

L. C. v. Daniel L. Wyand, PT

(November 6, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

L. C.

Opinion No. 31-07WC

v.

By: George K. Belcher
Hearing Officer

Daniel L. Wyand, PT/
Guard Insurance

For: Patricia Moulton Powden
Commissioner

State File No. P-09969

OPINION AND ORDER

Hearing held in Montpelier September 19, 2007.
Records closed on October 4, 2007.

APPEARANCES:

Craig A. Jarvis, Esq., for the Claimant
John W. Valente, Esq., for the Defendant

ISSUES PRESENTED:

1. Whether the Claimant's current right knee complaints and resulting treatments are causally related to a work related injury at the Defendant's place of employment?
2. If the current knee complaints are causally related to the work related injury, then what benefits are due?

EXHIBITS:

Joint Medical Exhibit

Claimant's Exhibit 1: Medical Bills and Rule 40 Summary of Medical Costs
Claimant's Exhibit 2: Department of Labor Forms Regarding Knee Injuries
Claimant's Affidavit or Attorney's Fees, Costs, and Fee Agreement

FINDINGS OF FACT:

1. At all times relevant to the matter under consideration the Claimant, Lois Chasse, was an employee for purposes of receiving benefits under the Vermont Workers Compensation Act.
2. At all times relevant to the matter under consideration the Defendant, Daniel L. Wyand, Physical Therapy, was an employer for purposes of the Act.

3. The Claimant was born on June 6, 1943. She has held a number of different types of employment over the years, including working as an assistant physical therapist, a massage therapist, and a nursing assistant.
4. In the 1980's she had a non-work-related right knee injury when her foot slipped off a ladder and she felt pain in her right knee. She was treated for this injury and it completely resolved.
5. While working as an assistant physical therapist for the Defendant, the Claimant suffered an injury, which arose out of, and in the course of, her employment with Daniel L. Wyand Physical Therapy. On September 8, 1999, she was walking down an outdoor stairway which had crabapples on it. She slipped and twisted her *right* knee.
6. For one week after her injury she attempted to work but the pain increased. She was ultimately referred to Richard N. Gagnon, M.D. He diagnosed a patellar subluxation with lateral maltracking. On December 20, 1999, he performed an arthroscopic patellar chondroplasty and with chondroplasty of the trochlea of the distal femur, and a lateral retinacular release. Joint Medical Exhibit, Page 23.
7. She returned to work part-time and resumed her work as an assistant physical therapist. In February of 2000 she injured her *left* knee while at work. As she worked, the pain in her left knee increased. Joint Medical Exhibit, pages 46-50.
8. On August 21, 2000 the Claimant underwent an arthroscopic surgery to her left knee. On July 1, 2002, Dr. Howard recommended that the Claimant have total knee replacements of both her right and left knee. On October 24, 2002 Dr. Lon Howard conducted a uniconylar knee replacement of the left knee. This was done because the left knee was the most painful for the Claimant, however both knees had been causing her pain and Dr. Howard had indicated that she was a candidate for knee replacements of both knees.
9. In June of 2002, the Defendant arranged a medical record review by Dr. Charles DiCecca of Plaistow, New Hampshire. Dr. DiCecca concluded that, based on the medical records, "[T]his patient clearly requires bilateral total knee replacements. The inappropriate implantation of a unicondylar arthroplasty would not be helpful as she has involvement of the patellofemoral joints along with at least one weightbearing joint in each knee... The prognosis for this patient's knees is poor without resort to the prescribed surgical reconstruction of her joints." See Joint Medical Exhibit, page 283-284. Dr. DiCecca had other opinions about causation (he opined that the knee injuries were not work related), but what is important here is that before the right knee was accepted for a permanent partial impairment rating of three per cent, Dr. DiCecca predicted that a total knee replacement would be required.
10. Claimant received treatment for her work-related knee injuries and she reached maximum medical improvement for both knees in June of 2003.

11. The Claimant and Defendant entered into an agreement for permanent partial disability benefits in August of 2003 in which the Claimant received a 15% whole body impairment rating in regards to her left knee and a 3% whole body impairment rating in regards to her right knee. On September 29, 2003, the Department approved the agreement.
12. The Claimant continued to have knee pain and, particularly, pain in her right knee. See Joint Medical Exhibit, Page 47. On November 16, 2005, the Claimant had an x-ray of her right knee which showed near bone-on-bone degeneration of her right knee.
13. In April of 2006 Dr. Howard performed a replacement of the Claimant's right knee. Dr. Howard's surgical finding was that the Claimant's right knee had "bone on bone deformity medially, significant loss of articular cartilage in the femoral trochlea, as well as the lateral tibial plateau." Operative procedure note, Medical Record Exhibit, Page 420.
14. The Claimant contends that the worsening of the right knee and the knee replacement were part of the original injury. The Defendant claims that the worsening of the Claimant's right knee was not related to the work injury and was a natural progression of pre-existing osteoarthritis, aggravated by the fact that the Claimant has been overweight. There is medical evidence to support both positions.
15. Dr. Lon Howard is an orthopedic surgeon who has treated the Claimant since April 12, 2000. He is a board certified orthopedic surgeon and 30-40 % of his practice involves knee injuries.
16. Dr. Howard acknowledged that the Claimant had some arthritis in her knees before the injury in 1999, but with no significant pain. He was of the opinion that her injury caused damage to the articular cartilage of the knee. Dr. Howard believes that the injury at work caused a progression of the arthritis beyond what would have otherwise occurred. He believes that the progressive arthritis caused increased pain to the right knee and, eventually, the need for a knee replacement. One rationale for his opinion is the pain which the Claimant experienced which started following the injury and continued, somewhat consistently, thereafter. It was his opinion that the right knee problem of the Claimant was work-related and caused by the 1999 incident at work. Joint Medical Exhibit, Page 471.
17. Dr. Howard expressed the opinion that heredity and obesity are not the cause of osteoarthritis, but that trauma can be a factor in causing osteoarthritis.

18. Dr. Victor Gennaro is an orthopaedic surgeon. He reviewed the medical records of the Claimant and examined her on July 27, 2007. It was his opinion that heredity, trauma, and obesity are factors in degenerative osteoarthritis. It was his opinion that the Claimant's right knee condition between 2002 and 2006 was an accelerated progression of osteoarthritis and that her knee pain and need for surgery in 2006 was related to the knee injury in 1999. It was his opinion that the right knee replacement surgery of 2006 was reasonable and necessary. It was further his opinion that the Claimant has 15% whole person impairment due to her right knee injury. See Joint Medical Exhibit, Page 476-477.
19. Dr. James H. Forbes is an orthopedic surgeon who has practiced from 1976 to the present. He is board certified in orthopedic surgery and between 15-20% of his practice relates to knees. On June 6, 2006, he conducted an examination of the Claimants records and he examined the Claimant.
20. It is the opinion of Dr. Forbes that the pain of the Claimant in 1999 was related to the injury at work, but that the pain she felt in 2006 was different and was caused by osteoarthritis in the medial compartment of the knee. This pain, in his opinion, was unrelated to the injury. Rather, he believes that the knee pain was the product of progressive and degenerative arthritis. It was his opinion that her pain was originating from the medial compartment of the knee and that there was no evidence of acute injury to the medial compartment of the knee when Dr. Gagnon performed his arthroscopy of her right knee in 1999. See. Dr. Forbes' report of June 20, 2006. Joint Medical Exhibit, Page 465.
21. Dr. Forbes did not agree, as a general principle, that trauma plays a role in osteoarthritis of the knees.
22. The Claimant incurred medical expenses for the surgery and treatment in the amount of \$40,722.03 consistent with Workers' Compensation Rule 40. Joint Medical Exhibit, Pages 478-528.
23. The Claimant's average weekly wage at the time of the injury in 1999 was \$567.20 per week and her initial compensation rate was \$378.14.
24. The Claimant incurred \$2,592.10 in costs. (see attorney affidavit dated October 3, 2007, filed with proposed findings.)

CONCLUSIONS OF LAW:

1. In Worker's 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 proven must be the more probable hypothesis. *Burton v. Holden and Martin Lumber Co.* 112 Vt. 17 (1941).
3. Where the causal connection between the accident and the injury is obscure and a layperson would have no well-grounded opinion as to causation, expert medical opinion is necessary. *Lapan v. Burno's Inc.*, 137 Vt. 393 (1979).
4. While the claimant has the burden of proof in the first instance, once the claim is accepted and benefits are paid, the burden of proof to terminate the claim is upon the employer. *Merrill v. University of Vermont*, 133 Vt. 101 (1974). In this case the parties executed a Form 22 agreement on June 18, 2003 which accepted Dr. Gennaro's rating of a 3% whole person impairment based upon the right knee. Under Workers' Compensation Rule 17.0000, "Once executed by the parties and approved by the Division, these forms shall become binding agreements and, absent evidence of fraud or material mistake of fact, the parties shall be deemed to have waived their right to contest the material portions thereof." Thus, as of June 18, 2003 it was agreed and determined that the 3% whole person impairment of the right knee was the result of a work-related injury.
5. But in this case, the Defendant claims that the worsening of the Claimant's right knee following 2003 was a spontaneous degeneration of the knee which was unrelated to the accident.

6. Dr. Howard (the treating physician) and Dr. Gennaro (whose opinion was the basis for the Form 22 agreement) are both of the opinion that the worsening of the right knee was causally related to the injury. Dr. Forbes (who is not a treating physician) is of the opinion that there is no causal relationship. When choosing between conflicting medical opinions, the Department has looked at several factors: (1) whether the expert has a treating relationship with the claimant; (2) the professional education and experience of the expert; (3) the evaluation performed, including whether the expert had all the medical records in making the assessment; and (4) the objective basis underlying the opinion. *Yee v. IBM*, Op. No. 38-00 WC (2000). Here, these factors weigh heavily in favor of the opinions of Dr. Howard and Dr. Gennaro. Their opinions are more persuasive and appear to be based upon the chronology, the clearly-stated pain complaints of the Claimant, as well as, the objective tests and films. It is also worthwhile to note that Dr. Howard and Dr. DiCecca, recommended that the Claimant should have or would need a total replacement of the right knee before the agreement of June of 2003. In this way, it appears that the ultimate knee replacement of 2006 was not only necessary, but was predictably necessary. The fact that the right knee replacement was done in 2006 constituted a change in the condition of the Claimant under 21 VSA Sec. 668.
7. The Defendant claims that there are fatal flaws in the opinions of both Dr. Howard and Dr. Gennaro. There were minor errors in Dr. Howard's stated history of the patient (he reported that the Claimant fell to the ground in 1999 instead of twisting her knee short of falling). Dr. Gennaro's opinion was attacked because he did not know of a previous injury which the Claimant had in 1980, but it seems obvious that the prior injury completely resolved and was not believed by any of the experts to have played a significant role in the Claimant's condition. If there are flaws in the Claimant's experts, they are minor and not fatal. The Commissioner finds that the right knee condition of the Claimant up through her surgery of 2006 and her subsequent treatments for her right knee are work related and compensable.
8. The Claimant seeks medical benefits pursuant to 21 VSA Sec. 640 and additional permanent partial disability benefits pursuant to 21 VSA Sec. 648. The permanency to which she is entitled (15% whole person) must be reduced by the amount of permanency already paid (3% whole person). 21 VSA Sec. 648(d).
9. The Claimant proved medical benefits in the amount of \$40,722.03. The permanency benefit of an additional 12% would have expired had it been paid from the period of permanency already paid. Accordingly it is calculated to be \$22,820.32.¹

¹ The compensation rate at the time of the injury on September 8, 1999 was \$378.14. The cost of living adjustments are to \$438.26 as of the commencement of permanency on June 18, 2003; \$448.78 after July 1, 2003; \$464.04 after July 1, 2004; and \$481.67 after July 1, 2005. The Claimant was entitled to an additional 48.6 weeks of permanency starting at November 9, 2004 (the date that the prior permanency period ended. Using the rates quoted above the permanency benefit is \$22,820.32.

10. Where the Claimant prevails the Commissioner shall include interest at the statutory rate computed from the date upon the total amount of unpaid compensation. The compensability of this claim was known to the Defendant as of the date of Dr. Gennaro's report dated July 27, 2007 and this is the date upon which the Claimant seeks interest to run on the total amount of unpaid compensation. Likewise interest shall be paid on each unpaid medical bill from the date of service
11. Under Vermont Workers' Compensation Rule 10.0000 and 21 VSA Sec. 678(a), the Commissioner may, in her discretion, award reasonable attorney's fees to the prevailing party. The Claimant may be awarded a contingent fee based upon 20% of the compensation awarded, not to exceed \$9,000.00. Workers' Compensation Rule 10.1220. A contingent fee in this case would exceed \$9,000.00 and therefore the Claimant is entitled to \$9,000.00 in attorney fees.
12. Since all the disability compensation benefits are past-due, they must be paid in a lump sum. Workers' Compensation Rule 19.1000. Under 21 VSA Sec. 652(c), orders for lump sum disability benefits shall segregate excludable expenses and pro-rate the remainder of the payments in order to protect the claimant's entitlement to Social Security benefits. In this case, one-third of the permanent partial disability award of \$22,820.32 is excludable and the balance of \$15,213.55 shall be paid by the insurer, pro-rated over the lifetime of the Claimant at the rate of \$53.27 per month starting as of November 9, 2004.

ORDER:

Therefore, based upon the foregoing findings of fact and conclusions of law, the Commissioner determines that the Claimant is entitled to the following:

1. Medical benefits regarding the Claimant's right knee condition in the amount of \$40,722.03;
2. Permanent partial disability benefits in the amount of \$22,820.32 of which \$7,606.77 shall be paid forthwith and the balance of \$15,213.55 shall be paid over time, amortized as the rate of \$53.27 per month starting on November 9, 2004 for the lifetime of the Claimant;
3. Interest shall be paid at the legal rate on the medical benefits from the date of each medical service and the permanent partial disability from July 27, 2007 to the date of payment (except for future amortized payments in number 2 above);
4. Attorneys' fees of \$9,000.00, and costs of \$2,592.10.

Dated at Montpelier, this 6th day of November 2007.

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. Sec. 670, 672.