

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Corey Shores

Opinion No. 01-21WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Mack Molding Company, Inc.

For: Michael A. Harrington
Commissioner

State File No. FF-56028

OPINION AND ORDER

Hearing held via Microsoft Teams on November 13, 2020
Record closed on December 21, 2020

APPEARANCES:

James M. Dingley, Esq., for Claimant
Keith J. Kasper, Esq., for Defendant

ISSUE PRESENTED:

Are bilateral facet joint radiofrequency denervations at the L3, L4 and L5 levels of Claimant's spine reasonable medical treatment for his accepted work injury?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum vitae* of Robert W. Giering, MD

Claimant's Exhibit 2: Exercise log

Defendant's Exhibit A: *Curriculum vitae* of Verne L. Backus, MD

CLAIM:

Medical benefits pursuant to 21 V.S.A. § 640
Costs and attorney fees pursuant to 21 V.S.A. § 678

FINDINGS OF FACT:

1. At all relevant times, Claimant was an employee and Defendant was his employer as those terms are defined in the Vermont Workers' Compensation Act.
2. I take judicial notice of all forms in the Department's file relating to this claim.

3. Claimant is a 50-year-old man who lives in Manchester Center, Vermont. He began work for Defendant as a laser technician about ten years ago. His job involves operating a machine to lift four-foot by eight-foot sheets of stainless steel or aluminum, cutting the sheets with a laser, and loading them onto a pallet. Claimant's job is physically demanding, involving frequent lifting and bending, as well as pushing and pulling pallet jacks all day long. He works on his feet for eight hours per day and has not missed a day of work in ten years, other than in relation to his work injury.

Claimant's Work Injury and Subsequent Medical Course

4. On November 14, 2013, Claimant sustained a work-related low back injury when he tried to move a heavy barrel into the hazardous materials cage with a coworker. The barrel began to tip over, and as he tried to push it back up, he felt a snap in his low back and pain in his low back, legs and toes. Defendant accepted his injury as compensable and began paying workers' compensation benefits accordingly.
5. Claimant sought medical treatment with orthopedic spine surgeon Daniel Robbins, MD, who diagnosed him with lumbar radiculopathy caused by a herniated disc. Dr. Robbins prescribed physical therapy and provided Claimant with a booklet outlining specific exercises for his medical condition.
6. Claimant began physical therapy on December 3, 2013, and he performed the exercises outlined in the booklet. Dr. Robbins noted that physical therapy was "helping a lot," but it did not eliminate Claimant's symptoms. Thus Dr. Robbins referred him to pain management physician Robert Giering, MD.
7. Dr. Giering performed two epidural steroid injections in Claimant's low back in 2014, but the second one was not as effective as the first. In September 2014, Dr. Robbins performed surgery to decompress several levels of Claimant's lumbar spine. In November, Claimant was released to full-duty work for Defendant and began another course of physical therapy.
8. Although surgery improved Claimant's symptoms at first, the symptoms worsened over time. Claimant received epidural steroid injections in 2016, 2017 and 2018 for post-surgical pain and functional limitations. In 2016, those injections provided him with significant pain relief and improved function, but over time their effectiveness waned.
9. In October 2018, Dr. Giering performed a radiofrequency denervation procedure on Claimant's facet joints at the L3, L4 and L5 levels. The procedure was successful, with Claimant reporting 85 percent pain relief.
10. Dr. Giering repeated the procedure on May 13, 2019. Claimant reported 100 percent pain relief from the second procedure, lasting almost four months, with no ill effects. Dr. Giering thus considered radiofrequency denervation a "highly effective treatment" for Claimant's low back pain. *Joint Exhibit I*, at 196. He advised Claimant that he

could undergo the procedure as frequently as every six months and instructed him to continue his home exercise program.

11. On August 29, 2019, Claimant saw physician assistant Robert Mitchell in Dr. Giering's office. Claimant reported the gradual return of his low back pain, with pain at a level of one to two out of ten. PA Mitchell recommended another radiofrequency denervation procedure.
12. At Defendant's request, Claimant underwent an independent medical examination with occupational medicine physician Verne Backus, MD, in October 2019. Based on Dr. Backus' report, Defendant declined to preauthorize an additional radiofrequency denervation.
13. Claimant returned to Dr. Giering in February 2020. Dr. Giering agreed with PA Mitchell's recommendation for a third radiofrequency denervation. He did not perform the procedure, however, because Defendant had denied preauthorization.
14. Claimant has not received any medical treatment for his low back condition since May 2019, other than his prescribed medication.

Claimant's Current Status

15. Claimant continues to perform his physically demanding job for Defendant. He and his wife walk several miles on the Manchester Recreational Center's gravel path three to five evenings per week. Sometimes they hike Mount Equinox or the Prospect Rock Trail in Manchester. Beginning in May 2020, Claimant added jogging to his physical activity routine. He also tries to perform three core workouts per week but must plan them carefully because they affect his low back and how far he can walk. Finally, Claimant still performs the exercises outlined in the booklet that Drs. Robbins and Giering provided.
16. Claimant's pain is centered in his low back, with numbness in his buttocks and groin and a shooting pain in his leg. He also has leg cramps that interfere with his sleep. His symptoms affect many of his activities, including motorcycle riding, hunting and mowing the lawn. On the day of hearing, he credibly described his pain level as eight out of ten.
17. Claimant credibly testified that the two radiofrequency denervations that he underwent helped to both relieve his pain and improve his function. Prior to the procedures, he could not put his pants or socks on without his wife's help. After the procedures, his back did not hurt. He slept better, felt less stiff upon awakening, and was able to dress himself. He was also able to enjoy motorcycle riding, hunting and fishing again. Claimant wishes to undergo another radiofrequency denervation.

Expert Medical Testimony

18. The parties presented expert medical testimony as to the reasonableness of a third radiofrequency denervation procedure at the L3, L4 and L5 levels of Claimant's spine.

(a) Dr. Giering

19. Dr. Giering is Claimant's treating physician. He graduated from Albany Medical College in 1999 and is board-certified in physical medicine and rehabilitation. He also completed a fellowship in interventional pain management and has a subspecialty in pain medicine. From 2004 through 2011, Dr. Giering had an active clinical practice in rehabilitation medicine and interventional pain management. In 2012 he partnered with orthopedic surgeon Dr. Robbins to operate a clinical practice focusing on the spine. Dr. Giering has treated about 75 spine patients per week for 17 years.
20. Radiofrequency denervation uses heat generated by radio waves to target specific nerves and temporarily turn off their ability to send pain signals to the brain. The pain relief offered by this procedure typically lasts from five to twelve months. Dr. Giering has performed radiofrequency denervation between 5,000 and 10,000 times.
21. In Dr. Giering's opinion, performing a third radiofrequency denervation at the L3, L4 and L5 levels of Claimant's spine is a reasonable treatment for his work-related low back condition because the pain Claimant is experiencing now is the same as the pain that was treated successfully by this procedure on two prior occasions.¹ Thus, Dr. Giering expects that a repeat procedure would likely relieve Claimant's pain and improve his function. *See Joint Exhibit I*, at 234.
22. In recommending this treatment, Dr. Giering compared it with Claimant's other treatment options. He already had one surgery; a repeat surgery would present significantly more risk without necessarily offering a greater long-term benefit. He has undergone two physical therapy courses and engages in an exercise routine, *see* Finding of Fact No. 15 *supra*, but has not achieved sufficient, lasting pain relief from these activities. Finally, Claimant's prescribed medications do not fully resolve his pain, and he does not wish to rely on opioid medications. Thus, Dr. Giering has recommended radiofrequency denervation as presently the best treatment option. He acknowledged that a more formal exercise program might provide a small benefit but does not consider it a prerequisite to another radiofrequency denervation.
23. Dr. Giering testified that there are different sets of clinical practice guidelines applicable to radiofrequency denervation, including those published by the American College of Occupational and Environmental Medicine (ACOEM) and those published by the American Society of Regional Anesthesia (ASRA). He follows the ASRA guidelines, as they are based on a more comprehensive body of studies concerning this specific procedure. The ASRA guidelines provide that radiofrequency denervation may be performed as frequently as every six months if the procedure provides a benefit. Thus, Dr. Giering's recommendation is in accord with the ASRA guidelines.

¹ The first procedure provided Claimant 85 percent pain relief initially and 75 percent pain relief five months later, an outcome that Dr. Giering called "quite good." The second procedure provided Claimant 100 percent pain relief for two months and 50 percent pain relief after three and a half months, which Dr. Giering considered a successful outcome.

24. Dr. Giering's opinions have a firm basis in his training as a pain management physician and his experience performing radiofrequency denervation on thousands of patients, including Claimant. I find his opinions credible.

(b) Dr. Backus

25. Defendant presented expert medical testimony from Verne Backus, MD, as to the reasonableness of another radiofrequency denervation. Dr. Backus is a board-certified occupational medicine physician. He graduated from Dartmouth Medical School and completed his occupational and environmental medicine residency at the Harvard School of Public Health. His current practice focuses on independent medical examinations. At Defendant's request, Dr. Backus performed such an examination of Claimant on October 11, 2019, including a physical examination and a medical records review. *Joint Exhibit I*, at 201-31.
26. Dr. Backus acknowledged that Claimant obtained significant pain relief from the radiofrequency denervation procedures performed by Dr. Giering in October 2018 and May 2019. However, in his opinion, a third radiofrequency denervation would not be reasonable treatment unless Claimant undertook an active exercise program first, including aerobic activity, like walking, and core strengthening exercises. In his opinion, a more active exercise program might obviate the need for another radiofrequency denervation. If Claimant engaged in more active exercise and still did not achieve sufficient pain relief, then Dr. Backus would find it reasonable to perform a third radiofrequency denervation procedure.
27. Dr. Backus acknowledged that Claimant engages in a regular walking and stretching program and that he has a physically demanding job. Nevertheless, he offered his opinion that these activities fall short of an active exercise program. In his opinion, it would be best for Claimant to work with a physical therapist or personal trainer to get the most out of his exercise routine, although such assistance would not be strictly necessary. Short of that, he should at least perform exercises specifically designed for the muscle groups that support his low back.²
28. Dr. Backus cited the ACOEM practice guidelines to support his opinion. These guidelines are based on meta-studies of the effectiveness of certain medical procedures, including radiofrequency denervation. Although there are many different practice guidelines available to physicians, he thinks that these guidelines are the best. Relying on these guidelines, Dr. Backus testified that the evidence favoring radiofrequency denervation is not strong; however, he acknowledged that the guidelines do not offer any specific recommendations for or against performing the procedure. Dr. Backus further acknowledged that the ACOEM guidelines do not constitute a standard of care and that physicians rely on a variety of guidelines.

² At the October 2019 independent medical examination, Claimant reported walking and stretching to Dr. Backus but did not report the frequency and variety of exercise to which he credibly testified at the hearing. This was due, at least in part, to his not having begun some of his exercise routines until after October 2019. Thus, Dr. Backus did not have a full picture of Claimant's exercise profile at the independent medical examination.

29. Dr. Backus credibly explained the value of the ACOEM guidelines and why he relies on them. However, those guidelines do not recommend against performing radiofrequency denervation on a patient like Claimant. Further, as Dr. Backus' training and experience are not in pain management, I find his opinion less persuasive than Dr. Giering's.

CONCLUSIONS OF LAW:

Reasonableness of Proposed Medical Treatment

1. Vermont's workers' compensation statute obligates an employer to furnish "reasonable" medical services and supplies to an employee who has sustained a compensable work-related injury. 21 V.S.A. § 640(a). 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, 2010); *Brodeur v. Energizer Battery Mfg., Inc.*, Opinion No. 06-14WC (April 2, 2014). In this case, the parties do not dispute that the proposed radiofrequency denervation procedure is related to the Claimant's compensable injury. Their dispute concerns only whether the treatment is medically necessary.
2. Unless the employer is seeking to discontinue a previously accepted medical treatment, the claimant has the burden of proving that a proposed medical treatment is reasonable under 21 V.S.A. § 640(a). *Merriam v. Bennington Convalescent Center*, Opinion No. 55-06 (January 2, 2007); *Baraw, supra*. In determining what is reasonable, the decisive factor is not what the claimant desires but what is shown by competent expert evidence to be reasonable. *Merriam, supra*. Defendant here has denied preauthorization for a third radiofrequency denervation procedure. See Defendant's Denial (Form 2), filed September 16, 2019. Thus, Claimant has the burden of establishing that the proposed treatment is reasonable.
3. The parties presented conflicting expert testimony on the issue of whether a third radiofrequency denervation is reasonable treatment for Claimant's work-related low back condition. 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).
4. Relying primarily on the first and fifth *Geiger* factors, I conclude that Dr. Giering's opinion is the most persuasive. As Claimant's treating physician, Dr. Giering is in the best position to understand Claimant's past response to radiofrequency denervation and to determine the best treatment going forward. In addition, Dr. Giering is a pain management specialist who has performed this procedure more than 5,000 times.
5. Further, Dr. Giering's analysis of the success of Claimant's prior radiofrequency denervation procedures, which considered both the extent and the duration of his pain

relief, was clear, thorough, and objectively supported. He established that Claimant's present pain is the same as the pain previously treated with this procedure and that Claimant was likely to achieve a similar positive outcome in a third procedure.

6. In contrast, Dr. Backus has no patient-provider relationship with Claimant and no expertise in pain management. He has never performed a radiofrequency denervation. Accordingly, his opinion was largely based on the ACOEM guidelines, which recommend neither for nor against the procedure. Further, although he credibly testified that Claimant's exercise routine might benefit from the guidance of a physical therapist or personal trainer, he failed to convince me that such guidance is a prerequisite for an additional radiofrequency denervation. I therefore find his testimony unpersuasive.
7. I conclude that Claimant has met his burden of proof that a third radiofrequency denervation procedure constitutes reasonable medical treatment for his work-related injury.

Costs and Attorney Fees

8. As Claimant has prevailed on his claim, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. § 678(e), he shall have 30 days from the date of this opinion within which to submit his itemized claim.

ORDER:

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

1. Medical benefits associated with Claimant's third radiofrequency denervation procedure, in accordance with 21 V.S.A. § 640(a); and
2. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. § 678.

DATED at Montpelier, Vermont this 15th day of January 2021.

Michael A. Harrington
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.