Dzemel Mahmutovic v. SOV, AOT (October 22, 2013)

STATE OF VERMONT
DEPARTMENT OF LABOR

Dzemel Mahmutovic	Opinion No. 24-13WC
v.	By: Jane Woodruff, Esq. Hearing Officer
State of Vermont, Agency of Transportation	For: Anne M. Noonan Commissioner
	State File No. BB-62629

OPINION AND ORDER

Hearing held in Montpelier, Vermont on May 8, 2013
Record closed on June 10, 2013

APPEARANCES:

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

ISSUES PRESENTED:

1. Has Claimant reached an end medical result for his May 20, 2010 compensable work injury?

2. If yes, when did this occur?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	*Curriculum vitae,* George White, Jr., M.D.
Claimant's Exhibit 2:	Kathleen Pratt independent evaluation, undated
Claimant's Exhibit 3:	List of periodicals
Defendant's Exhibit A:	Dr. Sobel's April 15, 2013 report
Defendant's Exhibit B:	Three surveillance videotapes

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640(a)
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

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

2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

3. Claimant is a Bosnian immigrant who came to the United States in April 2000 with his family. He began working for Defendant in 2007 as a drill operator tasked with locating ledge. At times he would drill down 170 feet in search of ledge. In addition to his job with Defendant, Claimant also worked 73 hours every two weeks as a custodian.

4. Claimant's only significant pre-injury complaints involved low back pain and radicular pain into his left buttock and calf in 2008. He was diagnosed with a left leg discrepancy and facet joint arthritis. A shoe orthotic alleviated his symptoms.

5. On May 20, 2010 Claimant was drilling a portion of the bank of the White River. He pounded a steel rod into the ground with a sledge hammer and listened for an echo. At a depth of 21 feet, he heard an echo. He bent over and attempted to pull the rod out of the ground. As he did so, he felt a sharp pain in his low back. He immediately sat down and stopped work.

6. Claimant went to work the next day. After he entered data into his time sheet, he was unable to stand. His supervisor made arrangements for him to go to the emergency department. After examination and x-rays, he was diagnosed with a low back strain with possible radiculitis in his left leg and discharged home with medications.

Claimant's Course of Treatment

7. Claimant initially treated with Monique Karthaus, P.A., his primary care provider. She referred him to physical therapy and restricted his work to light duty. Defendant accommodated those work restrictions with office duties and Claimant engaged in physical therapy.

8. Claimant continued with conservative treatment, which included injections and additional physical therapy. He consulted with Dr. Horgan, a neurosurgeon, who diagnosed him with disc degeneration at L4-5 and L5-S1 and root compression evidenced by his left leg radiculitis. Claimant indicated he was interested in surgery so that he could return to work as soon as possible.

9. Dr. Horgan performed decompression surgery at the L4-5 level in November 2010. Post-surgery, Claimant's pain lessened for three months, but thereafter it returned to its pre-surgery level. An MRI in March 2011 revealed disc bulging and narrowing of the spinal canal. Dr. Horgan recommended against further surgery and instead suggested additional physical therapy and work hardening.

10. Claimant underwent a "mini" functional capacity evaluation in April 2011 to assess what tasks he could perform at a light duty level. He tested at the light work capacity level with some capabilities in the light-medium level. In the evaluator's opinion, Claimant gave variable to high levels of physical effort and his reporting of disability showed variable to high reliability.

11. In May 2011 Claimant was discharged from physical therapy, having failed to show any improvement during the previous two months. His therapist recommended work hardening and referred him to a pain specialist.

12. Claimant treated with Dr. Ivie, the pain specialist, over the course of the next year. He underwent lumbar, facet and transforaminal epidural injections, medial branch blocks and radio frequency ablation to address his complaints of low back pain. None of these treatments were successful, nor did they identify a specific nerve root as the cause of Claimant's pain.

13. At Defendant's request, on August 11, 2011 Claimant underwent an independent medical examination with Dr. Sobel, a board certified orthopedic surgeon. Dr. Sobel physically examined Claimant, reviewed the pertinent medical records and also viewed a series of surveillance videos (discussed further *infra*) that had been taken in June and July.

14. According to Dr. Sobel's analysis, Claimant's ongoing symptoms and need for treatment were causally related to his pre-existing facet arthritis, not to his work injury. Furthermore, to the extent the work injury had aggravated that condition it had been adequately treated by Dr. Horgan's November 2010 decompression surgery. As Claimant was now nine months removed from that procedure, in Dr. Sobel's opinion he had reached an end medical result from any work-related aggravation.

15. With Dr. Sobel's end medical result opinion as support, the Department approved Defendant's Notice of Intention to Discontinue Payments (Form 27), effective September 2, 2011.

16. Notwithstanding Dr. Sobel's end medical result determination, Claimant continued to treat. In October 2011 he sought a second opinion from Dr. Krag, a spine surgeon. As Dr. Horgan had, Dr. Krag determined that Claimant was not a candidate for additional spine surgery, because it likely would not alleviate his pain.

17. In April 2012 Claimant completed a multidisciplinary work hardening program. On April 30, 2012 Dr. Olsen, an occupational specialist with the program, placed him at end medical result and assessed him with a light duty work capacity.

18. Again, despite this second end medical result determination Claimant continued to seek treatment to alleviate his pain. In the ensuing months, he underwent a variety of evaluations with a host of different doctors, detailed as follows:

- An evaluation with Dr. Serafini, a pain specialist, on May 7, 2012. Dr. Serafini administered a transforaminal epidural injection, and when that proved ineffective, suggested that Claimant return to Dr. Krag for further surgical evaluation.

- A second surgical consultation with Dr. Krag, in October 2012. Upon reviewing Claimant's imaging studies and finding no structural basis for his ongoing pain, Dr. Krag reiterated his opinion that Claimant was not a surgical candidate.

- A consultation with Dr. Horgan, his treating neurosurgeon, to discuss the possibility of a spinal cord stimulator. Dr. Horgan suspected that the device likely would not be effective, but suggested that Claimant consult with a pain specialist for a more definitive assessment.

- A surgical consultation with Dr. Sengupta, an orthopedic surgeon, on November 27, 2012. Dr. Sengupta noted that Claimant was able to walk with a normal gait, visibly expressed his pain and exaggerated his symptoms. Finding no objective signs to support Claimant's symptoms, Dr. Sengupta concluded, as both Dr. Horgan and Dr. Krag had, that he was not a surgical candidate. Instead, he determined that Claimant had reached an end medical result.

- A caudal (tail bone) injection with Dr. Lake, a pain specialist, in December 2012. This injection was not successful.

- A consultation with Dr. Ivie, as to whether a spinal cord stimulator might prove effective at alleviating his pain. In accordance with the standard treatment protocol, Dr. Ivie referred Claimant to Dr. Ericsson, a psychiatrist, as a first step to determining whether he was a suitable candidate for the device. Because Defendant has disputed the reasonableness of a spinal cord stimulator in Claimant's case, he has yet to undergo that evaluation.

19. I find that at least up until Dr. Sengupta's November 27, 2012 evaluation, the treatments Claimant underwent, including both injections and surgical consultations, were pursued for both diagnostic and therapeutic purposes, and were reasonably calculated at the time to lead to further improvement in his medical recovery process.

20. In March 2013 Claimant underwent a full functional capacity evaluation with Kathleen Pratt, an occupational therapist. During this testing, he exerted varying levels of physical effort, and Ms. Pratt noted minor inconsistencies between his reports of pain and disability and her clinical observations. Based on her test results, Ms. Pratt determined that Claimant's lifting capacity placed him in the occasional sedentary (up to ten pounds for one-third of the day) to occasional light (up to twenty pounds for one-third of the day) work category. He was capable of sitting, standing and walking occasionally (for one-third of the day), and could not crouch, squat or kneel so as to accomplish low level work.

Video Surveillance

21. Defendant undertook video surveillance of Claimant in both in 2011 and 2012 – first, for four days in mid-June 2011 and again on July 1, 2011, then on August 15 and 24, 2012 and again on September 5 and 6, 2012.

22. The 2011 surveillance primarily showed Claimant walking, standing and getting in and out of his car. I find from this evidence that while at times Claimant appeared stiff with these movements and walked with an antalgic gait, he was nonetheless capable of getting around.

23. In general, the 2012 surveillance videos document that Claimant is capable of performing activities of daily living. For example:

- Claimant was able to get in and out of his car and operate it with no apparent difficulty;

- He was able to assist his wife at her commercial cleaning job on more than one occasion, by mixing mop solution, pushing an industrial mop pail full of water and actively mopping;

- On two occasions he was able to throw what appear to be full 30 gallon trash bags from shoulder height into a dumpster[1]; and

- He was able to fill all four of his vehicle's tires one after another, maintaining a sustained crouch at each tire (84 seconds in one instance), and then walking easily around the car with no visible signs of pain, stiffness or antalgic gait.

24. At the formal hearing Claimant explained that he viewed assisting his wife with her cleaning activities as part of his physical therapy routine. I do not find this testimony credible. Claimant's capabilities, which were videotaped while he was unaware he was being watched, belie his complaints of pain and his perceived disability.

[1] There is no way to gauge how much any of these trash bags weighed.

Expert Medical Opinions

25. The parties presented conflicting expert opinions regarding whether or not Claimant has reached an end medical result. As noted above, Findings of Fact Nos. 17 and 18 *supra*, two treating physicians have already placed him at end medical result – Dr. Olsen on April 30, 2012, and Dr. Sengupta on November 27, 2012. Two expert medical providers also have weighed in – Dr. Sobel on Defendant's behalf, and Dr. White on Claimant's behalf.

(a) Dr. Sobel

26. As noted above, Finding of Fact Nos. 13 and 14 *supra*, Dr. Sobel first examined Claimant at Defendant's request in August 2011. At that time, he determined that Claimant's condition was causally related to his pre-existing facet arthritis, and that following Dr. Horgan's decompression surgery he had now reached an end medical result for any work-related aggravation.

27. In an April 2012 addendum Dr. Sobel reiterated this opinion. By this time Claimant had undergone a series of injections with Dr. Ivie and a second surgical consult with Dr. Krag, and was in the midst of Dr. Olsen's functional restoration program. Noting that Claimant did not appear to have "reached any significant improvement, change or palliation due to his additional treatments, work hardening, functional restoration or nerve root ablations," Dr. Sobel concluded that these treatments had not negated his August 2011 end medical result determination in any way. Dr. Sobel did not consider whether the treatments were calculated to improve Claimant's condition at the time they were undertaken, however. For that reason, I find his analysis lacking.

28. In October 2012 Dr. Sobel provided a second addendum. For this report he reviewed additional medical records as well as the 2011 and 2012 surveillance videos. Dr. Sobel again reiterated his opinion that Claimant had reached an end medical result as of his first examination in August 2011. As support for his opinion he noted the ease with which Claimant accomplished the various tasks documented on the surveillance videos, particularly when assisting his wife with her work, which Dr. Sobel characterized as requiring a medium work capacity. Again, however, Dr. Sobel failed to consider whether the treatments Claimant had undergone since his original end medical result determination in August 2011 had been reasonably calculated, at the time they were undertaken, to lead to further improvement in his condition. For that reason, again I must discount his analysis.

29. In his formal hearing testimony, Dr. Sobel stood by his August 2011 end medical result determination. Alternatively, however, he testified that if Claimant had not reached an end medical result by that date, he surely had done so by November 2012. I find this testimony persuasive, because it corroborates Dr. Sengupta's end medical result determination.

30. Dr. Sobel agreed that all of the treatments Claimant underwent between August 11, 2011 and November 27, 2012 were reasonable and necessary. However, he disagreed that any evaluation for a possible spinal cord stimulator was reasonable. In his opinion, spinal cord stimulators should be reserved for patients who are completely debilitated as a result of a chronic condition. For those patients, the device may result in some return of function. Claimant already has substantial functional abilities, however. Even if he was deemed psychologically suitable he would not be an appropriate candidate, therefore. For this reason, according to Dr. Sobel, not even a psychiatric evaluation is reasonable treatment at this point. I find this analysis persuasive.

(b) Dr. White

31. Dr. White is board certified in occupational medicine. Claimant engaged him to perform an independent medical evaluation in February 2013. Dr. White reviewed all of the relevant medical records. Significantly, he did not review any of the video surveillance.

32. Dr. White rejected Dr. Sobel's August 2011 end medical result determination on two grounds – first, because Claimant was not yet at least one year removed from spine surgery at that point, and second, because his treating physicians were still pursuing diagnostic interventions, and continued to do so throughout 2012. I find this analysis credible.

33. In Dr. White's opinion, Claimant has not even now reached an end medical result for his work injury. His medical support for this opinion was lacking, however. Dr. White never addressed the question whether a spinal cord stimulator was an appropriate treatment option for Claimant. Instead, he relied on a prior decision by the commissioner in which a spinal cord stimulator trial was deemed to negate a finding of end medical result. I find this analysis troubling.

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. The issue presented in this case is whether Defendant appropriately terminated Claimant's benefits in September 2011 on the basis of Dr. Sobel's August 2011 end medical result determination. Defendant asserts that Claimant did not undergo any further treatment after that date that significantly improved his condition, and therefore the discontinuance was proper. Claimant contends that because he is seeking a spinal cord stimulator trial to address his chronic pain, a finding of end medical result is as yet premature.

3. Vermont's workers' compensation rules define "end medical result" as follows:

> "End medical result" . . . means the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment. Workers' Compensation Rule 2.1200.

4. An employer is only obligated to pay for medical treatments that are determined to be both "reasonable" and causally related to the compensable injury or condition. 21 V.S.A. §640(a); *MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009). The commissioner has discretion to determine what constitutes "reasonable" medical treatment given the particular circumstances of each case. *Id.* A treatment can be unreasonable either because it is not medically necessary or because it is not related to the compensable injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2011).

5. Fairness dictates that the determination whether a treatment is or is not reasonably calculated to lead to further improvement must be made prospectively, at the time it is undertaken, not retrospectively and with the benefit of hindsight. *Luff v. Rent Way*, Opinion No. 07-10WC (February 16, 2010); *Lukic v. Rhino Foods*, Opinion No. 49-09WC (December 15, 2009). The practice of medicine is often inexact, and the efficacy of a particular treatment often cannot be known with certainty until it is attempted.

6. Here, as even Dr. Sobel conceded, the treatments Claimant underwent after August 2011 were all reasonable. And although ultimately they proved unsuccessful, I conclude that they were reasonably calculated, at the time they were undertaken, to lead to further improvement in his work-related condition. For that reason, I must conclude that Dr. Sobel's end medical result determination was premature.

7. However, I accept as credible Dr. Sobel's analysis regarding the efficacy of a spinal cord stimulator in Claimant's case. As the surveillance videos document, Claimant's functional abilities are significantly greater than what typically is required to justify this course of treatment. That no structural basis for Claimant's subjective complaints has yet been identified is further cause for concern. Based on these factors, I conclude from the more credible medical evidence that a spinal cord stimulator is not an appropriate treatment option.

8. I must also reject as unreasonable the psychiatric evaluation that has been proposed to determine if Claimant is a suitable candidate for a spinal cord stimulator from a psychological perspective. Having already concluded that the device is not appropriate on other grounds, there is no basis for continuing with this inquiry.

9. I conclude that Claimant reached an end medical result for his work-related condition on November 27, 2012. By that date, Claimant had undergone thorough evaluation and treatment, including a series of injections, with a pain specialist. He had completed a functional restoration program, and had been determined, by both Dr. Horgan and Dr. Krag, not to be an appropriate candidate for additional surgery. Dr. Sengupta reiterated that opinion. I accept his end medical result determination as the most credible.

10. In sum, I conclude that Claimant reached an end medical result for his work-related condition on November 27, 2012. He therefore is entitled to temporary total disability benefits from September 2, 2011 (the effective date of Defendant's discontinuance) to November 27, 2012. I further conclude that neither a spinal cord stimulator nor the psychiatric evaluation proposed as part of the treatment protocol for it constitutes reasonable medical treatment. Therefore, Defendant is not obligated to pay for them.

11. Claimant has submitted a request for an award of litigation costs totaling $6,067.14 and attorney fees totaling 15,650. As he has prevailed on only a portion of his claim for benefits, he is entitled to an award of only those costs that relate directly thereto. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997). Of the costs submitted, I conclude that the expenses referable to Dr. White's and Ms. Pratt's evaluations are not recoverable. The remaining expenses, totaling $1,867.14 are awarded. As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. I conclude that an award of $3,967.13 (25 percent of the amount requested) is appropriate.

ORDER:

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

1. Temporary total disability benefits from September 2, 2011 to November 27, 2012, in accordance with 21 V.S.A. §642;

2. Interest on the above amount, calculated in accordance with 21 V.S.A. §664; and

3. Costs totaling $1,867.14 and attorney fees totaling $3,967.13.

DATED at Montpelier, Vermont this 22nd day of October 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.