

**STATE OF VERMONT
DEPARTMENT OF LABOR**

R. D.)	Opinion No. 54-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Pizzagalli Construction)	For: Patricia A. McDonald
)	Commissioner
)	
)	State File No. P-00784

Case submitted on the record without a hearing

APPEARANCES:

William C. Kittell, Esq., for the Claimant
John W. Valente, Esq., for the Defendant

ISSUE:

Is the claimant’s ulnar neuritis and surgery performed by Dr. Maloney on February 2, 2005 causally related to his work related injury?

BACKGROUND:

This is the second hearing decision involving claimant’s June 1999 injury. In the first, Opinion No. 14-04WC (March 9, 2004), the Commissioner held that claimant reached medical end result for his work related elbow injury on May 17, 2001 with a 7% whole person impairment. Claimant’s appeal of the permanency determination is pending in Chittenden Superior Court.

FINDINGS OF FACT:

1. Claimant’s June 1999 work related elbow injury was severe. Dr. Mahoney, his treating surgeon, opined that in that accident claimant dislocated his right elbow and tore ligaments.
2. In January 2000, right ulnar neuropathic pain was diagnosed.
3. Dr. Mahoney treated the elbow surgically with the surgical excision of the radial head in May of 2000.

4. On January 10, 2001, claimant had a punch jab incident with the forceable hyperextension of his elbow. According to Dr. Kenosh, that incident increased the claimant's pain but did not aggravate the underlying condition. (Kenosh Report of August 2003, Part III).
5. On September 25, 2001, claimant fell on a cement surface, with resulting swelling in his injured elbow.
6. A hearing was held on October 2003 and decision issued in March 2004 on the issues of date of medical end result and extent of permanency.
7. Since the hearing decision, claimant continued to have difficulty with numbness and tingling on the ulnar side of his right hand in the fourth and fifth fingers.
8. After evaluating the claimant and new EMG and nerve conduction studies, which revealed mild ulnar neuropathy, Dr. Mahoney recommended the ulnar nerve transposition surgery he performed in February 2005.

Medical Opinions

9. Dr. Patrick Mahoney is an orthopedic surgeon and claimant's treating physician. He opined that claimant's ulnar nerve problem is "clearly" related to his 1999 work related injury. He emphasized the severity of claimant's injury and explained that claimant's ulnar neuritis "is a well known late effect after a variety of elbow injuries including fractures and dislocations." Dr. Mahoney reviewed and rejected Dr. Kenosh's opinion.
10. Dr. Michael Kenosh is a physician board certified in physical medicine and rehabilitation and independent medical examinations. He evaluated the claimant for the defense in this case and has since reviewed updated medical records. He opined that the surgery Dr. Mahoney performed in February of this year was not related to the 1999 work related injury. He based that opinion on the lack of objective findings on physical examination, indication of pain behaviors, lack of ulnar findings on the 1999 EMG, and the unlikelihood that ulnar neuritis would follow an injury to the radial head. He also concluded a more recent electrodiagnostic study reveals only mild ulnar neuropathy. Finally, Dr. Kenosh noted that claimant had two significant intervening events that traumatized his elbow. He agrees with Dr. Mahoney that ulnar neuritis "is a well known late effect" of elbow fracture.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
2. 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 inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. An injured worker is entitled to reasonable medical and surgical treatment causally related to his work related injury. See 21 V.S.A. § 640(a).
4. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
5. In this case where there is only one opinion from a surgeon and the question concerns surgery, Dr. Mahoney's opinion regarding causation must be accepted. It is well supported with the severity of the original injury, ulnar nerve clinical findings from the outset, more recent changes seen on nerve conduction studies and the well accepted medical tenet that ulnar neuritis is a known late effect of severe elbow injuries.
6. Accordingly, the ulnar nerve neuritis is causally related to the 1999 injury and the surgery performed by Dr. Mahoney in January 2005 is compensable.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to cover the surgery and related costs.

Dated at Montpelier, Vermont this 26th day of August 2005.

Thomas W. Douse, Deputy Commissioner
as Designee for Patricia A. McDonald, 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.