M. A. v. Phillips & Sylvester and Gifford Med. Ctr. (February 12, 2004)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

M. A.	*Opinion No. 07-04WC*
	By: Margaret A. Mangan
v.	*Hearing Officer*
Acadia as insurer for Phillips & Sylvester; Royal & SunAlliance as insurer for Gifford Medical Center	*For: Michael S. Bertrand* *Commissioner*

State File Nos. P-14501; S-03670; S-06411

Hearing held in Montpelier on November 5, 2004
Record closed on November 24, 2004

APPEARANCES:

Heidi S. Groff, Esq., for the Claimant
Tammy B. Denton, Esq., for Defendant Royal SunAlliance/Gifford Medical Center
Jason R. Ferreira, Esq., for Defendant Acadia/Phillips & Sylvester

ISSUE:

Is claimant's condition a result of an aggravation or recurrence?

EXHIBITS:

Joint Exhibit I:	*Medical Records*
Claimant's Exhibit 1:	*Preservation deposition of Dr. Joseph Phillips*
Claimant's Exhibit 2:	*Curriculum Vitae of Dr. Joseph Phillips*
Defendant Acadia A:	*Discovery deposition of Dr. Joseph Phillips*
Defendant Acadia B:	*Gifford Position Description for Housekeeper*

STIPULATION:

Claimant was an employee of Phillips & Sylvester (P&S) within the meaning of the Vermont Workers' Compensation Act (Act) at all relevant times.

Defendant P&S was an employer within the meaning of the Act at all relevant times.

Acadia was the workers' compensation insurer for P&S at all relevant times.

Defendant Gifford Medical Center (Gifford) was an employer within the meaning of the Act at all relevant times.

Royal & SunAlliance (RSA) was the workers' compensation insurer for Gifford at all relevant times.

On or about January 17, 2000, claimant suffered a work-related injury to his back when he fell at a construction site while working for P&S. Acadia accepted this claim. See Form 21.

A T12 compression fracture was noted on January 18, 2000 at Gifford. No MRI was performed.

A March 16, 2000 x-ray at Gifford Medical Center revealed that the L1 lumbar vertebra was intact.

Claimant eventually returned to full duty work at P&S. On or around July 13, 2000, claimant suffered another work-related injury to his back when he fell from a height of about three feet on a ladder working for P&S.

A July 13, 2000 x-ray at Gifford noted, "some diminished intervertebral disc space at L5-S1. This [was] similar to earlier studies."

An August 24, 2000 MRI at DHMC showed "no spinal stenosis or herniated disk."

On or about July 10, 2001, claimant began working in a maintenance position at Gifford.

An October 8, 2000 x-ray at Gifford showed a "slight decrease of L5-S1…." The study when compared to the examination of July 13, 2000 is unchanged.

On or about August 10, 2001, claimant experienced back symptoms while he was cleaning at Gifford Medical Center. No films were performed at that time. Claimant returned to work at Gifford on August 15, 2001.

On or about October 4, 2001, claimant experienced back symptoms while lifting the lid of a trashcan while working for Gifford.

An October 19, 2001 CT scan revealed, "extruded disc, L5-S1 slightly to the left of midline. Large area of extrusion noted, occupying approximately one-half of the intrathecal space."

Acadia, carrier for P&S, had the claimant seen by Dr. John Peterson for an IME on October 22, 2001. Dr. Peterson put claimant at medical end point and assigned the claimant 0% whole person permanency rating for his back injuries on-the-job with P&S.

Acadia discontinued benefits on a Form 27, on or around November 10, 2001. The reason for the discontinuance was an alleged aggravation at Gifford. See Form 27.

An October 7, 2001 MRI revealed an "extruded herniation at the L5-S1 level" and "disc space narrowing at the L5-S1 level."

Following the October 2001 incident, claimant was referred to Joseph Phillips, M.D. who performed a L5-S1 discectomy on January 31, 2002. Dr. Phillips has concluded that claimant's current condition, and the need for the surgery, resulted from the original injury at P&S in January of 2000. The other events were simply recurrences of that original injury.

Dr. Phillips put claimant at a medical end point on June 25, 2002. The Form 27 discontinued TTD effective October 8, 2002 (the date of approval).

Dr. Phillips assigned the claimant a 13% whole person impairment to his spine on September 18, 2002.

Neither defendant in this matter is claiming that claimant's condition was as a result of anything other than his work for either P&S or Gifford.

Claimant average weekly wage at P&S was $475.36, and his initial compensation rate would have been $316.92. See Form 21. With the July 1, 2001 COLA, the compensation rate would have become $345.42 and with the July 1, 2002 COLA, the compensation rate would have become $360.62.

Claimant's average weekly wage at Gifford was $258.25, and his initial compensation rate would have been $210.50, his weekly net income. His initial compensation rate would not have exceeded $210.50.

FINDINGS OF FACT:

Claimant's work history includes self-employment as a carpenter when he twice fell off roofs. After the first fall, he needed treatment for his feet. After the second, which occurred in 1995, he had back pain that took several months to resolve.

At P&S, claimant worked 45 to 55 hours per week at $12 per hour.

On January 17, 2000, while working at P&S, claimant was standing on top of a pile of forms stacked on a tractor-trailer bed. His job was to hook the forms to a boom cable, so that they could be moved individually to the location of installation. In the process of this work, claimant was constantly twisting his body as he looked for the ball at the end of the crane boom, a ball that had struck him on occasion. At one point, his right leg slipped between the forms and dropped about 32 inches (the length of his inseam). He continued to twist his upper body to avoid the ball, and his left leg hyper extended. Despite his discomfort, he worked for the rest of the day.

However, the next day, claimant had severe lower back pain with a fuzzy sensation in his legs. He went to an emergency room, where x-rays confirmed a T-12 compression fracture, which would require a significant amount of force in one claimant's age. Neurologically, he was stable. Dr. George Terwilliger placed claimant out of work,

prescribed pain and anti-inflammatory medication and instructed him to wear a back brace.

Claimant then followed up with his primary care physician, Dr. William Minsinger, who released him to light duty work on March 1, 2000 with the restriction that he avoid heavy lifting.

Claimant progressed to where he could work at P&S without his brace and in less pain.

Later in March of 2000 claimant began physical therapy. By May of 2000 Dr. Minsinger released him to full-duty work, although he declined to place him at medical end result.

On July 13, 2000, claimant fell off a ladder from a height of three feet, landing on his feet. He returned to the Gifford Medical Center with complaints of back pain and a numbing sensation in his legs. According to the note for that visit, claimant was "rugged" and used to the pain he had that day. However, he walked hunched over and could not straighten up. Claimant was given pain medication and cleared to return to work, depending on his pain.

In August or September of 2000, claimant experienced a tingling sensation in his feet as a result of pushing some trusses with a 2 x 4 overhead while working at P&S. He then sought care from Dr. Minsinger for numbness and pain in the legs. Dr. Minsinger ordered an MRI. That study, performed on August 24, 2000 at DHMC, did not reveal spinal stenosis or a disc herniation.

On September 27, 2000, Dr. Ward performed a neurological examination, noting that claimant had bilateral S1 radiculopathies and that he could be susceptible to developing neurological symptoms with heavy straining or lifting. Dr. Ward's findings were consistent with a L5-S1 herniation.

Claimant stopped working at P&S in the fall of 2000 because of his back pain.

In November 2000 claimant resumed physical therapy and began exercising at a gym. On November 28, 2000, Dr. Minsinger released claimant to light duty, lifting up to 10 pounds frequently and 20 pounds occasionally.

According to a December 22, 2000 Functional Capacity Evaluation (FCE), claimant had a full time sedentary work capacity, although he had not reached his physical maximum during that evaluation.

At the time claimant's physical therapy was discontinued on January 31, 2001, claimant had no back pain, but the numbness in his legs persisted.

In May of 2001, claimant's physical demand level was up to the light to medium capacity as shown by a Dartmouth Spine Center functional assessment.

During the time claimant was out of work between August of 2000 and July 2001, he did some work around his house, but generally was not active.

Claimant began working in a maintenance job at Gifford Medical Center in July 2001, after he had passed a pre-employment physical for maintenance/janitorial work. His work consisted of cleaning offices, examination and waiting rooms, sweeping, mopping, restocking shelves, cleaning inside and outside windows and cleaning vents and baseboards. Although it was part of his job description, claimant never performed minor plumbing tasks, never lifted or moved boxes of medical records, never worked on the boiler, and never performed minor electrical tasks other than changing light bulbs. In short, he did not perform heavy tasks.

At the time he began his work at Gifford, claimant had no back pain. He was not wearing a back brace, nor was he taking any prescribed pain medication for his back or legs.

After about a month on the job at Gifford, on August 10, 2001, claimant was picking up or putting down a bottle while cleaning, when he experienced intense pain in his lower back that radiated down to his left knee. The next day he sought treatment at the emergency room with Dr. Jerald Ward who described the low back pain as fairly severe and which could have represented a new problem or an exacerbation of prior spine problems. He took claimant out of work.

On August 21, 2001, Dr. Mark Seymour, claimant's primary care physician, released him to return to work and referred him to physical therapy, which helped him to decrease his pain.

Then, on October 4, 2001, claimant experienced back and leg pain while discarding trash bags and flipping over a dumpster lid at Gifford. As soon as he lifted the dumpster lid, he felt severe lower back pain and was unable to lift his feet. From the dumpster, he had to "shuffle" across the parking lot. That was claimant's last day of work at Gifford.

Claimant's back pain continued to worsen. He was unable to stand erect while walking. When seen at the emergency room on October 6th, he was diagnosed with sciatica and prescribed pain medication.

Claimant resumed physical therapy. On October 8th, he returned to the emergency room because his pain continued despite rest and narcotic medication. Additional medication was prescribed and he was told not to work.

Next, a CT scan was performed on October 19, 2001, which revealed a large extruded disc at L5-S1 slightly to the left of midline, prompting Dr. Seymour to refer claimant to a neurosurgeon, Dr. Joseph Phillips.

Based on the CT scan and repeat MRI, which also revealed a significant disc herniation at L5-S1, Dr. Phillips performed a surgical L5-S1 discectomy on January 31, 2002.

Claimant reached a medical end result on June 25, 2002 with a 13% whole person impairment to his spine according to Dr. Phillips.

Expert Medical Opinions

In treating the claimant, Dr. Phillips reviewed all records and diagnostic films, including the MRI and CT scans. Plain films showed bony changes consistent with a lumbar disc herniation before August 2000 even though frank herniation did not become apparent until 2001. In Dr. Phillips's opinion, what he saw at the time of surgery, a torn annulus, disc fragments and extruded end plate, was more consistent with major trauma than a minor injury. He considered the dumpster incident a minor one.

Therefore, Dr. Phillips attributes the torn annulus and disc herniation to the claimant's accident at P&S. He bases that opinion on the nature of the event in 2000, compared to what he described as the "nonevent" at Gifford, resulting in the same symptoms he had experienced before. Further, Dr. Phillips noted that claimant had longstanding and persistent lower extremity symptoms before the dumpster incident and that his clinical situation had not been stable. He opined that claimant likely had the disc herniation before the Gifford event, even though it was not yet evident on the MRI, and would have been a surgical candidate even without the dumpster incident because his complaints lasted more than a year.

John Peterson, a general practitioner and independent medical evaluator, conducted an evaluation for P&S. He interviewed and examined the claimant and reviewed medical records and radiologic films. In his opinion, claimant suffered a new injury at Gifford while lifting the lid of the dumpster and discarding the trash bags. He based his opinion on the October 2001 CT showing a disc herniation that was not present in August of 2000, negative neurological findings before October of 2001 and the increase in claimant's leg pain and decrease in range of motion after the Gifford incident. He rejected Dr. Phillips's theory that the herniation was present, but not seen, on the earlier scans.

However, Dr. Peterson conceded that at T12 fracture would not have explained claimant's low back and lower extremity symptoms. Dr. Peterson did not review records from Dr. Phillips or the 2001 MRI film. His opinion to the contrary, claimant had positive neurological findings before October of 2001.

Attorney fees and costs

Claimant's attorney was an active participant in this litigation, advocating for a conclusion that this is a recurrence, thereby providing claimant with a higher compensation rate. She seeks attorney fees for her work. In support of this claim, she submitted a copy of the attorney-client fee agreement, time records indicating that 71.5 hours were worked on this case, and $1,073.50 incurred in expenses.

However, the issue of compensability was never at issue, as one or the other of the employers would be liable, providing claimant with benefits regardless of the ultimate legal conclusion on the aggravation-recurrence issue.

DISCUSSION:

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 form 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 issues contested here are of the nature that expert testimony is essential. Because Dr. Phillips has the advantage of a treating surgeon with the specialty in neurosurgery and because he reviewed all relevant records and films, his opinion is given the greater weight in this case. See Miller v. Cornwall Orchards, Opinion No. 20-97WC (1997).

In workers' compensation cases involving successive injuries, the employer/carrier at the time of the first injury remains liable unless the medical evidence establishes that the second injury "causally contribute[d] to the claimant's disability." Stannard v. Stannard Co., Inc., 2003 Vt.52, ¶ 11; Pacher v. Fairdale Farms, 166 Vt. 626, 627 (1997) (mem.).

The opinion of Dr. Phillips that the more strenuous work at P&S was the causative agent is supported by a comparison of the work in the two jobs, with the P&S work clearly more strenuous, by the continued symptoms from the time of the P&S injuries, the presence of radicular signs, the continued need to seek medical care and by the fact that claimant had not yet reached medical end result at the time of the dumpster incident at Gifford. See Trask v. Richburg Builders, Opinion No. 51- 98WC (1998). Although it is troubling to note that claimant's pre-Gifford films failed to note a herniated disc and the ones

afterwards did, in light of all the factors supporting recurrence in this case, I accept Dr. Phillips explanation that the herniation is not always visible, even on sophisticated tests.

Finally is the issue of claimant's attorney fees and costs, which are recoverable when the claimant "prevails." 21 V.S.A. § 678(a); Hodgeman v. Jard Company, 157 Vt. 461 (1991). In this case, however, when compensability was never at issue, it cannot be said that claimant prevailed, entitling him to fees and costs. To hold otherwise would encourage unnecessary expense in the workers' compensation process and would discourage the use of arbitration pursuant to 21 V.S.A. § 662(e).

CONCLUSIONS OF LAW

Therefore, the convincing medical evidence supports the conclusion that claimant's condition is recurrence, not an aggravation or new injury. See Stannard, 2003 Vt.52; Pacher, 166 Vt. 626;WC Rule 2.1312.

The claim for fees and costs pursuant to 21 V.S.A. § 678(a) is denied because claimant's entitlement to benefits was not challenged.

ORDER:

THEREFORE, based on the foregoing findings of fact and conclusions of law,

Phillips & Sylvester is ORDERED to adjust this claim.

The claim for attorney fees and costs is DENIED.

Dated at Montpelier, Vermont this 12th day of February 2004.

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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.