

L. M. v. Woodridge Nursing Home

(December 6, 2006)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

L. M.

Opinion No. 46-06WC

v.

By: Margaret A. Mangan  
Hearing Officer

Woodridge Nursing Home

For: Patricia Moulton Powden  
Commissioner

State File No. W-51502

Hearing held in Montpelier on September 1, 2006

Record closed on September 20, 2006

**APPEARANCES:**

Steven P. Robinson, Esq. and Jennifer Ciarlo Pacholek, Esq., for the Claimant  
Keith J. Kasper, Esq., for the Defendant

**ISSUES:**

1. Is Claimant's current condition caused by her work-related injury?
2. When did Claimant reach medical end result for her work-related injury?
3. To what benefits, if any, is Claimant entitled?

**EXHIBITS:**

Medical Records

**STIPULATION:**

1. On August 15, 2004 Claimant was an employee of Defendant within the meaning of the Vermont Workers' Compensation Act (Act).
2. On August 15, 2004, Defendant was the employer of Claimant within the meaning of the Act.
3. On August 15, 2004, Claimant suffered an injury by accident arising out of and in the course of her employment.

4. At the time of the injury, Claimant had an average weekly wage of \$394.17 resulting in an initial compensation rate of \$305.
5. At the time of her injury and thereafter, Claimant has had no dependents within the meaning of the Act.
6. Effective July 23, 2005, Defendant terminated temporary partial disability benefits on the basis that Claimant had reached medical end result. It also terminated medical treatment alleging that the treatment Claimant was receiving was unrelated to the work injury.
7. Claimant seeks reinstatement of her benefits and, if successful, an award of attorney fees and costs of the litigation process.

**FINDINGS OF FACT:**

1. In 2002, before the event at issue here, Claimant hurt her back lifting a patient. She sought medical attention, missed a few days at work and returned to work full time, full duty.
2. In August of 2004, Claimant was working as a licensed nursing assistant (LNA) at the Woodridge Nursing Home. She had been an LNA for five years.
3. On Friday August 15, 2004, Claimant was using a Hoyer lift to help a patient return to bed from a wheelchair. In the process, she leaned, slipped, and then fell back striking her right side (in the area over the kidney) against a nightstand. Claimant completed her task; she then reported the incident to her supervisor.
4. Claimant went to hospital emergency department the day of the incident where she was seen by a nurse and physician's assistant (PA). The PA noted costo vertebral tenderness. Diagnoses were back contusion and possible compression fracture of the spine. Claimant was given an out of work note stating that she fell at work and sustained a lumbar sacral strain.
5. Claimant iced her back over the weekend and took anti-inflammatory medications.
6. On Monday, August 18, 2004, Claimant consulted with her primary care physician at the Health Center. Her pain was described as "right paralumbar pain and right SI [sacroiliac] joint pain." The straight leg raise (SLR) on the right was negative. Claimant was referred to physical therapy (PT).
7. Stedman's Medical Dictionary (25<sup>th</sup> ed.) defines lumbar as "[r]elating to the loins, or the part of the back and sides between the ribs and the pelvis." The paralumbar muscles; sacroiliac joint; and costovertebral angle, higher in that area, are in the general lumbar region of the back.

8. An August 28, 2004 PT note indicates that Claimant had fallen on her right side pelvis. The SLR test on the right was positive, which suggests nerve involvement.
9. On September 3, 2004, the physical therapist noted that Claimant was “sore on the other side now.”
10. On October 15, 2004, Dr. Rohan noted that Claimant still had a tender area where she was bumped. She had point tenderness in paraspinal muscles.
11. Tests performed in October of 2004—a CT scan and MRI—revealed multi level degenerative disc disease in Claimant’s lower back and facet arthrosis.
12. Claimant returned to work on a part time (three hours per day), light duty basis in September, 2004.
13. In July 2005, Dr. Boucher, Board Certified in Environmental Medicine, evaluated Claimant for the defense in June 2005. Dr. Boucher opined that Claimant’s only work related injury was a contusion to the right side of her lumbar area as documented in the original emergency department notes. He described her current complaints in paraspinal muscles as anatomically distinct from the area of injury and, therefore, unrelated. The straight leg raise test was negative at the time of Dr. Boucher’s evaluation.
14. Dr. Boucher noted that Claimant magnifies symptoms, a conclusion that is consistent with the medical records. He placed her at medical end result, an accurate assessment because her symptoms had reached a plateau. He found no permanent partial impairment.
15. Based on Dr. Boucher’s report, Claimant was informed that she would be fired from her job if she did not return full time. Claimant did not return to work full time.
16. A Functional Capacity Evaluation of Claimant, performed in September 2005, indicated that Claimant had a work capacity of “less than sedentary.”
17. In October 2005 Claimant was fired for not returning to work full time.
18. The carrier terminated temporary total and medical benefits based on Dr. Boucher’s evaluation.
19. Claimant has not looked for work within her restrictions.

20. Dr. Davignon evaluated Claimant in February 2006. The evaluation included an examination of the Claimant and review of medical records, although he did not have her pre-injury records. He opined that her current symptoms are causally related to her work related injury. Unlike Dr Boucher, he did not find that the ED note regarding costovertebral angle pain and subsequent notes documenting sacroiliac and low back pain indicated different phenomena. From the outset, Claimant's pain has been in her lower back on the right. Her large body habitus makes precise location impossible.
21. Dr. Davignon opined that Claimant has a part time sedentary to light work capacity based on the FCE and physical examination. He acknowledged that Claimant had pre-existing degenerative conditions of the back, conditions aggravated by her work related injury.
22. No evidence had been produced to suggest that Claimant injured her back in any way other than at work.
23. Claimant submitted support for a claim for attorney fees based on 73.1 attorney hours at \$90.00 per hour and 3.7 paralegal hours at \$60.00 per hour as well as costs to \$828.95.

#### **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 from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. With an obscure injury and causation beyond the ken of a layperson, expert testimony is necessary to lay the foundation for an award. *Lapan v. Berno's Inc.*, 137Vt. 393 (1979).
4. In this case, as in many others, the medical evidence on which an order depends is in conflict. To resolve the differences, this Department traditionally has looked at several factors: 1) whether the expert has had a treating physician relationship with the claimant; 2) the professional education and experience of the expert; 3) the evaluation performed, including whether the expert had all medical records in making the assessment; and 4) the objective bases underlying the opinion. *Yee v. IBM*, Opinion No. 38-00WC (2000).

5. Neither of the experts has a treating physician relationship with the Claimant. Both are well versed in the area of occupational medicine, although Dr. Boucher has an edge with his board certification. Both had available to them records and history relevant to this claim. Although Dr. Davignon had not seen the pre-injury records, he was well aware of preexisting degenerative disc disease. The difference lies with the interpretation of the symptoms and understanding of medical end result.
6. To accept Dr. Boucher's opinion on causation, I would have to accept that the precise location of one's pain is always clearly documented in the medical records and that it remains in that precise location at all times. Dr. Davignon's opinion to the contrary is more logical. Claimant hurt her lower back on the right side at work. She described it as over her kidney at one time and in her lower back, which is slightly lower and more central, at other times. The areas are within inches of one another. No intervening events have been identified that would account for Claimant's continuing symptoms. Although Claimant had a preexisting degenerative condition, that condition was asymptomatic prior to the injury at issue. It is well established that aggravation from a preexisting condition is compensable. *Jackson v. True Temper Corp.*, 151 Vt. 592, 595-596 (1989). (citing to *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31, 35-36 (1980); *Laird v. State Highway Dep't*, 112 Vt. 67, 86 (1941); *Gillespie v. Vermont Hosiery & Machinery Co.*, 109 Vt. 409, 415 (1938)).
7. On the question of ongoing disability, however, Dr. Boucher provided the more persuasive opinion. This claim fails for two reasons: medical end result and failure to conduct a job search.
8. "Medical end result means the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected regardless of treatment." WC Rule 2.1200. The fact that some treatment such as drug or physical therapy continues to be necessary does not preclude a finding of medical end result if the underlying condition causing the disability has become stable and if further treatment will not improve that condition. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996). "[A] claimant may reach medical end result, relieving the employer of temporary disability benefits, but still require medical care associated with the injury for which the employer retains responsibility." *Pacher v. Fairdale Farms*, 166 Vt. 626, 629 (1997); *Coburn*, 165 Vt. at 532. The necessity of treatment such as physical therapy or medications is not inconsistent with finding medical end result. *Pacher*, 166 Vt. at 626. Claimant had reached a medical end result at the time Dr. Boucher had examined her, as demonstrated by the plateau in her symptoms, thereby justifying the termination of her temporary total disability benefits.

9. Furthermore, Claimant has not proven that she is incapable of working. Claimant had been released to work yet failed to pursue any employment on her personal belief that she could not work. Such a subjective belief, however, cannot support such a claim for TTD. See *Davis v. The Journal Co.*, Op. No. 31-92WC (1992).
10. However, since this is a compensable claim, Claimant's medical benefits must be reinstated pursuant to 21 V.S.A. § 640(a).
11. The carrier must adjust the claim with payment of medical benefits and permanent partial disability benefits if so assessed, although it was justified in terminating temporary total disability benefits in July 2005 because Claimant had reached medical end result.
12. Because Claimant has prevailed on her claim for compensability and medical benefits, claims that depended on the same core set of facts as the claim for TTD that is denied, she is entitled to the requested attorney fees and costs pursuant to 21 V.S.A. § 678(a) and WC Rule 10.000. See also *The Electric Man, Inc. v. Charos* 2006 VT 16. ¶ 9-12.

**ORDER:**

Therefore, based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to adjust this claim, including payment of:

1. Medical Benefits;
2. Attorney fees and costs;
3. Permanent partial disability benefits, if so determined.

The claim for temporary total disability benefits is DENIED.

Dated at Montpelier, Vermont this 6<sup>th</sup> day of December 2006.

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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.