

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Casey Dewey)	Opinion No. 31-04WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Copley Hospital)	For: Michael S. Bertrand
)	Commissioner
)	
)	State File No. R-00623

Hearing held in Montpelier on April 7, 2004
Record Closed on April 29, 2004

APPEARANCES:

Robert Halpert, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUES:

1. Was claimant's Chiari Malformation, a congenital condition, aggravated by a work related trauma?
2. Following the termination of benefits in November of 2002, has the ongoing psychiatric treatment claimant has been receiving reasonable?
3. Did the Employer waive its right to challenge this claim for Chiari Malformation by entering into a Form 21 agreement for a work-related injury to her back?
4. Is claimant entitled to temporary total disability benefits after those benefits were terminated on November 25, 2002?

EXHIBITS:

Joint I:	Medical Records
Claimant's 1:	Curriculum Vitae of Joseph M. Phillips, M.D., Ph.D.
Claimant's 2:	Summary of unpaid medical invoices totaling \$22,370.50.

STIPULATIONS:

1. On July 10, 2000, claimant was employed by Copley Hospital as a Licensed Nursing Assistant (LNA).
2. On July 10, 2000, Copley Hospital was insured by TIG Insurance Company for workers' compensation.
3. The Employer's First Report of Injury states that on July 10, 2000, claimant "lifted a patient then laundry bags. Twisted and instantly felt pain in spine area-intense headaches."
4. On July 10, 2000, claimant's average weekly wage was \$189.57.
5. The employer accepted a work injury and paid workers' compensation benefits including temporary total disability and medical treatment benefits.
6. In November 2002, the Employer filed a Form 27 supported by treating physician Dr. Johansson's October 10, 2002 report of medical end result with a 5% impairment rating for DRE Category II, cervical injury. This Department approved the Form 27.
7. The employer advanced the permanency benefits associated with Dr. Johansson's rating.
8. The employer has not paid any indemnity or medical benefits since the approval of the Form 27 in November of 2002.

FINDINGS OF FACT:

1. The stipulations are accepted as true and the exhibits are admitted into evidence.
2. On July 10, 2000, claimant felt the immediate onset of pain at the top of her neck or base of her skull when she was lifting at work. During that time when she was working as a LNA, she was also a nursing student at Norwich University and Vermont Technical College.
3. After her injury at Copley on July 10, 2000 claimant first treated with Adult Nurse Practitioner Jean Cass who diagnosed cervical strain. Ms. Cass prescribed medication and physical therapy.
4. Claimant participated in physical therapy from July 18, 2000 until August 14, 2000. She returned to work at light duty with a restriction against patient transfers.

5. From October of 2000 until March of 2001, claimant continued her busy lifestyle.
6. On March 4, 2001, claimant sought treatment at Copley Emergency Room for intense headache, nausea and dizziness. She refused a recommended CT scan and was released with pain medication.
7. On March 5, her primary care provider, Jennifer Laurent, noted that claimant's headaches had continued since the injury at work eight months earlier. She was diagnosed with occipital neuralgia and prescribed medication and physical therapy.
8. Claimant was discharged from physical therapy for an inability to tolerate pain during treatment.
9. Claimant was seen at the emergency department again on August 9, 2001 for headache and chronic neck pain.
10. Dr. Prunty evaluated claimant on August 15, 2001 for headaches, neck pain and nausea. He ordered laboratory and diagnostic tests and referred her to Dr. Anne Vitaletti-Coughlin, a pain specialist.
11. Dr. Vitaletti-Coughlin diagnosed likely occipitally triggered migraine headaches and clinical depression. She performed nerve blocks and prescribed massage.
12. Next, on January 23, 2002, claimant began treating with James Cummings, D.O., who opined that the cervicothoracic strain from claimant's work injury progressed to neuralgia, myofascial pain, depression and anxiety. His recommendation was treatment for pain moderation, for which the Employer paid.
13. Less than a week later, on January 28, 2002, claimant sought counseling with Kate Osborne. Their work continued until May 12, 2003, when Ms. Osborne took a personal leave from work. The Employer paid for the treatment until November 2002.
14. John Johansson, D.O., evaluated claimant on July 10, 2002, after which she attended the three-week intensive program at Vermont Center for Occupational Rehabilitation. Until she began Dr. Johansson's six-week program, claimant continued to work, although she had headaches.

15. On October 10, 2002, Dr. Johansson placed claimant at medical end result with a 5% whole person impairment. The Employer has advanced the permanency benefits associated with that rating. Dr. Johansson determined that no further treatment was indicated at that time. He noted that claimant was working six hours a day and intended to increase to eight hours a day “until the pregnancy makes it impossible for her to continue working that many hours.”
16. No medical record exists following Dr. Johansson’s work release in the fall of 2002 until January 2003.
17. On November 21, 2002, it was noted that claimant was working part-time in the billing office.
18. Claimant was placed on maternity leave as of December 15, 2002 and has not worked since. Her child was born on January 1, 2003. At the end of the maternity leave after twelve weeks, claimant did not return to work because she did not feel fit to work.
19. The employer has not paid indemnity or medical benefits since the approval of the Form 27 in November 2002.
20. Next, claimant was evaluated at Dartmouth Hitchcock Medical Center, where she was admitted from August 11 to 14, 2003.
21. In November of 2003, Neurosurgeon Joseph Phillips, M.D., evaluated the claimant. Ultimately, he diagnosed a mild Chiari I malformation, a congenital condition that at times becomes symptomatic due to trauma.
22. A Chiari malformation is an anatomic anomaly characterized by a smaller than normal compartment at the base of the skull, resulting in the brain to be crowded down where it transitions to the spinal cord. Dr. Phillips described it as a “hindbrain hernia.”
23. In Dr. Phillips’s opinion, even a slight Chiari malformation can produce the precise type of severe headaches that claimant has suffered. In fact, that was his working diagnosis when he first saw the claimant, a diagnosis confirmed by surgical findings. He noted that even a mild trauma can make a previously asymptomatic condition very painful.
24. According to Dr. Phillips, there is no correlation between the degree of the malformation and severity of resulting headaches. Nor is there a correlation between the degree of trauma and severity of headaches. However, Dr. Phillips could not comment on the severity of the headaches claimant had.

25. Dr. Phillips has performed dozens of surgical procedures on Chiari malformations. That experience and his neurosurgical education have shown that when the malformation is the cause of the headaches, surgery relieves those headaches. Whether to perform the surgery was up to the claimant because it depended on symptoms, not on specific test results.
26. Claimant had the surgery recommended by Dr. Phillips in March of 2004. Although she experienced normal post-operative discomfort, she was relieved of the presurgical headaches.
27. Christopher Brigham, M.D. is an occupational health expert who reviewed claimant's medical records for the defense in this case. In his April 25, 2003 report, he stated that claimant's then current medical treatment was not reasonable and that he could find no objective basis for her subjective pain symptoms. He recommended further psychological testing, opined that she was at maximum medical improvement and that she had a full time, light duty work capacity.
28. At the hearing, Dr. Brigham opined that that claimant's Chiari malformation caused the claimant headaches, but that they are unrelated to the work incident in July of 2000. He based this opinion on the mechanism of injury, lack of objective findings, gap in treatment and what he believes was a resolution of symptoms.
29. Dr. Brigham's knowledge of Chiari malformation is based on recent research related specifically to this case. He has had no professional experience or formal education related to the problem.
30. Claimant and her grandmother both testified that her headaches preoperatively were debilitating. However, their lay opinions are not supported by contemporaneous medical records or by claimant's continued ability to work until her maternity leave began.

Counseling

31. Claimant began counseling with Kate Osborne on January 28, 2002, which focused on improving her adjustment to pain, stabilize symptoms of depression and improve her coping skills. That counseling ended in May of 2003, when Ms. Osborne took a personal leave. The employer paid for those counseling sessions. Claimant did not choose a different counselor in May of 2003, but resumed treatment with Osborne when she returned.
32. Ms. Osborne never took claimant out of work for psychological reasons. She testified at hearing that claimant would benefit from counseling. However, in her notes of December of 2002 she wrote that claimant should treat with someone else in a few months, if her treatments were not successful.

33. Claimant cannot afford to pay for counseling sessions. Part of this claim is based on her contention that continued treatment with Ms. Osborne is reasonable, causally related to her work-related injury and the responsibility of the carrier to cover.
34. Claimant rejected her neurologist's suggestion that she treat with a psychologist with expertise in chronic pain.
35. Claimant submitted a copy of her contingency fee agreement with her attorney and itemization of hours worked and costs incurred.

CONCLUSIONS OF LAW:

Burden of Proof

1. Because the Employer entered into a Form 21 agreement to pay the claimant temporary total disability benefits for an injury to her back, claimant argues that defendant accepted this claim for headaches related to the Chiari malformation and now has the burden of proving that it should be relieved of liability. Indeed, with the acceptance of a claim, the burden is on the defendant to establish the propriety of ceasing benefits or denying further compensation. See *Merrill v. UVM*, 133 Vt. 101 (1974). However, that is not what occurred in this case. The employer agreed to pay temporary total disability benefits for a back injury. It did not, nor could it have, accepted compensability of Chiari malformation, a congenital condition that took years to diagnosis.
2. Consequently, in this as in most workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). 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).

Causation

3. 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). 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).

4. The defense urges this Department to reject the opinion of Dr. Phillips on causation because the doctor's opinion was limited to the known correlation between the onset of symptoms and trauma. He could not articulate the precise physiologic connection, presumably because it is not known.
5. Were the standard of proof one of absolute certainty, the defense might prevail on the issue of causation, but it is one of probability, which claimant has met. The education and experience of Dr. Philips have prepared him well to render an opinion on the probable link between claimant's trauma at work and the onset of the headaches from the Chiari malformation. Prior to the work related event, the malformation had been quiescent. Once awakened by the trauma, it created headaches, baffled diagnosticians and eventually led to surgery. Claimant has proven that the work related event, at minimum, accelerated the onset of the headaches and necessitated the surgery. Our law is clear, "the aggravation or *acceleration* of a preexisting condition by an employment accident is compensable under the workers' compensation law." *Jackson v. True Temper Corp.*, 151 Vt. 592 (1989) (emphasis in original, citation omitted).
6. With this finding of compensability, questions follow as to what benefits are due.

Temporary total disability benefits

7. "Where the injury causes total disability for work..." 21 V.S.A. § 642, a claimant is entitled to temporary total disability benefits until reaching medical end result or successfully returning to work. 21 V.S.A. § 642; *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996).
8. "Medical end result is the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected regardless of treatment." WC Rule 2.1200. The proper focus is on "the treatment contemplated at the time it was given..." *Coburn*, 165 Vt. at 533.
9. In this case, although an accurate diagnosis had not yet been made, claimant had reached a substantial plateau in her recovery, justifying Dr. Johansson's medical end result determination in October 2002. Therefore, the carrier's discontinuance of temporary total disability benefits was valid.
10. Furthermore, the discontinuance would have been valid even if claimant had not yet reached medical end result because she had been released to work and had been working.

11. In September of 2002, claimant had been released to return to work with a light duty capacity and was working six hours a day in October, with the expectation that she would soon increase those hours to eight each day. Claimant continued to work until she left for maternity leave in December of 2002.
12. When her maternity leave was exhausted, claimant determined that she was unable to return to work because of the headaches. Yet, the records do not support her current contention that her headaches after the birth of her child were different from the condition before the birth, when she was clearly capable of working. This case is distinguishable from *Wood v. Fletcher Allen Health Care*, 169 Vt. 419 (1999), where a claimant's work related shoulder injury totally disabled her from working, but could not have been surgically treated until after the pregnancy. There the carrier was ordered to continue paying temporary total disability benefits through the pregnancy and until Ms. Wood could have the surgery.
13. Here, claimant was not disabled by the work related injury prior to her maternity leave and has not proven that she was disabled afterwards.
14. Furthermore, claimant was working at the time the initial determination of medical end result was made, and then voluntarily left her employer. In general, one is not entitled to temporary total disability benefits after voluntarily quitting a job for reasons unrelated to the injury unless she can show not only 1) a work injury, but also 2) a reasonably diligent attempt to return to the work force and 3) that the inability to work, or a reduced wage, is due to the work injury and not to other factors. See *Pfalzer v. Pollution Solutions of Vermont*, Opinion No. 23-01(2001) and cases cited therein. Not only has claimant failed to prove disability, she made no attempt to return to the work force.

Medical Benefits

15. Because claimant's work-related injury accelerated the need for the Chiari surgery, all costs associated with that procedure, subject to the Rule 40 Fee Schedule, are appropriate. 21 V.S.A. § 640(a).
16. Although, claimant has proven that the psychological treatment with Ms. Osborne before the successful Chiari malformation surgery was compensable because it helped her cope, she has not proven that post operatively it has been reasonable or causally related to her work related injury.

Attorney Fees and Costs

17. A prevailing claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678(a). Since claimant has prevailed on only a part of her claim, her attorneys have 30 days to modify the request filed unless the parties can resolve the case in the interim.

ORDER:

- A. Based on the Foregoing findings of fact and conclusions of law, defendant is ordered to pay:
1. Costs associated with the Chiari Malformation surgery, including TTD for the postoperative period;
 2. Costs of counseling up to the time of surgery;
- B. The question of attorney fees and costs is deferred.

Dated at Montpelier, Vermont this 14th day of September 2004.

Michael S. Bertrand
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.