

L. G. v. Chittenden County Transportation Authority (November 25, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

L. G.

Opinion No. 48-08WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

Chittenden County
Transportation Authority

For: Patricia Moulton Powden
Commissioner

State File No. Y-55221

OPINION AND ORDER

Hearing held in Montpelier on August 1, 2008
Record closed on September 15, 2008

APPEARANCES:

Richard Cassidy, Esq. for Claimant
Jason Ferreira, Esq. for Defendant

ISSUES PRESENTED:

1. Is Claimant at end medical result for her November 9, 2006 low back injury and if so, to what permanency benefits is she entitled?
2. Is Claimant's left shoulder injury compensable and if so, to what workers' compensation benefits is she entitled?

EXHIBITS:

Joint Exhibit I: Medical records

Joint Exhibit II: Deposition of Susan LaBarge, R.P.T., taken on July 22, 2008

Claimant's Exhibit 1: Deposition of Philip Davignon, MD, taken on May 15, 2008

Claimant's Exhibit 2: *Curriculum vitae*, Philip Davignon, MD

Claimant's Exhibit 3: Report of Dr. Davignon, July 2, 2007

Claimant's Exhibit 4: Employee's Incident Report, November 9, 2006

Claimant's Exhibit 5: Employee's Statement of Injury Facts, November 24, 2006

Claimant's Exhibit 6: Concentra Health Services medical records

Claimant's Exhibit 7: Physical therapy records

Claimant's Exhibit 8: Hand drawing (not to scale) of angle of lift platform tilt

Defendant's Exhibit A: *Curriculum vitae*, John Johansson, D.O.

Defendant's Exhibit B: Letter from Graydon Wilson to Dr. Davignon, June 22, 2007

Defendant's Exhibit C: Concentra "Presenting Problem Information" questionnaire, November 9, 2006

Defendant's Exhibit D: Report of Dr. Johansson, April 14, 2007

CLAIM:

Permanent partial disability benefits pursuant to 21 V.S.A. §648

Medical benefits pursuant to 21 V.S.A. §640

Interest pursuant to 21 V.S.A. §664

Attorney's fees and costs pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. Judicial notice is taken of all forms and correspondence contained in the Department's file relating to this claim.
2. At all times relevant to these proceedings Claimant was an employee and Defendant was an employer as defined in Vermont's Workers' Compensation Act.
3. Claimant is 34 years old and resides in Plattsburgh, New York. Beginning in 2004 she was employed by Defendant as a bus driver in Burlington, Vermont.

Claimant's Work-Related Injury

4. On November 9, 2006 Claimant was using an elevator platform to off-load a wheelchair-bound passenger from the bus she drove. The passenger was a large man, and including both his wheelchair and the duffel bag he held on his lap, Claimant estimated his total weight to be more than 350 pounds.
5. The platform jammed as Claimant was lowering it to street level. She tried several times to get it to descend properly, but without success. Finally the platform tilted downward. Afraid that the passenger would roll or fall forward, Claimant pulled both him and his wheelchair back onto the bus. As she did so, she immediately felt back pain.
6. After reporting the incident to the Assistant Manager of Operations, Claimant ended her route and was instructed to go to Concentra Health Services for medical treatment.

Claimant's Medical Treatment

7. Claimant treated initially with Dr. Richard Pembrook. On her patient intake form she complained of pain in her middle to lower back on both the right and left sides. Dr. Pembrook diagnosed a lumbar strain. He restricted her from bus driving, prescribed ibuprofen and instructed her to begin intensive physical therapy immediately.
8. Claimant's pain worsened overnight. She returned to Dr. Pembrook the following day. Although she continued to complain primarily of back pain, Dr. Pembrook also noted some tenderness "up in the interscapular region," a reference to the area in Claimant's upper back between her shoulder blades. Notwithstanding this notation, however, Dr. Pembrook maintained the diagnosis of lumbar strain. As treatment, he prescribed a narcotic pain medication and a heating pad.
9. Claimant maintained during her testimony that she complained of left shoulder pain to her doctors throughout her treatment history. However, none of the many professionals with whom she treated noted shoulder pain until almost two months after her injury.
10. Specifically, throughout November and December 2006 Claimant treated with numerous primary care providers at Concentra, including Drs. Mercia and Waldman. She underwent two courses of physical therapy, one with Eduardo Plantilla and one with Susan LaBarge, and also was evaluated by Dr. John Peterson, an osteopath. None of these providers' notes make any mention whatsoever of left shoulder pain. All of their reported findings were consistent with Dr. Pembrook's initial diagnosis of lumbar strain. Some noted positive Waddell's signs, possibly indicating a psychological component to Claimant's pain. At least one provider also noted that Claimant voiced additional pain complaints in her hips and knees.
11. In addition, Claimant herself failed to make any mention of left shoulder pain in the "Employee's Statement of Injury Facts" form she completed for Defendant on November 24, 2006.
12. The first report of left shoulder pain documented in the medical records was on December 20, 2006 when Claimant saw Dr. Elizabeth White. Dr. White reported that Claimant recently had experienced some left shoulder pain and right inguinal discomfort while undergoing physical therapy. Dr. White diagnosed Claimant with lumbar strain, shoulder strain and inguinal ligament strain. She concluded that Claimant's left shoulder pain "likely" was due to physical therapy.
13. Susan LaBarge, the physical therapist with whom Claimant treated beginning in late November 2006, questioned Dr. White's conclusion that Claimant's shoulder pain "likely" was due to physical therapy. Ms. LaBarge testified that Claimant did not complain of shoulder pain at any point during her therapy. The physical therapy treatment notes confirm that testimony.

14. In January 2007 Claimant asked that her care providers at Concentra begin treating her for a left shoulder injury. Dr. Waldman questioned the causal relationship between her shoulder complaints and the work injury. He noted that Claimant now was wearing a splint for right wrist pain and complained of right groin tenderness as well. Dr. Waldman suggested that Claimant might be exhibiting signs of a “chronic pain syndrome.” Certainly Claimant’s pain complaints were confusing. Initially she appeared to be focused on her left shoulder, but many of the subsequent symptoms she reported were on her right side.
15. Throughout Claimant’s treatment for the lumbar strain that was diagnosed following the November 2006 work injury, it was never suggested that anything but conservative treatment was necessary for Claimant’s back injury. As of the formal hearing, no further treatment has been recommended for this injury.
16. Delores Burroughs-Biron at Concentra also treated Claimant. Dr. Burroughs-Biron diagnosed Claimant with chronic lumbar strain, groin strain and a “questionable” shoulder injury. She observed that Claimant moved well in and out of her examination chair and noted positive Waddell’s signs as well.
17. Dr. Burroughs-Biron placed Claimant at end medical result on August 2, 2007. Neither of the independent medical evaluators who examined Claimant has disputed this determination.
18. In January 2008 Claimant returned to full-time employment as a convenience store manager in the Plattsburgh, NY area.

Claimant’s Expert Medical Opinion

19. At Claimant’s request, Dr. Philip Davignon conducted an independent medical evaluation on August 7, 2007. Dr. Davignon has retired from direct patient care and his primary focus now is conducting independent medical examinations, permanency evaluations, second opinions and records reviews. Dr. Davignon has been a licensed occupational medicine provider for more than twenty years. In addition to maintaining his own private practice, he has been associated with Fletcher Allen Health Care and the Spine Institute of New England.
20. Although Dr. Davignon essentially agreed that the primary diagnosis for Claimant’s work injury was a lumbar strain, he also concluded that her left shoulder injury most likely was causally related as well. In support of this conclusion, Dr. Davignon noted that a left shoulder injury was consistent with the mechanism of how Claimant’s work injury had been sustained, and also that there was no evidence of any other incident or injury involving the left shoulder. Dr. Davignon did acknowledge that there was a behavioral component to Claimant’s pain complaints, but also observed that her upper extremities had never been evaluated. Last, Dr. Davignon admitted that he had based his determination, at least in part, on Claimant’s subjective representations and assumed that they were true and correct.

21. As to Claimant's lumbar injury, Dr. Davignon did not comment on either end medical result or the extent of any permanent impairment.

Defendant's Expert Medical Opinion

22. At Defendant's request, Dr. John Johansson, an osteopathic physician, conducted an independent medical evaluation of Claimant on March 28, 2007. Dr. Johansson is the medical director and co-founder of the Vermont Center for Occupational Rehabilitation (VCOR) and Champlain Sports Medicine.
23. During the course of his examination, Dr. Johansson observed positive Waddell's signs. He determined that Claimant's pain symptoms were very exaggerated, and that her subjective complaints outweighed the objective findings.
24. Dr. Johansson stated that normally a complaint of shoulder pain from the type of injury Claimant experienced would have become evident within 72 hours to a week. In Claimant's case, however, he observed that the medical records did not document any complaints of shoulder pain until almost two months after the work injury. Dr. Johansson noted in this regard that the interscapular pain reported by Dr. Pembroke on the day after Claimant's work injury cannot be interpreted to refer to shoulder pain, as this area of the back is not directly related to the shoulder at all.
25. Dr. Johansson further noted that aside from her left shoulder, Claimant's complaints were focused primarily on her right side. Last, Dr. Johansson determined from his own examination that there was nothing wrong with Claimant's left shoulder. Considering all of these factors, Dr. Johansson concluded that Claimant's complaints of left shoulder pain were not causally related to her work injury.
26. Dr. Johansson reevaluated Claimant on October 11, 2007. After doing so, he concurred with Dr. Burroughs-Biron's finding of end medical result as of August 2, 2007. Dr. Johansson rated Claimant with a 2% permanent impairment referable to her low back injury.

CONCLUSIONS OF LAW:

1. Claimant asserts that she injured both her left shoulder and her low back in the November 9, 2006 work incident. As to the low back injury, she seeks permanent partial disability benefits. As to the left shoulder, she seeks a finding of compensability.

2. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she 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). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993). Sufficient competent evidence must be submitted verifying the character and extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

Permanent Partial Disability for Claimant's Low Back Injury

3. The medical experts agree that Claimant suffered a compensable low back injury on November 9, 2006. Both Dr. Burroughs-Biron and Dr. Johansson opined that she reached an end medical result for that injury on August 2, 2007. There is no medical evidence to refute that conclusion, only Claimant's continued subjective complaints, which I find to be insufficient. I conclude, therefore, that the appropriate end medical result date for Claimant's low back injury is August 2, 2007.
4. As for permanency, the only expert medical evidence produced was Dr. Johansson's 2% whole person rating. I accept this calculation as the appropriate impairment.

Compensability of Left Shoulder Injury

5. As to the left shoulder, Claimant has the burden of establishing the causal relationship between her claimed injury and the November 9, 2006 work accident. Expert testimony is the sole means of laying a foundation for an award of compensability. *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1970).
6. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).

7. In the instant case, Dr. Johansson reviewed all of the medical records, including those subsequent to his first independent medical evaluation, some of which Dr. Davignon did not review. Given the mechanism of injury, Dr. Johansson determined that had Claimant injured her left shoulder in the November 2006 work incident, she would have felt symptoms there within a short period of time thereafter. Yet none of the many physicians who saw Claimant during the six-week period after her work injury noted any symptoms indicative of a left shoulder injury. This fact renders Claimant's testimony that she repeatedly told her doctors of her concern about her left shoulder less credible. Although it is conceivable that one physician could fail to note the left shoulder injury, it is not conceivable that four or five doctors would fail to do so.
8. I find that the other medical opinions that arguably establish causation are flawed. Dr. White's assumption that Claimant's left shoulder symptoms resulted from her participation in physical therapy was contradicted by the physical therapist herself, whose testimony I find credible. As for Dr. Davignon, his opinion suffers from too great a reliance on Claimant's subjective statements, and does not adequately account for the lack of corroboration in the medical records themselves.
9. Thus, viewing the medical record as a whole, and based as well on Dr. Johansson's credible testimony, I find that Claimant has failed to meet her burden of proving that her left shoulder injury was causally related to the November 9, 2006 work accident.
10. As Claimant has prevailed on her claim for permanency benefits for her low back injury, she is entitled to an award of only those costs that relate directly thereto. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997). As for attorney's fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. Subject to these limitations, Claimant shall have 30 days from the date of this opinion to submit evidence of her allowable costs and attorney's fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits for her left shoulder injury is **DENIED**. As for the low back injury, Defendant is hereby **ORDERED** to pay:

1. Permanent partial disability benefits in accordance with a 2% whole person impairment referable to the spine, commencing as of the date of end medical result, August 2, 2007;
2. Medical benefits covering all reasonably necessary medical services and supplies related to treatment of Claimant's low back injury;
3. Interest on the above in accordance with 21 V.S.A. §664; and
4. Costs and attorney's fees in accordance with Conclusion of Law 10 above.

DATED at Montpelier, Vermont this 25th day of November 2008.

Patricia Moulton Powden
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.