

Laurel Zeno v. University of Vermont (August 19, 2010)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Laurel Zeno

Opinion No. 27-10WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

University of Vermont

For: Valerie Rickert
Acting Commissioner

State File No. Z-00033

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ATTORNEYS:

Christopher McVeigh, Esq., for Claimant
Stephen Ellis, Esq., for Defendant

ISSUES PRESENTED:

1. Do any genuine issues of material fact exist as to whether Defendant's May 1, 2008 discontinuance of benefits on end medical result grounds was proper?
2. Is Defendant entitled to judgment as a matter of law as to the extent of Claimant's permanent impairment, if any, causally related to her June 20, 2007 injury?

FINDINGS OF FACT:

Considering the facts in the light most favorable to the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. On June 20, 2007 Claimant suffered a work-related injury when she fell in Defendant's parking lot. Subsequently she sought treatment for right knee and left shoulder pain causally related to her fall.
2. Claimant has an extensive prior medical history, including right shoulder surgery in 1998, left shoulder surgery in 2006 and right knee arthroscopy in 2003. Claimant also suffers from cerebral palsy on her left side.

Medical Evidence as to the Cause, Nature and Extent of Claimant's Injury

3. Since her June 2007 fall Claimant has treated primarily with Dr. Campbell for her right knee symptoms and with Dr. Macy for her left shoulder symptoms. She also has treated regularly with Dr. Hageman, her primary care provider, for general health issues.

4. In his office notes, Dr. Campbell has described the etiology of Claimant's right knee symptoms as "multifactorial" and consistent with some combination of osteoarthritis, iliotibial band friction syndrome and tibiofibular joint pain. More recently, in a July 12, 2010 letter to Claimant's attorney Dr. Campbell stated that the preexisting arthritis in Claimant's right knee "was certainly aggravated" by her June 2007 fall.
5. As treatment for Claimant's right knee symptoms, Dr. Campbell has at various times prescribed injections, physical therapy and Celebrex.
6. As for Claimant's left shoulder complaints, Dr. Macy first addressed these in September 2007. His treatment plan at the time included physical therapy. Claimant participated in physical therapy from September 2007 through March 2008, at both Dr. Campbell's and Dr. Macy's referral.
7. At Defendant's request, in March 2008 Claimant underwent an independent medical examination with Dr. Levy. In Dr. Levy's opinion, "the most probable cause of [Claimant's] longstanding widespread pain is degenerative arthritic change in all regions involved, including both shoulders and knees." Dr. Levy determined that the June 2007 fall had resulted in a flare-up of Claimant's "pre-existing problem," but had not caused any aggravation in her underlying condition. According to his diagnosis, Claimant had suffered only a bruised right knee and a soft tissue injury to her left shoulder as a result of her June 2007 fall at work.
8. In Dr. Levy's opinion, Claimant would have reached an end medical result for her right knee within 7 to 14 days after her fall, and for her left shoulder "sometime in the fall of 2007 after she did four to six weeks of physical therapy." As for permanency, Dr. Levy rated Claimant with a 0% impairment referable to the June 2007 fall.
9. With Dr. Levy's independent medical examination as support, in April 2008 Defendant denied responsibility for any other injuries Claimant allegedly suffered as a consequence of her June 2007 fall. It also filed a Notice of Intention to Discontinue Payments (Form 27) as to both temporary disability and medical benefits on the grounds that Claimant had reached an end medical result for her compensable injuries. The Department approved Defendant's discontinuance effective May 2, 2008.
10. On May 9, 2008 Claimant filed a Notice and Application for Hearing (Form 6), in which she sought temporary partial disability benefits, permanent partial disability benefits, medical benefits and attorney fees on account of her June 2007 fall. Claimant stated the issues in dispute as: "Whether [Claimant] is at a medical end result; whether the Form 27 is supported by a probability of the evidence; whether [Claimant] is entitled to a gym membership."¹

¹ Claimant appears to have withdrawn her request for a gym membership.

11. Notwithstanding Defendant's discontinuance, Claimant has continued to treat sporadically with Dr. Campbell for her persistent right knee discomfort. The medical records reflect additional physical therapy referrals in both June 2008 and December 2009. Claimant also underwent injections in December 2009 and again in May 2010. In April 2010 she underwent a bone scan.
12. Claimant also has treated on two occasions with Dr. Macy since Defendant's discontinuance, once in December 2009 and again in January 2010. The December 2009 office note describes both left and right shoulder pain, but according to Dr. Macy, "at this point, her right shoulder is more bothersome." Dr. Macy determined that the left shoulder could not be repaired surgically. His treatment plan was to obtain a right shoulder MRI. Dr. Macy reviewed the results of the MRI at Claimant's January 2010 visit, and prescribed a course of physical therapy for her right shoulder. His office note does not reflect any further treatment recommendations for Claimant's left shoulder discomfort.
13. In her December 17, 2007 office note, Dr. Hageman stated her opinion that Claimant's previous injuries "were definitely aggravated" by her June 2007 fall. Dr. Hageman also remarked that Claimant "would likely benefit from continued physical therapy/aqua therapy" for her left shoulder symptoms. Presumably this was a reference to the therapy Claimant already was undergoing at Dr. Macy's referral.

Discovery and Disclosure Issues

14. In anticipation of the formal hearing in this claim, which previously was scheduled for October 2009, in July 2009 Defendant filed its final disclosures, in which it identified the disputed issues as including (1) whether Claimant had reached an end medical result for her compensable work injury on June 20, 2007; and (2) if yes, whether there was any resulting permanent impairment.
15. Also anticipating the previously scheduled formal hearing, Claimant filed her final disclosures in October 2009, in which she characterized the issues for determination as including "the extent of benefits" due her under the Workers' Compensation Act. Claimant identified Dr. Campbell as her witness regarding the care and treatment of her knee injury, and Dr. Macy as her witness regarding the treatment of her left shoulder injury.
16. Initially both parties had included as a disputed issue the question whether Claimant sustained a compensable work-related injury as a result of her June 20, 2007 fall. Defendant later conceded that she did, and now characterizes the disputed issues as involving only the nature and extent of that injury. Defendant has identified Dr. Levy as its expert witness on these issues. Presumably Dr. Levy will testify in accordance with the opinions noted in Findings 7 and 8 above.

17. In January 2010 Defendant served expert interrogatories on Claimant. Claimant did not initially respond, whereupon the hearing officer ordered her to do so no later than May 21, 2010. Claimant notified Defendant by letter on that date that she intended to call Dr. Campbell to testify regarding her knee condition. Claimant specified that Dr. Campbell would testify that her current knee condition was the result of her June 20, 2007 fall at work, and that his testimony would be “consistent with his medical records.”
18. The formal hearing now has been rescheduled to October 8, 2010 with final disclosures due no later than September 10, 2010.
19. On July 13, 2010 Claimant filed a “Supplemental Disclosure” with the hearing officer, in which she named both Dr. Hageman and Dr. Macy as additional expert witnesses whom she anticipates calling at hearing. Claimant anticipates that Dr. Hageman will testify “consistent with her medical notes in which she opined that [Claimant’s] June 20, 2007 fall aggravated her left shoulder and right knee conditions.” Claimant anticipates that Dr. Macy will testify “consistent with his medical records that [Claimant] has had an ongoing left shoulder condition for which he has recommended physical therapy.”

DISCUSSION:

1. 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 a judgment in its favor as a matter of law. *Samplid 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. Realty of Vermont*, 137 Vt. 425 (1979).
2. Here, Defendant contends that Claimant has failed to adduce sufficient evidence to establish that she had not reached an end medical result for the injuries she sustained in her June 2007 fall at least by May 2, 2008, the effective date of Defendant’s Form 27 discontinuance. Thus, Defendant argues, it is entitled to summary judgment in its favor on the question whether its discontinuance was properly supported.
3. I cannot agree with Defendant’s characterization of the evidence, particularly as it pertains to Claimant’s right knee injury. Dr. Campbell’s office notes reflect ongoing, albeit somewhat sporadic, treatment well beyond May 2008 and as recently as May 2010. Given his opinion that the June 2007 fall “certainly aggravated” the pre-existing arthritis in Claimant’s right knee, genuine issues of material fact exist as to whether this treatment was necessitated by that aggravation. If it was, then Claimant may not have reached an end medical result as early as Defendant contends. This, therefore, is a factual issue sufficient to defeat summary judgment.

4. I also must reject Defendant's assertion that it is entitled to summary judgment on the question whether Claimant suffered any permanent impairment as a consequence of her June 2007 fall. Defendant contends that Claimant has not produced any evidence to negate Dr. Levy's determination that there was no ratable permanency referable to the limited injuries he diagnosed. This is true, but it does not follow that summary judgment on the issue is therefore warranted. At the heart of the parties' dispute is Claimant's assertion that the June 2007 fall caused injuries far more substantial than what Dr. Levy diagnosed, that her treatment has not yet concluded and that therefore it is premature to estimate the extent of her permanent impairment. Genuine issues of material fact abound here, which render summary judgment inappropriate.
5. Last, Defendant argues that because Claimant's "Supplemental Disclosure" of Drs. Hageman and Macy as witnesses was filed after the deadline for responding to its expert interrogatories, it should be disregarded. I do not condone in any respect Claimant's failure to respond to Defendant's discovery requests in a complete and timely manner. Nevertheless, I am mindful of the fact that the hearing officer's final disclosure deadline has not yet passed and that there is still ample time for Defendant to prepare for these witnesses' appearance prior to the October 8, 2010 formal hearing. Under these circumstances, I will not grant the relief Defendant seeks.

ORDER:

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

DATED at Montpelier, Vermont this 19th day of August 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.