

**STATE OF VERMONT
DEPARTMENT OF LABOR**

George Plante

Opinion No. 19A-13WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

State of Vermont
Agency of Transportation

For: Anne M. Noonan
Commissioner

State File Nos. X-4039 and BB-0900

AMENDED ORDER

This case was decided on August 23, 2013. Subsequently, Defendant requested that the Order be amended as to the recoverable costs referable to Dr. Carling's deposition and hearing testimony. Claimant requested reimbursement of \$1,772.00 for 4.25 hours of Dr. Carling's billed time. At the approved rate of \$300.00 per hour, *see Hatin v. Our Lady of Providence*, Opinion No. 21S-03WC (October 22, 2003), and Workers' Compensation Rule 40.111(a), the 4.25 hours billed for this testimony should have totaled \$1,275.00, not \$1,772.00 as originally awarded. The award is hereby amended to reflect the lower total.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Litigation costs totaling \$4,689.55 and attorney fees totaling \$14,280.00, in accordance with 21 V.S.A. §678(a).
2. All other aspects of the August 23, 2013 Order remain in full force and effect.

DATED at Montpelier, Vermont this 25th day of November 2013.

Anne M. Noonan
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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OPINION AND ORDER

Hearing held in Montpelier on March 25, 2013

Record closed on May 28, 2013

APPEARANCES:

Frank Talbott, Esq., for Claimant
Keith Kasper, Esq., for Defendant

ISSUES PRESENTED:

1. What is the appropriate compensation rate for the indemnity benefits due Claimant as a consequence of his December 2009 cervical disc fusion surgery?
2. Were Claimant's staph bacteremia infection and its sequelae causally related to his February 14, 2011 work-related neck strain?

EXHIBITS:

Joint Exhibit I: Medical records

Joint Exhibit II: Veterans' Administration medical records

Claimant's Exhibit 5: *Curriculum vitae*, Philip Carling, M.D.

Claimant's Exhibit 6: Army National Guard 2004 Physical Profile

Claimant's Exhibit 7: Army National Guard correspondence and memorandum, May 11, 2006

Claimant's Exhibit 8: Final Discharge Notice, October 22, 2007

Defendant's Exhibit A: Department of Veterans' Affairs Rating Decision, September 13, 2005

Defendant's Exhibit B: Correspondence from Kristie Farnham, February 17, 2009 and January 26, 2009

Defendant's Exhibit C: *Curriculum vitae*, Marjorie Eskay-Auerbach, M.D., J.D.

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Permanent partial disability benefits pursuant to 21 V.S.A. § 648
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

Procedural History

This is the third time that issues related to Claimant's July 1, 2005 compensable work injury have come before the Commissioner. In *Plante v. Vermont Agency of Transportation (Plante I)*, Opinion No. 26-10WC (August 5, 2010), the Commissioner considered whether Claimant's cervical condition had been caused or aggravated by his work for Defendant, and concluded that it had not. In doing so, the Commissioner rejected evidence from Claimant's treating orthopedic surgeon to the effect that the July 2005 injury, which Defendant had accepted in its initial presentation as bilateral carpal tunnel syndrome, actually consisted of a "double crush syndrome," involving pinched nerves in both the neck and the wrists.

Claimant successfully appealed the Commissioner's determination in *Plante I* to the Franklin Superior Court Civil Division, where a jury concluded that his cervical condition had in fact been "caused and/or aggravated by his employment for Defendant." Thereafter, the Commissioner entered an Amended Order requiring Defendant to pay "all workers' compensation benefits to which Claimant establishes his entitlement as a consequence of his compensable cervical condition." *Plante v. Vermont Agency of Transportation*, Opinion No. 26A-10WC (January 18, 2012).

In *Plante v. State of Vermont Agency of Transportation (Plante II)*, Opinion No. 24-12WC (September 14, 2012), the Commissioner was asked to determine the date of Claimant's cervical injury, so that the average weekly wage and compensation rate for subsequent periods of disability could be calculated appropriately. The Commissioner assigned the same date of injury – July 1, 2005 – to that condition as had been assigned to Claimant's original bilateral carpal tunnel complaints.

Left unresolved in *Plante II* was whether Claimant's wages from a concurrent employer, the Vermont Army National Guard, should be included in calculating his average weekly wage and compensation rate for indemnity benefits due as a consequence of his December 2009 cervical disc fusion surgery. That issue is now ripe for consideration. Also to be decided in the current action is whether the staph bacteremia infection with which Claimant was diagnosed in March 2011 was causally related to a separate compensable injury, consisting of a neck strain suffered at work on February 14, 2011.

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant has been an employee and Defendant has been his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim. Judicial notice also is taken of the Commissioner's Opinion and Order in *Plante v. State of Vermont Agency of Transportation (Plante II)*, Opinion No. 24-12WC (September 14, 2012).

Claimant's National Guard Employment and Average Weekly Wage Calculation

3. At the time of his July 2005 work injury, Claimant was a member of the Vermont Army National Guard. During his tenure there he suffered a low back injury in 2003, as a result of which he was rated as 20 percent disabled. Later, following a medical evaluation in 2004, his Guard-related physical profile indicated that he suffered from neck pain and depression.
4. In 2006 Claimant's unit was deployed to Iraq. His neck pain precluded him from wearing a helmet or other required protective gear, which weighed 70 pounds. For that reason, he was deemed a medical "hard no go." As a result of that determination, the Guard initiated medical discharge proceedings against him. The discharge decision was issued in May 2006, and following his unsuccessful appeal, Claimant was discharged in January 2008. I find from Claimant's credible testimony that had he not been discharged for medical reasons his intention would have been to remain in the Guard until his retirement age.
5. In February 2009 Claimant signed a document prepared by Defendant's adjuster indicating that his discharge from the Guard was not related to his July 2005 work injury. At the time, Claimant had not yet been diagnosed with double crush syndrome, and therefore did not understand that his cervical condition was in any way related to his work injury. I find from his credible testimony that he executed the document because he believed that his work injury consisted solely of bilateral carpal tunnel syndrome, which he expected would eventually heal.
6. Claimant endured three separate periods of disability causally related to his July 2005 work injury – the first following carpal tunnel surgery in March 2006, the second following repeat carpal tunnel surgery in December 2008, and the third following cervical disc fusion surgery in December 2009. His combined average weekly wage (including wages received from both Defendant and the Guard) prior to the first period of disability was \$1,269.54. By the time of his 2008 and 2009 surgeries, he was no longer employed by the Guard, and therefore his average weekly wage for those periods of disability was significantly lower – \$788.46 for the weeks prior to December 2008, and \$814.41 for the weeks prior to December 2009.
7. As a result of his December 2009 cervical disc fusion surgery, Claimant was totally disabled from December 23, 2009 until February 1, 2010.

Claimant's February 2011 Work Injury and Subsequent Staph Bacteremia Infection

8. On February 14, 2011 Claimant was at work for Defendant, shoveling at a roadside site in Addison County. During the course of this activity, he felt a popping in his neck that "hurt like heck." He finished his shift and went home. That evening, he had to curtail a Valentine's Day dinner with his wife due to increasing, severe neck pain.
9. The next day Claimant reported his injury, remained home from work and sought treatment with his primary care provider, who diagnosed a neck strain. In the ensuing days, his symptoms worsened dramatically. His neck was red and swollen and he had a high fever. He made several emergency department visits for unbearable, intractable pain.
10. On March 10, 2011 Claimant was taken to the hospital after collapsing at home. Ultimately, he was diagnosed with a staph infection, specifically staph bacteremia, which had developed into an epidural abscess at the site of his December 2009 cervical fusion. Now critically ill, Claimant underwent emergency laminectomies at C2, C3 and C4 and drainage of the abscess at C1-2 and C3-4. After an intense rehabilitation, he returned to work in May 2011.

Expert Medical Opinions

11. The parties presented conflicting expert opinions as to the causal relationship, if any, between Claimant's 2011 work injury and his staph bacteremia infection.
 - (a) Dr. Carling
12. Dr. Carling, an epidemiologist, is board certified in infectious diseases. His primary clinical duties involve consultations in infectious disease cases. He also has published many articles on the subject. At Claimant's request, he reviewed the relevant medical records in this case.
13. As Dr. Carling credibly explained, staph bacteremia is a well-recognized cause of infection, especially epidural abscesses. Many of us carry staph bacteria in our bodies, but in most cases infections do not result. For that to occur, the staph bacteria must break out of the bloodstream and become affixed to a site or nesting place, known as a nidus. A miniscule weakness in a vessel wall may be sufficient to allow this to occur. If the vessel wall breaks, bleeding occurs. Blood is the best nutrient for staph bacteria; even in minute amounts, blood fosters the infection to develop and multiply rapidly. Symptoms caused by the infection usually appear within four to ten days, and typically include intense pain, fever, and redness and swelling at the nidus.

14. According to Dr. Carling, in Claimant's case the cervical strain he suffered at work on February 14, 2011 was the likely cause of his staph bacteremia infection. Even a small strain causes the muscles and tendons in the area to tear, which in turn causes the vessel walls to break and bleed. Thus, when Claimant strained his neck while shoveling, the mechanism was thereby provided for the staph bacteria to break out of the bloodstream. I find this analysis credible.
15. As for how the epidural abscess in Claimant's cervical spine occurred, according to Dr. Carling the surgical hardware at the site of his December 2009 fusion surgery made that area a likely target for a staph infection to develop. The number of staph cells necessary to cause an infection decreases by a thousand fold when the nidus is a foreign body. In addition, the human body will not kill infectious cells associated with the metal or plastic that comprises the hardware.
16. As Dr. Carling correctly observed, the timeframe during which the symptoms indicative of staph bacteremia occurred in Claimant's case – four to ten days after his February 2011 neck strain – point to that event as the inciting factor that allowed the infection to break out of the bloodstream. Having left the bloodstream, the most likely nidus for the infection was at the site of his prior cervical fusion, a surgery necessitated by his July 2005 work injury. For these reasons, in Dr. Carling's opinion, to a high degree of medical certainty Claimant's staph bacteremia and subsequent epidural abscess were both work-related. I find this analysis extremely persuasive.
17. Dr. Carling acknowledged that the original source of the staph cells in Claimant's body may never be known. As noted above, it is possible for a person to carry the bacteria in the body without ever developing a staph bacteremia infection.

(b) Dr. Eskay-Auerbach

18. Dr. Eskay-Auerbach is a board certified orthopedic surgeon and spine specialist. She has not conducted any clinical research regarding staph infections and has not published on the subject. At Defendant's request, she reviewed Claimant's relevant medical records.
19. In Dr. Eskay-Auerbach's opinion, Claimant's staph bacteremia infection was not causally related in any way to his February 14, 2011 work injury. According to her analysis, the "popping" sensation that Claimant experienced while shoveling on that day evidenced that his infection was already existent. The onset of his pain and pattern of his subsequent symptoms were consistent with an infection, but the medical records provide no objective evidence that his neck strain resulted in either external or internal bleeding.
20. Contrary to Dr. Carling's analysis, Dr. Eskay-Auerbach denied that a muscle strain typically causes even a small pinprick of blood to escape from a blood vessel or muscle tissue. She testified that in her twenty five years of experience, she has never observed a muscle or tendon strain that bled. While I accept that she was earnest in her opinion, nevertheless I find Dr. Carling's testimony and analysis more convincing on this point.

21. In her testimony, Dr. Eskay-Auerbach identified what she considered another reasonable explanation for the development of staph bacteremia in Claimant's case – a subcutaneous cyst on his hand that was removed in 2010. However, Dr. Carling credibly refuted this theory in his testimony, noting that there was no indication in the medical records that the cyst had been infected and that it appeared to have healed without complications. Had the cyst been the genesis of the staph bacteremia infection, furthermore, one would have expected the epidural abscess at the site of Claimant's cervical fusion to have developed within the seven-to-ten-day progression in symptoms typically associated with the condition, not some two months later. For these reasons, I find Dr. Carling's analysis more persuasive than Dr. Eskay-Auerbach's on this issue.
22. Both Dr. Eskay-Auerbach and Dr. Carling agreed on the following points:
 - Claimant suffered a cervical strain on February 14, 2011;
 - It is impossible to determine the origin of the staph cells in Claimant's body; and
 - A foreign body can be the nidus of a staph infection, and likely was in this case.

Where the two experts diverge is on the question whether the February 2011 cervical strain was the precipitating factor that allowed the staph cells to develop into bacteremia.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. This case presents two distinct issues. First, should Claimant's average weekly wage and compensation rate for the indemnity benefits due him as a consequence of his December 2009 cervical fusion surgery include his Vermont Army National Guard wages? Claimant argues that his Guard wages should be included, because it was at least in part because of his July 2005 work injury that he was medically discharged from that concurrent employment.
3. The second issue is whether Claimant's staph bacteremia infection was causally related to his February 2011 compensable work injury. Claimant asserts that the cervical strain was what precipitated the infection, and therefore the necessary causal link is established. Defendant contends otherwise.

Average Weekly Wage and Compensation Rate

4. At the time of Claimant's 2005 work injury, Vermont's workers' compensation statute stated: "Average weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the 12 weeks preceding an injury."¹ 21 V.S.A. §650(a). As to subsequent periods of disability arising from the same compensable injury, §650(c) states: "When temporary disability . . . does not occur in a continuous period but occurs in separate intervals each resulting from the original injury, compensation shall be adjusted for each recurrence of disability to reflect any increases in wages or benefits prevailing at that time."
5. The rationale underlying §650(c) is to prevent an injured worker from being penalized in situations where more recent wages – those immediately preceding a subsequent period of disability – have been diminished as a consequence of work restrictions imposed following the original injury and earlier period of disability. *Griggs v. New Generation Communications*, Opinion No. 30-10WC (October 1, 2010). By the same token, however, an injured worker should not receive a windfall when a reduction in earnings is due to circumstances completely unrelated to the work injury. *Id.*
6. In this case, I conclude from the credible evidence that because Claimant's July 2005 work injury precluded him from maintaining his concurrent employment for the Vermont Army National Guard, the wages he received prior to his December 2009 disability were accordingly diminished. Under §650(c), his compensation rate should have been based on the earlier, higher average wages he had been able to earn prior to his original period of disability.
7. Defendant points to the document Claimant signed in February 2009 as evidence that even he did not consider his medical discharge from the Guard to have been causally related in any way to his work injury. However, Defendant fails to acknowledge that at the time that document was executed the diagnosis of double crush syndrome, which effectively tied Claimant's cervical condition back to his July 2005 work injury, had not yet been made. Under those circumstances, I conclude that the document carries no value. The connection that mattered was the one supplied by medical experts based on credible theories of medical causation, not the one Claimant misinterpreted based on his understanding as a lay person.
8. As for Defendant's argument that the medical records do not support a finding that Claimant's discharge from the Guard was due at least in part to his compensable neck injury, I disagree. It is true that Claimant may have suffered from other conditions unrelated to his employment for Defendant, such as low back pain. Taken as a whole, the evidence is sufficient to justify a conclusion that his work-related cervical injury contributed as well, however. Indeed, it was his neck pain that precluded him from wearing a helmet in 2006, with the result that he was disqualified from deploying with his unit to Iraq.

¹ The statute was amended in 2008 to increase the computation period from 12 to 26 weeks.

9. I conclude that the indemnity benefits to which Claimant is entitled as a consequence of his December 2009 cervical fusion surgery should be based on the wages he earned prior to his original injury in July 2005, and thus should include both his wages from Defendant and those from the Guard. Those wages yield an average weekly wage of \$1,269.54, and a corresponding weekly compensation rate of \$846.36.

Compensability of Staph Bacteremia Infection

10. The parties presented conflicting expert opinions as to whether Claimant's staph bacteremia infection was causally related to his February 2011 compensable cervical strain. In such cases, the commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).
11. I conclude that Dr. Carling's opinion was more persuasive than Dr. Eskay-Auerbach's. His expertise in the area of infectious diseases was particularly relevant to understanding how the staph cells in Claimant's body developed first into a staph bacteremia infection and then caused an epidural abscess at the site of the surgical hardware left from his prior cervical fusion. Dr. Carling based his opinion on the objective signs with which Claimant presented – a soft tissue injury followed by a steady progression of symptoms including fever, severe pain and redness and swelling in his neck. Considering all of these factors, Dr. Carling's analysis was clearer, more thorough and better supported objectively than Dr. Eskay-Auerbach's opinion.

Costs and Attorney Fees

12. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. 21 V.S.A. §678(a). Claimant has submitted a request for costs totaling \$5,186.55, and attorney fees totaling \$14,280.00. Defendant did not object to these requests. I conclude that both the costs and fees are reasonable and they are thereby awarded.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Temporary total disability benefits in accordance with 21 V.S.A. §642 from December 23, 2009 through January 31, 2010 at a compensation rate of \$846.36 weekly, with interest on any unpaid amounts in accordance with 21 V.S.A. §664;
2. Permanent partial disability benefits in accordance with 21 V.S.A. §648 for the ratable impairment referable to Claimant's cervical condition and fusion surgery, to be paid at an initial compensation rate of \$846.36 weekly, with interest on any unpaid amounts in accordance with 21 V.S.A. §664;
3. Temporary total disability benefits in accordance with 21 V.S.A. §642 covering the period during which Claimant was disabled from working as a consequence of his staph bacteremia infection, such benefits to be paid at a compensation rate based on Claimant's average weekly wage for the 26 weeks prior to February 14, 2011 and with interest on any unpaid amounts in accordance with 21 V.S.A. §664;
4. Medical benefits covering reasonable treatment and supplies for Claimant's staph bacteremia infection and its sequelae, in accordance with 21 V.S.A. §640(a); and
5. Litigation costs totaling \$5,186.55 and attorney fees totaling \$14,280.00, in accordance with 21 V.S.A. §678(a).

DATED at Montpelier, Vermont this 22nd day of August 2013.

Anne M. Noonan
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.