K. R. v. Mack Molding (December 11, 2007)

STATE OF VERMONT
DEPARTMENT OF LABOR

K. R. Opinion No. 34-07WC

v. Jane Dimotsis, Esq.
Hearing Officer

Mack Molding

Patricia Moulton Powden
Commissioner

State File No. H-08964

OPINION AND ORDER

Hearing held in Montpelier on July 12, 2007.

APPEARANCES:

Charles Powell, Esq. for Claimant
Keith Kasper, Esq. for Defendant

ISSUE PRESENTED:

Whether Claimant's 2006 cervical surgery is causally related to her original 1994 work-related injury, and if so, to what benefits Claimant is entitled.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records

Claimant's Exhibits:

Claimant's Exhibit 1: *Curriculum Vitae* of Dr. Joseph Phillips
Claimant's Exhibit 2: Dr. Phillips office note, 3/14/06
Claimant's Exhibit 2A: Dr. Phillips report, 3/14/06
Claimant's Exhibit 3: Dr. Phillips report, 2/21/07
Claimant's Exhibit 4: Dr. Phillips preservation deposition, July 9, 2007
Claimant's Exhibit 5: Dr. Phillips report, 7/11/07

CLAIM:

Temporary total disability benefits under 21 V.S.A. §642
Medical benefits under 21 V.S.A. §640(a)
Attorney's fees, costs and interest under 21 V.S.A. §678

STIPULATIONS:

1. On October 17, 1994 Claimant was an employee of Defendant within the meaning of the Vermont Workers' Compensation Act (hereinafter "Act").

2. On October 17, 1994 Defendant was Claimant's employer within the meaning of the Act.

3. On October 17, 1994 Claimant suffered a personal injury to her neck arising out of and in the course of her employment with Defendant.

4. At the time of the injury, Claimant had an average weekly wage of $539.67, resulting in an initial compensation rate of $427.80.

5. Claimant has had no dependents within the meaning of the Act since July 2, 2006.

6. On September 24, 2002 Claimant was found to be at end medical result with a 22% impairment to her spine referable to her work injury.

7. Claimant alleges that her recent cervical surgery by Dr. Phillips is causally related to her original 1994 work injury. Defendant agrees as to the reasonableness and necessity of the recent surgery but disputes its causal connection to the original work injury.

8. The sole issue in this case is whether Claimant's recent cervical surgery is causally related to her 1994 compensable work injury.

9. Claimant seeks an order of compensability from the Commissioner (inclusive of weekly wage benefits, medical expense benefits, etc.) and if compensable, an award of attorney's fees and costs of the litigation process.

FINDINGS OF FACT:

1. Stipulations 1 through 9 are accepted as true.

2. Judicial notice is taken of all forms contained in the Department's file in this matter.

3. Claimant is forty-nine years old and right-hand dominant. She began working at Defendant's plastics manufacturing plant in 1986.

4. For the first five to seven years of her employment, Claimant worked as a machine operator. She worked standing up and used both of her arms repetitively, her left arm to open a machine door and her right arm to remove a part from within the machine. Claimant also had to perform other repetitive work, including using a drill press, wrapping and packaging parts and lifting boxes onto overhead pallets.

5. After five to seven years as a machine operator, Claimant was moved to floor work. In this job she was responsible for providing support to other machine operators on the production floor. At various times her duties included both operating the machines and filling them with raw plastic. The plastic came in fifty-pound bags, which Claimant had to throw over her shoulder and carry up the machines before dumping their contents inside. Claimant also had to lift and carry boxes of parts, some of which weighed up to sixty pounds. Her duties also included cleaning the machines and sweeping the floors around them. Claimant held this position for about two years.

6. In 1994 Claimant's job duties continued to involve operating machines in the repetitive manner described in Paragraph 4 above. During this time, she began to experience the gradual onset of pain in her neck and right shoulder.

7. In October 1994 Claimant sought treatment for her neck and right shoulder symptoms with Chris Allen, M.D. Dr. Allen diagnosed tendonitis related to repetitive work activities. He treated her with a steroid injection and recommended physical therapy if her symptoms persisted.

8. Claimant's symptoms persisted and later became identified primarily with her neck. She testified that in 1995 she suffered headaches originating in the base of her skull, and pain radiating from her neck, between both shoulder blades and into her right shoulder.

9. Claimant was temporarily disabled from working on account of her neck and right shoulder symptoms for nine months in 1995, from January until September.

10. Upon her return to work in September 1995 Claimant assumed a new position as a molding quality auditor. While this job did not involve the same type and extent of repetitive motion that her prior machine operator and floor support assignments did, it still required a significant amount of overhead lifting, reaching and carrying.

11. In late 1997 or early 1998 Claimant's job responsibilities changed again. In her new position as quality technician Claimant provided clerical support for engineers. Her job duties included typing, filing and measuring and inspecting parts. As with her other positions, this job required Claimant to lift and lower boxes to and from pallets, but this task often was interspersed during the day with clerical work. As to the clerical work, Claimant testified that sometimes her hands would become numb and she would be unable to type for more than fifteen minutes at a time.

12. Claimant became disabled from working again in 1999 due to chronic, persistent headaches, neck and right upper extremity pain and hand numbness. She has not worked since.

13. Claimant testified that she first began to experience left upper extremity symptoms in 1997 and that these symptoms, while not as painful or disturbing as her right-sided complaints, have persisted since that time and gradually worsened.

14. From 1997 through the present, Claimant has undergone treatments and evaluations with numerous medical providers, including primary care providers, physical therapists, chiropractors, neurosurgeons, psychologists and pain management specialists. Although left-sided symptoms such as headaches, left shoulder pain and left hand numbness sometimes have been reported, the predominant complaint throughout most of this period has been right-sided.

15. In 2001 Claimant began treating with Dr. Phillips, a neurosurgeon. Dr. Phillips described Claimant's symptoms as including pain in her neck and shoulder, right worse than left, and headaches, again right worse than left. He reviewed an MRI scan taken of Claimant's neck in 1998 and also ordered electrodiagnostic testing. Dr. Phillips made the following findings:

- Narrowing of neural foramina at C6, right worse than left;
- Narrowing of neural foramina at C7 on left;
- No evidence of cord compression;
- Mild carpal tunnel syndrome on right.

16. Based on the above findings, Dr. Phillips concluded that Claimant probably suffered from "double crush syndrome." Patients with this condition suffer symptoms in their upper extremity that are related to median nerve entrapment in their hand as well as symptoms radiating down the neck and into the upper extremity related to nerve root entrapment caused by cervical spondylosis. Spondylosis is a degenerative arthritic condition. It often is associated with the natural aging process, but its symptoms can be caused or accelerated by activities such as repetitive work.

17. Dr. Phillips recommended right carpal tunnel decompression surgery as treatment, reasoning that this would result in the "biggest bang" in terms of alleviating Claimant's symptoms, which were predominantly right-sided. Claimant underwent this surgery in May 2001.

18. Following the right carpal tunnel release surgery, Claimant's right hand and elbow symptoms improved, but she continued to experience pain in her neck radiating into her right shoulder and arm. To address these symptoms – the other half of the "double crush," so to speak – Dr. Phillips performed a right C6 foraminotomy in October 2001.

19. Initially, following the October 2001 surgery, Dr. Phillips reported that Claimant's symptoms had improved. However, by March 2002, Claimant again was complaining of muscle tension, soreness and renewed symptoms in her neck, head and shoulder. Dr. Phillips opined at the time that he had nothing more to offer from a neurosurgical point of view. He recommended physical therapy and pain management as remaining treatment options.

20. Dr. Phillips next saw Claimant in June 2005. Claimant's symptoms had continued over the intervening years, and the numbness in her left hand had worsened. Electrodiagnostic evaluation confirmed significant carpal tunnel syndrome on the left. Dr. Phillips recommended left carpal tunnel release surgery. Surgery was delayed for almost a year, however, pending authorization from Defendant's workers' compensation insurance carrier. During the intervening months, Claimant's bilateral neck and shoulder pain worsened.

21. Dr. Phillips next examined Claimant in March 2006. An MRI scan revealed that the cervical spondylosis in Claimant's neck had progressed considerably, with "large protruding encroachments at C5-6 and C6-7" and "frank cord impingement." Given the progression of symptoms in her neck and upper extremities, Dr. Phillips now recommended that Claimant undergo a two-level anterior cervical discectomy and fusion at C5-6 and C6-7. This surgery was performed in September 2006.

22. Since the 2006 surgery, Claimant's left upper extremity symptoms have improved, but she continues to suffer from cervical pain and stiffness. Her fusion has been slow to take, which accounts for at least some of her ongoing discomfort.

23. Dr. Phillips is a board-certified neurosurgeon with twenty years of neurosurgical experience. He performs between 200 and 300 surgeries annually, about half of which involve the cervical spine.

24. In Dr. Phillips' opinion, the need for Claimant's 2006 cervical surgery was directly related to the repetitive job activities she performed for Defendant until she stopped working in 1999. Dr. Phillips reasoned as follows:

- The degenerative changes in Claimant's neck that were visible on the MRI in 1998 would not themselves have caused symptoms but for the repetitive stress caused by her job activities;

- Those degenerative changes, and particularly the right-sided symptoms they caused, necessitated the 2001 right C6 cervical foraminotomy;

- It would have been reasonable medically to address the degenerative changes at C5-6 and C6-7 at the same time, but this would have required a far more complicated surgery, one that Dr. Phillips felt was not called for given the relative paucity of left-sided symptoms as compared to the right;

- Once Claimant's left-sided symptoms worsened, it became clear that the degenerative changes at C5-6 and C6-7 had to be addressed surgically.

25. As Dr. Phillips testified, therefore, determining the causal relationship of Claimant's 2006 surgery to her work for Defendant was a matter of "connect[ing] the dots". He opined if the 2001 surgery was necessitated by Claimant's work, then the 2006 surgery must have been as well, because both surgeries were performed to address the same degenerative condition in her cervical spine, a condition that had been aggravated by the repetitive work she did for Defendant.

26. In March 2006, Dr. William Boucher performed a medical records review at Defendant's request and rendered an opinion as to the causal relationship between Claimant's work for Defendant and the 2006 cervical fusion surgery. Dr. Boucher is board-certified in occupational medicine. His medical practice consists almost entirely in performing independent medical evaluations and records reviews for workers' compensation insurance carriers.

27. In Dr. Boucher's opinion, the progression of left-sided symptoms that necessitated Claimant's 2006 cervical fusion surgery could not possibly have been work-related. Dr. Boucher's reasoning is as follows:

- The repetitive work Claimant performed for Defendant caused greater symptoms on her right side than on her left side, a fact that was borne out by the 1998 MRI findings, which documented more foraminal narrowing at C6 on the right than at C7 on the left;

- The 2005 MRI documented significantly more advanced degenerative changes at both C5-6 and C6-7, including disc herniations at those levels that had not been present at the time of Dr. Phillips' 2001 surgery;

- The combination of these disc herniations with Claimant's pre-existing spondylosis caused pinched nerves in her left arm and resulted in worsening left upper extremity symptoms;

- Had the disc herniations been caused by Claimant's work for Defendant, they would have been apparent at least by 2001 and certainly before 2006;

- By 2006 Claimant had not worked for Defendant for at least six years, a gap in time that would make any causal connection between her repetitive job-related activities and her worsening symptoms medically implausible.

28. Thus, Dr. Boucher believed that Claimant's left-sided symptoms worsened because of age-related degenerative changes in her cervical spine, changes that were neither caused nor aggravated by her work for Defendant.

CONCLUSIONS OF LAW:

1. When an employer seeks to terminate coverage for medical benefits, defendant has the burden of proving that the treatment at issue is not reasonable. *Liscinsky v. Temporary Payroll Incentives, Inc.*, Opinion No. 9-01WC (March 22, 2001), *citing Rolfe v. Textron, Inc.*, Opinion No. 8-00WC (May 16, 2000).

2. A treatment may be unreasonable either because it is not medically necessary or because it is not related to the compensable condition or injury. *See, e.g., Morrisseau v. State of Vermont, Agency of Transportation,* Opinion No. 19-04WC (May 17, 2004). In this case, Defendant concedes that the repetitive work Claimant performed in the course of her employment for Defendant until 1999 either caused or aggravated her cervical spondylosis. Defendant further concedes that as a result Claimant suffered debilitating symptoms in her neck and right upper extremity, symptoms that required surgery in 2001. Defendant does not concede, however, that the surgery performed in 2006 to address Claimant's worsening left upper extremity symptoms was related either to Claimant's prior job activities or to the compensable condition that led to her 2001 surgery.

3. It is true, as the leading workers' compensation commentator has stated that all of the medical consequences and sequelae that flow from an injured worker's primary compensable injury are themselves compensable as well as the original injury. 1 *Larson's Workers' Compensation Law* §10.01. Determining which medical consequences flow from the primary injury and which do not, however, requires expert medical testimony. *Lapan v. Berno's, Inc.,* 137 Vt. 393 (1979). Establishing the requisite connection, furthermore, requires more than mere possibility, suspicion or surmise. Rather, the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.,* 112 Vt. 17 (1941).

4. In claims involving conflicting medical evidence from expert witnesses, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive, considering (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).

5. The "dueling experts" in this claim are Dr. Phillips and Dr. Boucher. Dr. Phillips has in his favor the following factors: (1) he has been Claimant's treating neurosurgeon since 2001 and thus has had an opportunity to observe the progression of her symptoms over time; (2) he has examined all pertinent records and conducted a comprehensive evaluation of Claimant's condition; and (3) as a practicing neurosurgeon he has extensive training and experience in the evaluation and treatment of cervical conditions such as the one from which Claimant suffers.

6. For his part, Dr. Boucher has the following factors in his favor: (1) he has examined all pertinent records; and (2) as a specialist in occupational medicine he has been trained to evaluate workplace injuries with a particular eye towards the issue of causation.

7. Were the issue in this claim the appropriateness of the 2006 surgery as treatment for Claimant's symptoms, the combination of Dr. Phillips' neurosurgical training and experience and his treatment relationship with Claimant would lend greater weight to his opinion. The issue, however, is causation, whether symptoms that arose initially in 1994, seven years before Dr. Phillips came on the case, and became disabling in 1999, two years before his involvement began are compensable. Dr. Phillips had no particularly timely knowledge, therefore, of Claimant's specific work activities and their impact on the progression of her cervical disease.

8. As to Dr. Phillips' familiarity with the progression of the symptoms in Claimant's left upper extremity, furthermore, this advantage dissipates upon close scrutiny as well. In fact, after Claimant's initial recovery period from the 2001 surgery, Dr. Phillips saw her just once in 2002 and then not again until 2005, by which time her left-sided symptoms already had worsened considerably. Dr. Phillips' status as treating neurosurgeon, therefore, does not confer as much additional credibility as might appear at first blush.

9. Again, were the issue anything but causation Dr. Boucher's reliance solely on the cold medical record, with no physical examination of the Claimant to supplement and corroborate his conclusions, might prove fatal. Under the facts of this claim, however, Dr. Boucher's analysis depends primarily on his comparison of Claimant's MRI findings in 1998, 2001 and 2005. Under these circumstances, a hands-on evaluation of Claimant, whether in the context of an independent medical examination or as part of a treating physician relationship, would add nothing.

10. In evaluating the relative strength of the two doctors' opinions, therefore, the key factor is not which one was the treating doctor and which one was the independent reviewer, or even which one physically examined Claimant and which one did not. It is simply which one has rendered an opinion that is clearer, more thorough and better supported objectively.

11. Dr. Phillips testified that the disease that he treated surgically in 2006 was the same disease that he had treated surgically in 2001. According to his analysis, therefore, if the 2001 surgery was causally related to Claimant's work, then the 2006 surgery must have been causally related as well. But this analysis begs the workers' compensation causation question. The fact is, Claimant's left-sided symptoms were not severe enough to warrant surgical attention in 2001, and her MRI at the time did not reveal the disc herniations or advanced deterioration that were evident in the 2006 MRI. The workers' compensation causation question, therefore, is what caused her condition to deteriorate further to the point where the 2006 surgery became necessary? Dr. Phillips' analysis provides no answer.

12. In Dr. Boucher's opinion, Claimant's gradually worsening left-sided symptoms resulted from the disc herniations that occurred some time after 2001. Dr. Boucher plausibly identified both the cause of Claimant's worsened left upper extremity symptoms – the disc herniations – and the cause of the herniations themselves – the natural progression of her underlying degenerative disease. Dr. Boucher found no medical evidence from which to conclude that Claimant's work for Defendant accelerated these events in any way, and in fact concluded that such a link was medically unsupportable.

13. It is true that when work activities hasten disabling symptoms in a degenerative disease, the result is deemed work-related. *Stannard v. Stannard*, 175 Vt. 549 (2003). Based on this tenet of workers' compensation law, the neck and right upper extremity symptoms Claimant initially suffered, and the 2001 surgery Dr. Phillips performed to treat them, clearly were compensable. But given that Claimant stopped working in 1999, and her left-sided symptoms did not become disabling for some years thereafter, it is no longer reasonable to conclude that work activities contributed in any way to necessitate Claimant's 2006 surgery. The more plausible conclusion is that Claimant's condition gradually worsened simply because that is what degenerative conditions do over time.

14. I conclude, therefore, that the more credible view of Claimant's 2006 surgery is that it was necessitated by the natural progression of her underlying degenerative cervical disease and not by her work for Defendant. Her claim for workers' compensation benefits related to the 2006 surgery, therefore, must fail.

ORDER:

1. Claimant's claim for workers' compensation benefits associated with her 2006 cervical surgery is DENIED;

2. Because Claimant has not prevailed, she is not entitled to an award of attorney's fees or costs under 21 V.S.A. §678.

DATED at Montpelier, Vermont this 11th day of December 2007.

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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.