STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Lois Vitagliano	)	State File No. P-07534
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Kaiser Permanente	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 39-03WC

Hearing held in Montpelier on January 31, 2003
Record closed on February 14, 2003

APPEARANCES:

John J. Welch, Esq., for the Claimant
Christopher J. McVeigh, Esq., for the Defendant

ISSUES:

Should Kaiser-Permanente be relieved of any further liability for Ms. Vitagliano's workers' compensation benefits?

EXHIBITS:

Joint Exhibit I: Medical Records

Claimant's Exhibits:

1. Report by Dr. Bannerjee dated September 20, 2001
4. Letter from Crawford October 30, 2001

Defendant's Exhibits:

A. Letter from Crawford to Dr. Ball dated July 24, 2001
B. Deposition of Dr. Bucksbaum
C. Pay Records

FINDINGS OF FACT:

1. Lois Vitagliano, the Claimant, began working at Kaiser Permanente (KP) as a receptionist in late July of 1999. Before that she had worked at Castleton Medical Center beginning in 1998; at Mintzers of Rutland beginning in 1996; and at Albank in Rutland beginning in 1994. She had no significant absenteeism recorded at any of those jobs.

2. One of the Claimant's duties at Kaiser Permanente was to carry medical charts from her desk to the medical chart storage area. The medical storage area was approximately 36 feet away from her desk.

3. The charts were made up of various types of paper with medical records printed on them. The Claimant testified that the charts, or stacks of charts, that she carried were never more than approximately 5.5 inches high and never more than approximately 10 lbs.

4. The Claimant has smoked a pack of cigarettes a day for almost thirty years. Smoking can be a contributing factor in the degeneration of someone's cervical spine.

5. On September 10, 1999, the Claimant picked up a stack of charts, held them against her body and walked towards the chart cart. When she reached the cart, she lifted the charts from approximately her waist height to approximately her chest height and then felt a pull in her neck. She finished work that day despite the neck discomfort.

6. At the hearing, on cross-examination, Claimant stated that she did not twist her body when she lifted the files.

7. The next day the Claimant spoke with a nurse at Kaiser Permanente regarding her pain, and the nurse gave her Advil.

8. On September 22, 1999, the Claimant went to the Rutland Regional Medical Center for emergency care related to severe neck pain. She treated with John Conlon, M.D. Dr. Conlon's report from the visit indicates that the Claimant stated that there was no history of trauma to her neck and that she had recently been lifting some heavy bottles. She stated that she had been having pain for about a week. During the hearing in this matter, the Claimant testified that she had not been lifting any bottles. The Claimant's husband also testified that the Claimant had not been lifting heavy bottles.

9. Next, the Claimant treated with Joseph Corbett, M.D., a neurosurgeon, on September 27, 1999. No mention is made of a lifting incident in the note for that visit.

10. Dr. Corbett operated on the Claimant on September 29, 1999 to repair a soft tissue disc herniation at the C4-C5 level. According to Dr. Corbett, a disc herniation of this type usually occurs with a twisting mechanism. Even 10 pounds would be a sufficient weight if one were off balance. The most likely cause of the herniation according to Dr. Corbett was the chart-lifting incident.

11. During surgery, Dr. Corbett noted degeneration at multiple levels of Claimant's surgical spine and performed surgery at cervical levels three to six. Although the surgery exceeded that caused by the work-related lifting incident, the additional procedures did not appreciably increase the cost.

12. In October 1999 Claimant reported to a physical therapist that she had hurt her neck lifting files at work.

13. The Claimant reported a work related injury to Kaiser Permanente, who filed an Employer's First Report of Injury on October 4, 1999.

14. At the request of Crawford & Company, who adjusted this claim, Sikhar Banerjee, M.D., a rehabilitation specialist, examined the Claimant on September 20, 2001. Gail Meddaugh, a registered nurse employed by Crawford, met the Claimant at the doctor's office. After the examination, Dr. Banerjee spoke with Ms. Meddaugh about his findings. Dr. Banerjee's notes indicate that the Claimant "reported that on 9/10/99 when she was working…at a medical office she was lifting a stack of charts weighing about ten pounds and she suddenly felt a sharp pulling sensation in the back of her neck." He recounted her course of treatment, including the surgical procedures she had undergone. He accepted that she had suffered a lifting injury at work and concluded that she had reached a medical end result with a 28 % whole person impairment for her cervical spine, 6% for gait and station impairment and 6% for the left shoulder for a total of 38% whole person based on the combined values chart. He recommended that she have a functional capacity evaluation.

15. At the request of the Defendant, Mark Bucksbaum, M.D., a physician board certified in pain management, independent medical examination and rehabilitation reviewed the Claimant's medical file, as well as the depositions of the Claimant, Dr. Corbett and Dr. Sikhar Banerjee, both of which were conducted in 2002. Although he had conducted nerve conduction studies some years before, Dr. Bucksbaum did not conduct a physical examination of Lois Vitagliano and never saw her prior to September 10, 1999.

16. Dr. Bucksbaum was aware that the Claimant had degeneration in her cervical spine prior to September 10, 1999. In reviewing the medical file and depositions, Dr. Bucksbaum came to the conclusion that the Claimant's lifting of the medical files on September 10, 1999 would have been insufficient to create an injury to the cervical spine of the nature Claimant suffered. He based his conclusion on the facts that the weight of the files was insignificant and that there was no rotational force involved with the lifting. While he believed the lifting of the files to be an insignificant event, Dr. Bucksbaum did believe that the lifting of heavy bottles described in the emergency room note might have been significant enough to generate a force that could produce a cervical herniation.

17. Based on his interpretation of the Guides, Dr. Bucksbaum concluded that Claimant's permanent partial impairment would be 28% whole person if the DRE method were used prior to any apportionment for her pre-existing condition. Because Claimant had multi-level disease of her spinal cord, Dr. Bucksbaum opined that the appropriate methodology for a determination of permanency under the 5th edition of the AMA Guides is the range of motion model, not the DRE model used by Dr. Bannerjee. Nevertheless, the impairment would be 28% without apportionment under either model because 3% would be added for pain in the ROM model and not in the DRE model.

18. Claimant's attorney provided supporting evidence of his claim for fees based on 24 hours at $90.00 for a total of $2,160.00 and necessary expenses of $623.25. The record also includes the suggestion that there is an attorney lien from Todd Kalter, Esq., but the existence and nature of that lien are unclear.

CONCLUSIONS OF LAW:

1. In a typical Workers' Compensation case the Claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). However, if an employer initially accepts a claim and then seeks to relieve itself of responsibility for the claim, the burden of proof will shift to the employer. *Merrill v. University of Vermont*, 133 Vt. 101 (1974).

2. "Having received notice or knowledge of an injury, the employer shall promptly investigate and determine whether or not compensation is due." WC Rule 3.700 Furthermore,

> [t]he employer shall have 21 days from receiving notice or knowledge of an injury within which to determine whether any compensation is due. If it determines that no compensation is due, it shall, within 21 days of notice or knowledge of the injury, notify the commissioner and the Claimant in writing of its denial and the reasons therefore. The denial shall be accompanied by copies of all relevant documentation, medical or otherwise, relied upon to support the denial. If, despite good faith efforts, the employer/carrier cannot render a decision within the 21 day time limit the employer/carrier must request, in writing to the commissioner, an extension of the 21 day limit. This extension must be specific as to the number of days needed and the reason for the delay and must be received by the commissioner prior to the end of the 21 day limit. A copy of the request for an extension must be provided to the Claimant at the time the request is provided to the commissioner.

WC Rule 3.0900.

3. Kaiser Permanente's insurer adjusted this claim and paid certain disability and medical payments to the Claimant. It seeks now to relieve itself of further liability based on the theory that there is no causal link between Claimant's cervical spine condition and the 1999 work-related injury. Crucial to the defense is Claimant's testimony that she did not twist when she was carrying the files she alleges caused the injury. Had a twisting mechanism been involved, Dr. Bucksbaum, on whose opinion Defendant now relies, agrees that the weight she was carrying could have caused the disc herniation. Claimant's neurosurgeon, Dr. Corbett, opined that it was the likely cause.

4. Defendant now argues that the medical record demonstrates an inconsistent history of complaints on the part of the Claimant. Although she obtained Advil from a nurse the day after the injury, a claim of being injured at work was not made until October 4, 1999, over three weeks after the incident occurred. On two occasions before that, on September 22 and September 27, she consulted with two doctors. Yet she denied any history of trauma to both Dr. Conlon and Dr. Corbett. The Claimant did not mention that she had injured herself while lifting files at work on either occasion. Well within the 21 days the insurer had to investigate the claim, those records were available.

5. Therefore, the defense now rests on evidence it had during the time it investigated this claim and the stale memory of the Claimant that she did not twist when she was lifting the charts. As Dr. Corbett testified, even being off balance with a ten-pound weight would have been sufficient to have caused the herniated disc and being off balance when placing ten pounds of files on a cart is not something one would necessarily remember years later. Defendant will not now be permitted to rest on the Claimant's current memory of events to relieve itself of liability, when the records it now relies on were available to it during the time it had to investigate this claim.

6. On balance the defense has failed to meet its burden of proof to justify the termination of benefits. See Merrill, 133 Vt 101.

7. Furthermore, it is disingenuous at best for the Defendant to now disavow the opinion of Dr. Bannerjee and characterize it as a Claimant examination when it was the insurer who asked the doctor to perform the examination and when it sent a nurse case manager to the doctor's office to discuss the case with him. Clearly that was a defense examination.

8. Yet, it now has another opinion based on a record review of Dr. Bucksbaum and argues that the range of motion model is the appropriate methodology and that the permanency must be apportioned and the degree attributable to her preexisting condition subtracted from the total.

9. According the Guides, 5th edition, "the DRE method is the principal methodology used to evaluate an individual who has a distinct injury." § 15.2 at 379. However, the range of motion model is used "when there is multiple level involvement in the same spinal region. Id. at 380. Therefore, Dr. Bucksbaum's opinion on the proper methodology based on the range of motion model must be accepted over Dr. Bannerjee's DRE determination. However they do not disagree on the total degree of permanency for the cervical spine, 28%.

10. Next is whether that total must be reduced for the preexisting condition. The Workers' Compensation Act (Act), cases and the *Guides* all consider the issue of apportionment. Under the Act, there is only one situation for which apportionment is mandatory: an "impairment rating…shall be reduced by any previously determined impairment for which compensation has been paid…21 V.S.A. § 648(d). The *Guides* provides for the subtraction of permanency for preexisting condition with "an approach that requires accurate and comparable data for both impairments." *Guides,* § 1.6B at 12; see also *Aker v. ALIIC* Opinion No. 53-98WC (1998).

11. Contrary to the defense assertion, apportionment is not mandatory in Vermont except in those cases where a Claimant had been paid permanency for the prior injuries, which is not the case here. Without pre-injury data on which to base an apportionment analysis, the necessary "accurate and comparable data" are lacking. Therefore, apportionment will note be permitted.

12. Claimant is entitled to permanency based on 28% whole person impairment.

13. As a prevailing Claimant she is also entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678(a). Her success is due to the efforts of her attorney whose fee request based on 24 hours is reasonable. Accordingly, she is awarded fees based on 24 hours at $90.00 for a total of $2,160.00 and necessary expenses of $623.25. It is not possible to determine the issue of Attorney Kalter's lien on the record presented.

ORDER:

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law:

A. The defense motion to be relieved of liability is DENIED.

B. Defendant is ORDERED to:

1. Continue adjusting this claim;
2. Pay Claimant Permanency based on 28% whole person impairment;
3. Pay Attorney fees and costs as stated above.

Dated at Montpelier, Vermont this 8th day of September 2003.

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Michael S. Bertrand
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.