve with the proposed surgery, although he opined that the surgery would slow the degenerative process.

32. Dr. Bucksbaum attributed Claimant's cervical pathology to degenerative changes that do not explain the Claimant's pain. He based this opinion on his examination of the Claimant and the absence of positive findings of radiculopathy. The electrodiagnositic studies were normal. Further, because the Claimant already has a congenital fusion one level below the proposed fusion, the proposed surgery would add undue stress on the non-fused areas.

33. In sum, Dr. Bucksbaum does not believe that the proposed surgery will improve a work-related condition or symptoms.

Request for Attorney Fees and Costs

34. Claimant submitted evidence of his fee agreement with his attorney, evidence of 100.25 attorney hours and 21.75 paralegal hour worked on this case and $1,889.51 incurred in disbursements.

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 form 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).

4. This case necessitates a choice between conflicting medical opinions. Dr. Bucksbaum opines that the proposed cervical fusion is not reasonable to relieve the Claimant's pain. His opinion is premised on his view that the Claimant's symptoms are the product of a cervical soft tissue injury and are not cervical in nature.

5. Dr. Corbett opines that the proposed cervical fusion is reasonable, based on his view that a significant component of the Claimant's pain is cervicogenic.

6. 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).

7. The first and second factors devolve in favor of Dr. Corbett who has been treating the Claimant and who has the particular expertise in neurosurgery, and as such is the one who assesses a patient's need for the surgery, performs the procedure and manages the postoperative period. Both physicians performed comprehensive examinations and had all relevant records. And both physicians present plausible explanations for their opinions, with Dr. Corbett's more persuasive given the neurological subtleties presented, particularly the theory implicating the C-6 nerve root when hand symptoms and past history of pain supported the theory even though the pain could not be explained by the typical dermatomal pattern. On balance, the weigh shifts in favor of Dr. Corbett with this neurosurgical expertise.

8. Furthermore, persuasive evidence proves that Claimant's cervical symptoms following the fall from the ladder are work-related as an aggravation of a preexisting problem. As long as the work injury accelerates or exacerbates an underlying condition, the claim is compensable, even if the condition would inevitably lead to the same result. *Marsigli Estate v. Granite City Sales,* 124. Vt. 95, 103 (1964). Although Claimant had degenerative changes, those symptoms were not symptomatic until after the injury, with the onset of neck complaints after the accident, although they were not the most acute of his problems at that time.

9. Next is the question whether Claimant is entitled to temporary total disability and, of so, for what period. TTD benefits are due until a claimant returns to work or has reached a medical end result. "When maximum earning power has been restored or the recovery process has ended, the temporary aspect of the workman's disability is concluded." *Orvis v. Hutchins*, 123 Vt. 18, 24 (1962). Periods of temporary disability may be intermittent. See, 21 V.S.A. § 650 (c); *Stannard v. The Stannard Company*, Op.No.33-01 (2001).

10. The carrier was justified in terminating temporary benefits on May 23, 2002 because, without considering the surgical option, Claimant's condition had reached medical end result. However, once Claimant opted to have the surgery, he was no longer on the medical end result "plateau." See, WC Rule 2.1200. For this reason, Claimant seeks TTD benefits from August 23, 2002, when he asked the carrier to pay for the fusion surgery and it refused, until he recovers from the fusion surgery.

11. Defendant argues that to grant Claimant's request would be to give the Claimant a windfall and unfairly penalize the carrier for a bona fide dispute. Had the carrier accepted the compensability of the proposed surgery at the time of Claimant's request, its only TTD liability would be for the immediate post operative period.

12. Now that the Claimant seeks surgery, he will not reach medical end result until after the procedure. A fair interpretation of the Act, including the prompt adjustment of claims, leads to the conclusion that he is entitled to temporary total disability from the time the carrier denied payment for the procedure recommended by his treating physician. To hold otherwise could inadvertently encouraged denial of reasonable treatment with a concomitant delay in providing medical care and in returning a claimant to work.

13. Finally is the issue of attorney fees and costs. Pursuant to 21 V.S.A. § 678(a), an award of attorney fees to a prevailing claimant is one of discretion and an award of necessary costs a requirement within the parameters of the Rule 40 fee schedule. The dispute at issue here began on August 23, 2002, and justifies an award of attorney fees after that time, but not before. Therefore, the time billed and expenses incurred before this dispute arose must be subtracted from the total requested. Defendant also argues that it is not possible to determine from the billing records what each task actually was because the descriptions arguably could cover work not applicable to the issues present here. Further, it argues that 0.25 time blocks are unreasonable. I agree. When an award is to be made against a carrier, it is important and reasonable that there is precision and clarity. See generally, *In re S.T.N., Inc.* 70 B.R.823 (Bankr.D.Vt. 1987) (principles underlying an attorney fee award in a bankruptcy context discussed).

14. The person performing the work must be identified, which has been done in this case. However, the 0.25-hour minimum and grouping of tasks make it difficult to determine if the work was actually less than a quarter hour or whether non-compensable work may have been included in the descriptions. It is reasonable to expect one requesting the fees to put such doubts at rest.

15. Before an attorney fee and cost award will be made, the request must be amended to conform with these guidelines: 1) include only time worked on the contested issues; 2) use increments no greater than one-tenth of an hour; and 3) specify the specific task performed in each time block. Time preparing the request is compensable as is work by a paralegal. The request for costs must also be amended to conform with the time parameters set out above and the limits in the Rule 40 fee schedule. Claimant has thirty days from the date this order is mailed to amend the fee and cost request, unless the issue can be resolved in the interim.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, the Defendant is ORDERED to:

1. Cover the proposed cervical fusion and reasonably associated benefits;
2. Pay the Claimant temporary total disability benefits from August 23, 2002 until he reaches medical end result or returns to work.

The issue of attorney fees and costs is deferred.

Dated at Montpelier, Vermont this 16th day of April 2003.

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.

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