T. S. v. State of Vermont, Agency of Transportation (November 12, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

T. S.	Opinion No. 45-08WC
v.	By: Phyllis G. Phillips, Esq., Hearing Officer
State of Vermont Agency of Transportation	For: Patricia Moulton Powden, Commissioner
	State File No. X-06039

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
William Blake, Esq., for Defendant

ISSUE PRESENTED:

Is Defendant entitled to judgment as a matter of law on the question whether Claimant has reached an end medical result?

FINDINGS OF FACT:

The following facts are undisputed:

1. On May 23, 2006 Claimant had been an eighteen-year employee of the State of Vermont, then working for the Mapping Division of the Agency of Transportation. While at work on that day, Claimant was knocked to the ground when a visitor to her office inadvertently stepped backward into her path.

2. Claimant was transported to the hospital complaining of low back and increased right leg pain.

3. Claimant attempted to return to work on June 27, 2006 but fell again and was unable to continue.

4. Defendant accepted both the May 23, 2006 and June 27, 2006 falls as involving compensable injuries and began paying workers' compensation benefits accordingly.

5. Claimant has a prior medical history of chronic pain disorder focused in the low back, hip and right leg relating to a snowmobile accident in 1991. Several treatment providers noted non-physiological components to Claimant's examinations following that accident, and psychological factors were found to be significant.

6. At Defendant's request, on July 27, 2006 Claimant underwent an independent medical evaluation with Dr. Verne Backus. Dr. Backus stated his diagnosis as follows:

> Chronic low back and right sciatica by history. Illness behavior (e.g. symptom magnification behavior) was severe.
>
> . . .
>
> Her current presentation is best described by a Pain Disorder.

7. As to causation, Dr. Backus stated:

> Based on the available information, to a reasonable degree of medical certainty, the primary diagnosis was only a temporary exacerbation of her pre-existing condition. She has a well-established history of chronic pain disorder focused in the low back to SI and hip to right leg for many years that has been progressing in subjective symptoms over the last year without any evidence of progressive signs.
>
> There was no objective evidence of an injury on any of the diagnostic studies and, in this examiner's opinion, the falls at work were limited to soft tissue injuries that healed within 2-3 weeks maximum each time with subjective symptoms beyond that being only manifestations of her pre-existing pain disorder.

8. As to end medical result, Dr. Backus stated:

> Maximum medical improvement has been reached at this time being one month from her second fall at work, which is more than enough time for her soft tissue injuries to have healed. It is difficult to see this given the superimposed pain disorder, but that is characteristic of that condition.

9. As to work capacity, Dr. Backus stated:

> Based on the analysis of this case Ms. Southworth has no restrictions that are directly related to her work injuries. However, I would not recommend she return to work but rather stay on short-term disability until her pain syndrome is addressed, as discussed below.

10. Last, as to further treatment recommendations, Dr. Backus stated:

> Based on a careful review of the clinical issues with this case, to a reasonable degree of medical certainty, no further medical care, surgical interventions or physical therapy is required that is directly related to her work injuries. In order for her to return to work, however, unrelated to her work injuries I agree an IDE at SpINE to evaluate for a multidisciplinary approach has a reasonable chance of success in returning her to work and at the same time may further define and guide her to what appropriate

psychological treatment may help her pre-existing non-work-related pain disorder.

11. Relying on Dr. Backus' report, Defendant filed a Form 27 on September 21, 2006. On October 11, 2006 the Department rejected the proposed discontinuance on the grounds that "Dr. Backus' report and opinion that claimant has reached pre-injury status is not persuasive."

12. On October 25, 2006 Defendant filed a Notice and Application for Hearing on the issue of end medical result.

13. On December 4, 2006 Defendant filed a second Form 27, again based on Dr. Backus' IME report. Again the Department rejected the proposed discontinuance, finding that Dr. Backus' conclusion that Claimant had returned to her pre-injury baseline was inconsistent with his recommendation that she not return to work until she received further treatment for her pre-existing pain syndrome.

14. On May 25, 2007 the Department reconsidered its denial of Defendant's Form 27. Considering not only Dr. Backus' end medical result opinion but also the lack of any further treatment recommendations from Dr. Chronister, one of Claimant's treating physicians, the Department concluded that Claimant had failed to provide any medical evidence to refute a finding of end medical result. This time, therefore, it approved the discontinuance.

15. Notwithstanding the discontinuance of her workers' compensation benefits, Claimant continued to treat. From May 14, 2007 through May 21, 2007 she was an in-patient at a rehabilitation hospital in Concord, New Hampshire, under Dr. Chronister's care.

16. Claimant filed a Notice and Application for Hearing to appeal the discontinuance. Claimant identified her treating physicians, Dr. Hart and Dr. Chronister, as expert medical witnesses.

17. Defendant deposed Dr. Chronister on December 6, 2007. Dr. Chronister testified that in his opinion Claimant suffered from complex regional pain syndrome (CRPS) and that her fall at work in May 2006 destabilized what previously had been a stable medical condition. Dr. Chronister further testified that there were two physicians affiliated with the pain center at Massachusetts General Hospital who do research in CRPS. With their expertise in mind, Dr. Chronister referred Claimant on for evaluation, diagnosis and possible treatment. Having done so, Dr. Chronister testified that he had no further treatment recommendations to offer Claimant and that he no longer was following her care.

18. Defendant deposed Dr. Hart on January 10, 2008. Dr. Hart testified that she did not hold an opinion to the required degree of medical certainty either as to Claimant's medical diagnosis or as to whether further medical treatment would improve her condition significantly.

19. Claimant underwent an evaluation with Drs. Rivera and Gulur at the Massachusetts General Hospital Pain Center on November 2, 2007. As to diagnosis, the report of this evaluation states, "It is likely that [the] primary component of the patient's pain is neuropathic in nature with inflammatory contribution as well." As for treatment, Drs. Rivera and Gulur commented as follows:

> [W]e advise the patient at length that her presentation was certainly atypical for [complex regional pain syndrome] and regardless of the co-diagnosis, the treatment would be the same, which is primarily self-motivated physical therapy and strengthening exercise. We then further emphasize the need for aggressive prolonged physical therapy and that the patient may benefit from short-term inpatient physical therapy course, however, that would need to be decided upon between her and her primary care physician.

CONCLUSIONS OF LAW:

1. Defendant seeks summary judgment on the issue of end medical result. It contends that because neither of Claimant's treating physicians has made any specific recommendations for further treatment, as a matter of law Claimant thereby lacks the evidence necessary to refute Dr. Backus' end medical result finding.

2. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *Samlid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979).

3. Defendant argues that having produced sufficient evidence to support its discontinuance at the informal level pursuant to 21 V.S.A. §643a, the burden then shifted to Claimant to prove her entitlement to additional benefits. Vermont law clearly provides to the contrary. Once a claim has been accepted and benefits have been paid, the party seeking to discontinue bears the burden of proving that to do so is proper. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974). This is true even if, as was the case here, the discontinuance previously had been approved at the informal level. *F.B. v. Visiting Nurse Association*, Opinion No. 29-06WC (July 7, 2006). Because the standard of proof is different – reasonable support at the informal level, preponderance at the formal level – different conclusions logically may result.

4. Defendant's evidence fails to achieve this standard, because it centers on the wrong question. The true focus of the debate in this claim is whether Claimant's work-related falls aggravated her underlying pain disorder, not whether she has reached end medical result yet. If the work-related falls caused a compensable aggravation, then arguably Claimant has not yet reached end medical result. Further treatment, in the form of self-directed and/or in-patient physical therapy as recommended by Drs. Rivera and Gulur, still might improve her condition. If, on the other hand, the work-related falls caused nothing more than a minor soft tissue injury that neither aggravated nor accelerated Claimant's underlying pain disorder, then perhaps Dr. Backus' end medical result determination will stick.

5. Taking the evidence in the light most favorable to Claimant, genuine issues of material fact exist that preclude summary judgment. Dr. Chronister testified that Claimant's work-related falls destabilized what previously had been a stable medical condition. With that statement he provided the foundation for what ultimately might be a compensable work-related aggravation. If so, the treatment suggested by Drs. Rivera and Gulur reasonably might be interpreted to negate a finding of end medical result.

6. The sole purpose of summary judgment review is to determine if a genuine issue of material fact exists. If such an issue does exist, it cannot be adjudicated in the summary judgment context, no matter how unlikely it seems that the party opposing the motion will prevail at trial. *Fonda v. Fay*, 131 Vt. 421 (1973). However tenuous or unlikely the evidence in support of Claimant's claim that her work-related falls aggravated her underlying pain disorder, she is entitled nonetheless to present the evidence and litigate the question. Summary judgment against her is not appropriate.

ORDER:

Defendant's Motion for Summary Judgment is **DENIED**.

DATED at Montpelier, Vermont this 12th day of November 2008.

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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.