Lavallee v. Loyal Order of Moose #1618 (09/15/03)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Kathy Lavallee	)	State File No. E-20402
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Loyal Order of Moose #1618	)	
and The Travelers	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 40SJ-03WC

APPEARANCES:

Christopher J. McVeigh, Esq., for the Claimant
Jennifer K. Moore, Esq. , for the Defendant

RULING ON MOTIONS FOR SUMMARY JUDGMENT

Both parties move for summary judgment, claimant on the issue of compensability, defendant on its claim of entitlement to reimbursement or credit for benefits paid for medical treatment it now claims was not causally related to claimant's 1992 work related injury.

The record contains the following undisputed facts:

Claimant Kathy Lavallee began working as a bartender at the Loyal Order of the Moose #1618 on April 13, 1992.

Claimant filed, and Travelers accepted, a claim for an April 30, 1992 work related injury to claimant's back, arms and neck injured from lifting cases of beer when one case slipped.

Claimant has not worked since April 30, 1992.

Claimant began treating for what was diagnosed as a back strain in early May 1992 and by December of that year had lumbar spine x-rays that revealed some degenerative changes.

In the winter of 1992-1993 the claimant moved to Las Vegas, Nevada temporarily. There are no records that the claimant sought medical treatment from December 8, 1992 through April 28, 1993.

Claimant consulted with a physician in April 1993, had physical therapy and returned to the doctor a year later.

On February 14, 1994, the claimant underwent an Independent Medical Exam with Leonard Jennings, M.D. who diagnosed degenerative changes in her neck and low back and assessed a 4% permanent partial whole person disability for her lower back problem and a 9% permanent partial whole disability for her cervical spine.

A March 1994 neurological examination of her continued cervical and multilevel back pain complaints was unremarkable. The neurologist diagnosed chronic pain.

In November of 1994, the claimant moved to Las Vegas permanently. At that time, she began working at her son's business office performing data entry and other clerical skills.

Claimant sought chiropractic care in Las Vegas for neck back pain. She had more x-rays and another neurological evaluation that proved negative.

By May of 1996 the claimant was referred to a pain management specialist and underwent the trigger point injections.

In November of 1997 the claimant contacted this Department regarding benefits for her lower back problems. This resulted in telephone conferences involving Jean Perrigo, of the Department and Robert Ronan for The Travelers Insurance Company. The claimant demanded that Travelers pay for her fusion surgery, arguing that it was related to her work related injury. Mr. Ronan was the Travelers adjuster responsible for the claimant's claim at that time.

From November 1997 to January 1998 claimant had X-rays, CT scan and MRI.

On January 18, 1998, the claimant met with John Thalgott, M.D., an orthopedic surgeon. The claimant again complained of pain in her lower back and an aching neck. Dr. Thalgott recommended, and a month later performed, the lumbar fusion procedure on the claimant.

On April 4, 1998, after several communications with the Department of Labor and Industry and the claimant, Mr. Ronan agreed that Travelers would pay for the lumbar fusion surgery.

On or about May 26, 1999, Patricia Greene, a workers' compensation adjuster for the Travelers, assumed responsibility of the claimant's case. After reviewing the activity notes from the previous adjustors, Ms. Greene acknowledged that Travelers had agreed to pay for the fusion surgery. Based on her previous experience, Ms. Greene was also aware that lower back surgeries often led to permanent partial impairments.

On June 11, 2001, Dr. Thalgott related the claimant's symptoms "most likely to a perineural fibrosis basis directly related to her industrial accident."

At his deposition, Dr. Thalgott testified that the cause of the claimant's spinal stenosis was "clearly degenerative." He further stated: "She obviously had significant, pre-existing, age related degenerative changes and stenosis causing radiculopathy, which were not industrial related." Dr. Thalgott stated that any belief he may have had that the claimant's lower back condition was linked to her industrial accident was based solely on the claimant's report to him.

On February 4, 2002, the claimant underwent an independent medical examination with Patrick Brandner, M.D., in Las Vegas. Dr. Brandner had received and reviewed treatment records regarding the claimant's lower back traumas, accidents and other injuries, dating back to 1971. Dr. Brandner found that the claimant's lower back problems which led to her 1998 surgery with Dr. Thalgott were secondary to progressive degeneration of the lumbosacral spine. He stated in his conclusions that the claimant's lower back problems show a "History of reconstructive lumbosacral surgery from L4 to S1 with successful fusion, related to symptomatic degenerative lumbar spondylosis, not related to alleged workers' compensation incident in 1992."

CONCLUSIONS OF LAW:

The Vermont Rules of Civil Procedure apply to workers' compensation hearings insofar as they do not defeat the informal nature of the proceedings. Workers' Compensation (WC) Rule 7.1000. Pursuant to V.R.C.P. 56(c), summary judgment is appropriate when the moving party demonstrates that there is no genuine issue of any material fact and that party is entitled to judgment as a matter of law. *Toy, Inc., v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990).

In this case, where both parties have moved for summary judgment, each is entitled to the benefits of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists when the opposing party's motion is being judged. *Id.*

Claimant argues that Travelers accepted this claim by words and actions-- assurances from adjusters that it would pay as well as the actual payment-- and consequently has waived any defense that causation is lacking. See *Humphrey v. Vermont Tap and Die*, Op.No. 1-96WC conclusion ¶ 8 (1996)

The Travelers does not dispute that it accepted a compensable work related injury on April 30, 1992. Nor does it dispute that it paid for claimant's 1998 lumbar fusion and some, but not all, of her subsequent medical treatment. However, since 1998 it has disputed the causal relationship between the 1992 injury and the surgery and continuing treatment six years later.

Travelers argues that claimant cannot establish her entitlement to temporary total or permanent partial benefits related to the 1998 surgery in a dispositive motion such as this, but only if she prevails after an evidentiary hearing. I agree.

Whether Travelers "accepted" the compensability of the 1998 surgery and associated benefits is a crucial disputed fact that precludes claimant's motion for judgment as a matter of law on the issue of compensability. On the instant motion, I cannot conclude that an adjuster's agreement to pay for a surgical procedure translates into carte blanche acceptance of causation.

Nor can I conclude as a matter of law, as Travelers urges, that the condition necessitating the spinal fusion surgery was not related to her work related incident and that it is now entitled to reimbursement and/or a credit for benefits paid.

Accordingly, claimant's motion and the defense motion for summary judgment are DENIED.

Dated at Montpelier, Vermont this 15th 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.