Pamela (Barrett) Simmons v. Landmark College Inc. (February 28, 2013)

STATE OF VERMONT
DEPARTMENT OF LABOR

Pamela (Barrett) Simmons

v.

Landmark College, Inc.

Opinion No. 07-13WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. W-59833

OPINION AND ORDER

Hearing held in Montpelier, Vermont on March 1, 2012
Record closed on January 7, 2013

APPEARANCES:

Thomas Bixby, Esq., for Claimant
Bonnie Shappy, Esq., for Defendant

ISSUE PRESENTED:

Did Claimant's May 2011 cervical surgery constitute reasonable medical treatment for her compensable March 2005 work injury?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	First Report of Injury
Claimant's Exhibit 2:	Agreement for Permanent Partial Disability Compensation (Form 22)
Claimant's Exhibit 3:	Ergonomic Work Site Evaluation, February 11, 2008
Claimant's Exhibit 7:	Letter from Attorney Bixby to Claimant, August 18, 2011
Claimant's Exhibit 8:	Summary of invoices from Attorney Bixby, July 31, 2011
Claimant's Exhibit 9:	Handwritten notes taken by Dr. Wieneke
Claimant's Exhibit 10:	Dr. Magnadottir deposition, September 14, 2012
Defendant's Exhibit A:	*Curriculum vitae,* Dr. Wieneke

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Medical benefits pursuant to 21 V.S.A. §640(a)
Vocational rehabilitation benefits pursuant to 21 V.S.A. §641
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

RULING ON POST-HEARING MOTIONS:

Motion to Strike Dr. Wieneke's Post-Hearing Report

Because Claimant's expert witness, Dr. Magnadottir, was not available to testify at the formal hearing, Defendant agreed to present its own expert witness, Dr. Wieneke, out of turn, with the proviso that he be allowed an opportunity to comment on Dr. Magnadottir's testimony once her deposition was proffered post-hearing. Claimant asserts that the written report in which he did so merely restated his hearing testimony and therefore should be stricken as irrelevant. I disagree. The report contained opinion evidence germane to Dr. Magnadottir's testimony. Claimant's Motion to Strike is **DENIED**.

Motion for Directed Verdict

Claimant filed a motion for directed verdict on the issue of causal relationship. A motion for directed verdict was a form of pleading under both the civil and criminal rules of procedure. It has since been abolished and replaced, in the civil context with a Motion for Judgment as a Matter of Law, V.R.C.P. 50(a), and in the criminal context with a Motion for Judgment of Acquittal, V.R.Cr.P. 29. The purpose of such motions is to remove a case from consideration by a jury in situations where judgment for the moving party is required as a matter of law. Where there is no jury, as is the case in administrative proceedings such as this one, a post-hearing motion for judgment serves no purpose. Claimant's Motion for Directed Verdict is therefore **DENIED**.

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 contained in the Department's file relating to this claim as well as the Commissioner's prior decision in this claim, *Barrett-Simmons v. Landmark College, Inc.,* Opinion No. 35-10WC (November 16, 2010). In addition, judicial notice is taken of the December 9, 2010 vocational rehabilitation report prepared by Claimant's vocational rehabilitation counselor, Jay Spiegel.

Claimant's Work Injury and Prior Medical History

3. Claimant worked for Defendant as a housekeeper. On March 18, 2005 she slipped and fell on a wet floor. Claimant injured her neck and right shoulder in the fall. Defendant accepted this injury as compensable and paid workers' compensation benefits accordingly.

4. Over the course of the next three years Claimant underwent three surgeries, including fusions at two cervical spine levels. Unfortunately, all of these surgeries failed. Her symptoms, which include pain, muscle spasms and limited range of motion in her neck and right shoulder, have persisted.

5. Following her third surgery, in February 2009 Claimant's treating neurosurgeon, Dr. Magnadottir, determined that she had reached an end medical result. The Department later approved the parties' proposed Agreement for Permanent Partial Disability Compensation (Form 22), by the terms of which Claimant received compensation for a 23.5 percent whole person permanent impairment referable to her cervical spine. The compensable injury was described in the Agreement as "right shoulder/upper back, C4-7."

Claimant's Fourth Cervical Surgery

6. In February 2011 Claimant returned to Dr. Magnadottir for another neurosurgical consult. She reported that over the course of the prior year her neck pain had been constant and her right shoulder pain had worsened. In addition, her symptoms now involved her right hand. Claimant described dropping things, making messes and burning her right hand while cooking. She had not suffered any new injuries, falls or motor vehicle accidents to account for these new and/or worsening symptoms.

7. Dr. Magnadottir's physical examination revealed that Claimant exhibited symmetric motor function (except for some give-way weakness in the right deltoid) and symmetric reflexes and sensation, but a substantial amount of myofascial pain[1] and tenderness bilaterally in the trapezoids and rhomboids. A review of Claimant's cervical spine and right shoulder MRI at this office visit showed tendonitis and significant narrowing of the C5 foramen.

8. Dr. Magnadottir discussed Claimant's potential treatment options with her. These included exercises, physical therapy and surgery. Claimant took some time to decide, and ultimately chose to pursue surgery. Once her decision was made, Dr. Magnadottir described Claimant as being "very strong" in her desire to proceed in this manner. I find that Claimant elected surgical treatment with full knowledge and understanding that it would not alleviate her major complaint of persistent myofascial right shoulder pain.

[1] Myofascial pain is muscular pain that is very non-specific and difficult to diagnose. It is a non-radicular pain that does not follow a nerve root pattern. The affected muscle often has "trigger points," that is, hyper-irritable spots and associated palpable nodules in skeletal muscle.

9. In May 2011, Claimant underwent the fourth surgery, a procedure to decompress the C5 nerve root. As expected, the surgery did not alleviate the persistent myofascial pain in her right shoulder. The symptoms in her right hand have abated, though it is unclear why. Medically, there is no reason why nerve compression at the C5 level would have resulted in the symptoms Claimant reported, and therefore no reason why surgical decompression would have caused them to resolve.

Expert Medical Opinions

(a) Dr. Magnadottir

10. Dr. Magnadottir testified by deposition. She is a board certified neurosurgeon. She performed Claimant's third cervical surgery in 2009, and her fourth surgery (the subject of the pending compensability dispute) in May 2011. In formulating her opinion as to the reasonableness of the latter surgery, Dr. Magnadottir did not review Claimant's entire medical history, but rather relied on her knowledge of Claimant's condition since she began treating her.

11. In Dr. Magnadottir's opinion, Claimant's May 2011 surgery was causally related to her compensable work injury. Claimant suffered from disc disease at the C5, C6 and C7 levels, and had undergone cervical fusion at the C5-6 level. According to the accepted medical literature, disc disease in one joint significantly contributes to the development of disc disease in adjacent joints as well.

12. As to the medical necessity of a fourth surgery, Dr. Magnadottir relied primarily on the fact that Claimant's recent MRI showed her C5 foramen to be significantly narrowed. With this finding in mind, Dr. Magnadottir anticipated that repeat surgery at that level might relieve at least some of Claimant's pain. However, Dr. Magnadottir did not refer Claimant for electrodiagnostic studies in order to determine whether there were objective signs of nerve damage at C5. Nor did she recommend that Claimant undergo diagnostic epidural injections in the C5 root, to see if she would experience any relief from pain at this root level. Dr. Magnadottir reasoned that even if there was relief, it would be short lived.

13. Dr. Magnadottir acknowledged that the May 2011 surgery would not address the persistent myofascial pain in Claimant's right shoulder. She also acknowledged that Claimant's pain complaints were all subjective in nature. Last, Dr. Magnadottir acknowledged that damage to the C5 nerve root would not in any way manifest itself in the type of hand symptoms Claimant was reporting. I find that these facts significantly undermine Dr. Magnadottir's opinion that Claimant's May 2011 surgery constituted reasonable and necessary medical treatment.

(b) Dr. Wieneke

14. At Defendant's request Dr. Wieneke, a board certified orthopedic surgeon, performed an independent medical examination of Claimant for the purpose of determining whether a fourth surgery would have constituted reasonable treatment for her 2005 work injury. Dr. Wieneke had evaluated Claimant previously and therefore was familiar with her medical history.[2] Before performing his most recent examination, Dr. Wieneke also reviewed all of Claimant's past and current medical records.

15. In Dr. Wieneke's opinion, Claimant's fourth surgery did not constitute reasonable and necessary medical treatment. He based this opinion on the following:

- Prior to 2011, all of Claimant's EMG studies were negative, indicating no C5 nerve root damage that would warrant surgery;
- There was no current electrodiagnostic evidence of radiculopathy to confirm Claimant's current complaints of pain;
- Claimant's give-way weakness in her right deltoid was a Waddell sign, which suggested a psychological component to her pain complaints;
- The C5 nerve root distribution does not manifest itself in the hand, and therefore damage or compression at that level would not explain Claimant's most recent symptoms; and
- Claimant had already undergone three major cervical surgeries with virtually no improvement and little likelihood of success with a fourth surgery.

16. I find Dr. Wieneke's review and knowledge of Claimant's medical condition extensive and his opinions well supported by objective evidence.

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).

[2] Dr. Wieneke evaluated Claimant's case on four different occasions. He performed independent medical examinations of Claimant in 2006, 2009 and October 2011. He performed a records review in May 2011.

2. At issue here is whether Claimant's May 2011 surgery is compensable. Vermont's workers' compensation statute obligates an employer to pay only for those medical treatments that are determined to be both "reasonable" and causally related to the compensable injury. 21 V.S.A. §640(a); *MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009). The commissioner has discretion to determine what constitutes "reasonable" medical treatment given the particular circumstances of each case. *Id.* A treatment can be unreasonable either because it is not medically necessary or because it is not related to the compensable injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2011).

3. Here, the condition for which Claimant sought surgery in 2011 involved significant narrowing of her C5 foramen and persistent right shoulder pain. Both of these conditions were well within the terms of the approved Form 22 agreement pursuant to which Defendant paid permanency benefits in 2009. Claimant did not suffer any other injuries subsequently, such as a motor vehicle accident or new slip and fall incident, that might account for her ongoing and/or worsening symptoms. Considering all of the credible evidence, I conclude that the neck and right shoulder pain for which she sought additional treatment in 2011 was causally related to her accepted work injuries.

4. Having concluded that Claimant's need for ongoing treatment is causally related to her compensable work injuries, I next consider whether the treatment at issue was medically necessary. This determination is based on evidence establishing the likelihood that it would improve the patient's condition, either by relieving symptoms and/or by maintaining or increasing functional abilities. *Cahill v. Benchmark Assisted Living*, Opinion No. 13-12WC (April 27, 2012); *Quinn v. Emery Worldwide*, Opinion No. 29-00WC (September 11, 2000).

5. Conflicting medical testimony was offered as to the reasonableness of Claimant's fourth cervical surgery. 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. Here, based primarily on the second and third factors, I conclude that Dr. Wieneke's opinion was more persuasive than Dr. Magnadottir's. Dr. Wieneke had the advantage of reviewing Claimant's entire medical history. More important, his opinions were clear, thorough and corroborated by objective evidence. Given that (1) the C5 nerve root distribution does not manifest itself in the hand; (2) no objective tests were performed to identify the C5 level as the pain generator for Claimant's complaints; and (3) surgery clearly would not relieve the myofascial pain in Claimant's shoulder, Dr. Wieneke credibly concluded that surgery was not a reasonable treatment option for the symptoms of which she complained. The fact that Claimant already had undergone three failed surgeries with no significant pain relief was a strong contraindication as well.

7. In contrast, given both Claimant's medical history and the nature of her ongoing complaints, Dr. Magnadottir failed to explain adequately why a fourth surgery was justified.

8. I conclude that Claimant has failed to sustain her burden of proving that her May 2011 cervical surgery constituted reasonable medical treatment, such that Defendant should be obligated to pay for it. Therefore, her claim for workers' compensation benefits must fail.

9. As Claimant has failed to prevail on her claim for benefits, she is not entitled to an award of costs or attorney fees.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Claimant's claim for workers' compensation benefits referable to her May 2011 cervical surgery is hereby **DENIED**.

DATED at Montpelier, Vermont this 28th day of February 2013.

_____
Anne M. Noonan
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.