

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AMY ELWELL,
Claimant,

vs.

BOMGAARS SUPPLY, INC.,
Employer,

and

IOWA INSURANCE GUARANTY
ASSOCIATION on behalf of
RELIAMAX INSURANCE COMPANY,
Insurance Carrier,
Defendants.

File No. 5040442

REMAND
DECISION

Head Note Nos.: 1802, 2505, 2600,
2700, 2701

FILED

JAN 28 2015

WORKERS' COMPENSATION

This case returns to the Iowa Division of Workers' Compensation via a remand from the Iowa District Court in and for Woodbury County. The ruling was filed on July 16, 2014. The case had been stayed pursuant to an order issued on September 11, 2014. The stay order was finally lifted on December 18, 2014. For ease of understanding, this acting workers' compensation commissioner will trace the procedural history of the case.

The arbitration case was heard in Sioux City, Iowa by a former deputy workers' compensation commissioner on April 14, 2013. The case was deemed fully submitted on May 15, 2013. The presiding deputy issued the arbitration decision on August 5, 2013. In the arbitration decision, the deputy ruled, among other matters, whether claimant's second cervical surgery was caused by the work injury and whether the surgical treatment was reasonable and necessary.

Originally, Michael Espiritu, M.D., an authorized treating neurosurgeon, performed an anterior cervical discectomy with fusion and allograft at the C5-6 level on December 17, 2010. (Exhibit 10) Claimant engaged in rehabilitation following her surgery. On April 12, 2011, claimant participated in a valid functional capacity evaluation (FCE). She was placed in the light-medium exertional category with

occasional material handling of 21 to 35 pounds. (Ex. 19) On June 13, 2011, Dr. Espiritu adopted the FCE findings as his own. The neurosurgeon determined claimant was at maximum medical improvement. (Ex. 6, page 22)

Nevertheless, claimant continued to experience discomfort throughout and following Dr. Espiritu's treatment. No additional treatment was offered to claimant once she had been deemed to be at maximum medical improvement.

The presiding deputy found claimant consulted her family physician, Michael Jennings, M.D. The consultation was made without any authorization from defendants. Dr. Jennings opined claimant was unable to work effective October 7, 2011. (Ex. 11) Dr. Jennings referred claimant to an orthopedic surgeon, Eric Phillips, M.D., who ordered a CT scan. The scan indicated a possible incomplete fusion or pseudarthrosis. Accordingly, Dr. Phillips offered claimant a second surgery.

Dr. Espiritu, the original neurosurgeon, disagreed with the opinions of Dr. Phillips regarding the results of the CT scan. Dr. Espiritu opined:

There do appear to be pockets of bone in the disk space with other dark areas. Therefore, I cannot definitively say that the patient has 100% fusion across the disk space, although the flexion-extension films show that there is very little motion at the disk space in question.

If we take the assumption that the patient does have a pseudarthrosis and that it is asymptomatic, it is unclear exactly how this would be causing the symptoms that she is complaining about. The neck pain axially appears to be out of proportion in regard to the possible pseudarthrosis at that level. . . . Furthermore, it is unclear how the pseudarthrosis at C5-6 would explain her bilateral lower extremity symptoms. In addition, the patient appears to also have continued nicotine dependence, which makes the chance of having a repeat fusion still have a higher increased chance of developing a secondary pseudarthrosis....

I think based on the previous history of the patient's complaints, I do not know if all her symptoms including bilateral arm symptoms, bilateral leg symptoms, and severe axial neck pain can be attributable to the pseudarthrosis at C5-6. I think the pain is out of proportion to her clinical and imaging studies, and it may [sic] that repeat surgery may not do the patient any good. However, certainly surgery to treat the possible pseudarthrosis, if it was successful and got a solid fusion, could eliminate the pain associated with motion. However, I believe at this point in time the patient's pain is constant, and therefore, she may not get the pain relief she wants even if a solid fusion is achieved.

(Arbitration, pp. 3-4, citing, Ex. 8, p. 23)

Despite the contrary opinions of Dr. Espiritu, Dr. Phillips performed the second/revision surgery on claimant's cervical spine. The surgery occurred on April 10, 2012. The presiding deputy quoted from Dr. Phillips' surgical notes in the arbitration decision:

The plate was then elevated by removing a membrane around it and removing the locking screws from C5 and C6. On removing the locking screws at C6 the entire screw came out as they were totally loosened and had no purchase.

(Arbitration, p. 4, citing, Ex. 15)

In the arbitration decision, the deputy found:

The surgical revision accomplished by Dr. Phillips was partially successful: Elwell described her symptoms as 75% better in the arms and 50% in the neck, accompanied by a beneficial reduction in headaches, although she is still stiff and sore. In addition, Elwell has reduced the ability to participate in some previously-enjoyed activities of daily living, such as bowling and yard work.

(Arbitration, p. 5)

The presiding deputy concluded:

The essential dispute to be resolved is whether the second surgery, that performed by Dr. Phillips, was necessitated by the work injury. Although Dr. Espiritu and Dr. Martin concluded prior to that surgery that it was not, Dr. Phillip's reported findings – severe screw loosening – are obviously consistent with Elwell's ongoing symptoms and convincingly show that it was. Because it was, Elwell meets her burden of proving causal nexus to the disputed healing period and medical treatment costs.

(Arbitration, p. 7)

On August 7, 2013, claimant filed a motion for enlargement of or amendment to the order issued by the deputy on August 5, 2013. Claimant requested reimbursement for medical charges detailed in exhibits 39 and 40 in the total sum of \$71,786.84. The presiding deputy modified the decision on August 21, 2013.

Defendants filed their notice of appeal on August 23, 2013. They filed their appeal brief on October 14, 2013. Claimant filed her appeal brief on October 23, 2013. Defendants listed three issues on appeal:

1. The extent of healing period benefits was appealed;
2. The extent of permanent disability was appealed; and
3. The recovery of certain medical expenses was challenged.

On January 21, 2014, the workers' compensation commissioner affirmed without comment the arbitration decision and the enlargement that were filed on August 5 and August 7, 2013.

On February 19, 2014, defendants filed a petition for judicial review in the District Court of Iowa in and for Woodbury County. On July 16, 2014, the Honorable Judge John D. Ackerman, District Court Judge for the Third Judicial District of Iowa, issued a ruling on the petition for judicial review. The ruling on the petition for judicial review held: the commissioner's appeal decision was affirmed in part, and remanded in part. (Order, page 12)

Judge Ackerman decided the undersigned was to determine whether claimant is allowed to recover the cost of the unauthorized medical care, as well as healing period benefits. The judge held claimant could only recover the cost of unauthorized medical care upon proof by a preponderance of the evidence that such care was reasonable and beneficial. If the medical care was reasonable and beneficial, then claimant was also entitled to recover healing period benefits. (Ruling on Petition for Judicial Review, p. 9) The Judge wrote in his ruling:

Respondent [claimant] contends Deputy Rasey made factual findings indicating the care was reasonable and beneficial. Respondent identifies references, in the factual findings portion of the Arbitration Decision, to Dr. Phillips' notes from January 24, 2013 and Respondent's own description of her symptoms after the revisionary surgery. The unauthorized care must be established as reasonable and beneficial "under all the surrounding circumstances, including the reasonableness of the employer-provided care, and the reasonableness of the decision to abandon the care furnished by the employer in the absence of an order from the commissioner authorizing alternative care." Bell Bros., 779 N.W.2d at 208. In order to be beneficial, a determination must be made as to "whether the care provided a more favorable outcome than would likely have been achieved by the care authorized by the employer." Id. The record is devoid of such a determination, as Deputy Rasey did not compare the Petitioners' [employer] course of treatment with the unauthorized course of treatment. Additionally, the treatment must be

beneficial in addressing the work injury, and not simply beneficial to one's overall health. See, Verizon Bus. Network Servs., Inc. v. McKenzie, 823 N.W.2d 418, *12 (Iowa Ct. App. 2012) (finding lack of substantial evidence to support a finding of "beneficial" where gastric bypass surgery corrected non-work-related concerns, but did not provide a more favorable outcome for the work injury.) Respondent's contention that the second surgery brought some benefit to her does not allow this Court to determine whether the unauthorized care was reasonable and beneficial as a matter of law.

Therefore, the matter is remanded for a determination as to whether the unauthorized care was reasonable and beneficial and the Respondent is entitled to recover the costs according to Bell Bros. Without a determination as to whether the care was reasonable and beneficial, the court is unable to determine whether Elwell is entitled to healing-period benefits. Bell Bros., 779 N.W.2d at 209.

The petition for Judicial Review is granted as to the determination of the Petitioner's liability for Respondent's unauthorized medical care costs and healing period benefits.

In the summary for the ruling on the petition for judicial review, Judge Ackerman wrote:

Based on the foregoing, the Court finds the determination of a causal relationship between the Respondent's second surgery and the work injury of September 2010 to be supported by substantial evidence. Additionally, the Court finds the determination of an industrial disability to be supported by substantial evidence. The Commissioner's Appeal Decision is affirmed as to such findings. The Court finds Petitioners had not denied liability for Respondent's September 2010 injury. Thus, the commissioner was required to determine whether the unauthorized medical care was reasonable and beneficial in order to find the Petitioners liable for such costs and healing period benefits, rather than reasonable and necessary. Therefore, the Court remands the matter for further proceedings before the workers' compensation commissioner to allow for a determination of the necessary factual findings.

(Ruling on Petition for Judicial Review, p. 12)

It is the duty of the claimant to establish by a preponderance of the evidence the unauthorized medical care was reasonable and beneficial. Bell Bros., at 206. The claimant bears the burden because:

The allocation of this significant burden to the claimant maintains the employer's statutory right to choose the care under section 85.27(4), while permitting a claimant to obtain reimbursement for alternative medical care upon proof by a preponderance of the evidence that such care was reasonable and beneficial.

Bell Bros., at 206.

In the present case, Eric Phillips, M.D., performed the revision surgery on April 10, 2012. This was an unauthorized surgery. The surgical notes revealed in relevant portion:

The plate was then elevated by removing a membrane around it and removing the locking screws from C5 and C6. On removing the locking screws at C6 the entire screw came out as they were totally loosened and had no purchase.

(Ex. 15)

Claimant underwent a functional capacity evaluation in November 2012. Neal Wachholtz, PT, conducted the examination. The therapist concluded:

Amy demonstrated consistent effort throughout her examination with no significant non-physiological findings. Records indicate a solid fusion at C5-6 following two surgical procedures for stabilization. Test findings indicate that Amy is safe to perform work activities at the LIGHT-MEDIUM physical demand level with greater restrictions for lifting to shoulder level and above. She would also benefit from a restriction in prolonged or repetitive overhead work to limit aggravation of cervical complaints. The functional levels outlined in this report are felt to represent safe guidelines for work activities on a full time basis.

(Ex. 20, pp. 71-72)

On January 24, 2013, Dr. Phillips reported:

It was clear, however, that the surgery performed by Dr. Espiritu was necessary as a result of her work related injury. . . . [revision] Surgery was eventually performed on April 10, 2012. Severe screw loosening and pseudoarthrosis was disclosed on this date. Considerable difficulty was encountered in finding fixation points and plate placement as a result of screw lucencies from the previous surgery. The patient eventually came to satisfactory fusion as demonstrated by plain radiographs including flexion extension views. A functional capacity evaluation was performed

on November 5, 2012 at the Excel Physical Therapy Center and was found to be a valid study. Patient was capable of participating in the light-medium physical demand category of work...

The patient achieved maximum medical improvement on July 16, 2012. . . . [T]he patient is assessed . . . a 27% permanent partial impairment.

No follow up was arranged for this patient in the future. Judicious use of over the counter anti-inflammatories and nonnarcotic analgesics is advised.

(Ex. 16, pp. 61-62)

On February 7, 2013, Dr. Phillips expressed the following two opinions:

Question 1: Was the April 10, 2012 surgery you performed necessary to correct a failed December 17, 2010 surgery?

Yes No

Questions 3: Is it your opinion that the recommended work guidelines identified in the FCE Report completed by Neal Wascholtz (The Excel Physical Therapy Form dated October 29, 2012 and the Wachholtz' Report, four pages dated November 5, 2012) set forth reasonable permanent work restrictions that you would adopt as appropriate for Ms. Elwell as a result of her neck surgeries?

Yes No

(Ex. 17, p. 63)

The authorized treating physician, Michael T. Espiritu, M.D., did not want to perform a second surgery. In his report of November 2, 2011, Dr. Espiritu stated the reasons why he did not agree surgery was a reasonable treatment modality. He wrote in relevant portion:

I think based on the previous history of the patient's complaints, I do not know if all her symptoms including bilateral arm symptoms, bilateral leg symptoms, and severe axial neck pain can be attributable to the pseudarthrosis at C5-6. I think the pain is out of proportion to her clinical and imaging studies, and it may that repeat surgery may not do the patient any good. However, certainly, surgery to treat the possible pseudarthrosis, if it was successful and got a solid fusion, could eliminate the pain associated with motion. However, I believe at this point in time

the patient's pain is constant, and therefore, she may not get the pain relief she wants even if a solid fusion is achieved.

(Ex. 8, p. 23)

Additionally, in another report that was dated November 22, 2011, Dr. Espiritu wrote:

1. If contemplating surgical fusion to treat Ms. Cote-Elwell's constant pain, I would not recommend surgery because it is more likely than not that a fusion procedure would only address motion-related pain.

(Ex. 9, p. 24)

Dr. Espiritu did not recommend other treatment modalities to address claimant's chronic pain. He did not prescribe narcotic medications for pain control. He simply stated claimant's pain complaints were out of proportion to Dr. Espiritu's medical findings. No other medical treatment was offered. Dr. Espiritu did not refer claimant to another medical provider.

Charles Mooney, M.D., conducted an independent medical examination on February 18, 2013. The request for the examination was made by defendants. The physician did not establish a doctor/patient relationship. Dr. Mooney examined claimant subsequent to the second surgery. The examining physician did not express an opinion whether he believed the second surgery was reasonable. However, Dr. Mooney opined claimant reached maximum medical improvement after the second surgery and on October 10, 2012. The evaluating physician did not offer any treatment recommendations.

Dr. Mooney opined the restrictions established by Mr. Wachholtz in the second FCE were appropriate. Dr. Mooney concurred with Dr. Phillips. Claimant was capable of work in the LIGHT-MEDIUM physical demand level of work. Dr. Mooney imposed the following restrictions:

Lifting objects to shoulder height restricted to 20 pounds on an occasional basis and 10 pounds on a frequent basis with a maximum lift/carry of 35 pounds occasionally, and 20 pounds frequently near waist level and below.

Overhead lifting should be restricted to an occasional basis with 15 pounds or less and no prolonged or repetitive overhead work is indicated.

It is my opinion that there are no restrictions in sitting, standing, or other routine activities including the operation of a hand pallet jack and

product cart provided the push/pull requirements do not exceed 40 pounds.

Lastly, based on the review of the FCE of 02/23/04 her current work tolerances are essentially unchanged with the exception of overhead lifting restricted to an occasional basis with 15 pounds or less and no prolonged or repetitive overhead work.

(Ex. 46, p. 149)

During the arbitration hearing, claimant testified she did not receive any relief after the first surgery. The pain was just terrible. (Transcript, p. 45) She testified there were periods of time when she was unable to work due to chronic pain, numbness and weakness in her arms and hands. (Tr., p. 47) Claimant's last day of work was October 6, 2011. (Tr., p. 49)

On direct examination, claimant testified she had improvement following the second surgery. She stated:

A. I would say with my arms that was, like, 75 percent a lot better. It's not going down as much down through my arms and everything. With my neck it gave me -- I would say over half of the -- not the pain and all that. I still have it where the stiffness and the hurtness when I move side to side, but it released a lot of the headaches, migraines I was getting and stuff like that. It helped tremendously.

Q. If we ask you about your neck today as we sit here and how it's been let's say the last -- well, since the surgery by Dr. Phillips, as I understand it you still have discomfort but it's better?

A. Yes.

Q. Is it once a week? Once a month? Once a day? How does it work?

A. With what?

Q. With your neck pain.

A. That's there basically all the time.

Q. And is it better or worse depending on how much you move your head?

A. It can vary. It varies. That's exactly because it varies. It depends if I'm moving my neck a lot with how much the pain --

Q. Are you better just looking straight ahead?

A. Yes. I can look straight ahead.

Q. And then do you ever get muscle spasms in your neck?

A. Yes, I do.

Q. But better than before the second surgery?

A. Yeah.

Q. With respect to your arms and hands, how are they doing with compared to how they were before your second surgery?

A. Oh, a lot, lot better.

Q. Do you have symptoms in your arms or hands, or have they completely resolved?

A. I get them, like, once or twice a week but not nearly --

Q. What kind of problems do you get once or twice a week in your arms and hands?

A. Just with the numbness and the weakness and sometimes with the pain, but it's just mild pain.

(Tr., pp. 55-56)

On cross-examination, claimant admitted she was not completely pain free following the second surgery. Nevertheless, the surgery "helped out quite a bit." (Tr., p. 93) Dr. Phillips released claimant from his care. (Tr., pp. 95-96) There were no additional recommendations for medical care. (Tr., p. 96) Dr. Phillips did not restrict claimant from working. (Tr., pp. 95-96)

It is determined the medical care offered by Dr. Phillips was reasonable. He repaired the initial cervical fusion. The screws had come loose after the first surgery. The initial fusion was not holding the plates together. There was unnecessary movement of the cervical spine because of the loose screw. After the second surgery, there was a satisfactory fusion. Dr. Espiritu did not have any medical treatment to offer

in lieu of the revision surgery. He merely questioned claimant's pain complaints. The unauthorized medical treatment was reasonable in light of Bell Bros.

The second surgery was also beneficial for claimant. It reduced approximately 75 percent of claimant's arm complaints. Claimant estimated 50 percent of her neck pain was reduced and her headaches were lessened too. The second surgery was beneficial to claimant under the standards set in Bell Bros.

In light of the foregoing, defendants are now liable for the unauthorized medical expenses detailed in Exhibits 39 and 40. Defendants are also liable for healing period benefits for the period from October 7, 2011 through July 16, 2012 and said benefits shall be paid at the rate of two hundred fifty-six and 58/100 dollars (\$256.58) per week.

ORDER

IT IS THEREFORE ORDERED that the Remand Decision from the Iowa District Court on the Petition for Judicial Review of July 16, 2014 is as follows:

Defendants shall pay the medical expenses detailed in Exhibits 39 and 40.

Defendants shall pay healing period benefits for the period from October 17, 2011 through July 16, 2012 at the rate of two hundred fifty-six and 58/100 dollars (\$256.58) per week.

Defendants shall pay the costs of the remand, if any.

Signed and filed this 28TH day of January, 2015.



MICHELLE A. McGOVERN
ACTING WORKERS' COMPENSATION
COMMISSIONER

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