

Margery Harvey v. United Parcel Service

(February 3, 2010)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Margery Harvey

Opinion No. 04-10WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

United Parcel Service

For: Patricia Moulton Powden
Commissioner

State File No. Z-59094

OPINION AND ORDER

Hearing held in Montpelier, Vermont on September 18, 2009

Record closed on October 19, 2009

APPEARANCES:

Vincent Illuzzi, Esq., for Claimant
Jason Ferreira, Esq., for Defendant

ISSUE PRESENTED:

Was Claimant's September 2008 surgery causally related to her November 7, 2007 work injury?

EXHIBITS:

Joint Exhibit 1: Deposition of Miriam Simon, P.A., July 7, 2009
Joint Exhibit 2: Deposition of Michael Matteis, R.P.T., July 9, 2009
Joint Exhibit 3: Deposition of William Abdu, M.D., July 2, 2009
Joint Exhibit 4: Deposition of Rowland Hazard, M.D., August 28, 2009
Joint Exhibit 5: Deposition of Thomas Turek, D.C., September 1, 2009
Joint Exhibit 6: Medical records

Claimant's Exhibit 1: Letter from Ron Rabideau, March 11, 2008
Claimant's Exhibit 2: Injury and Illness Incident Report
Claimant's Exhibit 6: E-mail correspondence, August 27, 2008

Defendant's Exhibit 1: *Curriculum vitae*, Leon Ensalada M.D., M.P.H.
Defendant's Exhibit 2: Injury Investigation Summary

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642

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

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

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.
3. Claimant has worked as a package delivery driver for Defendant since 1991.
4. Outside of work, Claimant is an avid hunter. She owns and trains 21 hunting dogs. Working with the dogs requires extensive walking across varied terrain. Claimant testified that her hunting and dog training activities take up all of her spare time, nearly year round.

Claimant's Work Injury

5. On November 7, 2007 Claimant slipped and fell down some exterior concrete stairs after delivering a package to a residence. She landed on her left hip, with her right leg forward and her left leg behind her. Claimant was quite shaken by the fall. She testified that she felt severe pain in her lower back, just above her buttocks, as well as in her left hip and knee. In addition, she testified, both of her legs were scratched and bruised, all the way from her ankles to her buttocks.
6. After resting on the bottom step for a few minutes Claimant drove her truck across the road and called Defendant's Health and Safety Compliance Supervisor, Monica Franz, to report the injury. Claimant was upset and fearful at having to do so. As the non-management co-chair of Defendant's safety committee, Claimant knew what the financial implications to Defendant were for adding to its workplace injury count. By suffering an injury herself, she felt she had let the company down. In addition, Claimant testified that Defendant's culture was not supportive of employees who were injured at work, and she feared her boss' reaction.

7. Upon learning of Claimant's injury, Ms. Franz, who was also a personal friend, asked Claimant if she felt able to continue working. Claimant responded that she was. Ms. Franz also inquired whether she wanted to report the injury to Defendant's workers' compensation insurance carrier and Claimant declined, stating that she did not need medical treatment. Ms. Franz testified that in her experience this was not an unusual response. According to her understanding of Defendant's injury reporting policy, it was not necessary to report an incident such as Claimant's to the carrier unless the injured employee sought medical attention.¹
8. Claimant testified that on the day following her injury she showed Ms. Franz her bruises and explained that she was still in severe pain. She continued to work, however, and testified that at least at that point she still did not intend to seek medical treatment.
9. Ms. Franz did not recall Claimant showing her the bruises on her legs. She did recall following up with Claimant at least three or four times in the ensuing week or two, asking her how she was doing and whether she wanted to report the injury, to which Claimant responded that she did not. Claimant did not recollect these conversations.

¹ Defendant's union steward, Christopher Myott, provided contrary testimony. According to him, Defendant's collective bargaining agreement with its employees required it to report all work-related injuries to its workers' compensation insurance carrier, even those for which the injured employee did not seek medical treatment.

Medical Treatment Prior to November 7, 2007

10. Prior to November 2007 Claimant had treated for a variety of musculoskeletal and other complaints. She had suffered for many years from bilateral ankle and foot pain due to hyperpronation. She also suffered from chronic knee pain. Of particular relevance to the current claim, Claimant treated as well for low back, hip and groin pain at various times prior to November 2007, to wit:
 - Claimant's primary care medical records document complaints of left hip and groin pain in January and March 2001. Diagnostic studies (both x-ray and MRI) revealed no evidence of left hip arthritis and were essentially normal.
 - In 2003 Claimant was referred to physical therapy for evaluation of low back pain of several months' duration. The pain was described as centered primarily in the lower back and bilateral upper buttocks, with some pain in the left hip flexor area as well. Claimant's symptoms subsided with postural correction and a home exercise program.
 - On July 1, 2007 Claimant presented to a nurse practitioner at the hospital walk-in clinic with complaints of nagging left hip and groin pain radiating from the buttocks through to the groin. X-rays of her hip joint were normal.
 - On August 6, 2007 the orthopedic surgeon who was treating Claimant's bilateral knee pain reported that she also was complaining of chronic left hip pain, specifically in her left groin and buttock.
 - On October 18, 2007 Claimant's primary care medical records document a nurse's note indicating that Claimant was complaining of "problems" with her back, as well as gynecological issues.

Medical Treatment After November 7, 2007

11. Three days after the stair incident, on November 10, 2007 Claimant was hunting in the woods behind her house when she suffered an idiopathic anaphylactic reaction. She broke out in hives, her tongue and lips swelled and she felt dizzy. Claimant was frightened by the event, which can be life-threatening.
12. At the time of this incident, Claimant already had a previously scheduled appointment on November 12, 2007 with her primary care provider, Miriam Simon, a physician's assistant. The purpose of this visit was to have been a follow-up as to Claimant's anti-depressant medication. Instead, the focus was on Claimant's anaphylactic reaction two days earlier. Ms. Simon's office note made no mention of Claimant's work-related fall on November 7th, nor did it reflect any complaints of low back or hip pain related to that incident.

13. Claimant next presented to Ms. Simon on December 6, 2007 for a recheck as to both her anaphylactic reaction and her anti-depressant medication. Ms. Simon's office note also referenced pain complaints in Claimant's knees and buttocks. As to the latter, it stated:

She's developed a new problem of bilateral hip pain. She thinks this began about 2 mos ago when she got new orthotics for her hyperpronation.

14. Ms. Simon reported objective findings that included increased pain with hyperextension (i.e., with the back bent backwards). Her assessment was bilateral hip pain,² which she suspected might be indicative of facet arthropathy or mild spinal stenosis. Notably, Ms. Simon's office note made no reference to Claimant's November 7th fall at work.

15. Facet arthropathy, essentially another term for arthritis, is a disease of the small joints that connect the vertebrae in one's spine. Spinal stenosis refers to the narrowing of the spinal canal, with consequent compression on the spinal cord. Both conditions most commonly are degenerative in origin, caused by age-related changes in the spine. Typical symptoms include pain in the lower back with referred pain into the hips, groin and buttocks, as well as numbness and paresthesias down the leg and into the foot. Activities that tend to aggravate these symptoms are those that involve arching or hyperextending the back, including walking downhill and lying prone. Positions that involve forward flexion, such as sitting, will relieve these symptoms.

16. As treatment for Claimant's symptoms, Ms. Simon recommended physical therapy. To that end, Claimant underwent an initial physical therapy evaluation on December 10, 2007. Her therapist, Michael Matteis, reported her history as follows:

The patient is a 44 year old female referred for evaluation and treatment with complaints of bilateral buttock pain. She has noticed increased symptoms in the lateral hips and buttocks over the last 4 to 5 months. Sitting does relieve her symptoms, esp. if she performs a forward flexion motion. . . . She reports that her symptoms worsened over the summer months in early July while she was training her dogs. This required a lot of walking in the woods. Does have increased symptoms when walking downhill, as well as with prone lying position. . . . Does have occasional right foot numbness on the outer aspect of the foot into toes 3 through 5. This resolves with flexion based activity. . . . She admits she has been strengthening at The Body Shop with Carol Fisher, but has only noticed symptoms worsening in the past two months.

17. In thus describing the history of Claimant's presenting symptoms, Mr. Matteis made no mention of her November 2007 fall at work. Mr. Matteis testified that he was certain that if Claimant had mentioned the fall, he would have noted it, if for no other reason than for insurance billing and reimbursement purposes.

² Ms. Simon testified that her reference to hip pain in this note actually was meant to describe low back pain in the area of Claimant's buttocks.

18. For her part, Claimant testified at the formal hearing that she began experiencing pain and numbness down her leg and into her foot and toes approximately three or four weeks after her fall, which would correspond roughly with the date she first saw Mr. Matteis. Claimant testified that Mr. Matteis confused various parts of her history and that both he and Ms. Simon “got it wrong” in their accounts of when and how her symptoms first developed.
19. Mr. Matteis concluded, as Ms. Simon had, that Claimant’s symptoms were indicative of spinal stenosis. Over the ensuing weeks he reported Claimant’s various complaints of pain in her buttocks, low back and hips. In addition to these pain complaints, on January 18, 2008 Mr. Matteis noted that Claimant was experiencing occasional mild paresthesias in her right leg.
20. In her next follow-up visit with Ms. Simon, on January 22, 2008 Claimant reported symptoms of low back and hip pain, now radiating bilaterally into her legs, with numbness as well extending down her left leg and into her toes. Again, Ms. Simon diagnosed spinal stenosis. Again, she made no mention of Claimant’s November 2007 work-related fall in discussing Claimant’s symptoms. Ms. Simon recommended continued physical therapy and diagnostic x-rays.
21. Up until this point Defendant still had not filed an injury report with its workers’ compensation insurance carrier. Instead, Claimant had instructed her medical providers to bill her group health insurance carrier. When Mr. Matteis recommended a TENS unit for home use, however, and Claimant learned that her group health insurance would not cover this expense, she approached Ms. Franz and asked to have it covered by workers’ compensation instead. Ms. Franz agreed to do so. Mr. Matteis testified that it was in this context – changing Claimant’s billing from group health to workers’ compensation, which occurred in early February 2008 – that Claimant first mentioned the November 2007 fall at work to him.
22. Claimant’s left hip and spine were x-rayed on January 31, 2008. The x-ray revealed significant facet arthropathy at L4-5 as well as spondylolisthesis. Spondylolisthesis is a particular form of spinal stenosis in which the facet joints at one level degenerate to the point where they are no longer able to maintain the vertebrae in their correct alignment. As a result, the vertebra at one level slides forward relative to the one beneath it, thus narrowing the spinal canal. Like both facet arthropathy and spinal stenosis, spondylolisthesis is usually a gradual process, most commonly caused by aging. As with spinal stenosis generally, the nerve compression that results from spondylolisthesis can progress to the point of causing pain, numbness and paresthesias into the legs. Both activities of daily living, including walking downhill or lying prone, and/or sudden trauma, such as a fall, can aggravate the condition.
23. Mr. Matteis’ physical therapy progress notes throughout February 2008 continued to reflect Claimant’s complaints of low back and leg pain, particularly upon awakening in the morning. On one occasion Mr. Matteis reported that Claimant was experiencing increased symptoms after “doing a lot of outdoor walking” the previous day. When her symptoms failed to respond satisfactorily to physical therapy, Claimant returned to Ms. Simon, who referred her to the Dartmouth Hitchcock Spine Center for further evaluation.

24. Dr. Hazard, the director of the Spine Center's functional restoration program, evaluated Claimant in March 2008. An MRI study confirmed that Claimant was suffering from facet arthropathy, spinal stenosis and spondylolisthesis. An epidural steroid injection relieved her symptoms temporarily, but in June 2008 they recurred. Because Claimant was experiencing not just low back pain but also worsening pain and numbness down her legs, Dr. Hazard referred her on to Dr. Abdu, an orthopedic surgeon, for consideration of surgical options. Leg pain typically is the most significant indicator for surgical correction of these conditions, as it signifies nerve root involvement. Surgery decompresses the nerve and opens up the spinal canal, thus relieving the stenosis, and then stabilizes the vertebrae to prevent further slippage, thus addressing the spondylolisthesis.
25. Claimant underwent surgery with Dr. Abdu in September 2008. She recovered well and by January 2009 was essentially asymptomatic. Claimant returned to work for Defendant on January 30, 2009. At her attorney's referral, she underwent a permanency evaluation with Dr. Turek, a chiropractic orthopedist, in July 2009. Dr. Turek determined that Claimant had reached an end medical result, and rated her with a 21% whole person permanent impairment referable to her spine.

Medical Opinions as to Causation

26. Claimant's treating medical providers – Ms. Simon, Mr. Matteis, Dr. Hazard and Dr. Abdu – all have testified as to the causal relationship, if any, between Claimant's November 2007 fall at work and the need for her September 2008 surgery. In addition, Dr. Ensalada, the independent medical evaluator hired by Defendant, and Dr. Turek, who as noted above was retained by Claimant's attorney to rate the extent of her permanent impairment, also rendered opinions as to causation.
27. All of the medical providers agree that the degenerative conditions in Claimant's spine – facet arthropathy, spinal stenosis and spondylolisthesis – most likely predated her November 2007 fall at work. The dispute among them centers on the extent to which these conditions were asymptomatic prior to the fall and specifically, whether the fall itself caused the leg symptoms that ultimately led to Dr. Abdu's surgery.
28. Neither Ms. Simon nor Mr. Matteis could state to the required degree of medical certainty that the November 2007 fall caused Claimant's leg symptoms. Both acknowledged that a fall such as the one Claimant suffered could have caused worsening symptoms into her legs. Without any reference to the incident in the histories they recorded in their contemporaneous treatment notes, however, neither could state that that was the most likely cause.³

³ Claimant testified that she told both Ms. Simon and Mr. Matteis of her November 2007 fall early on in her treatment. Without stating a specific motive for them to do so, she asserted that both Ms. Simon and Mr. Matteis "threw me under the bus" with respect to her current workers' compensation claim.

29. Dr. Hazard testified that according to the history he obtained from Claimant, her chief complaint when he examined her – leg pain – began with the November 2007 fall at work. His understanding was that in addition to whatever symptoms Claimant may have had previously in her lower back, hips, buttocks and groin, within a few days after the fall she began to experience a new symptom – radiating pain into her leg – as well. Based primarily on this history, Dr. Hazard concluded that it was more probable than not that the fall aggravated the nerve roots in Claimant’s lumbar spine and thereby caused her leg symptoms.
30. Dr. Hazard testified that for a fall such as Claimant’s to be responsible for the ensuing symptoms into her leg, he would expect the symptoms to have occurred within days of the trauma. Consequently, he acknowledged that his causation opinion would change if the symptoms did not occur until a month or so later, as Claimant herself testified was the case. According to Dr. Hazard, it would be difficult in that event to relate the symptoms back to any particular trauma.
31. As Dr. Hazard had done, Dr. Abdu based his opinion as to the causal relationship between the November 2007 fall and the September 2008 surgery primarily on the history Claimant reported to him regarding how her symptoms had progressed. Dr. Abdu concluded that the fall caused the leg symptoms, and ultimately, therefore, the September 2008 surgery. In reaching this conclusion Dr. Abdu refused to comment in any respect on the conflicting history reported by Mr. Matteis in his initial physical therapy evaluation as to the onset of Claimant’s leg symptoms.
32. In Dr. Ensalada’s opinion, Claimant’s November 2007 fall at work did not cause, exacerbate or accelerate in any way the degenerative conditions in her spine, the symptoms she experienced in her legs or the need for her September 2008 surgery. According to his review, Claimant’s medical records prior to November 2007 documented a “classic” progression of degenerative stenosis symptoms, from low back pain to buttock, groin and hip pain, and last to radicular symptoms into the legs. Dr. Ensalada accepted Mr. Matteis’ December 10, 2007 account of Claimant’s history as accurate, and deduced from it that Claimant in fact had been symptomatic for some months prior to November 2007. Thus, Dr. Ensalada concluded, the relationship between Claimant’s fall and the further progression of her symptoms was “one of coincidence, not one of causation.”
33. In reaching this conclusion, Dr. Ensalada also remarked on the fact that the medical records most contemporaneous to the November 2007 fall made no mention of the incident. Dr. Ensalada testified that he agreed with Dr. Hazard’s assessment that if the fall had irritated Claimant’s L5 nerve root or otherwise exacerbated her underlying degenerative condition, she would have developed leg symptoms within a day or two, not three or four weeks later.

34. Dr. Turek disagreed. He testified that although typically a fall that results in nerve root impingement likely would result in leg pain within a few days' time that was not always the case. Rather, in some cases the progression of symptoms can be very gradual. In Claimant's case, Dr. Turek surmised that the November 2007 fall aggravated her degenerative spondylolisthesis such that the vertebrae began to slip more. Ultimately the slippage progressed to the point where Claimant's nerve root became irritated, thus producing her leg symptoms. In this way, Dr. Turek concluded, the fall necessitated Claimant's September 2008 surgery.
35. Notwithstanding this conclusion, however, Dr. Turek admitted that if Claimant's history as Mr. Matteis had reported it in December 2007 was accurate, such that in fact she already had been experiencing pain and numbness down her leg and into her toes for some time prior to November 2007, he no longer would be able to state his opinion to the required degree of medical certainty. Dr. Turek acknowledged, therefore, that in reaching his conclusions he relied substantially on the assumption that Claimant had reported her history accurately.

CONCLUSIONS OF LAW:

1. 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).
2. The disputed issue here is whether Defendant should be held responsible for Claimant's September 2008 surgery. Through her medical expert witnesses, Claimant essentially acknowledges that she suffered from preexisting degenerative conditions in her spine. She asserts, however, that her November 2007 fall at work aggravated those conditions and precipitated the leg symptoms that ultimately necessitated surgery. Defendant argues that the fall was irrelevant to the surgery. Instead, it claims that Claimant already was experiencing the symptoms that would lead to surgery before her fall.
3. 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).

4. It is notable that neither Ms. Simon, Claimant's primary care provider for many years, nor Mr. Matteis, the physical therapist who treated her symptoms within weeks after her fall, could support her claim to the required degree of medical certainty. Not only did their contemporaneous medical records fail to mention the fall in any respect, but both reported in their histories that Claimant attributed her symptoms to entirely unrelated events instead. These omissions and inconsistencies raise doubts as to Claimant's credibility in reporting her history to subsequent medical providers.
5. These doubts carry over, and affect my consideration of Dr. Hazard's, Dr. Abdu's and Dr. Turek's opinions as well. Based on the history Claimant reported to Dr. Hazard, he assumed that Claimant began experiencing symptoms in her legs almost immediately after her fall. In fact, both according to Claimant's own formal hearing testimony and as reported in the contemporaneous medical records, this did not occur until at least three or four weeks later. Dr. Hazard testified that this information was significant, and if true, would affect his causation opinion negatively.
6. Both Dr. Abdu and Dr. Turek testified that their opinions were based primarily on the history Claimant reported, specifically as to when her leg symptoms first presented. At best, that history is uncorroborated by contemporaneous medical records. At worst, it is contradicted by them. To the extent that the history was crucial to both doctors' opinions, both opinions suffer. *W.G. v. S.D. Ireland Concrete*, Opinion No. 15-08WC (May 9, 2008); *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).
7. I am left with Dr. Ensalada's opinion as the most credible in this claim. I believe, as Dr. Ensalada found, that the medical records prior to November 2007 document a gradual progression of Claimant's symptoms. With no corroborating documentation to establish the November 2007 fall as having precipitated new and worsening symptoms, I accept his conclusion as the only one objectively supported and substantiated by the evidence.
8. I conclude, therefore, that Claimant has failed to sustain her burden of proof as to whether the November 2007 fall at work necessitated the September 2008 surgery.
9. Claimant having failed to prevail, she is not entitled to an award of costs or attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits causally related to her September 2008 surgery is hereby **DENIED**.

DATED at Montpelier, Vermont this 3rd day of February 2010.

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.