

Rochelle, Steven

TREATMENT

Proper and necessary medical and surgical services (RCW 51.36.010)

Spinal column stimulator

Notwithstanding the Health Technology Clinical Committee preclusion for authorizing spinal cord stimulator treatment, the Department remains obligated to repair or replace a spinal cord stimulator it had previously authorized.***In re Steven Rochelle, BIIA Dec., 15 24143 (2017)***

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DECISION AND ORDER

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DISCUSSION

Spinal Cord Stimulator

The evidence presented by the parties almost exclusively concerns the need to repair or replace Mr. Rochelle's spinal cord stimulator or its battery. The failing effectiveness of the spinal cord stimulator prompted Mr. Rochelle to file an application to reopen his claim. Mr. Rochelle suffers from two failed back surgeries as a result of the industrial injury, and his spinal cord stimulator was implanted in 2006 under this claim for treatment of the condition proximately caused by the industrial injury, with the approval of the Department as part of a pilot project and study. The device appears to have greatly increased Mr. Rochelle's functioning and allowed him to return to work. In 2013 or 2014, Mr. Rochelle noticed that he could no longer recharge the spinal cord stimulator, and his pain

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1 and loss of function began to worsen, resulting in a decline in his condition and level of functioning.
2
3 Therefore, he applied to reopen the claim to have the spinal cord stimulator repaired or replaced.

4 On October 22, 2010, the Health Technology Clinical Committee, which governs coverage
5 determinations by the Department of Labor and Industries and was established under the aegis of
6 the Health Care Authority, issued a determination declaring spinal cord stimulators to be a
7 non-covered benefit. That determination precludes coverage of spinal cord stimulators by the
8 Department, and precludes consideration of whether, in an individual case, a spinal cord stimulator
9 is medically necessary, or proper and necessary treatment.¹ In *Joy v. Department of Labor & Indus.*,
10 the court determined that the Department and this Board are precluded from authorizing any form of
11 treatment that has been determined by the Health Technology Clinical Committee to be a
12 non-covered benefit.² However, the court declined to determine whether the application in the case
13 of Ms. Joy, or the prohibition of such treatment in general, could operate retroactively.³

14 We conclude that the Department remains obligated to repair or, if necessary, replace
15 Mr. Rochelle's spinal cord stimulator or the unit's battery. Once Mr. Rochelle received his spinal cord
16 stimulator as treatment through the Department's clinical study, he obtained a vested right to the
17 repair or replacement of the device as a piece of durable medical equipment, pursuant to WAC 296-
18 20-1102. At the time the Department provided him treatment in the form of the spinal cord stimulator,
19 it also vested in him the right to the repair and replacement of the device. To now apply the Health
20 Technology Clinical Committee determination that the device is not a covered treatment is clearly a
21 retrospective application of that determination to Mr. Rochelle's circumstances. The WAC vested
22 Mr. Rochelle with the right to have the Department bear the cost of maintaining the device it had
23 previously approved. Generally, a statute will not apply retrospectively on a vested right, absent clear
24 language to the contrary.⁴ The denial of coverage for spinal cord stimulators should be applied
25 prospectively only. In our view, the denial applies to authorization of implanting a spinal cord
26 stimulator after the determination became effective but does not apply to maintenance, repair or
27 replacement of a device previously authorized and implanted.

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45 ¹ See, RCW 70.14.120(3).

46 ² *Joy v. Department of Labor and Indus.*, 170 Wn. App. 614 (2012); *In re Ladonia Skinner*, BIIA Dec., 14 10594 (2015).

47 ³ *Joy* at 629-630.

⁴ *Bodine v. Department of Labor & Indus.*, 29 Wn.2d 879 (1948).

1 **Objective Evidence of Worsening**

2 We agree with the Department that the medical evidence in the record before us is not
3 sufficient to establish that Mr. Rochelle's condition worsened during the relevant period. To establish
4 worsening within the meaning of RCW 51.32.160, a worker must prove through medical testimony⁵
5 that a proximate causal relationship exists between his industrial injury and the subsequent disability.⁶
6 Such medical testimony simply is not in the evidence before us.
7

8 Mr. Rochelle testified that his symptoms worsened with increased leg pain and wetting the bed
9 at night. He stated that he did complain to his doctor (who did not testify) of the increased leg pain
10 and bed-wetting.⁷ The fact that his physician filed an application to reopen the claim was sufficient
11 for our judge to infer that the physician had the opinion that these conditions were proximately caused
12 by the industrial injury, and had worsened between the terminal dates. We agree with the Department
13 that such an inference is conjecture; we do not know whether that physician, or any other medical
14 expert for that matter, would testify that the conditions Mr. Rochelle complains of were proximately
15 caused by the industrial injury. Even if we accept that the nocturnal bed wetting and increased leg
16 pain did develop between the terminal dates, there is no medical opinion the industrial injury
17 more-likely-than-not proximately caused the conditions.
18

19 Although Mr. Rochelle has not established that the claim should be reopened based on a
20 comparison of objective findings, we do not consider this a barrier to directing the Department to
21 repair or replace the spinal cord stimulator. The Department's responsibility to repair or replace the
22 device as required by WAC 296-20-1102 is not dependent on reopening the claim. The WAC clearly
23 requires that device be repaired or replaced upon documentation and substantiation by the attending
24 doctor. The record reflects that the attending physician presented such documentation with the
25 application to reopen. The Department responded by issuing an order denying the application and
26 thereby denying the requested repair or replacement of the device. Accordingly, we direct the
27 Department to repair or replace the spinal cord stimulator as requested.
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29 **DECISION**

30 In Docket No. 15 24143, the claimant, Steven G. Rochelle, filed a protest with the Department
31 of Labor and Industries on September 11, 2015. The Department forwarded it to this Board as an
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45 ⁵ *Johnson v. Department of Labor & Indus.*, 114 Wn.2d 479 (1990).

46 ⁶ *Cyr v. Department of Labor & Indus.*, 47 Wn.2d 92 (1955).

47 ⁷ We do not read the Department's petition, as the claimant asserts, to contain an untimely objection to the physician's chart note that was read into the record by Dr. Gilmore.

1 appeal. Mr. Rochelle appeals a Department order dated August 4, 2015. In this order, the
2 Department affirmed the provisions of a prior order in which it denied an application to reopen the
3 claim for aggravation of condition. This order is correct and is affirmed.
4

5 6 **FINDINGS OF FACT**

- 7 1. On January 7, 2016, an industrial appeals judge certified that the parties
8 agreed to include the Jurisdictional History in the Board record solely for
9 jurisdictional purposes.
- 10 2. Steven G. Rochelle sustained an industrial injury on October 23, 1995,
11 when he jumped down from a bridge abutment to the ground and injured
12 his low back, herniating at least one disc.
- 13 3. In 2006 the Department authorized treatment in the form of an implant of
14 a spinal cord stimulator.
- 15 4. On October 22, 2010, the Washington Health Care Authority adopted a
16 Health Technology Assessment Finding (HTA) on spinal cord stimulators
17 that prohibits the Department of Labor and Industries from authorizing
18 the use of a spinal cord stimulator as treatment for an industrial injury.
- 19 5. In May 2015 Steven Rochelle filed an application to reopen his claim in
20 order to have his spinal cord stimulator repaired or replaced.
- 21 6. The spinal cord stimulator needs maintenance and replacement of its
22 battery as substantiated by Mr. Rochelle's attending physician.
- 23 7. Steven Rochelle's back condition proximately caused by the industrial
24 injury did not objectively worsen between January 28, 2011, and
25 August 4, 2015.

26 27 **CONCLUSIONS OF LAW**

- 28 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
29 and subject matter in this appeal.
- 30 2. The October 22, 2010 Health Technology Assessment Finding on spinal
31 cord stimulators adopted under RCW 70.14 and WAC 182-55 does not
32 operate retrospectively to preclude the Department from authorizing a
33 maintenance and repair of spinal cord stimulator previously provided
34 under this claim as treatment for the October 13, 1995 industrial injury.
- 35 3. Under WAC 296-20-1102, the Department is obligated to repair or replace
36 the spinal cord stimulator without the need to reopen the claim for
37 aggravation of condition.
- 38 4. Between January 28, 2011, and August 4, 2015, the conditions
39 proximately caused by the industrial injury did not worsen within the
40 meaning of RCW 51.32.160.

- 1 5. The August 4, 2015 order is reversed and this matter is remanded to the
2 Department to deny the application to reopen the claim and grant
3 Mr. Rochelle's request to repair or replace his spinal cord stimulator.
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5 Dated: March 15, 2017.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS
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Addendum to Decision and Order
In re Steven G. Rochelle
Docket No. 15 24143
Claim No. P-042409

Appearances

Claimant, Steven G. Rochelle, by Putnam Lieb Potvin, per Dustin J. Dailey
Employer, Department of Transportation, None
Department of Labor and Industries, by The Office of the Attorney General, per Shawn W. Gordon

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department and the claimant filed timely Petitions for Review of a Proposed Decision and Order issued on November 4, 2016, in which the industrial appeals judge reversed and remanded the Department order dated August 4, 2015.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.