

P. M v. Bennington Convalescent Center & FGB Corporation (January 2, 2007)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

P. M.

Opinion No. 55-06WC

v.

By: Margaret A. Mangan  
Hearing Officer

Bennington Convalescent Center  
and FGB Corporation

For: Patricia Moulton Powden  
Commissioner

State File No. A-25839 & U-00957

Hearing held in Montpelier on August 29, 2006

Record closed on October 2, 2006

**APPEARANCES:**

Patrick Biggam, Esq., for the Claimant  
Tammy Denton, Esq., for Defendant NH Insurance Co./American Health Care.  
Jeffrey W. Spencer, Esq. for Defendant FGB

**ISSUES:**

1. Was Claimant's spinal surgery on April 14, 2003 reasonable?
2. Did Claimant suffer an aggravation or a recurrence of her previous work related back injury while working for FGB Corporation?
3. What, if any, benefits is the Claimant entitled to receive?

**CLAIM:**

1. Medical expenses in the amount of \$57,854.11 for treatment of back injury, including surgery on April 14, 2003;
2. Legal fees in the amount of 20% of the value awarded, not to exceed \$9,000;
3. Costs.

**EXHIBITS:**

Joint I: Medical Records

Defendant NH Insurance Co./American Health Care:

- A Verne Backus, M.D.'s Curriculum Vitae
- B Kuhrt Wieneke, M.D.'s Curriculum Vitae

Defendant FGB Corp.: Photographs

Claimant's 1: Medical Billing Packet

**FINDINGS OF FACT:**

1. On June 2, 1988, Claimant injured her low back while working as a nurse's aid for American Health Care ("AHC"). The injury occurred as she bent over to catch a patient to prevent a fall. The workers' compensation insurer for AHC accepted the claim.
2. Claimant's attempts to return to light duty as a nurse's aid failed.
3. In May of 1989, Dr. Gates performed a partial discectomy at L4-5, but Claimant's pain and numbness persisted postoperatively. Later she was diagnosed with a failed back syndrome.
4. In November 1989 Claimant was released to work with a lifting restriction of ten to twelve pounds.
5. In 1990, Claimant had reached medical end result. Dr. Gates assessed permanency at 34%; Dr. Ford assessed a 28% impairment.
6. In the summer of 1991, Claimant's work for AHC ended because she was unable to do the work.
7. Claimant continued to treat for back and leg pain and weakness. She received prescriptions for pain medication and a TENS unit.
8. A July 1992 CT scan revealed a herniated disc on the left at L4-5. Steroid therapy and facet injections followed.
9. In November 1992, Dr. Gates recommended further surgery to relieve her symptoms that he opined were related to a slow exacerbation of her work related injury. He later explained that with the disc pathology from the original injury, she had continued degeneration in the spine, narrowing the lateral recess and causing her pain.
10. The carrier refused to pay for the recommended surgery or other continued care, although it paid for medication.

11. By November 1998, the Claimant had been babysitting children in her home for four to five years.
12. In November of 1998, Claimant began working for Defendant FGB at a Laundromat, six hours per day, five days per week. The Laundromat was self-serve. Her pain continued at the level it had been, an eight on a scale of one to ten.
13. Claimant loaded washers and dryers and folded clothes. She lifted only weight she was comfortable lifting, asking for help from coworkers for heavy items. At all times, Claimant was compliant with the twenty pound lifting restriction she had been given. In addition, she was free to take breaks and sit as needed.
14. Work at the Laundromat did not change the progression of Claimant's pain. It worsened, but in the same way it had when she was not working. Nothing at work affected the pain.
15. Claimant missed some time from work for a shoulder injury in December 2002. When she returned in February 2003, no mention was made of any back problems. During her time out of work for the shoulder, her back symptoms progressed in the same way they did when she was working.
16. On April 14, 2003, Dr. Lapinsky performed back surgery on Claimant. The procedures were laminectomies, foraminotomies and a fusion.
17. AHC denied payment for the back surgery, arguing that the surgery was not reasonable or causally related to Claimant's work as a nurses' aid. Further it pointed to her later work at the Laundromat as the cause.
18. Dr. Lapinsky wrote that the basis for the fusion surgery was to address the spinal instability that would result from the decompression aspects of the surgical procedure. It was also intended to "stabilize the motion segments that have degenerated."
19. AHC denied payment for surgery based on the opinion of Dr. Verne Backus, Occupational Medicine expert, that the fusion was not a reasonable procedure because it was performed for pain alone, without evidence of instability. However, Dr. Backus agreed that the medical community differs on this subject, with many surgeons recommending fusion surgery for pain.
20. Dr. Kuhrt Wieneke, certified in orthopedic surgery and spine surgery, performed an independent medical examination of the Claimant on November 8, 2004. Dr. Wieneke opined that the Claimant suffered a series of aggravations while working at the laundromat because her back pain was more severe at the end of the workday.
21. Dr. Christopher Brigham, an expert hired by FGB Corporation to conduct a review of the Claimant's medical records, supported the compensability of the fusion surgery, noting that it was performed "because of the instability created by the removal of so much bone structure."

22. Furthermore, Dr. Brigham opined that Claimant's condition has followed a natural history since she was injured as a nurses' aid. That history is that of waxing and waning. He opined that nothing about the job at the Laundromat aggravated her back condition. In fact, he thought the light work there was therapeutic, as contrasted with completely sedentary work.
23. Medical records demonstrate that Claimant's back problems began in 1988 when she hurt her back helping a patient. She developed a failed back syndrome after the first surgery. Another surgical procedure was recommended before she ever started working at the Laundromat. Claimant lived with a level of back pain that slowly increased, but with no relationship with work. Claimant continued to treat unabated from the time she was hurt in 1988 to the present. Nothing happened at the Laundromat that worsened her condition.
24. Claimant incurred \$57,854.11 in expenses for treatment related to the back injury, including the surgery.
25. The Claimant is requesting attorney fees and costs. Claimant's Counsel has a 33 and 1/3% Fee Agreement with the Claimant. The Claimant has included an itemized list of litigation costs totaling \$810.75.

#### **CONCLUSIONS OF LAW:**

1. In a worker's compensation case, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1962). The claimant 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).
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 proven must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

#### Compensability of Surgery

3. On the reasonableness of the surgery, Claimant has the burden of proof pursuant to 21 V.S.A. § 640(a). "In determining what is reasonable under § 640(a), the decisive factor is not what the claimant desires or what [he] believes to be the most helpful. Rather, it is what is shown by competent expert evidence to be reasonable to relieve the claimant's back symptoms and maintain [his] functional abilities." *Quinn v. Emery Worldwide*, Opinion No. 29-00WC (2000).

4. The strong opinions of Dr. Lapinsky and Dr. Brigham convince me that the surgery performed by Dr. Lapinsky was reasonable and, therefore, compensable. 21 V.S.A. § 678 (a). The argument against compensability comes from Dr. Backus who opined that a fusion is performed only for spinal instability. The other experts amply address this concern by explaining that bone loss from the other surgical procedures put the Claimant at risk for instability, supporting the decision for a fusion. Further, degeneration in the Claimant's spine also led to the need to stabilize motion segments with a fusion.
5. Therefore, the responsible carrier must pay the medical bills related to Claimant's back injury, including costs of the surgery Dr. Lapinsky performed on April 14, 2003, subject to the fee schedule in Workers' Compensation Rule 40.000. That total is \$57,854.11.

#### Aggravation or recurrence

6. Next is the question whether Claimant's current condition is a recurrence, making AHC the responsible employer; or whether it is an aggravation, with FBG as the responsible party. "Generally, when two employers or insurers dispute liability for a workers' compensation claim arising out of successive injuries, the liability remains with the first insurer or employer if the second injury is a recurrence of the first." *Farris*, 177 Vt. at 458, citing *Pacher v. Fairdale Farms*, 166 Vt. 626, 627 (1997) (mem.). "If, however, the second incident aggravated, accelerated, or combined with a preexisting impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an 'aggravation,' and the second employer becomes solely responsible for the entire disability at that point." *Id.*
7. "[T]he employer or insurer at the time of the most recent personal injury ...shall have the burden of proving another employer's or insurer's liability." 21 V.S.A. § 662(c). *Farris v. Bryant Grinder*, 177 Vt. 456, 461 (2005). Therefore, FGB has the burden of proving AHC's liability.
8. The question turns on the medical evidence. Dr. Backus and Dr. Wieneke believe that Claimant's work at the Laundromat accelerated her back condition, making it an aggravation under the law of Vermont. On the other side are Dr. Brigham and Dr. Lapinsky, each of whom opined that Claimant's current condition is the natural progression of her underlying condition.
9. Where medical experts disagree, the Department considers the following factors: (1) the nature of treatment and length of time there has been a patient-provider relationship; (2) whether accident, medical and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination; and (5) the qualifications of the experts, including professional training and experience; *Morrow v. Vt. Financial Services Corp.*, Opinion No. 50-98WC (Aug. 25, 1998); *Durand v. Okemo Mountain*, Opinion No. 41S-98WC (Jul. 20, 1998).

10. Dr. Lapinsky's opinion carries greater weight for several reasons. First, the Department has traditionally given greater weight to the treating physician's opinion. *Searles v. Price Chopper*, Opinion No. 68S-98WC (1998) (citing *Mulinski v. C&S Wholesale Grocers*, Opinion No. 34-98WC (June 11, 1998)). This case is no exception; Dr. Lapinsky's education and experience as an orthopedic surgeon grant him a greater understanding of the Claimant's condition than either occupational medical expert. Also, while Doctors Wieneke and Lapinsky are both experienced orthopedic surgeons, Doctor Lapinsky's first-hand knowledge again tips the balance in his favor.
11. The evidence further strengthens Dr. Lapinsky's opinion regarding the diagnosis and treatment of the Claimant. First, Dr. Gates initially recommended a second surgery to treat the Claimant's destabilized and degenerating condition six years before the Claimant ever began working for Defendant FGB. Second, the Claimant's pain and disability continued steadily from the early 1990's until the 2003 surgery. Finally, the Claimant continued to experience pain in the same manner whether or not she was performing work related activities.
12. Therefore, the evidence supports recurrence in this case.

#### Attorney Fees and Costs

Based on 21 V.S.A. § 678(a) and Rule 10, Claimant is awarded Attorney fees of 20% of the total award or \$9,000, whichever is less.

**ORDER:**

THEREFORE, based on the above Findings of Fact and Conclusions of Law, the Defendant NH Insurance Co./American Health Care is ORDERED to pay:

1. Medical expenses related to the back injury, including the April 2003 surgery, in the amount of \$57, 854.11;
2. Interest from the date each medical expense was incurred;
3. Litigation costs of \$810.75;
4. Attorney fees of 20% or \$9,000.00, whichever is less.

Dated at Montpelier, Vermont this 2<sup>nd</sup> day of January 2007.

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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.