

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

	)	State File No. K-24580
	)	
Michael Wallace	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: Michael S. Bertrand
Velan Valve Corp.	)	Commissioner
	)	
	)	Opinion No. 51S-02WC

**SUPPLEMENTAL ORDER**

**APPEARANCES:**

Christopher J. McVeigh, Esq. for the Claimant  
William J. Blake, Esq. for the Defendant

This supplemental order corrects an error in Opinion No. 51-02WC, dated December 19, 2002, and addresses an attorney fee issue.

The contested issue addressed at the December 3, 2002 hearing was whether the C-2 cervical decompression surgery and C-6 foraminotomy proposed by Joseph Phillips M.D., Ph.D. were compensable surgical services pursuant to 21 V.S.A. § 640.

Contrary to paragraph 8 in the opinion, the carrier in this case did not accept the compensability of the C-6 foraminotomy. In fact, it never authorized any of the cervical spine surgical procedures proposed by Dr. Philips. The opinion addressed the opinions of differing experts, choosing as the prevailing one the opinion of Dr. Phillips who proposed both the decompression and foraminotomy. Therefore, both are compensable.

Next is a defense challenge to the Claimant's attorney's time records submitted in support of his claim for fees, records with material identified as subject to attorney-client privilege redacted. Since then un-redacted copies have been submitted for an *in camera* review and 0.6 hours subtracted from the total claimed and arithmetic errors corrected. My review of the un-redacted records supports the claim for 57.3 hours of attorney time on issues related to this claim. The records submitted for *in camera* review have been destroyed.

Accordingly, the order is hereby amended to read:

The defendant is **ORDERED** to pay:

- 1) Expenses related to the surgery Dr. Phillips proposed;
- 2) Attorney fees based of \$5,157, based on 57.3 hours at \$90.00 per hour.

Dated at Montpelier, Vermont this 24<sup>th</sup> day of February 2003.

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Michael S. Bertrand  
Commissioner

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	)	State File No. K-24580
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Michael Wallace	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Velan Valve Corporation	)	Commissioner
	)	
	)	Opinion No. 51-02WC

Expedited hearing Held in Montpelier on December 3, 2002  
Record closed on December 18, 2002

**ISSUE:**

Is the C-2 cervical decompression surgery proposed by Joseph Phillips M.D., Ph.D. a compensable surgical service pursuant to 21 V.S.A. § 640?

**STIPULATIONS:**

1. Claimant is an employee within the meaning of the Workers' Compensation Act.
2. Velan Valve is an employer within the meaning of the Workers' Compensation Act.
3. EBI/RSA is the workers' compensation insurance carrier for Velan Valve Corporation for this claim.

**FINDINGS OF FACT:**

1. Claimant Michael Wallace's case against Velan Valve was the subject of a previous ruling on the issue of the reinstatement of temporary total disability benefits, Op.No. 11-01WC (2001), where the facts underlying this case appear in some detail and will not be repeated here except as necessary for the narrow issue presented.
2. On June 9, 1997 Claimant incurred a work-related injury when he tried to catch a 130 pound part that was falling. Afterwards, he underwent surgical spine fusion and corpectomy at the C6-C7 level.
3. As a result of his work-related injury and inability to return to manual labor, Claimant has had ongoing physical and psychological difficulties, which have interfered with his normal daily activities. He has attempted suicide and has been hospitalized several times because of emotional problems. He has expressed the intent to kill himself if his pain cannot be relieved. Claimant has contracted with his therapist to contact her if he ever feels he will harm himself.

4. Claimant describes his headaches as severe, chronic and daily. He has neck and shoulder pain as well as headaches that start at the base of his skull and move up the back of his head. To date, treatment for his pain has included the pain medications, Vioxx and OxyContin. He has treated with Dr. Jerry Tarver, a pain management specialist at Fletcher Allen Health Care, has undergone occipital injections intended to relieve his pain and has undergone radio frequency ablations in an effort to control his headache pain. Relief has been transient and incomplete.
5. Claimant has continued intensive psychological treatment, which has not resulted in the desired headache relief.
6. In conjunction with his treatment with Dr. Tarver, Claimant began treating with Dr. Robert Shapiro, a neurologist at Fletcher Allen Health Care. After taking a history and examining the Claimant, Dr. Shapiro reported that because his headaches did not have the features of migraine, the presumptive diagnosis was that of headache referable to a C-2 distribution, which could be secondary to nerve compression.
7. On April 15, 2002, Dr. Tarver performed a fluoroscopically guided nerve block injection for the C-2 nerve root in Claimant's neck, resulting in significant but temporary relief from his headache. This test provided evidence that the C-2 nerve root is the source of the headache.
8. In July 2002, when it was clear that treatments offered only temporary relief, Dr. Traver expressed his opinion that surgical decompressive procedures might address Claimant's continued pain.
9. Despite multiple modalities, no treatment has yet provided Claimant with sustained relief of his unrelenting headache. As a result, he has been unable to participate in a vocational rehabilitation program.
10. On October 2, 2002. Claimant consulted with Dr. Phillips in Lebanon, New Hampshire for an analysis and diagnosis of his pain problems. Dr. Phillips reviewed Claimant's MRI, examined him, reviewed his medical records and discussed his analysis and diagnosis.
11. Dr. Phillips is a neurosurgeon who taught for many years at Dartmouth Medical School and who regularly performs operations on the spine, including the cervical spine.
12. Dr. Phillips explained that not every patient referred to his office for the cervical decompression surgery will actually be offered the opportunity to undergo the surgical procedure. Whether he recommends surgery depends on clinical examination and patient presentation, with the result that he recommends the procedure for one out of eight to ten patients referred for such an evaluation.
13. When measured as "adequate" pain relief, Dr. Phillips's success rate for the proposed surgery has been 80-90%. If measured as "complete" relief, it has been 30% to 40%.

14. Based on his physical examination of the Claimant, his evaluation of his medical records, and his experience in neurosurgery, Dr. Phillips recommended that Claimant undergo surgery to relieve his headache and left shoulder pain. For the headache, he recommended decompression of the C-2 nerve root, a procedure he has performed 100 times. He based his recommendation on the distribution of Claimant's pain, which is in the C-2 dermatome, the history of trauma, the unilateral nature of the pain, the fact that the pain had been abolished with local anesthetic at that level and the failure of conservative measures. No nerves would be cut during the procedure. Side effects include a 2% chance of infection, scalp numbness, disappointment if it fails and injury to the spinal cord, which is a theoretical risk that has never happened.
15. If the surgery benefits the Claimant, he should realize those benefits within three to six weeks after surgery. The surgery will not prevent the Claimant from obtaining Botox injections, an in-patient program or any other treatment modality in the future.
16. To treat Claimant's shoulder pain, Dr. Phillips proposes a C-6 foraminotomy designed to create more room for the nerve root at that level. The reasonableness of that procedure has not been challenged.
17. At the insurance carrier's request, claimant was sent to Dr. Richard Levy for a second opinion on the reasonableness of the proposed C-2 surgery. Based on Dr. Levy's opinion, the carrier declined to authorize payment for the proposed surgery. Dr. Levy is a neurologist with a specialty treating headaches.
18. In Dr. Levy's opinion, Claimant exaggerates his symptoms, has no detectable neurological findings. He diagnosed severe depression and gross symptom magnification and expressed the concern that the Claimant is suicidal.
19. In Dr. Levy's opinion there is insufficient medical evidence that the C-2 nerve can be the cause of headaches. Although he conceded that Dr. Phillips belongs to a school of thought that subscribes to the proposed surgical treatment, Dr. Levy remains skeptical.
20. Dr. Levy further opined that there are serious questions about whether the Claimant can provide true informed consent. This opinion is based on his belief that the Claimant would go into the procedure with high expectations of success and be at a high suicidal risk if those expectations are not met. However, Claimant has consistently provided informed consent for his medical treatment.
21. Dr. Levy recommended that a C-2 nerve block with diagnostic test guidance be performed to insure, as nearly as possible, that it was the C-2 nerve root that was causing the problem. Apparently he was unaware that the test had been done.
22. In pursuing this matter, Claimant's attorney expended 63.4 hours litigating this question and incurred costs in the amount of \$381.96. Claimant presented his fee agreement with his attorney, an itemized list of hours worked and attorney affidavit supporting his request for fees and costs.

## CONCLUSIONS OF LAW:

1. In 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).
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 proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. Causation between the Claimant's headaches and his work-related injury has not been challenged.
4. Vermont's Workers' Compensation Act requires the employer/carrier to pay for reasonable medical care causally related to a work-related injury. 21 V.S.A. § 640(a). Whether a proposed treatment is reasonable depends, not on the subjective desire of a claimant, but on the likelihood it will improve a work-related condition or symptoms. See, *Quinn v. Emery Worldwide*, Op. No. 29-00WC (2000). Such a determination must be made on a case-by-case basis, with an evaluation of the medical facts and reasons underlying the suggestion for surgery.
5. On the reasonableness of the proposed C-2 decompression surgery, opposing medical opinions have been presented. In choosing between them, this Department traditionally has considered the following criteria: 1) whether the expert has had a treating physician relationship with the claimant; 2) the professional education and experience of the expert; 3) the evaluation performed, including whether the expert had all medical records in making the assessment; and 4) the objective bases underlying the opinion. *Yee v. International Business Machines* Op.No. 38-00WC (2000); See also, *Morrow v. Vermont Financial Services Corp.* Op. No. 50-98WC (1998).
6. Neither of the testifying experts has had a long-standing treating physician relationship with the claimant, although Dr. Phillips's approached this case from the perspective of a surgeon who would perform the procedure and care for the Claimant. Both physicians are well qualified to provide expert opinions, although Dr. Phillips's qualifications on the issue presented are greater because he is a neurosurgeon who has done this procedure in the past. Dr. Levy's opinion is weakened by the fact that he was unaware that the Claimant had undergone a fluoroscopically guided C-2 procedure.
7. The objective bases support Dr. Phillips's opinion that he proposed surgery is reasonable for his claimant. Claimant's headaches are not of the migraine type. The proposed surgery is likely to improve the Claimant's headache, as shown by the success rate in the past and exacting criteria employed before the surgery is offered to any patient.

8. No challenge has been brought against the proposal for a C-6 foraminotomy, which is assume has been accepted as compensable.
9. 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); WC Rule 10. As a prevailing claimant, Michael Wallace is entitled to fees based on the 63.4 hours spent litigating this matter, reasonable given the challenge mounted and issues involved. The necessary costs of \$381.06 are also awarded.

**ORDER:**

THEREFORE, based on the Foregoing Findings of Fact and Conclusions of Law, the defendant is ORDERED to pay:

- Expenses related to the proposed C-2 surgery;
- Attorney fees of \$5,706 (63.4 hours x 90.00) and costs of \$381.06.

Dated at Montpelier, Vermont this 19<sup>th</sup> day of December 2002.

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R. Tasha Wallis  
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.