P. F. v. Ethan Allen (August 9, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR

	)	Opinion No. 50-05WC
P. F.	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Ethan Allen, Inc.	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. S-04913

Pretrial conference held March 14, 2005
Hearing held in Montpelier July 18 and July 19, 2005
Records closed July 25, 2005

APPEARANCES:

Patricia K. Turley, Esq., for the Claimant
Jennifer K. Moore, Esq., for the Defendant

ISSUES:

1. Are claimant's current neck pains and severe headaches caused by her 2001 work injury?

2. Is the proposed C7 decompression surgery and exploration of the C5-6 fusion reasonable under 21 V.S.A. § 640(a)?

EXHIBITS:

Joint Exhibit 1:	Medical Records
Claimant's Exhibit 1:	Curriculum Vitae of Joseph M. Phillips, MD.

CLAIM:

Dr. Phillips proposed C7 decompression surgery including exploration of the C5-6 fusion site and reinforcement of the site (if needed).

FINDINGS OF FACT:

1. On August 20, 2001, claimant sustained a work related injury. Claimant was hit on the back of the head by a fire escape door when it was kicked open by a co-worker. The employer accepted the claim, as well as medical care including physical therapy and injections. Despite the care, claimant's reports of head pain and dizziness persisted.

2. Claimant went under the care of Dr. Haq, a neurologist. Dr. Haq treated the claimant with various medications but could not determine why the claimant suffered from dizziness. Claimant then treated with Dr. Jenkyn, who assessed post concussion syndrome and took claimant out of work in May 2002.

3. Dr. Jenkyn did not believe that the C6-5 symptomology matched the C5-6 herniation, and recommended conservative pain management.

4. Due to her continued headaches, on May 20, 2002, Dr. Jenkyn ordered a cervical MRI. The MRI was positive for a C5-6 disc herniation.

5. On September 6, 2002, Dr. Jenkyn referred claimant to Dr. Hulda Magnadottir. Claimant complained of neck, head, shoulder and upper arm pain. Dr. Magnadottir recommended a C2 block to address claimant's headaches, but no treatment was recommended to address the neck and head pain.

6. On October 17, 2002, Dr. Magnadottir performed a decompression of the C2 nerve root, following claimant's report of relief from pain due to the nerve block. Dr. Jenkyn later reported in January 2003 that the claimant's headache was entirely resolved following the C2 nerve root.

7. In a follow up examination with Dr. Magnadottir on March 5, 2003, claimant presented complaints of recurring headaches, neck and bilateral and upper extremity pain. Dr. Magnadottir ordered an MRI, which showed a worsening of the C5-6 disc space. Dr. Magnadottir offered the claimant an anterior cervical disectomy (C5-6 fusion surgery), and claimant agreed to proceed.

8. The defendant's carrier initially refused to pay for the proposed fusion surgery, but was directed by specialist Paul LaPadula of the department on April 7, 2003 to pay for the surgery after Dr. Lapinsky provided a second opinion that the fusion proposed was reasonable and necessary. Since then, the defendant has not challenged the reasonableness of the fusion surgery.

9. Dr. Magnadottir performed the fusion on May 7, 2003. On June 2, 2003, claimant reported no neck pain and less headache pain. She was referred to physical therapy due to continued bilateral shoulder pain. On June 13, claimant reported to the Orleans Clinic, where she complained of continued headaches and neck pain.

10. Claimant's headaches and neck pain persisted. In February 2005, claimant began treating with Dr. Phillips, a neurosurgeon. She complained to him that there was a worsening of her symptoms in her shoulders, radiating up the back of her neck and into her head.

11. Dr. Phillips carried out an MRI of the claimant on March 25, 2005. Dr. Phillips concluded that the MRI results showed compression of the C7 nerve root, and that this was most likely the source of claimant's symptoms. Dr. Phillips also opined that the C5-6 joint may not have totally fused causing pseudoarthrotic condition. This would result in the joint's movement, causing the claimant's pain. He noted that the foraminal narrowing was most likely caused by the pressure exerted on the C7 joint.

12. Dr. Phillips admitted that it was difficult to point out specifically which condition was causing the pain, but concluded that a surgery covering both would most likely cure the claimant's symptoms. He proposed C7 decompression surgery including exploration of the C5-6 fusion site and, if he finds a loose joint, reinforcement of the site.

13. Dr. Levy, a neurologist, examined the claimant for the defendant. After reviewing all of the claimant's relevant medical history, he concluded that her symptoms are not related to her work injury. He concluded that claimant presents a "constellation" of symptoms, which are not consistent with typical symptoms of either a compressed nerve root or a pseudoarthrotic condition. He also did not note any specific clinical findings of foraminal narrowing in the C7 nerve root when he reviewed the March 11 2005 MRI. He also noted that it is his philosophy that C2 decompression surgeries, like the one claimant undertook in 2002, do not work.

14. Claimant requests an award of the proposed C7 decompression surgery, as well as an exploration of the C5-6 joint and, if Dr. Phillips' finds that the C5-6 is not fully fused, to complete the fusion.

CONCLUSIONS OF LAW:

1. The issue to decide in this ruling is whether Dr. Phillips' proposed surgery on claimant's back is reasonable under 21 V.S.A §640(a).

2. Under the workers' Compensation Act, the employer must furnish "reasonable surgical, medical and nursing services to an injured employee." 21 V.S.A. § 640(a).

3. 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).

4. 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). In this case, the burden is on the claimant to show that her current symptoms are caused by a foraminal narrowing at C7 and/ or movement at C5-C6 (also known as "pseudarthrosis"), that these injuries are causally related to her 2001 work injury and that Dr. Phillips' proposed surgical procedures are reasonable pursuant to 21 V.S.A §640(a).

5. Where a person would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979). The claimant in the present case requires expert testimony in order to establish a causal connection between her current pain symptoms and her work injury, as well as establishing that Dr. Phillips' surgical procedures are reasonable and necessary. Claimant relies on the testimony of her neurosurgeon, Dr. Phillips, to establish the causal connection and reasonableness of the proposed surgery.

6. Claimant argues that a causal connection exists between her current pain symptoms and her work related injury. Specifically, claimant argues that the pain is related to her previous surgical procedures that were carried out due to the work injury. Dr. Phillips, her treating doctor since February 2005, opined that both prior cervical surgeries resulted in claimant's current chronic pain condition. Specifically, the May 2003 C5-6 fusion surgery either caused or aggravated a narrowing of the foraminal nerve, which is the likely cause of claimant's symptoms. Dr. Phillips also opined that the C5-6 surgery probably failed to fully fuse together the C6-5 joints, thereby creating muscle tension which in turn causes the claimant's radiating pain and headaches. Dr. Phillips would expect a decompression of the foraminal nerve to improve claimant's condition. He also believes that if there is a pseudoarthrotic condition, then the reinforcement of the joint would lessen claimant's symptoms.

7. The defendant's expert witness, Dr. Levy, a neurologist, took a different stand and opined that Dr. Phillips' proposed surgery is unreasonable, and that claimant's symptoms are not caused by a narrowing of a nerve nor by an pseudoarthrotic condition. He made this conclusion after reviewing records of claimant's symptoms, concluding that claimant's pain was too widespread so as to be consistent with symptoms of C-7 foraminal narrowing. Furthermore, he opined that the claimant's pain is too widespread to indicate that the pain is due to pseudoarthrotis.

8. Because both experts have two different opinions as to what is causing the claimant's symptoms and whether the proposed surgery would likely solve any of the symptoms, we must decide which opinion should be afforded greater weight.

9. When evaluating the amount of weight to be given to expert testimony in a workers' compensation decision, the following factors are used: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (1997); *Gardner v. Grand Union*, Opinion No. 24-97WC (1997); *Yee v. International Business Machines*, Opinion No. 38-00WC (2000).

10. Dr. Phillips is the claimant's treating physician, although he has only been treating her since February 2005. Dr. Levy, like most independent medical examiners, only had brief contact with the claimant, examining her for approximately 10 minutes. Dr. Phillips is a highly experienced board certified neurosurgeon, and has routinely performed C7 decompression surgeries. Dr. Levy's qualifications in this respect are more limited, as he is a board certified neurologist and thus has little experience with regards to neurosurgery. Both experts extensively reviewed the claimant's medical history. Because Dr. Phillips has the advantage of being the treating physician, as well as being more qualified in the area of neurosurgery and its results, his opinion should be given greater weight.

11. The first issue to address is whether the pain the patient is currently suffering from is work related. I accept the opinion of Dr. Phillips, that the claimant's previous surgery is the more probable cause of her current symptoms. Although claimant's symptoms are not entirely consistent with the specific "typical" symptoms of pseudoarthrosis and foraminal narrowing, this alone cannot be the basis for a non-causal finding. Dr. Levy's opinion that, inter alia, age related factors caused the narrowing of the foraminal nerve is less probable. Taking into consideration the amount of pain the claimant suffers from, her history of surgeries, a fusion of the joints above the C7 joint, and her work related injury, as well as the deference typically granted to the treating physician, it is more probable that the claimant's previous surgeries caused any nerve root narrowing and/ or pseudoarthrosis.

12. Furthermore, the causal connection between the 2001 work related injury and her current pain symptom is satisfied. The defendant argues that, despite paying for the 2003 fusion surgery, because they initially disputed its reasonableness, the 2003 surgery should not be used as a causal connection to the work injury.

13. However, this argument fails on several points. First, the carrier paid after receiving a strong recommendation from the department when a second opinion determined that the fusion was reasonable and necessary. Second, and most important, the surgery was performed well over two years ago, and the carrier has never challenged it since April 2003. Even in this proceeding the defendant declined to challenge the reasonableness of the 2003 surgery. Although there was no order to pay with prejudice, the defendant has had ample time to challenge the 2003 surgery. To claim, based on this point, that a causal connection does not exist is not persuasive.

14. Therefore, the claimant is entitled to medical benefits and disability benefits for any condition, which is a natural outgrowth of the work, related injury. 21 V.S.A §640. *Andreescu v. Blodgett Supply Company*, Opinion No. 33-94WC (1994). Because it is more likely that the pain symptoms were caused by the previous work related surgery, claimant's current condition is casually connected to the work injury.

15. Even though there is a causal connection, the claimant must also satisfy the burden of proof that the proposed procedures are "reasonable" under §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). Therefore, claimant must still meet the burden of proof that the proposed surgeries would relieve her current back and neck pain.

16. In this case, it appears more probable that the surgeries would help relieve the claimant's back symptoms. Dr. Levy strongly maintains that the proposed C7 decompression would not relieve claimant's current symptoms, back, neck and headache pain, are inconsistent with those that a decompression surgery usually solves. Despite this, Dr. Phillips' opinion that "it is more likely than not" that the symptoms will improve are more persuasive. Dr. Phillips neurosurgery expertise, his experience in carrying out decompression surgeries and his familiarity of the results of such procedures makes his opinion the more probable result.

17. Also, the fact that the claimant suffers a multitude of symptoms rather then suffering the "classic" symptoms of a condition should not be a bar to obtaining medical procedures that the treating doctor in this case feels is necessary and reasonable. Granted, that with a showing of "classical" symptoms, the claimant's case would be stronger. However, on the evidence presented, it is more probable that the proposed procedures would alleviate the symptoms. In this case, the claimant has met this burden.

18. Dr. Levy questions the efficacy of decompression surgeries, although such a procedure is generally viewed as reasonable and necessary. Although Dr. Levy is a highly experienced and skilled neurologist, his less than optimistic view of an accepted method of treatment by neurosurgeons does not make the proposed surgery any less reasonable. Under department precedent, his difference of opinion with the treating neurosurgeon cannot form the basis of denial of the proposed C7 decompression. See *Galbicsek v. Experian Information Solutions*, Opinion No. 30-04WC (2004).

ORDER:

Claimant has sustained her burden of proving that the proposed surgery is reasonable pursuant to 21 V.S.A. § 640 (a). Accordingly, she is awarded:

Benefits associated with Dr. Phillips' proposed surgeries.

Dated at Montpelier, Vermont this ____ day of August 2005.

_____

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.