Linda Montague v. Tivoly Inc (September 22, 2011)

STATE OF VERMONT
DEPARTMENT OF LABOR

Linda Montague

v.

Tivoly, Inc.

Opinion No. 28-11WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. Z-64639

OPINION AND ORDER

Hearing held in Montpelier, Vermont on April 21, 2011
Record closed on June 6, 2011

APPEARANCES:

Kelly Massicotte, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUE PRESENTED:

Was Claimant's August 2010 fusion surgery reasonable, necessary and causally related to her January 31, 2008 work injury?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	Deposition of Hulda Magnadottir, M.D., April 13, 2011 (*Curriculum vitae* attached)
Claimant's Exhibit 2:	Compensation Agreements (Forms 21 and 22)
Defendant's Exhibit A:	Deposition of William Boucher, M.D., April 11, 2011

CLAIM:

All workers' compensation benefits to which Claimant is deemed entitled as a consequence of her August 2010 fusion surgery;

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 January 2008 Fall, Prior Medical History and Course of Treatment

3. Claimant worked for Defendant as a machinist. As she was leaving work on January 31, 2008 she slipped on some icy outside stairs. Her feet came out from under her and she fell to the ground, landing on her back. Claimant injured her neck and left shoulder in the fall.

4. Defendant accepted Claimant's injury as compensable and began paying workers' compensation benefits accordingly.

5. As a result of her injury Claimant experienced severe neck pain and stiffness, with extremely limited range of motion. The pain radiated into the top of her left shoulder and between her shoulder blades. She experienced debilitating headaches as well.

6. Claimant's prior medical history is significant for a two-level (C5-C7) cervical fusion following a motor vehicle accident some 20 years ago. More recently, in 2005 Claimant underwent surgery to repair a left rotator cuff tear following a work-related shoulder injury. Claimant fully recovered from both of these injuries and was experiencing no residual symptoms in either her neck or her left shoulder at the time of the January 2008 fall. Claimant also had a prior history of migraine headaches, most likely related to hormonal changes. Prior to her fall, these occurred on a monthly basis and were well controlled with medication.

7. Initially Claimant treated conservatively for the symptoms related to her January 2008 fall. She underwent a series of injections, but these were largely ineffective. Thereafter, Claimant underwent two surgical consultations, one with Dr. Braun, an orthopedic surgeon, and one with Dr. Ball, a neurosurgeon. Both doctors reviewed Claimant's diagnostic imaging studies, which showed degenerative changes both above and below the level of her prior fusion but no clear evidence of spinal stenosis, or narrowing of the spinal canal. Nor did Claimant's clinical examination reveal any signs of radiculopathy, such as asymmetric reflexes, decreased strength or sensory deficits in a dermatomal pattern. Lacking what they considered to be definitive evidence indicative of nerve root involvement, both doctors recommended against surgery as a treatment option.

8. Surgical treatment options having apparently been eliminated, in July 2009 Claimant participated in a three-week intensive functional restoration program at Dartmouth Hitchcock Medical Center (DHMC). Claimant experienced improvements in both her physical capacity and her pain levels as a result of that program. She was less depressed, and less reliant on narcotic pain medications for symptom relief. Functionally, however, even after completing the program Claimant still was unable to meet her goals for vocational, recreational and daily living activities. Her pattern of neck pain radiating into the top of her left shoulder was relatively unchanged as well.

9. On September 11, 2009 Dr. Hazard, the doctor who had supervised Claimant's participation in the DHMC functional restoration program, determined that she had reached an end medical result. Dr. Hazard rated Claimant with a 15% permanent impairment referable to her cervical spine as a result of her January 2008 work injury. In February 2010 the Department approved the parties' Agreement for Permanent Partial Disability Compensation (Form 22) to that effect.

10. Over the ensuing months Claimant's symptoms worsened. Her neck and shoulder pain continued, her headaches became constant and she spent much of her day in bed.

Dr. Magnadottir

11. At Claimant's request, in March 2010 her primary care provider referred her to Dr. Magnadottir, a board certified neurosurgeon, for another opinion as to whether surgery might yet be an appropriate treatment option for her ongoing symptoms. Fusion surgeries are a routine aspect of Dr. Magnadottir's practice; she estimates that she has performed approximately 1,000 such operations over the course of her career, at the rate of about 100 annually.

12. Based on her clinical exam findings, Dr. Magnadottir suspected that there was both a radicular and a myofascial component to Claimant's pain presentation. The myofascial component stemmed from muscle tightness and spasms in her neck and between her shoulder blades, and would not be relieved by surgery. The radicular component seemed to stem from a bone spur that appeared on MRI to be impinging on Claimant's C5 nerve root. If so, surgery might well be indicated to relieve at least some of her neck pain, as well as the radiating pain across the top of her left shoulder. The latter pain Claimant described as being particularly bothersome.

13. A diagnostic injection confirmed Dr. Magnadottir's suspicions as to the radicular component of Claimant's pain. Thereafter, on August 4, 2010 Dr. Magnadottir surgically decompressed Claimant's C5 nerve root and fused her C4-5 vertebrae. Among her surgical findings, Dr. Magnadottir observed that a fragment of the bone spur she had viewed on MRI was actually dislocated, and that this was what was impinging on Claimant's C5 nerve root. To a reasonable degree of medical certainty, Dr. Magnadottir concluded that although the bone spur itself likely preexisted, the dislocated fragment probably occurred as a result of Claimant's January 2008 fall. In her view, the symptoms that followed, and the surgery necessitated to alleviate them, were therefore causally related to that work injury. I find this reasoning to be persuasive.

14. As Dr. Magnadottir predicted, since the surgery Claimant's radicular symptoms have largely resolved, particularly the pain across the top of her left shoulder. Her cervical range of motion has improved, and her headaches are no longer constant and persistent. She no longer requires narcotic medications for pain relief, and takes muscle relaxants only occasionally. Her activity level, though still quite limited by muscle-related pain and stiffness in her neck and shoulder blades, is noticeably improved as well.

15. Dr. Magnadottir determined that Claimant had reached an end medical result from her fusion surgery as of the date of her last office visit, February 23, 2011.

16. Based on the particular location of the nerve compression she viewed during surgery, Dr. Magnadottir discounted degenerative changes as the cause of Claimant's more recent symptoms. In her opinion, furthermore, degenerative changes alone would not have caused the bone spur to fracture and dislocate as it did. I find this reasoning to be credible.

Dr. Boucher

17. At Defendant's request, in May 2010 Claimant underwent an independent medical examination with Dr. Boucher, a board certified occupational medicine specialist. Dr. Boucher reviewed Claimant's medical records and conducted a physical examination. From this he concluded that Claimant likely suffered a cervical strain as a result of her January 2008 fall at work.

18. Dr. Boucher strongly disagreed with Dr. Magnadottir's decision to treat Claimant's symptoms surgically. He believed it "quite clear" that Claimant's condition was entirely musculoskeletal, not radicular, in origin. Citing to treatment guidelines issued by the American College of Occupational and Environmental Medicine, and lacking what he considered to be any evidence indicative of nerve root involvement, Dr. Boucher asserted that fusion surgery was neither reasonable nor necessary in Claimant's case.

19. Dr. Boucher acknowledged that had there been evidence of developing radiculopathy, then the fusion surgery Dr. Magnadottir performed would have been medically appropriate. Even in that circumstance, however, Dr. Boucher would attribute the cause of such radiculopathy to the degenerative changes in Claimant's cervical spine, not to her January 2008 fall at work. As noted above, however, the specific location of the nerve compression that Dr. Magnadottir observed during surgery makes this unlikely.

20. I find that Dr. Magnadottir effectively refuted the premise upon which Dr. Boucher's conclusion was based. In her experience, quite often patients present with a pure radicular pain syndrome, without any accompanying sensory changes or motor dysfunction. The fact that a patient fails to exhibit signs of more severe nerve damage – strength deficits or numbness in a dermatomal pattern, for example – does not negate a finding of radiculopathy. In Claimant's case, Dr. Magnadottir sufficiently established the presence of radiculopathy pre-operatively by other means, including both clinical and diagnostic testing, and then later confirmed it in her surgical findings.

21. The fact that since her fusion surgery Claimant has experienced significant improvement in the symptoms that Dr. Magnadottir identified as radicular in nature also undermines Dr. Boucher's conclusion that her condition was entirely musculoskeletal. Dr. Boucher predicted that Claimant's neck pain would not improve with fusion surgery, and that her range of motion would worsen. In fact, however, as Claimant credibly testified and as Dr. Magnadottir's notes corroborate, the opposite has occurred.

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. The disputed issue presented here is whether Claimant's August 2010 fusion 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. §§618, 640(a); *Lackey v. Brattleboro Retreat,* Opinion No. 15-10WC (April 21, 2010). 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. *Id.; Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010).

3. Conflicting medical testimony was offered as to the reasonableness of Claimant's fusion 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).

4. Here I conclude that Dr. Magnadottir's opinion was more credible than Dr. Boucher's. With her experience in evaluating and treating patients with complaints such as Claimant's, Dr. Magnadottir was better positioned to discern the possibility that at least some of Claimant's symptoms were radicular in origin. The conclusions she drew from Claimant's clinical exam and diagnostic studies were confirmed by her surgical findings and therefore objectively supported. That Claimant improved thereafter provides further corroboration.

5. I also conclude that Dr. Magnadottir's analysis of the causal relationship between Claimant's January 2008 work injury and her developing radiculopathy was more persuasive than Dr. Boucher's. Again, Dr. Magnadottir's surgical findings effectively discounted degenerative changes alone as the cause of Claimant's condition, and instead pointed to her work-related fall as the inciting factor.

6. I conclude that Claimant's August 2010 fusion surgery was both medically necessary and causally related to her compensable work injury. It therefore constitutes reasonable medical treatment, for which Defendant is obligated to pay all associated medical and indemnity benefits.

7. As Claimant has prevailed on her claim for benefits, she is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit her itemized claim.

ORDER:

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

1. All workers' compensation benefits to which Claimant proves her entitlement as causally related to her August 2010 fusion surgery; and

2. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 22nd day of September 2011.

_____
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.