

A. R. v. EHV Weidman

(August 10, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

A. R.

Opinion No. 36-06WC

v.

By: Margaret A. Mangan
Hearing Officer

EHV Weidman

For Patricia Moulton Powden
Commissioner

State File No. X-19525

Hearing Held in Montpelier on June 6, 2006
Record closed on June 20, 2006

APPEARANCES:

Vincent Illuzzi, for the Claimant
Nicole R. Vincent, for the Defendant

ISSUE:

Is the Claimant's ongoing membership in a health club compensable?

EXHIBITS:

Joint I: Medical records

Claimant's 1: Affidavit of Thomas Turek, D.C.
Claimant's 2: Curriculum vitae of Dr. Turek

Defendant A: Transcript of deposition of Victor Gennaro, D.O.

FINDINGS OF FACT:

1. Claimant was an employee and EHV Weidmann his employer within the meaning of the Workers' Compensation Act from 1973 until Claimant retired in 1999.
2. In the fall of 1985, Claimant injured his upper back when he tried to catch a large heavy cylinder and twisted in the process. He was diagnosed with a thoracic strain.
3. Before the 1985 work related incident, Claimant did not have symptoms of back problems. However, he had a condition called osteogenesis imperfecta that is known to cause ligament laxity and fractures. Before the work-related injury, Claimant also had an exaggerated thoracic kyphosis that was asymptomatic.

4. After his work related injury, Claimant consulted with several health care providers, including Thomas Turek, D.C. who treated him with spinal manipulation, ultra-sound therapy and exercise therapy.
5. Dr. Turek placed Claimant at medical end result in July 1991. Palliative care continued. Dr. Turek recommended that Claimant continue flexibility exercises, which could be done at home.
6. An x-ray taken in 1991 revealed a thoracic level compression fracture that was not present in 1985.
7. In 1991 Dr. Peterson examined the Claimant. He determined that Claimant had reached medical end result and assigned a permanency rating. He also determined that Claimant would need continued chiropractic treatment on an infrequent basis and that he should continue daily exercise, including strength training.
8. In 1992 Claimant was advised to have aqua therapy for low back and leg pain unrelated to the work-related injury.
9. Claimant consistently follows an exercise routine recommended by his physicians and developed by a physical therapist at his local gym.
10. On occasions when Claimant had to stop his exercise regimen, his upper back pain returns.
11. The goal of a several month physical therapy program Claimant had in 1994 was to prepare him for an independent home exercise program.
12. In 1999 Claimant fell and fractured his hip. Treatment required hospitalization. He never returned to work after that injury.
13. In 2004 Claimant fell and sustained a clavicle fracture.
14. Dr. Turek opined that Claimant requires periodic treatment to maintain his status. Claimant's first visit to Dr. Turek in fifteen years was in August of 2005. At that time, he opined that Claimant's work related injury required continued use of the health club.
15. In February 2006 Dr. Victor Gennaro examined Claimant for the defense. He noted that those with osteogenesis imperfecta and thoracic kyphotic curvature frequently have chronic pain and spinal deformity. Dr. Gennaro opined that any symptoms Claimant now experiences are not from the 1985 injury, but from more recent causes. He based that decision on the diagnosis in 1985 (thoracic sprain), date of medical end result (1991), Claimant's other medical conditions, and the difference in Claimant's current symptoms compared to those in 1995. Further, Dr. Gennaro opined that the health club membership would be reasonable management for the osteogenesis imperfecta, but not for the work-related sprain. It would be reasonable because Claimant chose it. But all the exercises Claimant needs could be done with an exercise ball and walking, without the expense of a gym.

16. Dr. Hebert, Claimant's primary care physician, opined that the health club membership was reasonable treatment for Claimant's spinal compression fractures. Those fractures were not work-related.
17. Claimant has managed his symptoms by joining a gym and actively exercising.
18. The exercises Claimant needs to manage any persistent symptoms from his thoracic strain could be done at home. Claimant is more likely to do them if he goes to the gym regularly.
19. Claimant has submitted support for an attorney fee award based on 43 hours of work and necessary costs of \$429.82.

CONCLUSIONS OF LAW:

1. A Claimant injured in an accident that arose out of and in the course of his employment is entitled to reasonable medical treatment causally related to that injury. 21 V.S.A. § 618; 640(a).
2. Assuming that the gym membership is reasonable, the issue for decision is whether it is causally related to the 1995 work related injury.
3. In determining causation, there must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the work related injury caused the need for the gym membership; proof that it is more probable is necessary. See *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941).
4. Claimant is to be commended for his regular exercise regime from which he has reaped benefits. However, a careful review of all records, including early records from Dr. Turek, supports the defense position that the work-related thoracic strain does not account for the symptoms Claimant claims are helped by participation in the gym.
5. First, home exercises were all that was needed for the thoracic strain after physical therapy ended in 1994. Claimant's preference for a gym membership is a personal one, not a medical requirement for the work-related injury. The decisive factor is not what the Claimant desires or what he believes to be the most helpful, but what is shown by competent expert evidence to be reasonable and casually related to the work related injury. *Britton v. Laidlaw Transit*, Opinion No 47-03WC (2003). Second, the exercised Claimant performs at the gym are more likely needed because of the fractures that occurred after the work-related injury and Claimant's preexisting conditions, as one of Claimant's treating physicians and both defense experts have opined.
6. Because the crucial element of causation is lacking, the carrier is no longer responsible for paying the gym membership fee.

ORDER:

Therefore based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 10th day of August 2006.

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.