

Cynthia Galbicsek v. Experian Information Solutions (December 22, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Cynthia Galbicsek

Opinion No. 51-09WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Experian Information Solutions

For: Patricia Moulton Powden
Commissioner

State File No. S-07728

OPINION AND ORDER

Hearing held in Montpelier, Vermont on May 27, 2009

Record closed on August 17, 2009

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant's continued use of narcotic pain medications reasonable and necessary treatment for her compensable low back injury?

EXHIBITS:

Joint Exhibit I: Medical records

Joint Exhibit II: Various treatment algorithms, news releases and guidelines for use of opioid medications as treatment for chronic pain

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640

Costs and attorney fees pursuant to 21 V.S.A. §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 contained in the Department's file relating to this claim.

3. The relevant facts relating to Claimant original work injury are detailed in the Commissioner's prior opinion, *Galbicsek v. Experian Information Solutions*, Opinion No. 30-04WC (September 4, 2004), and will be recited only briefly here. Claimant suffered a low back injury in the course and scope of her employment for Defendant on September 23, 1999. She began treating with Dr. Bucksbaum in February 2000. Conservative treatments failed to alleviate her pain, which was determined to be mechanical in nature and not amenable to surgical correction. Ultimately Dr. Bucksbaum prescribed a regimen of narcotic medications to treat Claimant's chronic pain. Defendant objected to this course of treatment as neither reasonable nor necessary, and the claim proceeded to formal hearing on that issue.
4. After considering the expert medical testimony from both Dr. Bucksbaum, the treating physician, and from Dr. Ensalada, Defendant's independent medical evaluator, the Commissioner ruled that Dr. Bucksbaum's treatment plan was reasonable, necessary and therefore compensable. In making this determination, however, the Commissioner noted the inherent danger of sanctioning indefinitely a chronic pain patient's use of narcotics for pain relief. To provide some mechanism for re-evaluating the efficacy of Dr. Bucksbaum's treatment plan, therefore, the Commissioner mandated that the issue be considered anew in two years' time. Defendant now seeks that review.
5. Not much has changed in the intervening years. Dr. Bucksbaum continues as Claimant's treating physician, and as before, remains committed to a narcotic medication regimen as the most effective way to control Claimant's chronic pain and maintain her function. He continues to monitor Claimant's medication use closely, with monthly office visits, regular toxicology screening and strict prescription control.
6. Dr. Bucksbaum acknowledges that Claimant is drug dependent, but denies that she is drug addicted. Drug dependency is a normal phenomenon, in which a patient – a person who suffers from diabetes, for example – requires drugs – in the case of the diabetic, insulin – in order to avoid a deficient medical state. In contrast, drug addiction is an abnormal condition in which a patient seeks drugs, usually in increasing dosages, in order to obtain some secondary gain.
7. Dr. Bucksbaum's qualifications are well suited to treating patients, like Claimant, who suffer from chronic pain. He is board certified in physical medicine, rehabilitation and pain management, and has trained in both narcotic and non-narcotic methods of pain control. He also practices addiction medicine and in that context is familiar with the signs of illicit drug use. In Claimant's case, Dr. Bucksbaum has observed only one instance of inappropriate diversionary or addictive behavior, involving marijuana use in violation of her narcotics contract. That episode occurred many years ago and in his opinion is no longer clinically significant.

8. Dr. Bucksbaum's treatment approach is consistent with the Vermont Board of Medical Practice's "Policy for the Use of Controlled Substances for the Treatment of Pain," adopted in December 2005. The policy was adapted from the model endorsed by the Federation of State Medical Boards of the United States. It acknowledges that the medical management of pain can include, in appropriate circumstances, prescribing narcotic medications for patients with clearly documented unrelieved chronic pain. The goal of any such treatment should be "to control the patient's pain while effectively addressing other aspects of the patient's functioning, including physical, psychological, social and work-related factors." The policy recognizes, furthermore, that "tolerance and physical dependence are normal consequences of sustained use of opioid analgesics and are not the same as addiction."
9. The Medical Practice Board's policy endorses the continued use of narcotic medications for pain management therapy provided that the treating physician's evaluation of the patient's progress towards treatment goals remains satisfactory. "Satisfactory response to treatment may be indicated by the patient's decreased pain, increased level of function, or improved quality of life."
10. According to Dr. Bucksbaum, over the course of many examinations Claimant has demonstrated both positive physical findings and an unsatisfactory response to alternative treatments, enough to justify a narcotic medication regimen as the best option for treating her chronic pain. Treatment with narcotics has increased Claimant's tolerance for both work and daily living activities, and thereby has alleviated her depression as well. Though not a perfect solution, in Dr. Bucksbaum's opinion narcotic medications have given Claimant a level of pain control that is significantly better than what he would expect from any other treatment option. This has made a "major difference" to her. Dr. Bucksbaum anticipates that Claimant most likely will require narcotic pain control medications for the rest of her life.
11. Testifying on Defendant's behalf, Dr. Ensalada strongly disputed the appropriateness of Dr. Bucksbaum's treatment plan, for essentially the same reasons that he propounded at the earlier formal hearing in this claim. Dr. Ensalada is board certified in both pain medicine and anesthesiology. Although his current practice is largely forensic, in the past he devoted a significant portion of his time to treating pain patients.
12. According to Dr. Ensalada, Claimant's original injury was a minor low back strain/sprain resulting in non-specific low back pain. Since then, neither objective physical findings nor diagnostic studies have revealed any verifiable basis for her chronic pain. Dr. Ensalada emphasized that Claimant is not malingering or magnifying her symptoms in any way. In his opinion, however, without objective signs of underlying pathology Claimant's subjectively reported symptoms alone are insufficient to justify treating her with narcotic medications. For that reason, Dr. Ensalada believes that Dr. Bucksbaum's treatment has always been, and continues to be, neither reasonable nor necessary.

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. Once a claim has been accepted and benefits have been paid, the party seeking to discontinue bears the burden of proving that it is proper to do so. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974). As to the reasonable necessity of medical treatment, however, Claimant bears the burden of proof. *MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009).
3. At issue here is whether Claimant's continued ongoing use of narcotic medications for chronic pain control constitutes reasonable and necessary treatment. Dr. Bucksbaum, her treating physician, feels strongly that it is. Dr. Ensalada, Defendant's medical expert, feels strongly that it is not.
4. 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 (Sept. 17, 2003).
5. Notwithstanding the passage of more than five years' time, the medical expert testimony offered in the current claim is in most respects identical to that offered at the prior formal hearing. There, the Commissioner determined that Dr. Bucksbaum's opinion was the most credible. Since that time, Dr. Bucksbaum's opinion has been buttressed by the Vermont Medical Practice Board's publication of a policy that endorses the ongoing use of narcotic medications, in appropriate circumstances, as an effective treatment for chronic pain.
6. I conclude that Dr. Bucksbaum's treatment fits in all respects within the parameters of the Practice Board's policy. It also meets the definition of "palliative care" as stated in Workers' Compensation Rule 2.1310: "[M]edical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but [not including] medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition."

7. I also conclude that by virtue of his training and experience Dr. Bucksbaum is well qualified to administer a narcotic pain control program on Claimant's behalf. He has demonstrated his ability to impose strict controls on Claimant's drug use and to monitor both her compliance with, and her response to, his treatment regimen. Although not in itself a determinative factor, furthermore, Dr. Bucksbaum is entitled to due deference as Claimant's treating physician for more than nine years, managing a chronic pain condition for which only imperfect solutions exist.
8. In contrast, I am hard-pressed to accept Dr. Ensalada's analysis. It was insufficient to carry the day at the 2004 formal hearing, and it has not changed appreciably since.
9. I conclude that Dr. Bucksbaum's opinion is the most credible one here. With that opinion as support, Claimant has sustained her burden of proving that Dr. Bucksbaum's current treatment plan, which includes prescribing narcotic medications to manage her chronic pain, continues to be both reasonable and necessary treatment for her September 23, 1999 work injury. Although Claimant's circumstances may change in the future, either because her condition changes, or she becomes non-compliant, or medical science offers new treatment alternatives, at present Defendant remains responsible for what Dr. Bucksbaum has established to be the best option available to her.

ORDER:

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

1. Medical benefits covering all reasonable and necessary medical services and supplies causally related to Claimant's September 23, 1999 work injury, including coverage for narcotic pain medications; and
2. Costs and attorney fees, in amounts to be determined pursuant to 21 V.S.A. §678(e).

DATED at Montpelier, Vermont this 22nd day of December 2009.

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.