A. E. v. Harvey Industries, Inc. (June 5, 2006)

STATE OF VERMONT
DEPARTMENT OF LABOR

A. E. Opinion No. 25-06WC

By: Margaret A. Mangan
Hearing Officer

v.

Harvey Industries, Inc. For: Thomas W. Douse
Acting Commissioner

State File No. U-52497

Hearing held in Montpelier on February 16 and 17, 2006
Record Closed March 29, 2006

APPEARANCES:

Dennis O. Shillen, Esq., and Kathleen Welsh Ellis, Esq., for the Claimant
Eric A. Johnson, Esq., for the Defendant

ISSUES:

1. Whether the discectomy claimant underwent on March 21, 2005 was a reasonable procedure and therefore compensable under 21 V.S.A. 640 (a).

2. Whether the condition that gave rise to claimants need for discectomy was causally related to his April 20, 2004 work related injury.

3. Whether claimant is entitled to attorney fees and costs.

EXHIBITS:

Medical Records

FINDINGS OF FACT:

1. Claimant was an employee of Defendant Harvey Industries being his employer within the meaning of the Workers' Compensation Act.

2. On April 20, 2004 Claimant suffered a work related injury and his claim for temporary total disability benefits was approved.

3. Claimant is 32 years old and has done work in his adult life maintaining roads, flagging traffic and often lifting heavy objects.

4. In his work for Defendant, Harvey Industries, where he worked for 3½ years he was first a warehouse worker and later a delivery person. The warehouse work was labor intensive.

5. The driving work required the Claimant to obtain a CDL. Prior to the incident at issue here, he passed the tests required for that license, which included a physical examination.

6. On April 20, 2004 while attempting to pull an 80-pound roll of roofing material from the Defendant's truck to make a delivery, Claimant injured his back resulting in pain in his back and numbness in his legs. His supervisor suggested that he continue completing his deliveries that day, which he did. Soon thereafter, Claimant sought medical care. He was prescribed pain medication and received physical therapy.

7. On May 11, 2004 claimant's physician Dr. Kazal released him to perform light duty work consisting of a maximum lifting limit of 10 pounds and no more than 4 hours a day. Claimant thought that work even under those limitations caused back pain.

8. A May 20, 2004 MRI revealed that Claimant had a herniated disc at L5-S1.

9. By June of 2004 it was clear that Claimant was seeking a neurosurgical consultation because the pain medications were not relieving his pain.

10. The first doctor Claimant then saw was Robert K. McLellan, M.D. at the Dartmouth Hitchcock Medical Center (DHMC) Spine Center. Dr. McLellan is an Occupational and Environmental Medicine Physician, not a surgeon.

11. DHMC Spine Center is a disciplinary program that includes physical therapists, neurosurgeons, orthopedic surgeons, internal medicine specialists and occupational therapists.

12. Dr. McLennan took a history from the Claimant and performed a physical examination. He noted that Claimant had a preexisting nerve problem in his left leg and an adrenal gland problem since childhood that was treated with hormonal replacements. On examination Dr. McLellan noted that Claimant had a decreased sensation in the sole of his left foot and over the lateral aspect of his left calf and thigh. He also found a problem unrelated to his back injury, a pinch nerve in the groin, most likely related to his preexisting nerve problem in that leg. Also on examination Dr. McLellan noted the Claimant had a positive straight leg test and a suggestion of nerve root involvement. His review of the MRI confirmed the herniation that was central with a slight shift to the left. Dr. McLellan's diagnosis was a disc herniation for which he recommended conservative, non-surgical, care.

13. The Claimant declined Dr. McLellan suggestion of steroid injections; a decision that Dr. McLellan found was reasonable.

14. At the June 4, 2004 visit Dr. McLellan determined that Claimant did not have a work capacity.

15. Claimant participated in what has been described as a “mini FCE” performed on June 21, 2004 at DHMC. Claimant did not demonstrate even a sedentary work capacity.

16. Next, Claimant sought care from Upper Valley Neurosurgery where he saw Jennifer Kernan, M.D. on June 24, 2004. Dr. Kernan is a neurosurgeon. She initially recommended a non-surgical course of treatment for the Claimant that included physical therapy, aqua therapy and a change in medication.

17. On July 21, 2004 when the Claimant returned to see Dr Kernan she noted that the leg numbness he had earlier now extended into his foot. Claimant returned to physical therapy where he had pool therapy, land based therapy, massage, ultrasound and a TENS unit electrical stimulation.

18. On August 19, 2004 Dr. Kernan observed that Claimant was not improving and continued to be “severely disabled.” At that August visit Dr. Kernan discussed a surgical option with the Claimant that she believed might relieve his leg pain. She explained that a fusion generally is more beneficial for back pain and a discectomy is more beneficial for leg pain. They decided that she would perform a discectomy.

19. Dr. McLellan opined that Claimant had undergone a reasonable course of conservative therapy without success, therefore, a surgical option was reasonable.

20. On September 2004 the Claimant visited Dr. Victor Gennaro for an examination requested by the Defendant in this matter. Dr. Gennaro is a doctor of osteopathic medicine and an orthopedic surgeon. Dr. Gennaro conducted a physical examination and took a history from the Claimant.

21. On October 21, 2004, after the decision to have surgery was made, Claimant was in a motor vehicle accident.

22. Dr. Gennaro was unable to state that the automobile accident that Claimant was in on October 21, 2004 aggravated his back condition so as to require surgery. He did opine that he would not have performed the surgery Dr. Kernan performed in part because of the location of the disc herniation. In his opinion the Claimant should lose weight and become aerobically conditioned before he would an optimal candidate for surgery.

23. Dr. Kernan, the physician and neurosurgeon who performed the surgery on the Claimant believed that until Claimant had the surgery he would not have been capable of engaging in the aerobic conditioning being recommended by Dr. Gennaro. Also Dr. Kernan opined that the motor vehicle accident of October 2004 did not cause any worsening of the Claimant’s symptoms underlying pathology. In fact the decision to undergo the surgery was made before that motor vehicle accident.

24. Drs. Kernan and Gennaro agree that the Claimant suffered a herniated disc at L5-S1 as a result of his April 20, 2004 work related injury. That disc is mostly centralized with some eccentricity to the left. In most cases in which a disc is completely central with no eccentricity to the right or left the preferred surgical repair is disc fusion, which is a

more complicated procedure than the one performed in this case. Because of the eccentricity to the left in this case, however Dr. Kernan recommended the discectomy in the belief that it would relieve the most troublesome parts of the Claimant's pain.

25. The surgery Dr. Kernan performed March 21, 2005 was an L5-S1 laminectomy and bilateral foraminectomy. Preoperative diagnoses of nerve compression and radiculopathy on the left were confirmed by what she saw during surgery. The disc material at S1 had calcified and had begun to compress on the nerve causing the Claimant's leg pain.

26. Claimant showed initial improvement but after a few visits noticed that he still had some pain. Approval for postoperative physical therapy was not received until August of 2005, about five months after the doctor's recommendation.

27. At this point in time Claimant has shown improvement, his leg pain is gone, he is able to stand up straight and the numbness that he had preoperatively is no longer constant. In Dr. Kernan's opinion the surgery accomplished its goal even though some back pain persists. Since the surgery Claimant has been more active and has expressed a desire to return to work although he has not yet returned to work.

28. He now looks for vocational rehabilitation services in the hope that such services will increase his chances of obtaining a job.

CONCLUSIONS OF LAW:

1. The Claimant has the burden of establishing all facts essential to the rights asserted in this workers' compensation case. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). Workers' Compensation includes the right to reasonable, medical and surgical treatment. 21 V.S.A. § 640(a).

2. The Claimant must establish by sufficient credible evidence the character and the extent of the injury and disability as well as the causal connection between the injury and the employment. See *Egbert v. The Book Press*, 144 Vt. 367 (1984).

3. The Vermont Workers' Compensation Act requires that the employer/carrier pay for all reasonable medical care and treatment causally related to a work injury. 21 V.S.A. § 640(a).

4. Whether the proposed treatment is reasonable depends, not on the subjective desire of the claimant, but on the likelihood it will improve a work-related condition or symptoms. *Quinn v. Emery Worldwide*, Opinion No. 29-00WC (2000). Rather, it is what is shown by competent expert evidence to be reasonable to relieve a claimant's symptoms and maintain functional abilities. *Britton v. Laidlaw Transit*, Opinion No. 47-03WC (2003).

5. To address divergent opposing medical opinions, the Department considers the following criteria: 1) The nature of treatment and length of time there has been a patient-provider relationship; 2) whether all 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 includes objective support for the opinions expressed; 4) the comprehensiveness of the examination; and 5) the qualifications of the experts, including professional training and experience. *Wallace v. Velan Valve Corp.*, Opinion No. 51-02WC (2002); *Yee v. IBM*, Opinion No. 38-00WC (2000); *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (1997); *Martin v. Bennington Potters*, Opinion No. 42-97WC (1997); *see also*, *Morrow v. VT Financial Services*, Opinion No. 50-98WC (1998).

6. Dr. Kernan has the advantage as the treating surgeon. Both experts reviewed the relevant records. Both provided clear, objective opinions and comprehensive evaluations. Both are well qualified; Dr. Kernan in neurosurgery, Dr. Gennaro in orthopedics. The balance, therefore, tips in favor of Dr. Kernan as treating physician.

Was the Claimant's discectomy reasonable and causally related?

7. Claimant's surgical procedure was reasonable and causally related to his work injury at Harvey Industries, Inc.

8. The defense argues that the surgery was not reasonable, that Claimant duped Dr. Kernan into performing it. Even if I accepted the argument that Claimant pushed for the surgery, I cannot ignore the objective signs that led Dr. Kernan to suggest a surgical option. Claimant had a herniated disc and radicular signs. Dr. Gennaro may have delayed surgery in this case; he may have performed a different procedure. Such differences in opinion, however, do not render the treatment Dr. Kernan performed unreasonable.

9. Next, the defendant argues that the claimant's October 2004 automobile accident was an "efficient intervening cause." Defendant contends that the accident resulted in a significant increase in the claimant's symptoms. However, the causal link between the claimant's initial injury and his preoperative condition remains unbroken. Notes *Larson:*

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional conduct. More specifically, the progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause**.** A. Larson and L.K Larson, 1 Larson's Workers' Compensation Law, § 10 at 10-1.

10. The automobile accident was not an intervening event. Dr. Kernan's opinion that the Claimant was a surgical candidate was formulated prior to the accident. I accept the neurosurgeon's conclusion that the accident did not change the nature of the surgery. Furthermore, Dr. Gennaro was unable to state that the automobile accident aggravated the Claimant's back condition so as to require surgery. Evidence does not support the defendant's allegation of an intervening cause.

Attorney Fees

11. As a prevailing claimant, Allen Edmiston is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678(a). Claimant's litigation costs were necessary for the success of the complex issues presented. A decision on the attorney fee and cost issue will be deferred for 30 days unless the parties resolve the issue in the interim.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to pay for:

The Claimant's discectomy and reasonably associated benefits.

The issue of attorney fees and costs is deferred**.**

Dated at Montpelier, Vermont this ____ day of June 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.

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Eric A. Johnson, Esq., for the Defendant, Harvey Industries

RULING ON DEFENDANT'S MOTION TO STAY ORDER PENDING APPEAL

Motion for Stay

Pending its appeal to the Supreme Court pursuant to 21 V.S.A. § 672, the defendant has moved for a stay of the Order dated June 5, 2006 awarding medical costs and reasonable associated benefits for Claimant's discectomy, as well as attorney fees and costs, for the work-related injury to Claimant's spine.

Defendant Harvey Industries asks this Department to grant a stay of the Order based on three arguments: the Department provided no detailed analysis to explain why it found Claimant's medical expert more credible; the Department did not find that Claimant's car accident was an intervening factor—despite evidence to the contrary; and, the Department improperly accepted and relied upon Claimant's subjective testimony that the surgery was successful and reasonable.

In a worker's compensation case, "[a]ny award or order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner, any appeal notwithstanding." 21 V.S.A. § 675. To prevail on its request in the instant matter, defendant must demonstrate: "(1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) a stay will not substantially harm the other party; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co*., 132 Vt. 554 (1974). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v. Webster Corporation*, Opinion No. 62S-96WC (1996).

A strong likelihood of success on the merits:

Defendant unsuccessfully argued first that the Department provided no "detailed analysis of how it determined that Claimant's medical expert was more credible than Employer's medical expert." This argument fails the first analytic prong because the Defendant had notice of the severity of the injury from the beginning when the carrier accepted the claim. Second, Claimant's treating physician recommended surgery based on both objective and subjective findings—many of which Defendant's physician, agreed with. For example, both physicians examined the same MRI films, agreed that Claimant suffered a disc herniation at L5-S1 with a tilt to the left, and agreed that the tilt could indicate a radiculopathy that would best be treated by a discectomy as opposed to a fusion. Third, treating neurosurgeon, Dr. Kernan visually affirmed her diagnosis of nerve- root impingement while performing the surgery. Finally, Claimant's steady improvement in quality of life subsequent to surgery is clear confirmation of Dr. Kernan's prior formulation that Claimant was a candidate for surgery.

In Defendant's second argument for a stay, Defendant argues unsuccessfully that Claimant's October 24, 2004 car accident created an intervening factor in Claimant's spinal condition. This Department already addressed this issue and clearly articulated in the Order that Claimant's auto accident was not an intervening event because Dr. Kernan had *already* decided that Claimant needed surgery. Furthermore, Defendant's Independent Medical Examiner, Dr. Gennaro testified that he was unable to state that the automobile accident aggravated the Claimant's back condition so as to require surgery.

Defendant's third unsuccessful argument to stay the Order, alleges that the Department "improperly accepted and relied upon Claimant's testimony that the surgery improved his condition." Defendant's third argument will not prevail upon the merits because the Department correctly relied upon: the Claimant's subjective testimony that the surgery was successful, neurosurgeon's objective observations of Claimant's increased range of motion and enhanced functioning, decreased reports of pain evidenced by reduced use of pain medication, and Defendant's expert, Dr. Gennaro's testimony that Claimant's improvement could be the result of the surgery.

Defendant failed to show that they are likely to prevail upon the merits.

Irreparable injury if the stay is not granted:

The Defendant as the moving party must demonstrate irreparable harm before a stay can be granted. *Gilbert v. Gilbert,* 163 Vt. 549, 560 (1995). Here, the Defendant will not suffer irreparable injury if the stay is not granted because the Order from the Department subjects the carrier to medical costs and attorney's fees only. No large lump sum payment will be awarded in this case. Also, Harvey has already paid Claimant TTD, which Defendant claims is "not an insignificant amount of money" and now will just "entail new reimbursement to a health insurer for surgical services" plus, attorney fees and costs. Thus, Defendant will not suffer irreparable injury if Claimant prevails.

A stay will not substantially harm the other party:

Claimant will be harmed if Defendant's motion for stay is granted because Claimant has gone far too long without benefits. The stay of attorney's fees and costs would cause substantial harm to Claimant given the complexity of the issues and the attorney's time spent on litigating this case to protect Claimant's interests. For example, Dr. Kernan prescribed post-operative physical hydrotherapy, delayed for five months due to non-payment by the carrier, which impeded Claimant's progress toward returning to work. Defendant failed to show that Claimant will not be substantially harmed if the stay is granted.

The stay will serve the best interests of the public:

The public is best served by denying this motion to stay the Department's ruling because timely and efficient adjudication of worker's compensation claims saves time, judicial resources, and builds public credibility by allocating benefits that Claimant is legally entitled to receive.

ORDER:

The Defense motion for a stay is DENIED.

Dated at Montpelier, Vermont this 4th day of August 2006.

_____

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Acting Commissioner

Appeal:

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