

S. C. v. Barre Supervisory Union School (January 2, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

S. C.

Opinion No. 53-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Barre Supervisory Union School

For: Patricia Moulton Powden
Commissioner

State File No. T-11595

Hearing held in Montpelier on October 3 and 4, 2006
Record closed on November 9, 2006

APPEARANCES:

Steven P. Robinson, Esq. and Jennifer Ciarlo Pacholek, Esq., for the Claimant
Andrew C. Boxer, Esq., for the Defendant

ISSUES:

1. Is Claimant permanently and totally disabled as a result of a work related injury?
2. Are Claimant's current symptoms, medications, and treatment related to and required by her original work related injury?
3. Does Claimant have any permanent partial impairment?

EXHIBITS:

Claimant:

1. Dr. Peyser's deposition
2. Employment Records

Defendant:

- A. Dr. Ciongoli deposition
- B. Letters of reference (2)
- C. Articles

FINDINGS OF FACT:

1. Claimant was an employee and Barre Supervisory Union her employer within the Vermont Workers' Compensation Act at times relevant to this action.
2. Claimant worked as third and fourth grade teacher in the Barre schools for thirty-one years. At the time of her injury on January 8, 2003, she was in good physical health, without any arm, back or head injuries. She was teaching fourth grade at the time.
3. The injury giving rise to this claim occurred on January 8, 2003 when Claimant fell from a chair and hit her head. She had just taken her students to the gym for physical education, and then walked into a room to make a phone call. As she sat down and reached for the phone, the chair collapsed. Claimant hit her head on a shelf. The next thing she remembers is lying on the floor with her head stinging. As she tried to stand up, her legs wobbled.
4. The school principal took Claimant to Occupational Health where she was treated and released. Claimant went home and slept. Her attempt to return to work later in the week was unsuccessful.
5. A January 14, 2003 CT scan was normal.
6. An EEG showed minimal changes consistent with post concussion syndrome.
7. A February 2003 MRI showed mild cerebral atrophy, out of proportion with Claimant's age and small vessel disease.
8. Claimant began to have severe headaches. She did not return to work for the rest of the semester.
9. Shortly after the head injury, Dr. Kenneth Ciongoli, a neurologist began treating her. From her history he determined that she had a coup (same side) and contracoup (opposite side) injuries to her head. Since she hit the back of the head, the symptoms from that part of her brain resulted in visual changes and abnormal sensations; the contracoup injury to front part of her head gave her problems with thinking and memory. He noted a bump on her head and diagnosed post concussion syndrome. Claimant had difficulty completing sentences and maintaining a line of thought. She had headaches. Small vessel disease was noted on cerebral testing, but Dr. Ciongoli did not find it significant.
10. In June 2003 Claimant saw Dr. Fries who diagnosed post concussion syndrome. He found a causal connection between the work accident and her injuries. Dr. Fries determined that her cognitive deficits were particularly stubborn, though genuine. At that time, she had not reached medical end result.
11. In July 2003, Dr. Ciongoli noted that Claimant was 90% improved from her work injury. He cleared her to work on a trial basis.

12. In October 2003, Dr. Ciongoli noted that Claimant's examination was normal, although subjective complaints persisted.
13. At the start of the next academic year in late summer 2003, Claimant attended a few in service days and began teaching part-time in the mornings. Classrooms at the time were separated only by partitions.
14. In the afternoons, Claimant went home to rest. After about one month, she got behind in correcting papers and had trouble focusing during a lesson. She received two negative evaluations, a stark contrast with years of positive evaluations. Her contract was terminated.
15. In the ten years before the injury at issue, Claimant sought medical care for sleeping problems, anxiety, stress, fatigue, exhaustion, inability to focus, poor memory, attention span problems, headaches, word retrieval problems, depression and confusion.
16. Since the injury, she has complained of similar symptoms. She complains that the headaches are daily and debilitating. The difference is that she worked with the symptoms before the injury but is not working now.

Expert Opinions

Dr. Preis

17. Dr. Preis is a psychiatrist who has treated Claimant since 1992 for bipolar disorder, temporal lobe epilepsy and mild attention deficit disorder (ADD).
18. Dr. Preis noted that Claimant had adapted well to the mild ADD, compensating by being organized and taking frequent notes. The conditions Dr. Preis had been treating did not keep Claimant from working. However, Claimant often complained of memory problems at school in the 1993-94 academic year. At that time, Claimant stopped driving because she thought her problems with focus would make her a danger on the road.
19. In 1994 Dr. Preis documented Claimant's memories of early childhood abuse. Claimant had trouble sleeping and showed signs of depression. Three years later, she was complaining of headaches and visual distortion.
20. Over the years, Dr. Preis worked with Claimant to change and add medications and titrate dosages.
21. Although Dr. Preis agreed that Claimant had the same symptoms before and after the accident, she attributes the current symptoms to the work related head injury because she saw a dramatic change in these cognitive processes. She determined that Claimant is unable to do the multitasking necessary for teaching or for driving a car. Further, she opined that Claimant is unable to work because of debilitating headaches.

Dr. Ciongoli

22. Dr. Ciongoli treated Claimant and offered opinions on causation. Based on Claimant's progress and normal objective testing, he was surprised by subjective complaints that she had not recovered from her head injury by the fall of 2003. He had never seen a patient with such a small degree of trauma suffer from the degree of disability she is claiming.
23. Dr. Ciongoli opined that Claimant's work injury combined with her preexisting condition make it impossible for her to cope and resume the life she had before the injury. He believes she has reached medical end result and is unlikely to improve enough to return to work.

Dr. William Farrell

24. Dr. Farrell, a psychologist, conducted a Psychological IME on Claimant on June 3, 2005, although he did not testify at hearing. Dr. Farrell opined that Claimant has had an unexpectedly protracted post concussion syndrome. In his opinion, she is unable to perform duties of her usual occupation as a full time teacher and is not likely to ever be able to resume full time gainful employment.
25. Dr. Farrell assigned Claimant with a 26 to 32% permanent partial impairment.

Dr. Frederick Fries

26. Dr. Fries noted that some post concussion syndromes take a year or more to resolve. As noted above, he diagnosed a stubborn post concussion syndrome in 2003 when he thought she had not yet reached medical end result. At a second evaluation June 23, 2004, he made the same diagnosis and causal connection. He thought she had improved 60% but was not yet ready to resume teaching duties.

Dr. Janis Peyser

27. Dr. Peyser saw Claimant on a referral from Dr. Ciongoli to perform neuropsychological battery.
28. Dr. Peyser concluded that Claimant had difficulty with some tasks of attention, particularly with arithmetic. She opined that variable attention may hamper her ability to take in new information. However, the testing also revealed that Claimant's retention was intact, and that she had no other cognitive deficits.
29. Dr. Peyser observed that symptoms are always on the forefront of Claimant's mind. Such a focus prevents her from resolving the problems. In Dr. Peyser's opinion, there is a psychological overlay to Claimant's symptoms that contributes to her problems beyond what the head injury caused.

30. Dr. Peyser does not expect a long-term impairment in this case. She expects a full recovery. She concluded that Claimant's concussion did not cause any psychological deficits, but may have spawned a psychological reaction. She has no opinion as to whether the accident caused neuropsychological deficits.
31. Based on neuropsychological testing, Dr. Peyser opined that Claimant is capable of some form of work..

Dr. Nancy Hebben

32. Dr. Hebben conducted a neuropsychological evaluation of Claimant on March 24, 2006.
33. Based on the records, Dr. Hebben opined that Claimant did not suffer a significant traumatic brain injury and, as a result, is not expected to have permanent cognitive changes.
34. In addition, Dr. Hebben noted that Claimant has persistently complained of subjective symptoms, behavior that in general occurs in those with pre-existing psychiatric problems, poor general health, comorbid problems such as depression, chronic pain, and protracted litigation.
35. Dr. Hebben assessed Claimant's performance during Dr. Peyser's 2004 testing as representing her minimum level of functioning.
36. Testing Dr. Hebben conducted with Claimant did not reveal attention problems. Acquisition of new information improved compared with prior testing. Declines in other areas according to Dr. Hebben can be attributed to Claimant's small cell vessel disease, not to a head injury in 2003.
37. Based on her review of records, testing and interview, Dr. Hebben concluded that Claimant's persistent symptoms are related to some factor or factors unrelated to a head injury. The other factors include sleep apnea, Undifferentiated Somatoform Disorder, and/or possible progression of pre-existing small vessel disease.
38. According to Dr. Hebben, Claimant has no ongoing cognitive or psychiatric injury related to her fall. Any disruption she had was mild and temporary. She could have returned to work. She has no permanent impairment.

Vocational Rehabilitation

39. Laurie Langelier, vocational rehabilitation counselor, worked with Claimant after the injury. She developed an approved plan that included a gradual return to work, starting with a volunteer job. Claimant tried to volunteer at the Barre Town Library and at Washington County Mental Health, but found that her symptoms increased. The attempts were considered failures. Based on Dr. Ciongoli's opinion that Claimant could not return to work, Ms. Langelier told the Claimant that she had no other options for her. Therefore, the VR file was closed in April 2005.

40. Fran Plaisted, vocational rehabilitation counselor, provided a forensic vocational opinion in this case on April 28, 2006.
41. Ms. Plaisted identified four areas of function: 1) physical; 2) cognitive; 3) psychological; 4) subjective. Claimant has no physical limitations as a result of her 2003 head injury. She has a light duty work capacity as determined by her work history. Claimant has no cognitive limitations that prevent her from working, based on assessments by Dr. Peyser and Dr. Hebben. Next, Ms. Plaisted concluded that Claimant does not have psychological limitations that would prevent her from working. Although it is clear that Claimant had psychological problems before and after the fall, they are problems well controlled with medications. Finally, Ms Plaisted opined that Claimant has many subjective complaints of pain, yet no one has said that the pain prevents her from working. Despite the complaints of headache, Claimant was able to complete a full day of testing.
42. In Ms. Plaisted's opinion, Claimant's return to work attempts were unrealistic. Classrooms were separated by partitions, not traditional walls, increasing the distractions for Claimant and making it more difficult for her to work. When she was taken out of work, she had not been given the option of accommodations that would have allowed a successful return to work.
43. Ms. Plaisted criticized the vocational rehabilitation plan because it was not implemented properly. As such, it was not surprising that Claimant did not follow the plan and withdrew without obtaining a part-time job. Since then she has not tried to find a job or even continue with volunteer work.
44. In Ms. Plaisted's opinion, a counselor should have tried to find a teaching job Claimant could perform. Schools where class size is smaller and where there are fewer distractions may be a better setting than the Barre schools.
45. The first level of service should have been to return Claimant to a similar job, perhaps with a different employer with modifications. If that were not successful, the next level of service would be to explore work in a different occupation.
46. In short, Ms. Plaisted opined that VR services had been closed prematurely in this case based on Claimant's subjective belief that she could not work. Based on all the records, however, it is clear that Claimant is capable of gainful employment.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

2. To qualify for workers' compensation benefits, the personal injury must arise out of and in the course of employment. See 21 V.S.A. § 618 (a)(1).
3. 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 inference from the facts proved must be the more probable hypothesis. *Burton Holden & Martin Lumber Co.*, 112 Vt. 17 1941. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *J.G. v. Eden Park Nursing Home*, Opinion No. 52-05WC (2005) (citing *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979)).
4. On the issue of causation, Claimant has prevailed. The convincing medical evidence from Doctors Ciongoli, Peyser, Fries Farrell, Preis and Hebben combine to form in the mind of this trier a conclusion that Claimant's work related fall caused a concussion that has some lingering effects, when combined with her preexisting conditions. See *Jackson v. True Temper Corp.*, 151 Vt. 592, 595-96 (1989) (employer for seizures brought on by drinking alcohol where sawmill injury aggravated or accelerated claimant's preexisting alcoholism).
5. Next, is the question whether Claimant is capable of gainful employment, or as she alleges, she is permanently and totally disabled, considering her "age, experience, training, education and mental capacity." 21 V.S.A. § 644(b).
6. Claimant has not met her burden on this issue. Even Dr. Preis conceded that she may be able to return to work. Unfortunately, VR services were suspended prematurely. It may be that the passage of time has allowed Claimant's stubborn post concussion syndrome to resolve further and aided Claimant in the process. Claimant has a strong academic history, decades of professional work and an engaging personality. VR services must be resumed to help her return to work.
7. Her PTD claim fails on this record.
8. Because the only PPD rating in the record is from Dr. Farrell who was hired by the Defendant, Claimant must be paid the permanency he assessed.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law:

- Claimant is awarded PPD based on Dr. Farrell's rating
- The claim for permanent total disability is DENIED.

Dated at Montpelier, Vermont this 2nd day of January 2007.

Patricia Moulton Powden
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.