

J. F. v. Fletcher Allen Health Care

(November 19, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

J. F.

Opinion No. 47-08WC

v.

By: Jane Gomez-Dimotsis, Esq.
Hearing Officer

Fletcher Allen Health Care

For: Patricia Moulton Powden
Commissioner

State File No. Y-53181

OPINION AND ORDER

Hearing held in Montpelier on November 16, 2007

Record closed on December 12, 2007

APPEARANCES:

Ron Fox, Esq., for Claimant

Wesley Lawrence, Esq., for Fletcher Allen Health Care

ISSUE:

Was Claimant's March 2005 back surgery causally related to his August 2003 work injury?

EXHIBITS:

Claimant's Exhibit 1: Medical records

Claimant's Exhibit 2: FAHC Emergency Services Clinical Records, 05-11-02

Claimant's Exhibit 3: *Curriculum vitae*, Philip Davignon, M.D.

Defendant's Exhibit 1: Medical records

Defendant's Exhibit 6: Letter to Claimant, July 1, 2003

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640

Permanent partial disability benefits pursuant to 21 V.S.A. §648

Interest, attorney's fees and costs pursuant to 21 V.S.A. §§664 and 678(a)

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 Workers' Compensation Act.
2. Judicial notice is taken of all forms contained in the Department's file relating to this claim.
3. Claimant began working for Defendant in July 2003. His job was in the kitchen, assembling patients' meal trays and also cleaning dishes and pots.
4. Claimant's prior medical history includes morbid obesity, depression, gouty arthritis and migraine headaches. For at least a year prior to his employment with Defendant Claimant had been prescribed narcotic pain medications for these ailments.
5. Claimant also has a prior history of low back pain dating back at least to a motor vehicle accident in 1998. No medical records relating to that incident were produced, and Claimant recalled no details other than being treated and released at the hospital emergency room. At some point thereafter, Claimant had an episode of back pain while lifting bags of coins in the course of his employment for an armored car service. Again, no medical records relating to that incident were produced; Claimant recalled a brief course of physical therapy, following which his symptoms resolved and he returned to work.
6. Claimant had another episode of low back pain in May 2002, when he slipped against a waterbed. Claimant testified at the formal hearing that he had no recollection whatsoever of that incident. The medical records document that he was treated at the FAHC Emergency Department. In describing Claimant's symptoms, the emergency room record reports that Claimant "felt something 'pop' in his back," following which he experienced severe low back pain radiating into his hip and down his thigh, as well as numbness in his thigh in a stocking/glove distribution. Of note, the record also reports that Claimant had a "long history" of low back pain. Claimant was treated with pain medications and muscle relaxants, and discharged home feeling "much improved."
7. On August 8, 2003 while at work for Defendant, Claimant was preparing to clean a very large mixing bowl, weighing 20-30 pounds and measuring 2-1/2 to 3 feet across. As he lifted the bowl and twisted to put it on the counter he felt a twinge in his back. That night, his back started to hurt.
8. Claimant continued to work, and did not seek medical attention following the August 8th incident until August 18, 2003. On that date he sought treatment at Defendant's Walk-In Care Center. The record of that treatment states that Claimant had been experiencing low back pain for ten days, but denied any radiating pain, weakness, numbness or tingling in his legs.

9. There is some discrepancy as to whether Claimant suffered a second episode of back pain under virtually the same circumstances as the August 8th incident – lifting a large kettle and twisting to put it on a counter – on the day he finally sought treatment, August 18, 2003. Claimant testified to that effect at the formal hearing, but at his deposition, which had been taken only days earlier, he recalled that there had been only one incident, on August 8, 2003. Neither the August 18th treatment record nor Defendant's First Report of Injury, completed on August 19th, make any mention of an August 18th incident, but rather refer solely to the August 8th incident as the inciting event for Claimant's back pain.
10. Claimant treated conservatively for his back pain, diagnosed as a lumbar muscular strain, with Susan Anderson, PA-C. He continued to deny any radicular symptoms, and instead reported that his pain was focused in his low back rather than in his legs. For treatment, Ms. Anderson prescribed physical therapy and the same narcotic pain medications Claimant had been taking for his other ailments. She released Claimant to return to work half days, with a 10-pound lifting restriction.
11. Claimant realized only minor improvement with physical therapy. He continued to take narcotic medications for pain relief. Ms. Anderson noted that Claimant's large girth probably contributed to his back pain, as did the "unfortunate set-up" of his bed at home, which presumably did not offer optimal support for his spine.
12. In December 2003 Claimant underwent a neurosurgical consult with Dr. Penar. An MRI taken in October 2003 had revealed disc herniations at L4-5 and L5-S1, but given Claimant's symptom complex Dr. Penar suspected more of a disc injury as opposed to ongoing radiculopathy. For that reason, Dr. Penar was hesitant to recommend disc excision surgery. Such surgery generally is undertaken to relieve radicular complaints in the lower extremities; its success rate in relieving symptoms of back pain alone without corresponding radiculopathy is less than fifty percent.
13. In early January 2004 Ms. Anderson released Claimant to return to work full time, with a 5-pound lifting restriction. A few days later Defendant terminated Claimant's employment for "inappropriate behavior following multiple written corrective actions."
14. After Defendant terminated Claimant's employment, its workers' compensation insurance adjuster instructed him to seek alternative employment within his modified duty restrictions. Claimant declined to do so, however, because he felt his pain was too limiting.

15. In March 2004 Claimant revisited Dr. Penar, who again expressed his reluctance to perform disc excision surgery given the absence of any radicular component to Claimant's symptoms. As an alternative treatment option, Claimant's primary care physician, Dr. Willingham, suggested physical therapy and/or work restoration. Notably, Dr. Willingham remarked that Claimant was "more interested in disability" and did not appear motivated to become actively involved in a treatment plan. Other providers also have made similar observations. In any event, there is no evidence that Claimant pursued either of Dr. Willingham's recommendations. Instead, he continued to control his symptoms with narcotic pain medications.
16. On November 3, 2004 Claimant reported to the FAHC Emergency Department with a chief complaint of chronic back pain. The record of that visit relates the onset of Claimant's pain back to the approximate time of the August 2003 lifting incident, but also notes the onset of gradually worsening pain occurring about one week prior. Significantly, for the first time Claimant reported radicular symptoms, specifically pain in the right lumbar and buttock region radiating to the right thigh and calf.
17. In December 2004 Claimant returned to Dr. Penar. In contrast to his earlier visit, when Claimant had complained solely of back pain, this time he reported primarily radicular symptoms, with pain extending from his right buttock and thigh into his right calf and ankle. With these complaints in mind, Dr. Penar reconsidered disc excision surgery as a reasonable treatment option. Claimant elected to proceed.
18. On March 24, 2005 Dr. Penar performed a two-level disc excision at L4-5 and L5-S1. His operative report notes that the disc herniation at L4-5 was "very firm and partially calcified," and also documents "findings of a calcified disc herniation" at L5-S1. Dr. Penar reiterated these findings three weeks later in his first post-operative note, April 13, 2005, stating, "At both levels [L4-5 and L5-S1], he is found to have calcified disc herniation rather than soft tissue disc herniation. A good decompression of the nerve root was thought to be accomplished at both levels."
19. Reference to a calcified disc herniation connotes a finding of hard disc material, and indicates tissue damage that probably occurred more than a year previously. In contrast, a soft tissue herniation indicates a more recent injury. There is no way to know exactly when a herniation calcified, only that it probably did so more than a year ago.
20. Following the March 2005 surgery Claimant's low back pain gradually improved, and his radicular symptoms resolved. Claimant experienced aggravated symptoms in September 2006 causally related to lifting a bag of dog food at work. His employer at the time paid workers' compensation benefits and is not a party to the current proceedings.

Expert medical opinions

21. In support of its position that the March 2005 surgery was not causally related to Claimant's August 2003 work injury, Defendant presented evidence from Dr. Levy, a board-certified neurologist. Dr. Levy did not examine Claimant personally, but rather conducted a medical records review. He also reviewed Claimant's deposition.
22. In Dr. Levy's opinion there is insufficient medical evidence to establish that Claimant's March 2005 surgery was necessitated by his August 2003 lifting injury. Dr. Levy noted that the symptoms of which Claimant complained after the August 2003 incident were not radicular and did not suggest any nerve root pain, as would be expected in the case of either an acute disc herniation or the aggravation of a pre-existing herniation. Rather, it is far more likely that the August 2003 incident caused nothing more than a musculoskeletal injury with resulting mechanical low back pain. In Dr. Levy's opinion, this injury likely resolved within a few months' time, following which Claimant returned to his baseline condition, which at least since 1998 had included an element of occasional low back pain. Dr. Levy estimated that Claimant reached an end medical result from the August 2003 injury no later than April 2004.
23. Dr. Levy stated that it would be impossible, furthermore, to attribute with any certainty Claimant's radicular complaints, which did not appear until November 2004, to the August 2003 injury. Claimant's obesity and age both are known risk factors for disc herniation. Claimant's prior history of low back pain, which included documented radicular symptoms suggestive of disc herniation as early as May 2002, is another risk factor. According to Dr. Levy, there is no reasonable basis for concluding that the symptoms Claimant exhibited in November 2004, which ultimately led him to undergo the March 2005 surgery, were causally related to the August 2003 lifting incident as opposed to any of these other risk factors.
24. In support of his position that the March 2005 surgery was in fact necessitated by the August 2003 work injury, Claimant presented evidence from Dr. Davignon, an occupational medicine specialist. Dr. Davignon performed an independent medical evaluation in September 2007.
25. In Dr. Davignon's opinion, Dr. Penar's operative finding of a "partially calcified" disc herniation should be interpreted to indicate that the herniation was partially soft as well. Thus, Dr. Davignon concluded, even if the calcified herniation occurred *before* the August 2003 work injury, that injury most likely caused additional soft tissue to herniate. According to Dr. Davignon, this additional herniation led to increased symptoms and ultimately the need for the March 2005 disc excision surgery.
26. Notably, Dr. Davignon testified at the formal hearing that he had been unaware that Claimant had a history of low back pain related either to the 1998 motor vehicle accident or to the 2002 waterbed incident. Dr. Davignon admitted that the symptoms Claimant complained of following the latter incident were consistent with radiculopathy. Dr. Davignon further conceded that Claimant had not presented with any such radicular symptoms after the August 2003 work injury.

27. Dr. Davignon found Claimant to have reached end medical result as of the date of his evaluation. He rated Claimant's permanent partial impairment at 15% whole person, 13% of which he attributed to the August 2003 injury and 2% to the injury Claimant suffered in September 2006 while lifting a bag of dog food for a subsequent employer.

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. At issue here is the causal relationship between Claimant's March 2005 surgery and his August 2003 work injury. If the medical evidence establishes that, more likely than not, the August 2003 injury either caused Claimant's discs to herniate or aggravated pre-existing though asymptomatic disc herniations to the point where disc excision surgery became necessary, then he will have proven his entitlement to workers' compensation benefits. If the medical evidence establishes other equally likely causes for his worsening condition, however, then Claimant will have failed to sustain his burden of proving, to a reasonable degree of medical certainty, that the August 2003 work injury was the catalyst for the March 2005 surgery.
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). With these factors in mind, the key question is which expert medical opinion is the most credible? *Bonenfant v. Price Chopper*, Opinion No. 13-07WC (May 8, 2007).
4. I find that Dr. Davignon's opinion suffers from an incomplete review of the medical records documenting Claimant's prior history of low back pain. As a result, it places too much weight on the August 2003 injury as the instigating cause of Claimant's worsening condition in November 2004, specifically the radicular symptoms that ultimately led to the March 2005 surgery. Dr. Davignon did not account for the role that other significant risk factors probably played in causing Claimant's symptom complex to change in this manner. His failure to do so renders his opinion too speculative for me to accept.

5. In contrast, Dr. Levy's opinion credibly accounts for both the progression of Claimant's symptoms, which did not include any radicular component until more than a year after the August 2003 incident, and the presence of other equally likely risk factors for such symptoms to develop. For that reason, I find Dr. Levy's opinion to be the more credible one here.
6. I conclude, therefore, that Claimant has failed to sustain his burden of proving that the March 2005 surgery was necessitated by the August 2003 work injury.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits causally related to the March 2005 surgery is hereby **DENIED**.

Dated at Montpelier, Vermont this 19th day of November 2008.

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.