

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

CW)	Opinion No. 19-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Federal Express)	For: Laura Kilmer Collins
)	Commissioner
)	
)	State File No. P-04013

Pretrial conference on August 30, 2004
Hearing held in Montpelier on February 4, 2005
Record Closed on February 23, 2005¹

APPEARANCES:

Christopher J. McVeigh, Esq., for the Claimant
Marion T. Ferguson, Esq., for the Defendant

ISSUE:

Are claimant’s problems with retrograde ejaculation and/or sexual dysfunction causally related to his work related injury of March 1, 1999?

EXHIBITS:

Claimant 1: Medical Records
Claimant 2: Dr. Grunert Record 8/7/02

FINDINGS OF FACT:

1. Claimant suffered a work related injury on March 1, 1999 when he fell on an icy driveway, injuring his back. He underwent three surgical procedures, ultimately reached medical end result and settled his right to permanency for 27% whole person impairment.
2. Side effects of the surgery claimant had for his work related back condition included sexual dysfunction. Side effects of the pain medication claimant took postoperatively also include sexual dysfunction.

¹ Because there was no agreement that the parties would file responsive pleadings, memoranda filed after this date are out of time.

3. Later claimant filed a claim for psychological problems related to the 1999 injury, which resulted in a 12.5 % whole person impairment.
4. Claimant's problems with maintaining an erection or experiencing retrograde ejaculation began after the fusion surgery in 1999.
5. Claimant's weight has been in the obese range for his height for years and was at the time of his injury. He smokes cigarettes and has for at least eighteen years. In 2002 he was diagnosed with diabetes.
6. Claimant's primary care physician testified that his sexual dysfunction and retrograde ejaculation are related to his low back injury, the surgical aftermath and narcotic medication. He discounted the diabetes as a causative mechanism in this case because it did not arise for approximately two years after the sexual problems began.
7. The urologist who examined the claimant described the sexual problems as "multifactorial," caused not only by the back surgery, but also by the claimant's smoking, weight, and diabetes.
8. CW's attorney expended 39.30 hours pursuing this case and incurred \$604.30 dollars in costs.

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 (1962). 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. 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. Claimant has met his burden with his testimony that sexual dysfunction began after the back surgery and the medical opinion that the surgery was a cause.

5. The defense notes that surgery was not the sole cause of the problems. However, two of the other contributing causes, smoking and weight, predated the injury, surgery and sexual problems. They did not interfere with claimant's sexual function before sequelae of the work related injury intervened. The other contributing cause, diabetes, was not diagnosed for several years after the surgery, when the sexual dysfunction was fully established. Therefore, its role in causation today does not defeat this claim. Therefore, claimant has proven with the necessary degree of probability that treatment from his work related injury caused the sexual problems.
6. As a prevailing claimant CW is entitled to a discretionary award of attorney fees and mandatory award of costs pursuant to 21 V.S.A. § 678(a) and WC Rule 10. Hours claimed are reasonable given the work required to litigate this claim and costs incurred were necessary. Accordingly, the request for both is granted.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ordered to pay the medical and permanency benefits associated with claimant's sexual dysfunction and pay the fees based on 39.3 attorney hours and \$604.30 in costs.

Dated at Montpelier, Vermont this 7th day of March 2005.

Laura Kilmer Collins
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.