Christine Erickson v. Kennedy Brothers, Inc. (December 14, 2010)

STATE OF VERMONT
DEPARTMENT OF LABOR

Christine Erickson

v.

Kennedy Brothers, Inc.

Opinion No. 36-10WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Valerie Rickert
Acting Commissioner

State File No. S-09163

OPINION AND ORDER

Hearing held in Montpelier, Vermont on April 26 and August 18, 2010
Record closed on October 8, 2010

APPEARANCES:

Mary Kirkpatrick, Esq., for Claimant
William Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Was Claimant's L4-5 disc herniation causally related to her November 23, 2001 compensable work injury?

2. If yes, to what workers' compensation benefits is Claimant entitled?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 5: Medical Discussion Paper, Limping and Back Pain
Claimant's Exhibit 12: *Curriculum vitae,* Richard Levy, M.D.
Claimant's Exhibit 13: List of Dr. Levy's prior testimony
Claimant's Exhibit 14: Dr. Levy's patient ledger
Claimant's Exhibit 15: Letter from Marge McCluskey to Dr. Levy, October 28, 2008
Claimant's Exhibit 16: Dr. Levy report, November 3, 2008
Claimant's Exhibit 17: Letter from Dr. Levy to Attorney Blake, July 23, 2009
Claimant's Exhibit 20: Invoice of attorney fees and costs
Claimant's Exhibit 21: Contingency Fee Agreement
Claimant's Exhibit 22: Dr. Davignon Independent Medical Evaluation, 01/11/06
Claimant's Exhibit 23: Medical bills chart

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.

Claimant's November 2001 Work Injury and Subsequent Medical Course

3. On November 23, 2001 Claimant was at work, assisting her employer to string outdoor Christmas lights, when she caught her right leg in a stepladder and fell. Claimant sustained a severe tibial plateau fracture, which required two surgeries to repair. Defendant accepted the injury as compensable and paid workers' compensation benefits accordingly.

4. The injury caused permanent trauma to Claimant's right knee. It aches, lacks full range of motion and feels weak. As a result of these deficits, Claimant moves her body differently than she did previously, consistently leaning to her left and favoring her right side. She walks up and down stairs one step at a time, always leading with her left foot rather than alternating with her right. She cannot bend, squat or twist properly. Even when sitting or driving, she twists her core and cocks her weight more to her left side.

5. Because Claimant's right knee lacks full extension, she sometimes "toe walks," meaning that she completes her stride with her right heel still slightly above the ground. This gait abnormality is subtle; Claimant herself is not always aware that she is doing it. Her mother has observed it, as have some, but not all, of the physicians who have examined Claimant over the course of the past several years. It fluctuates in degree with the time of day (worse in the morning and in the evening) and the weather. It also worsens when Claimant is particularly fatigued, as after a long day spent standing or walking.

6. In December 2003 Claimant fractured her femur when her right knee gave out while descending some stairs. Defendant accepted this injury as compensable and paid workers' compensation benefits accordingly.

7. In November and December 2005 Claimant experienced two episodes of low back pain, one apparently prompted by having slept in a propped up position due to a cold, the other by lifting a bag of cat litter. Claimant had no prior history of low back pain. Following these episodes, Claimant's family physician, Dr. Hoffman, and her treating orthopedic surgeon, Dr. Kristiansen, both determined that her abnormal gait pattern was at least partly to blame for her low back pain. Defendant's independent medical evaluator, Dr. Davignon, concurred. All three recommended a course of physical therapy to emphasize back stretching, posture and gait training. Claimant underwent this therapy in early 2006, and Defendant bore the cost as causally related to her original 2001 work injury.

Claimant's Medical Treatment in February 2008 and Thereafter

8. Claimant is a 25-year cigarette smoker. She has a history of chronic bronchitis and also of rib fractures after coughing.

9. On February 6, 2008 Claimant presented to her family physician with a complaint of right-sided rib pain that had begun two days earlier, after she had coughed hard while twisting at the same time. Although Claimant suspected that she had fractured a rib, x-rays were negative.

10. More than a month later, on March 16, 2008 Claimant presented to the Porter Hospital Emergency Room complaining of left-sided low back pain that she reported had been present "for a couple of weeks." Claimant advised that she had had "quite a cough," for which she had seen her family physician "off and on for the last few months," but that the pain associated with that had been on the right side, whereas her current pain was on the left. Claimant was diagnosed with muscular back pain and referred for a course of physical therapy.

11. Claimant's physical therapist, Michael DiPalermo, evaluated her on March 19, 2008. On March 25, 2008 Maria Collette, a physician's assistant at Claimant's family practice, also evaluated her. Both providers reported that Claimant's low back symptoms had begun in February 2008, though neither specified exactly when. Ms. Collette further reported that Claimant's pain had worsened significantly over the prior weekend, thus prompting her visit to the Emergency Room, and that she now was experiencing radicular symptoms from her left buttock down her left leg and into her ankle.

12. Ms. Collette next examined Claimant on May 12, 2008. By that time, Claimant's low back and left leg symptoms had worsened further. Her response to a straight leg raise test, an objective test indicating the presence or absence of disc herniation, was positive. A subsequent MRI confirmed that Claimant had in fact suffered an L4-5 disc herniation with nerve root impingement. This correlated with Claimant's clinical signs and accounted for her symptoms.

13. Claimant's disc herniation most likely had an insidious rather than an acute onset, and probably occurred some time between March and May 2008. This is established by the fact that her straight leg raise test was reported to be negative at the March 16, 2008 emergency room visit. It was indicative of only a partial disc herniation at Ms. Collette's March 25th evaluation, but did not indicate a full herniation until the May 12th visit.

14. Claimant treated for her disc herniation with Dr. Flimlin, a specialist in physical and rehabilitative medicine at the Spine Institute of New England. Dr. Flimlin recommended physical therapy and epidural steroid injections. When neither of these treatments proved successful, Dr. Flimlin referred Claimant on to Dr. Braun, a surgeon. Dr. Braun performed disc surgery on December 11, 2009. Since that time, Claimant has had good relief of her radicular symptoms.

Expert Medical Opinions

15. Claimant's treating physicians, Drs. Kristiansen, Flimlin and Bicknell, all testified to the causal relationship between her 2001 work injury, her abnormal gait and her 2008 disc herniation.

16. Dr. Kristiansen is a board-certified orthopedic surgeon. He has provided ongoing treatment to Claimant for a variety of orthopedic issues since shortly after her original knee injury in November 2001. Dr. Kristiansen's primary area of interest involves orthopedic injuries to the arms and legs. He is fully capable of diagnosing disc herniations and disc trauma, although he typically refers such injuries to his colleagues for treatment.

17. Dr. Flimlin is board certified in physical medicine and rehabilitation. She routinely treats patients with mechanical low back pain and/or disc herniation issues. Dr. Flimlin evaluated and treated Claimant's low back pain from August 2008 until October 2009, at which point she referred Claimant on to Dr. Braun for surgical consideration.

18. Dr. Donald Bicknell has been one of Claimant's primary care physicians since 1986. Dr. Bicknell has treated many patients who developed low back pain after suffering an injury that altered their gait. He himself experienced low back pain many years ago, after suffering a tibial plateau fracture that temporarily caused him to limp.

19. There is very little information in the medical literature about the relationship between altered gait patterns and back pain. The premise is that walking with an altered gait pattern throws off the alignment of the hips and back and causes a lateral sway. Maintaining the body's altered center of gravity puts repetitive stress on the trunk muscles, which in turn increases the force transmitted across the lower back. The resulting wear and tear on the lumbar spine is thought to cause or accelerate degenerative disc changes.

20. Drs. Kristiansen, Flimlin and Bicknell all testified, to a reasonable degree of medical certainty, that this is what occurred in Claimant's case and what ultimately led to her 2008 disc herniation. Dr. Kristiansen's testimony was particularly credible. As Claimant's treating orthopedist for the many years since her initial knee injury, Dr. Kristiansen has been well able to observe the lasting impact that her inability to fully flex her knee has had on her body mechanics. Dr. Kristiansen specifically noted that Claimant's initial injury was "very severe," that she endured a lengthy rehabilitation period afterwards and that her altered gait affected her both when walking and when standing.

21. In further support of his conclusion that Claimant's abnormal gait pattern likely has caused the degenerative process in her lower back to accelerate, Dr. Kristiansen referred to a medical discussion paper authored by a doctor who also has training in biomechanics.[1] Although not peer-reviewed, I agree with Dr. Kristiansen that the paper is well-reasoned and makes logical sense.

22. Defendant's medical expert, Dr. Levy, testified that there is no scientific basis for concluding that an abnormal gait pattern can either accelerate disc degeneration or cause a disc to herniate. Dr. Levy is a board-certified neurologist. He reviewed Claimant's medical records and performed an independent medical examination in November 2008. In the course of his examination, Dr. Levy personally observed Claimant's abnormal gait.

23. Dr. Levy cited to two peer-reviewed medical journal articles he had read in which the relationship between limping and low back pain was studied. One study involved patients with congenital club foot, the other involved amputees. According to Dr. Levy, low back pain was not established to be more prevalent in either study group than it was in the general population. From this research, as well as his own experience with gait dysfunction patients, Dr. Levy determined that it was impossible to conclude, to the required degree of medical certainty, that Claimant's abnormal gait either caused or accelerated the disc degeneration in her lumbar spine.

24. Dr. Levy agreed that the biomechanical effect of an abnormal gait pattern would be to cause the body's center of gravity to shift, but disagreed that this would result in either mechanical back pain or lumbar disc degeneration. Instead, Dr. Levy cited a 25-year history of cigarette smoking as the most significant risk factor for degenerative disc disease in Claimant's case. Smoking decreases the blood supply to the area and causes the discs to become dessicated and more susceptible to cracking.

[1] Harrington, Ian J., M.D., *Limping and Back Pain*, Medical Discussion Paper presented to The Workplace Safety and Insurance Appeals Tribunal, March 2004 (Claimant's Exhibit 5).

25. Drs. Kristiansen, Flimlin and Bicknell all testified that although degenerative disc disease is a multi-factorial process, in Claimant's case her gait abnormality was a primary contributing cause. Of note, although smoking might contribute to disc degeneration throughout one's spine, the L4-5 disc is in an area that is specifically affected by gait mechanics. Claimant had evidence of degenerative disease at other levels in her spine, but only her L4-5 disc degenerated to the point of herniation. This is a strong indication that Claimant's abnormal gait was a more significant factor in accelerating the disease there than just her history of smoking alone.

26. As for the specific cause of Claimant's L4-5 disc herniation, in Dr. Levy's opinion this most likely was precipitated not by her gait abnormality, but by the episode of severe coughing she experienced in early February 2008. A particularly forceful cough can put increased stress on the abdominal muscles. When transferred to the spinal column, the increased force can cause an already degenerated disc to begin to herniate.

27. A disc is comprised of a hard outer layer, the annulus fibrosis, surrounding a jelly-like inner material, the nucleus pulposus. When the outer layer cracks, the jelly-like material inside may be pushed out, either gradually or all at once. If the extruded material compresses a nerve, the patient will experience radicular symptoms. Depending on the extent of the herniation, it may take some time for this to occur. Thus, the fact that Claimant had a severe coughing episode in early February 2008 but did not experience symptoms indicative of a disc herniation until some time later does not necessarily mean that the two events were unrelated. It is impossible to know definitively whether this is what happened, however.

28. Drs. Kristiansen, Flimlin and Bicknell all discounted the coughing episode as being in any way related to Claimant's disc herniation. Rather, they attributed the cause to the gradual progression of Claimant's degenerative disc disease, accelerated as it was at the L4-5 level by her abnormal gait pattern.

29. Claimant's physical therapist, Michael DiPalermo, also testified as to the causal link, if any, between Claimant's altered gait pattern, her low back pain and her L4-5 disc herniation. Claimant has undergone extensive courses of physical therapy since her 2001 injury, and Mr. DiPalermo has had the opportunity to assess her gait on multiple occasions over the years.

30. After reviewing the medical records concerning Claimant's coughing episode in early February 2008, Mr. DiPalermo testified that it was impossible to tell, to the required degree of medical certainty, exactly what caused Claimant's subsequent disc herniation. He admitted, however, that her abnormal gait pattern put her at greater risk for low back pain and made her more susceptible to a disc herniation, whether from coughing or otherwise. In this respect, Mr. DiPalermo's opinion coincided with that of Claimant's other medical experts.

Alleged Periods of Temporary Total Disability

31. At some point after her injury Claimant began working at the Wayberry Inn. She was terminated from her job there in May 2009, for reasons unrelated to her injury. Subsequently, Claimant collected unemployment benefits continuously up through the date of the formal hearing. She was anticipating starting a new job with the census bureau the day following.

32. Claimant testified that by the time she was laid off from work in May 2009 her low back pain had worsened to the point that it likely would have disabled her within another month. She further testified that her doctors told her "to do nothing" for twelve weeks following her December 2009 disc surgery. Last, Claimant alleged in her pleadings that she was disabled from working on August 28, 2008 and again on May 28, 2009, the days when she underwent epidural steroid injections at Dr. Flimlin's referral. Claimant's testimony notwithstanding, no medical evidence was introduced to substantiate her disability for any of these time periods.

Claimant's Medical Expenses and Mileage Reimbursement Claim

33. Claimant submitted into evidence a chart detailing the medical expenses that have been incurred relative to treatment for her low back pain and disc herniation. The billed charges total $54,603.37. Of this amount, Claimant has paid $1,465.91. Various group health insurance carriers covered most of the remaining charges; approximately $3,500.00 remains unpaid. None of the billed charges have been processed in accordance with the Workers' Compensation Medical Fee Schedule.

34. Although Claimant alleged in her post-hearing submissions that "her life and credit" have been impacted negatively as a result of Defendant's refusal to pay her outstanding medical bills, she failed to produce any evidence whatsoever to establish the truth of this assertion.

35. Claimant also alleged in her post-hearing submissions an entitlement to mileage reimbursement totaling $494.37, covering trips to and from medical appointments between 2008 and 2010. Again, Claimant failed to submit any evidence at the hearing relevant to this claim. In particular, there is no evidence as to her regular commute distance to and from work.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

Compensability of Claimant's Disc Herniation

2. At issue in this claim is whether there is a causal link connecting Claimant's initial work-related knee injury, her abnormal gait, the progression of her degenerative disc disease and her L4-5 disc herniation. If yes, then the latter condition is compensable as a natural consequence flowing directly from the original compensable injury. *A.B. v. Peerless Insurance Co.*, Opinion No. 16-08WC (April 16, 2008); *see generally*, 1 *Larson's Workers' Compensation Law* §10.01.

3. There is no dispute among the medical experts that Claimant developed an abnormal gait as a direct result of her initial knee injury. I conclude that at least this much of a causal link has been established, therefore.

4. Where the experts diverge is as to the impact, if any, that Claimant's abnormal gait had on the development and progression of degenerative disc disease in her lumbar spine. Drs. Kristiansen, Flimlin and Bicknell all opined, to a reasonable degree of medical certainty, that Claimant's altered gait accelerated the progression of the disease, thereby making her more susceptible to a lumbar disc herniation. Dr. Levy opined that her altered gait had no effect whatsoever.

5. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (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 (September 17, 2003).

6. Applying this test to the expert opinions rendered here, I conclude that Claimant's experts are the most persuasive. Dr. Kristiansen's opinion was particularly compelling. As Claimant's treating orthopedic surgeon for many years, Dr. Kristiansen has been able to observe the impact that her abnormal gait has had on her body mechanics over time. The basis for his opinion was clear and thorough. His testimony as to the biomechanical forces that likely cause lumbar disc degeneration lent further support to his conclusion.

7. Although Claimant's cigarette smoking likely contributed to her degenerative disc disease, I am unconvinced that this was the primary factor, as Dr. Levy concluded. Nor can I accept his conclusion that Claimant's altered gait played no role whatsoever. Rather, I am persuaded by Dr. Flimlin's testimony that the fact that Claimant's disc herniation occurred at a disc level that is specifically affected by gait mechanics indicates that her abnormal gait most likely was the primary contributing cause of the degeneration there.

8. I conclude, therefore, that the gait abnormality that resulted from Claimant's initial knee injury either caused or accelerated the progression of degenerative disease at the L4-5 level of her lumbar spine. The disc herniation that followed was the natural consequence of that accelerated degeneration, and likely occurred sooner than it otherwise would have had Claimant not suffered from an abnormal gait. *Stannard v. Stannard Co., Inc.*, 175 Vt. 549, 552 (2003), citing *Jackson v. True Temper Corp.*, 151 Vt. 592, 596 (1989).

9. In reaching this conclusion, I must reject Dr. Levy's opinion that the coughing episode Claimant reported in early February 2008 was the likely cause of a disc herniation that did not become symptomatic until some weeks later. Although I understand how such a chain of events might be possible, I cannot discern from Dr. Levy's testimony why it would have been probable in Claimant's case.

10. I conclude that Claimant has sustained her burden of proving that her L4-5 disc herniation was causally connected to her original work-related injury, and is therefore compensable.

Temporary Disability Benefits

11. Claimant asserts entitlement to temporary total disability benefits for a period extending from some time in June 2009 (one month after her most recent employment terminated) until approximately mid-March 2010 (twelve weeks after her December 2009 disc surgery). Claimant also asserts entitlement to disability benefits for two days on which she underwent epidural steroid injections at Dr. Flimlin's referral.

12. Defendant argues that because Claimant was receiving unemployment compensation for these time periods she is disqualified from receiving temporary total disability benefits. I agree that by asserting that she was available for and able to work for unemployment compensation purposes, *see* 21 V.S.A. §1343(a)(3), Claimant cast doubt on any claim that she was at the same time temporarily totally disabled for workers' compensation purposes. *See, e.g., Clay v. Precision Valley Communication,* Opinion No. 38-02WC (August 28, 2002); *Savage v. International Cheese Company, Inc.*, Opinion No. 60-95WC (November 30, 1995). Even more troublesome, Claimant did not produce any medical evidence at all to substantiate her claim. I conclude that she has failed to sustain her burden of proof on this issue, and therefore is not entitled to temporary disability benefits for any of the periods she claims.

Medical Expenses and Mileage

13. Having concluded that Claimant's low back pain and L4-5 disc herniation are compensable, Defendant is obligated to pay for all reasonable and necessary medical services and supplies causally related to treatment of these conditions. 21 V.S.A. §640(a). To the extent Claimant has paid some of these charges herself, I conclude that she is entitled to full reimbursement, with interest in accordance with 21 V.S.A. §664.

14. As for charges that were either paid by other insurance or remain outstanding, I conclude that Defendant is obligated to reimburse and/or pay these in accordance with the workers' compensation medical fee schedule, *Workers' Compensation Rule 40*, with interest as charged by the providers and in accordance with §664. Claimant's assertion to the contrary, there is no legal basis for requiring Defendant to pay at anything other than the applicable fee schedule rates.

15. I conclude that Claimant is not entitled to an award of mileage reimbursement for her travel to and from medical appointments at this time. She failed to present this claim at hearing, and it is unclear even from her post-hearing submissions whether she has correctly calculated the amount she claims is due. Claimant is free to present Defendant with a revised, substantiated claim, but not in the context of the current proceeding.

Costs and Attorney Fees

16. Claimant successfully established the compensability of her L4-5 disc herniation, and in that respect I conclude that she has substantially prevailed. *Hodgeman v. Jard,* 157 Vt. 461, 465 (1991). She is entitled to an award of costs and attorney fees commensurate with the extent of her success. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997). In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion to submit evidence of her claim for allowable costs and attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Medical benefits in accordance with Conclusions of Law Nos. 13 and 14 above, with interest as required under 21 V.S.A. §664;

2. Allowable costs and attorney fees in accordance with Conclusion of Law No. 16 above; and

3. Such other workers' compensation benefits as Claimant shall prove her entitlement as causally related to her November 23, 2001 compensable injury and/or her May 2008 L4-5 disc herniation.

DATED at Montpelier, Vermont this 14th day of December 2010.

_____
Valerie Rickert
Acting 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.