STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Julie Quinn	)	State File Nos. E-17678; B-20139
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
	)	For: R. Tasha Wallis
Emery Worldwide	)	Commissioner
	)	
	)	Opinion No. 29-00WC

Hearing held in Montpelier on March 30, 2000
Record closed on April 25, 2000

APPEARANCES:

James J. Dunn, Esq. for the claimant
John W. Valente, Esq. for the defendant

ISSUE:

The compensability of the claimant's continued chiropractic treatment under 21 V.S.A. § 640.

FINDINGS OF FACT:

1. Prior to the injury at issue in this case, Julie Quinn ("claimant") was a physically active individual. She swam competitively, jogged five miles a day and lifted weights on a regular basis. She is 42 years old.

2. On December 15, 1988, claimant suffered a back injury in the course of her employment with Emery Worldwide ("defendant"). While stepping down from her delivery van, her foot landed on ice and went out from under her. By grabbing the steering wheel, she avoided a fall to the ground, but in doing so twisted her back, with the weight of her body falling and causing sharp pain in her lower back.

3. The next day the claimant went to a hospital emergency department where she was given pain medications and placed on restricted duty. She then went on a previously scheduled vacation during which time the pain continued unabated. The claimant testified that because her back pain did not subside, she commenced a three-month recuperation period in which she was unable to work.

4. Initially the claimant sought treatment from an orthopedist who then referred her to physical therapy. The claimant testified that she received no relief from either of those treatment modalities.

5. On February 6, 1989 the claimant began treatment with Joseph Clauss, D.C. She testified that for the first time since her injury, she received relief of her pain from the chiropractic treatments he provided.

6. The claimant continued receiving the chiropractic treatments after returning to work. In August 1989, eight months after her injury, the workers' compensation insurer asked Dr. Francis Smith, another chiropractor, to evaluate this case and offer an opinion on the reasonableness of the chiropractic care she was receiving. Dr. Smith told the employer that the claimant had not reached a medical end result and recommended that she increase the frequency of the chiropractic visits to once a week.

7. The claimant continued her chiropractic treatments with Dr. Clauss. She testified that she found that the adjustments and treatment he provided afforded her at least temporary relief from the pain in her lower back and enabled her to continue working in her delivery position. Nevertheless, the claimant said that she was no longer able to engage in most of the non-work activities she once enjoyed.

8. Almost five years later, in June of 1994, the claimant returned to Dr. Smith for an evaluation and impairment rating. Dr. Smith concluded that when the claimant twisted her back as she was falling, she suffered "extremes of joint movement with concomitant stretching and tearing of the ligamentous structure of the lumbosacral spine." Dr. Smith believed that those areas "will be permanently weakened for an indefinite period of time, resulting in significant and permanent restrictive mobility." He further opined that "this weakness may well predispose these areas to further aggravation or trauma which might not have otherwise bothered her prior to the accident." With regard to permanency, he assessed her rating at a 29% whole person impairment.

9. The employer next referred the claimant to Dr. George White for a permanency evaluation. Dr. White concluded that the claimant had a 5% whole person impairment, but conceded that it could be higher if further testing were done.

10. Ultimately, the claimant and the employer agreed to settle the permanency portion of the claim at a 16.75% impairment of the spine.

11. Claimant left the employ of defendant, Emery Worldwide, sometime in 1992.

12. Since July 1993 the claimant has worked part time for United Parcel Service. She drives a truck, picks up next day packages from the loading dock, loads them into her truck, takes her truck to a tractor trailer, then unloads her truck into the feeder truck. In what she described as a "second loop" she picks up mail packages. Finally she goes to Plattsburgh, loads some packages on a plane, takes the remaining packages to the terminal and loads them on a belt. Most packages the claimant loads weigh between one and 30 to 35 pounds. She testified that although she sometimes lifts as much as 70 pounds, she always asks for help with the heavier items.

13. The claimant has continued to receive care from Dr. Clauss. She testified that the frequency of her visits varies depending on her workload. On average, she treats with Dr. Clauss every two to three weeks. She testified that she sees Dr. Clauss on a walk-in basis when she feels she needs the care, not on a prescheduled appointment basis.

14. The claimant described the chiropractic treatment as an adjustment that puts the vertebrae back in alignment. As a result, walking is easier, sitting is easier and the pain is less.

15. The claimant explained that after the chiropractic treatments, it takes a day or two for the muscles in her back to relax enough that she can do her job and engage in non-physically stressful household and parental chores.

16. In December of 1998 the employer sent the claimant to John Johansson, D.O., for another evaluation. Dr. Johansson is an osteopathic physician whose training and experience differs from those of a chiropractor in many respects, but includes the common element of spinal manipulation. Dr. Johansson's practice is a non-surgical orthopedic practice in which he treats patients with acute and chronic musculoskeletal injuries. He considers himself an expert in what he described as "manual medicine," i.e., manipulation.

17. Dr. Johansson agreed with Dr. Smith's diagnosis that the claimant suffers from stretched and torn ligaments in the lumbar spine. The injury to the ligaments in turn leads to hypermobility. He testified that literature supports a theory that repeated manipulation can actually cause ligamentous laxity and joint hypermobility, thereby causing more harm than good. Furthermore, although the manipulation temporarily mobilizes the joint, the resultant reflex stimulation of the muscle leads to pain.

18. Dr. Johansson testified to a reasonable degree of medical certainty that the chiropractic care the claimant has been receiving has gone beyond what would be reasonable and necessary. He opined that the standard care to prescribe to a person who has reached a medical end result is a home exercise program which involves exercises for flexibility and strengthening. He suggested that this claimant would benefit most from activities of walking and swimming. However, he conceded that if claimant were doing self-care and stretching, some amount of supportive chiropractic care might be appropriate, although he could not say how much.

19. On April 7, 1999, the Employer filed a Form 27, Notice to Discontinue Payments, supported with a report from Dr. Johansson. The reason checked on the form states: "The medical treatment has been determined to be inappropriate or unrelated to the work injury." This Department rejected that form and the instant action followed.

20. Dr. Clauss testified that claimant's symptoms are chronic and that her physically demanding job adversely affects her condition. The care he provides, supportive in nature, allows the claimant to continue to work at her physically demanding job and to otherwise perform most of the necessary daily activities of her life. The average cost of a visit is $28. In his opinion there are no risks associated with long term chiropractic care.

21. The claimant testified that she engages in a self-care exercise and stretching program at home on a "regular" basis. She did not specify how often that is.

22. Claimant has produced evidence that she incurred expenses in this matter totaling $433 and attorney's fees based on 30.25 hours.

CONCLUSIONS OF LAW:

1. Under our Workers' Compensation Act, an employer is obligated to provide reasonable surgical, medical and nursing services when an injury arises out of and in the course of employment. 21 V.S.A. § 640(a). Chiropractic services are included in that obligation. See e.g., *Smith v. Whetstone Log Homes*, Opinion No. 70-96WC (Nov. 25, 1996) and cases cited therein.

2. Once a claimant has established that she is entitled to benefits under the Act, the burden shifts to the employer to establish the propriety of either ceasing or denying further compensation. *Merrill v. University of Vermont*, 133 Vt. 101 (1974). At issue, therefore, is whether the medical evidence supports the defendant Emery Worldwide's position that it is no longer responsible for the claimant's chiropractic care.

3. Palliative care is compensable under the Act even after a claimant has reached medical end result if it is reasonable and necessary and causally related to the work-related injury. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 532 (1996); *Whetstone Log Homes*, Opinion No.: 70-96WC.

4. In determining what is reasonable under § 640(a), the decisive factor is not what the claimant desires or what she believes to be the most helpful. Rather, it is what is shown by competent expert evidence to be reasonable to relieve the claimant's back symptoms and maintain her functional abilities.

5. To evaluate the expert evidence and choose between opposing expert opinions, the Department traditionally looks to the following factors: (1) the nature of treatment and length of time there has been a patient-provider relationship; (2) whether accident, medical and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination; and (5) the qualifications of the experts, including professional training and experience; *Morrow v. Vt. Financial Services Corp.*, Opinion No. 50-98WC (Aug. 25, 1998); *Durand v. Okemo Mountain*, Opinion No. 41S-98WC (Jul. 20, 1998).

6. In this case both experts are well qualified to render opinions based on their education and experience. Both reviewed relevant medical records, most of which are Dr. Clauss's own office notes. Dr. Clauss has the advantage of a long-term treatment relationship with the claimant that Dr. Johansson lacks. Dr. Johansson brings more objectivity to his evaluation than that of Dr. Clauss whose decade long supportive relationship with the claimant has led to a strong advocacy position.

7. Ironically though, it is Dr. Clauss's position that has proven the defendant's case. He testified that it is claimant's current work that leads her to seek continued chiropractic care. The claimant argues that the defendant should be barred from introducing a lack of causation defense because that issue was never introduced at the pretrial stage. However, causation is necessarily a part of a § 640 analysis and cannot be ignored. Furthermore, the evidence that it is claimant's current employment that prompts the claimant to seek chiropractic treatment came from the direct examinant of the claimant's own expert. That cannot be ignored either.

8. Additionally, Dr. Clauss's opinion is based not only on the physically demanding work that the claimant continues to do, but the relief she says she receives from the treatment, and his belief that the treatment will not harm her.

9. Dr. Johansson believes that the chiropractic treatment is not reasonable. The part of his opinion suggesting that treatments must terminate once one reaches medical end result runs counter to the law in this state that allows for palliative care and, therefore, cannot be accepted. However, his opinion that continued chiropractic manipulation to a back with already lax ligaments does not help, and can potentially harm, the patient is persuasive. Furthermore, his opinion in support of active rather passive treatment convinces me that the claimant's return to walking and swimming would provide her with the palliation and functional gains she seeks without the risk of harm that continued manipulation may cause. This claimant has simply assumed that she can no longer swim or walk for the physical benefits. She has not convinced me that she can load boxes from a truck, yet not be able to engage in a more active treatment regime.

10. The experts seem to disagree on how to characterize the frequency of the visits with Dr. Clauss referring to them "as needed" and Dr. Johansson suggesting that they are habitual and too frequent. Dr. Johansson's view is the more persuasive one on this subject. It is clear that the claimant has come to view the chiropractic care as a necessary part of her life. That she does not make a specific appointment for the treatments does not negate the fact that she obtains the care regularly.

11. The claimant has argued that, like the claimant in *Raymond v. Grand Union Stores of Vermont*, Opinion No. 13-99WC (Mar. 24, 1999), she has been able to work "because of [her] strong work ethic and the temporary pain relief [s]he derived from the chiropractic treatments." The claimant in *Raymond* had a thirty-year history of work with the Grand Union. His diagnosis was different from the one here, with no suggestion that his spinal ligaments were the source of his problem. Experts in that case provided persuasive evidence that it was the chiropractic treatment that relieved his symptoms and allowed him to continue to work for same employer. There was no suggestion that the treatments were stretching already lax ligaments or that work for a different employer prompted the continued need for treatment.

12. In contrast, the most convincing medical evidence in this case proves that it was not the claimant's work at Emery that prompts the claimant to continue to seek chiropractic care and that frequent chiropractic treatments are potentially harmful and not reasonable. The defendant, therefore, has sustained its burden of proving that it is not liable under 21 V.S.A. § 640 to continue to pay for the claimant's chiropractic treatment.

ORDER:

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, the employer's action to terminate coverage for the claimant's chiropractic treatment with Dr. Clauss is GRANTED.

Dated at Montpelier, Vermont, this 11th day of September 2000.

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R. Tasha Wallis
Commissioner