

Jeffrey New v. Conway Central Express

(August 28, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Jeffrey New

Opinion No. 33-09WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

Conway Central Express

For: Patricia Moulton Powden
Commissioner

State File No. U-12847

OPINION AND ORDER

Hearing held in Montpelier on February 2, 2009

Record closed on March 3, 2009

APPEARANCES:

Jeffrey New, *pro se*
Corina Schaffner-Fegard, Esq., for Defendant

ISSUES:

1. Did the implantation of a spinal cord stimulator constitute reasonably necessary treatment for Claimant's February 2004 work injury?
2. When did Claimant reach an end medical result for his work injury and what, if any, ongoing treatment is reasonably necessary?

EXHIBITS:

Defendant's Exhibit A: Medical records
Defendant's Exhibit B: Dr. Ross medical records
Defendant's Exhibit C: Video surveillance
Defendant's Exhibit D: Dr. McClellan deposition
Defendant's Exhibit E: Tom Lathrop video deposition
Defendant's Exhibit G: Sony VHS tape of video surveillance

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Worker's Compensation Act.
2. Judicial notice is taken of all forms contained in the Department's file relating to this claim.
3. Claimant worked for Defendant as a truck driver. Part of his job involved loading and unloading the items to be delivered. Claimant's previous work history included both trucking and farm work, both of which are considered "heavy work."
4. Claimant lives in New Haven, Vermont with his wife and approximately 42 cats. As of February 2004 he was 40 years old.

Claimant's Work Injury and Subsequent Treatment

5. On February 23, 2004 Claimant was trying to unload a pallet of rolled of steel that had frozen to the bed of his trailer. As he bent to lift it, he heard his back "pop," and immediately felt significant pain in his low back. The pain radiated into his left hip and down his left leg. Claimant finished a few more deliveries, then reported his injury to Defendant and presented to the Emergency Room for treatment.
6. Defendant accepted Claimant's injury as compensable and paid both temporary disability and medical benefits accordingly. Claimant has not worked since the injury.
7. Claimant has a prior medical history of low back pain following a non-work-related injury in 2003. As treatment for this injury Claimant underwent an L3-4 discectomy in August 2003, following which he had a complete recovery and successfully returned to work.
8. Claimant also has a remote history of depression, including two suicide attempts, in his teenage years.
9. Initially Claimant treated conservatively following the February 2004 work injury. Neither physical therapy nor injections successfully alleviated his symptoms, however. Claimant consistently complained of high pain levels, for which his treating physicians prescribed various narcotic pain medications, including Oxycontin, Oxycodone and methadone. Against his doctors' advice, Claimant also self-medicated with dangerously high dosages of non-steroidal anti-inflammatories.

10. Without adequate pain control, Claimant became frustrated and depressed. Stressors in his personal life, including the death of two close family members, also contributed to his depression. At times, Claimant's treating physicians noted significant pain behaviors and questioned whether he was drug-seeking. In the fall of 2004, they recommended that he be admitted to a pain clinic so that he could wean off the high dosages of narcotic medications he was taking. For reasons that remain unclear, this recommendation was never pursued.
11. The question whether Claimant was misusing the narcotic medications he had been prescribed was never resolved. There was some evidence that Claimant was a "fast metabolizer," and thus required large dosages of medication to accomplish effective pain relief. In any event, ultimately both of Claimant's primary care physicians severed their relationship with him because of their ongoing concerns as to his use of narcotics.
12. Conservative treatment for Claimant's ongoing symptoms having failed, in August 2005 he underwent spinal fusion surgery with Dr. Sengupta, a neurosurgeon. Within a month thereafter, Claimant again was complaining of low back and left leg pain. The fusion appeared solid and Dr. Sengupta could find no anatomical basis for his ongoing symptoms.

Spinal Cord Stimulator

13. Various treatment options were recommended for Claimant's continued symptoms, including a functional restoration program, behavioral counseling and implantation of a spinal cord stimulator. As to the last recommendation, many doctors considered whether a spinal cord stimulator would be appropriate for Claimant, including Drs. Graubert, McClellan, Sengupta and Fancullo. Dr. Boucher also considered this treatment option in the context of the independent medical evaluation he performed at Defendant's request.
14. A spinal cord stimulator generally is considered to be a last option for patients with intractable pain such as Claimant's. The protocol for determining whether this treatment measure is appropriate for a particular patient varies, and there are several factors to consider. Spinal cord stimulators are more effective at treating lower extremity pain than they are at treating low back pain *per se*. They also are contraindicated in cases where the patient suffers from untreated depression or somatic pain, exhibits signs of symptom magnification and/or has a history of narcotic drug addiction or abuse. Claimant's current and prior medical course contains evidence of all of these contraindications.

15. After reviewing Claimant's medical records and the results of his psychological evaluation, in early 2008 a panel of physicians at Dartmouth Hitchcock Medical Center concluded that he was not an appropriate candidate for a spinal cord stimulator. Claimant remained committed to the idea, however. Ultimately, he presented to Dr. Ross at Brigham and Women's Hospital. After interviewing Claimant and conducting a psychological evaluation, Dr. Ross determined that he was an appropriate candidate. The basis for that determination is somewhat suspect, however. Claimant was not entirely truthful in his responses to Dr. Ross' inquiries and did not inform him either of his history of depression or of his issues with narcotic pain medications. Nor did Dr. Ross fully review Claimant's prior medical records.
16. Dr. Ross implanted Claimant's stimulator in November 2008. Initially thereafter Claimant reported that he experienced "nearly absolute pain relief." Such a marked improvement is virtually unheard of with spinal cord stimulators, which typically decrease a patient's pain but do not eliminate it altogether. In fact, Claimant's report is itself evidence that his symptoms may have been psychologically rather than organically based, and that his reaction to the spinal cord stimulator was a placebo effect. If that is the case, then the conclusion of the panel at Dartmouth Hitchcock – that the stimulator was not an appropriate treatment option for Claimant – ultimately was the correct one.
17. The extensive pain relief Claimant initially reported was short-lived. By January 2008 he was again undergoing spinal injections and Dr. Ross determined that he still was not capable of being released to return to work. Claimant testified at the formal hearing that both the injection therapy and his use of narcotic pain medications were continuing. As to the latter, Dr. Fancullo determined in April 2008 that further prescriptions were inappropriate; since that time Dr. Ross has been prescribing them. Claimant remains unemployed, though he recently has started an internet sales business.

End Medical Result

18. Medical opinions from three doctors were introduced as to when Claimant reached an end medical result for his work injury. Defendant's independent medical examiner, Dr. Boucher, determined that Claimant reached an end medical result on September 13, 2007. Drs. McClellan and Fancullo, both treating physicians, placed Claimant at end medical result on March 3, 2008 and April 1, 2008, respectively. Dr. McClellan testified that he would have done so earlier, but delayed his determination first because Claimant advised that Dr. Sengupta was considering further surgery, and later because Claimant was pursuing the possibility of a spinal cord stimulator.
19. With Dr. Boucher's end medical result determination as support, the Department approved Defendant's discontinuance of temporary disability benefits effective December 16, 2007.

Video Surveillance

20. Claimant's credibility as to the extent of his pain and his functional limitations was called into question by two episodes of video surveillance in late July and early August 2007. In the first episode Claimant was videotaped exiting a discount food store with a box of cat food, walking to his car upright, at a normal pace and without using his cane (which was draped over his arm), and bending to deposit the box in the trunk of his car. The second video depicts two men unloading lumber from a delivery truck in Claimant's driveway. The quality of the video is poor, and it is unclear which of the two men is Claimant. Claimant admitted that he had lumber delivered for a flooring project, and did not deny that he was one of the two men depicted.
21. Drs. McClellan, Fancullo and Boucher all viewed the surveillance videotapes. All remarked that Claimant demonstrated significantly greater physical capabilities and appeared to be in significantly less pain in the videos than what he had exhibited in the course of his office visits with each of them. All concluded that Claimant's presentation on the videos was inconsistent with what they had observed previously.

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 disputed issues in this claim involve first, whether Dr. Ross' spinal cord stimulator treatment constituted reasonably necessary treatment for Claimant's work injury, second, whether his ongoing use of narcotic pain medications was reasonable, and third, when it became appropriate to declare him at end medical result. All of these issues require expert medical evidence for their resolution.
3. Where expert medical opinions are conflicting, 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 (Sept. 17, 2003).

Reasonable Necessity of Spinal Cord Stimulator

4. As to the spinal cord stimulator, it is important to note that the reasonableness of a medical procedure must be determined from the perspective of what was known at the time, not in hindsight. *MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009); *Jacobs v. Biebel Builders*, Opinion No. 17-03WC (March 21, 2003).
5. Here, Drs. McClellan, Sengupta, Fancuillo and Boucher all opined that Claimant was not an appropriate candidate for a spinal cord stimulator. These doctors all had the benefit of having reviewed Claimant's entire medical record. I find their opinions on the issue to be more credible than that of Dr. Ross. Not only did Dr. Ross fail to review Claimant's pertinent medical history in its entirety, but also he may have been misled by Claimant, who was not as forthcoming as perhaps he should have been.
6. Claimant's credibility also suffers as a result of the inconsistencies between his behavior when presenting for doctors' appointments and his behavior as depicted on the surveillance videos. To the extent that the efficacy of treatment with a spinal cord stimulator depends on the extent of a patient's intractable pain, the questions raised by the surveillance tapes are impossible to overlook.

End Medical Result and Ongoing Treatment

7. I find that Dr. McClellan's March 3, 2008 end medical result date is the most appropriate here. Until the Dartmouth Hitchcock panel determined, in early 2008, that Claimant was not an appropriate candidate for a spinal cord stimulator, this remained a reasonable treatment option to pursue. Dr. Boucher's end medical result date, which predated this determination by some months, was premature. As for Dr. Fancuillo, he provided no treatment between March and April 2008, but merely reviewed the surveillance videotapes. Dr. McClellan's date, therefore, stands as the most credible.
8. As for ongoing treatment, I find that Claimant's use of narcotic pain medications after April 1, 2008 was not reasonably necessary. It was on that date that Dr. Fancuillo determined that further use of these drugs would not be helpful. I find this conclusion to be appropriate under the circumstances and therefore credible.

ORDER:

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

1. Temporary total disability benefits from the date these were discontinued, December 16, 2007 until March 3, 2008;
2. Interest on the above amount in accordance with 21 V.S.A. §664; and
3. Medical benefits covering all reasonably necessary and causally related services and supplies, including narcotic pain medications, until April 1, 2008.
4. Claimant's claim for workers' compensation benefits related to his ongoing treatment with Dr. Ross, including the implantation of the spinal cord stimulator, is hereby **DENIED**.

DATED at Montpelier, Vermont this 28th day of August 2009.

Patricia Moulton Powden
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.