Jacobs v. Beibel Builders (April 10, 2003)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Robert Jacobs	)	State File No. K-15745
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Beibel Builders/Acadia Insurance	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 17A-03WC

APPEARANCES:

Heidi S. Groff, Esq., for the Claimant
William J. Blake, Esq. for the Defendant

COSTS

Claimant has provided supporting documentation and pursuant to 21 V.S.A. § 678(a) is hereby awarded $992.52 in costs.

Dated at Montpelier, Vermont this 10th day of April 2003.

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Michael S. Bertrand
Commissioner

Jacobs v. Biebel Builders (march 21, 2003)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Robert Jacobs	)	State File No. K-15745
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Acadia as Insurer for	)	For: Michael S. Bertrand
Biebel Builders	)	Commissioner
	)	
	)	Opinion No. 17-03WC

APPEARANCES:

Heidi Groff, Esq., for the Claimant
William J. Blake, Esq., for the Defendant

ISSUES:

1. Was the placement of the spinal cord stimulator reasonable treatment for Claimant's compensable work-related injuries?

2. If so, to what benefits is Claimant entitled?

JOINT EXHIBITS:

I. Medical Records of Claimant
II. Curriculum vitae of Robert Rose, M.D.
III. Curriculum vitae of Arthur Taub, M.D.
IV. Literature relied upon by both experts
V. Supplemental medical records

CLAIM:

Medical and hospital benefits pursuant to 21 V.S.A. § 640, specifically the placement of the dorsal column stimulator; temporary total disability benefits pursuant to § 642 for the periods after placement of both the temporary and permanent stimulators; and attorney fees and costs.

STIPULATED FACTS:

1. Claimant was an employee of Defendant employer Biebel Builders within the meaning of the Vermont Workers' Compensation Act (Act) at all relevant times.

2. Defendant Biebel Builders was an employer within the meaning of the Act at all relevant times.

3. Acadia Insurance was the workers' compensation insurance carrier for employer Biebel Builders at all relevant times.

4. On or around May 1, 1996 Claimant suffered a personal injury by accident arising out of and in the course of his employment with Biebel Builders.

5. Claimant suffered a low back injury, which has been accepted by the carrier. Forms 21 and 22 have been signed by the parties and approved by the Department.

FINDINGS OF FACT:

1. Claimant was injured in a work related accident on or about May 1, 1996. Afterwards, he underwent a course of medical treatment which included three low back surgeries: 1) a decompression fusion performed by Dr. Abdu; 2) subsequent removal of hardware, fusion exploration and decompression at L3-4 performed by Dr. Abdu; and 3) an anterior interbody fusion performed by Dr. Banco.

2. The Form 21 in 1997 reflects an average weekly wage of $396.38 with a compensation rate of $264.26. In 1999 the average weekly wage was $479.12 with a compensation rate of $319.43.

3. Until the proposed implantation of a spinal cord stimulator, the carrier paid all benefits related to the Claimant's 1996 work-related injury.

4. Dr. Abdu discharged the Claimant from his care on December 2, 1997 when he placed him at medical end result and referred him to Dr. Robert Rose at a pain clinic that is now part of the Dartmouth Hitchcock Medical Center (DHMC). On December 11, 1997 Dr. Abdu noted that anxiety and lack of restorative sleep were component parts of the Claimant's pain and inability to work.

5. Dr. Rose first counseled the Claimant on the use of pain medications and the need for restorative sleep. In January 1998 Dr. Rose first mentioned the possibility of a dorsal column stimulator for pain relief. Claimant continued to treat with Dr. Rose for pain management.

6. Also in 1998 treatment for the management of Claimant's pain, which included medications and physical therapy.

7. In November 1999 Dr. Rose proposed a dorsal column stimulator for which he wrote a letter of necessity to Acadia insurance. In that letter, Dr. Rose proposed that they begin with a trial implantation then move to a permanent one if the trial led to a significant reduction in the Claimant's pain.

8. By January of 2000 Dr. Rose noted that treatment of the Claimant's pain had included opioid analgesics and various anti-inflammatory medications as well as antidepressants. Nothing had been effective. A month later he had a TENS unit, which helped him sleep. But the pain persisted, particularly in the left leg, "with shocks going into the toes of both feet." (DHMC 2/25/2002)

9. In March of 2000 Psychologist Janette Seville, Ph.D. evaluated the Claimant as part of a functional assessment for the program at the Spine Center at DHMC. Claimant then participated in a 2-week multidisciplinary functional restoration program. Afterwards, his function improved, but his pain persisted. Nevertheless, he determined not to take pain medications, a decision Dr. Rose characterized as healthy. Dr. Rose also determined that a spinal cord stimulator was warranted.

10. In June 2001 it was determined that Claimant has a 29% whole person impairment to his spine.

11. Claimant did not decide to go through with the spinal cord stimulator until January 2002.

12. On June 17, 2002 Claimant underwent the trial of the spinal cord stimulator, which Dr. Gilbert Fanciullo and Dr. Rebecca Burfeind at the DHMC Pain Clinic performed. A progress note of the next day indicated that the Claimant reported "good coverage." The plan then was to return to Mt. Ascutney Hospital on June 24, 2002 of a Phase II implantation. The subject of "significant pain reduction" is not mentioned in the notes.

13. Dr. Burfriend took the Claimant out of work on the date of the trial placement, on June 17, 2002.

14. At the hearing Dr. Rose explained that since the time he wrote the letter to Acadia, the protocol changed from using pain reduction to coverage as the determining factor for proceeding from Phase I to Phase II.

15. When he saw the Claimant on August 29, 2002 Dr. Rose noted that the Claimant had "reasonable coverage" in the area of his symptoms although he was still reporting 25% back pain and 75% leg pain. Further he noted that the pain reduction was not as much as expected, but that Claimant was satisfied with the benefits he realized.

16. Prior to the implantation, Claimant's leg pain felt like the leg was caught in a pair of vice grips. Afterwards, he felt as though someone had loosened the screws. Although he was unclear precisely when this postoperative benefit was realized, it was within three months of the surgery.

17. Dr. Rose released the Claimant back to work with lifting and reaching restrictions on September 16, 2002.

18. Claimant compared his condition before implantation of the spinal cord stimulator and the condition after the implantation to the difference between night and day. The most dramatic change he has noted is an increase in his sleep from two to four hours per night to six to eight hours, which is now restorative due to pain relief.

19. Several medical articles were admitted into evidence on the subject of spinal cord stimulators, first offered for the treatment of pain about 30 years ago. They describe the mechanisms of pain control and criteria different clinicians use in making a decision to progress from a temporary to permanent implant, ranging from a requirement of 70% pain relief before proceeding to a permanent implant to a single stage procedure where an assessment of pain relief is made with the first electrode, then the permanent device implanted. A unanimous standard is not evident from the literature submitted.

20. Claimant submitted a copy of his fee agreement with his attorneys, an itemized statement documenting that counsel spent 76.5 hours litigating this claim and incurred $1192.52 in disbursements.

Expert Medical Opinions

Robert Rose, M.D. for the Claimant

21. Dr. Rose is the Claimant's treating physician, a Board Certified Anesthesiologist since 1974, an expert in the area of pain management and the Head of the Pain Clinic at DHMC. Since 1998 his entire practice has been devoted to the management of pain. Although he does not perform the spinal cord implantation, he recommends approximately three to six spinal cord stimulators for his patients each year and only as a last resort for the treatment of pain.

22. In the Claimant's case, Dr. Rose explained that conservative measures failed to treat Claimant's back pain and ability to function. Back surgery also failed. After weighing the benefits of decreased pain and increased functioning in social life and work against the risks of infection, bleeding or a failed procedure, he recommended a spinal cord stimulator. The standard Dr. Rose used in deciding whether to implant a stimulator permanently after a trial was whether there was adequate "coverage" following the trial, indicating that the painful areas were being stimulated. On this question he deferred to the surgical team.

23. Dr. Rose explained that the protocol for determining when to move from a temporary to a permanent stimulator is an evolving one in the medical community, which to date has not been settled. Therefore there is no unanimity in practice among pain specialists. In this case, the Claimant reported coverage in the same area of previously reported leg pain. Dr. Rose explained that immediate pain relief is not essential to success because that happens variably, with actual pain relief sometime after the initial procedure. Consequently, some practitioners now proceed immediately from the Phase I to Phase II on the basis of coverage alone.

24. Dr. Rose noted that Claimant has had restorative sleep since the Phase II procedure, although it is too soon to determine if he will achieve other benefits.

25. The time period Claimant was out of work for the implantation was from June to September 16, 2002, a reasonable time in Dr. Rose's opinion because it takes several months for the effects of the surgery and recovery to be realized.

Arthur Taub, M.D., Ph.D. for the Defendant

26. Dr. Taub is a board certified neurologist with many years experience in the area of pain management. After reviewing the medical records in this case, he opined that a spinal cord stimulator is not reasonable because what he characterized as the standard had not been met. That standard is that there must be a substantial

27. Further, Dr. Taub determined that an assessment limited solely to "coverage" in order to determine the success of a trial stimulation, as was done in this case, is not the standard of medical care. "Coverage" simply means that the electric stimulation is traveling to the intended areas of the body. If it were absent, the treatment would certainly fail, but its presence is not predictive as to whether a patient will likely achieve pain relief. In Dr. Taub's opinion, Claimant did not have a successful trial in that there was no demonstrable pain relief during the trial phase and, therefore, should not have proceeded to permanent implantation.

28. Dr. Taub also opined that Claimant had not exhausted all alternative therapies available to him, particularly the proper use of opioid medications. In sum, he concluded that the permanent stimulator was not reasonable or indicated in this case.

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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. 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. In this case, both experts agree that the treatment of spinal cord stimulation may be an appropriate method of pain control in certain patients. Sufficient screening is necessary to determine whether one is an appropriate candidate. The final step in that process, in most but not all situations, is a trial stimulation which, if successful, leads to a permanent one.

5. In this case we have firm documentation of coverage after the trial stimulation, but not pain relief, and a decision was made to proceed to the permanent procedure despite the Claimant's complaint of worsening pain, which he now attributes to incisional pain.

6. Because the issue presented is beyond the ken of a layperson, it is necessary to base a decision on medical opinion and, in doing so, to choose between the differing medical opinions. Criteria used in making that choice are: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the 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*, Op. No. WC 20-97 (Aug. 4, 1997); *Gardner v. Grand Union* Op. No. 24-97WC (Aug. 22, 1997).

7. In this case, Dr. Rose has the advantage as the treating physician who has cared for the Claimant over time. Dr. Taub, with his expertise in neurology, and Dr. Rose as an anesthesiologist, both have expertise in the diagnosis and management of pain, with Dr. Rose having the greater expertise because of his recent certification and current concentration in the pain control. Both he and Dr. Taub provided objective reasons for their opinions and reviewed the relevant medical records. One basis for Dr. Taub's opinion that surgery was not warranted was his recommendation that the Claimant undergo a course of opioid treatment. Yet, the Claimant had been presented with that option and rejected it. Dr. Rose, his treating physician, acknowledged the reasonableness of that choice and offered as a "last resort" the spinal cord stimulator implantation.

8. The reasonableness of the medical procedure must be determined from the perspective of what was known at the time the decision was made. Claimant had participated in physical therapy and a pain program at DHMC. He had tried and rejected the use of medications. Two back surgeries had failed. His treating physician as a last resort offered a spinal cord stimulator, with minimal risks. It was reasonable. So too was the decision to move from a temporary to a permanent implantation when there was strong evidence of coverage and the standard is an evolving one, including evidence of coverage.

9. Dr. Rose's determination that Claimant was totally disabled from June to September 16, 2002 is also well reasoned and accepted.

10. As a prevailing Claimant, Mr. Jacobs 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. Although at first blush 76.5 attorney hours seem excessive in a case such as this, the record clearly supports the request. That is because this claim was challenged at every step. Without the assistance of his attorney, Claimant would not have received the treatment recommended by his doctor.

11. It is not clear from the submission supporting the claim for costs that it is in compliance with the Rule 40 fee schedule. Unless the parties resolve this issue in the interim, Claimant has 30 days from the date this order is mailed to submit an amended claim for costs.

ORDER:

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

- Medical expenses related to the permanent spinal cord stimulator;
- Temporary total disability benefits from June 17 to September 16, 2002.
- Attorney fees of $6,885.00 (76.5 x $90.00)

The decision regarding costs is deferred.

Dated at Montpelier, Vermont this 21st day of March 2003.

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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.