

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

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| |) | State File No. L-12126 |
| |) | |
| Madelin Colbert |) | By: Margaret A. Mangan |
| |) | Hearing Officer |
| v. |) | |
| |) | For: R. Tasha Wallis |
| Starr Farm Nursing Home |) | Commissioner |
| |) | |
| |) | Opinion No. 05-01WC |

Hearing Held in Montpelier on December 11, 2000.
Record Closed on January 16, 2001.

APPEARANCES:

John C. Swanson, Esq. for the claimant.
John W. Valente, Esq. for the defendant.

ISSUES:

1. Whether the claimant is entitled to temporary total disability benefits from September 9, 1999 to the present and continuing.
2. Whether the claimant is entitled to certain medical and hospital benefits under 21 V.S.A. § 640 in an amount to be determined.
3. Whether the claimant is entitled to reimbursement for reasonable attorney's fees, costs and interest.

DEPARTMENT FORMS:

1. Form 1, First Report of Injury, filed December 22, 1997.
2. Form 21, Agreement for Temporary Total Disability Compensation, filed March 19, 1998 for disability beginning on December 22, 1997.
3. Form 27, Notice of Intention to Discontinue Payments, filed December 3, 1998 based on medical end result and report of Dr. Bruce Forester. The Department rejected the Form on December 7, 1998.

4. Form 27 filed on September 1, 1999 and based on medical end result and report of Dr. Lapinsky. The Department approved the discontinuance on September 8, 1999.

EXHIBITS:

- Claimant's Exhibit 1: Medical Records.
- Claimant's Exhibit 2 Medicare Insurance document.
- Claimant's Exhibit 3: Curriculum Vitae of Mark Stuart Schultz, M.D.
- Claimant's Exhibit 4: Dr. Schultz's statement.
- Claimant's Exhibit 5: Letter from Attorney Valente to Dr. Kenosh, April 18, 2000.
- Claimant's Exhibit 6: Invoice for legal services.

- Defendant's Exhibit A: Medical Records.
- Defendant's Exhibit B: Curriculum Vitae of Albert Drukteinis, M.D., J.D.
- Defendant's Exhibit C: Page from Dr. Drukteinis's website.

STIPULATION OF FACTS:

1. Madelin Colbert was an employee of Starr Farm Nursing Home within the meaning of the Vermont Worker's Compensation Act at all relevant times.
2. Starr Farm Nursing Home was an employer within the meaning of the Act at all relevant times.
3. Constitution State Service Company was the workers' compensation carrier for Starr Farm Nursing Home at the time of the injury at issue in this case.
4. At the time of the injury, claimant was employed as a nursing assistant at Starr Farm Nursing Home. Her average weekly wage was \$340.00.
5. On December 10, 1997 the claimant was working her shift at Starr Farm Nursing Home when, in the performance of her duties, she was injured while assisting a co-employee lift a patient.
6. As a result of her injury, on March 4, 1998 the claimant underwent a laminectomy and discectomy.

FINDINGS OF FACT:

1. The First Report of Injury indicates that the claimant was hired to work at the Starr Farm Nursing Home on November 17, 1997. She had worked on and off for Starr Farm for three years; this most recent employment followed her return from Texas.

2. The claimant was born on August 31, 1957. Her work history includes five years at Woolworth's, one year at Sears and five years at the Visiting Nurse Association as a homemaker. She received training and became licensed as a nursing assistant. She worked at the Arbors, went to the Starr Farm, to Texas then back to Starr Farm where she was injured. Her education includes courses at Goddard and Burlington Colleges.
3. On December 10, 1997, at approximately 10:00 p.m., the claimant was injured while she was transferring a patient. She felt a pain in her back, but was able to finish the shift. When she arrived home, she testified, she felt back pain, as well as right leg, knee and foot pain.
4. Initially the claimant sought care at Immediate Health Care on December 12, 1997 where a diagnosis of lumbosacral strain with left sciatica was made. She was released to modified work on December 15, 1997. Since that time, James Cummings, D.O. at Champlain Sports Medicine has treated her.
5. On March 4, 1998, Dr. Binter performed surgery for severe S1 radiculopathy. Later that month, she recommended physical therapy three times per week.
6. The claimant continued to treat with Dr. Cummings. His follow-up note of June 3, 1998 reported that the CT and electromyogram demonstrated "only old changes with no repeat history and physical and no new radiculopathy." He recommended chronic pain management.
7. At a June 6, 1998 physical therapy session, the therapist, Mary Milsark, noted that the claimant "did not tolerate back strengthening exercises post operatively and continued to have pain down her right leg."
8. On July 1, 1998 Steven B. Mann, Ph.D., a psychologist at the Behavioral Medicine Center of Vermont, evaluated the claimant on a referral from Dr. Cummings. Dr. Mann reported claimant's history, including a description of the work-related injury and subsequent treatment. The note reflects the claimant's report that she had "lots of PT as well as aqua therapy with very little beneficial results." Dr. Mann's testing indicated that the claimant suffered from depression, but not of the degree that should have prevented her from working. Yet he noted that her own perception of her disability was that she was "virtually totally disabled," and that work would make her pain worse. Dr. Mann noted that her personality was such that physicians and other health care providers were likely to find her "pleasant and easy to be with." However, he also noted that she maintained compliance with medical treatment only until she was asked to do things on her own. With Dr. Mann and almost all of her health care providers, the claimant expressed a belief that she could go back to work.

9. Dr. Mann opined that the claimant had a severe psychological overlay to her pain experience. He noted that she exhibited a pattern of denial and superficial compliance as well as pain amplification, with pain out of proportion to objective testing as well as her presentation. In conclusion, Dr. Mann recommended the three week intensive program at the Center for Musculoskeletal Medicine with the intent of offering a "coordinated multidisciplinary treatment program with important rehabilitation protocols."
10. The claimant testified that she did not like or trust Dr. Mann. After the initial assessment, she did not think they could have an effective counseling relationship. She also said that she waited too long in his office before he saw her and had to lie down because of her pain. She refused to see Dr. Mann again.
11. On August 18, 1998 when Dr. Cummings saw the claimant again, he indicated that if she did not wish to attend pain management programs, she was at medical end result. He recommended that she have a permanency determination at that time.
12. On September 18, 1998 Dr. Christine Northrup referred the claimant for massage therapy two to three times per week for low back and right leg pain.
13. When Dr. Binter saw the claimant on October 2, 1998, she noted that the claimant was demonstrating a "lot of pain behavior in the office." Dr. Binter referred the claimant to Excel Physical Therapy and to Dr. Bruce Viani for a lumbar epidural steroid injection.
14. The employer in this case has presented three independent medical evaluations. Dr. Foerster performed an evaluation on November 10, 1998. He found that treatments up to then had been reasonable and necessary and placed her at medical end result based on the chronicity of her symptoms, although he also noted that further treatment might be of value. Dr. Foerster assessed a 10% permanent partial impairment based on a DRE Impairment Category III. He released her with modified job restrictions to 30 pounds and a light to medium job duty responsibility. Based upon Dr. Foerster's report, the defendant filed a Form 27 Notice to Discontinue Benefits, based on medical end result which was subsequently denied by the Department.
15. In January 1999, Dr. Binter reported that the postoperative MRI demonstrated no recurrent disc herniation at L5-S1 and a stable minor bulge at L4-5. Her physical examination was mostly pain related. Dr. Binter considered a Functional Capacity Assessment to determine her capabilities.

16. The claimant's primary care physician, Dr. Northrup, determined that "massage therapy is at least providing her with some relief." In April 1999 she recommended that the claimant should continue massage therapy for at least four months, two to three times per week, while other modalities for pain relief were followed.
17. Dr. Roland Hazard saw the claimant on February 5, 1999 when he reported that she had back and radicular pain from what was described as a good structural result from her discectomy. At her next visit with Dr. Hazard in March of 1999, he discussed options of rehabilitation with the claimant who refused them in favor of continued surgical consultations. Dr. Martin Krag then saw the claimant and indicated that the likelihood that surgery would improve her condition was less than the likelihood that it would worsen her symptoms. She then went to see Dr. Sargent and Dr. Abate. Dr. Hazard saw the claimant for the last time on March 14, 2000, noting that the counseling program was not effective for her.
18. On March 11, 1999 Dr. Hazard saw the claimant again and reviewed her January 3, 1999 MRI. He noted that she had some limited disc bulging but was uncertain about future surgery. However, he agreed with the claimant's request to seek a surgical opinion before beginning an interdisciplinary rehabilitation program.
19. On May 24, 1999 Dr. Krag saw the claimant for evaluation of low back and right lower extremity pain. He did not deem further surgery necessary.
20. The claimant complained of right ankle pain and swelling that she reported dated back to the injury in December 1997. In June 1999, Dr. Sargent evaluated the claimant for these complaints and ordered a MRI of the ankle.
21. In a June 7, 1999 letter to the insurance representative, Dr. Thomas Busby, a chiropractic physician, stated with medical certainty that the care in his office had been the result of her "unresolved low back injury at work."
22. On July 21, 1999 Magdalena R. Naylor, M.D., Ph.D., attending psychiatrist at Fletcher Allen Health Care, evaluated the claimant by taking a history, reviewing the medications she was taking, diagnosing her condition and making treating recommendations. Dr. Naylor diagnosed partially treated major depression, low back pain, inability to work, financial problems and a level of functioning of 50, compared with a previous high of 85. Among her treatment recommendations, Dr. Naylor prescribed a weekly "MindBody Health Program," with the stated belief that the claimant was an excellent candidate "secondary to her intelligence, cognitive skills and motivation to get better."

23. On August 19, 1999 Dr. Lapinsky determined that the claimant was capable of a sedentary work position, that she was at medical end result and that she had a 10% whole person impairment rating. In his opinion, the massage therapy the claimant was receiving was not indicated or efficacious in this case.
24. The claimant participated in the MindBody Health Program from September 2, to November 11, 1999.
25. The claimant saw William E. Kois, M.D. at the Southern New Hampshire Medical Center on October 21, 1999. At that time, she was taking Tylenol, Celebrex, Robaxin, Zoloft, Elavil, Zestril, Valium and Darvocet. She complained of pain in the lower back and right leg with numbness and tingling of the right leg. On examination, Dr. Kois noted that she was in no apparent distress, although she spoke with a guarded speech pattern. She had "fairly good" range of motion in her lower back on flexion, extension, lateral rotation and lateral flexion. She had brisk knee and ankle reflexes and some hypersensitivity in the right leg. Her motor examination showed some weakness in toe and heel walking on the right foot. Dr. Kois diagnosed chronic lumbar radiculopathy involving the right leg and complicated by depression and what he believed was frustration over the persistence of pain. He ordered X-rays and a MRI scan. The lumbar spine, pelvis, and hip films were normal. The MRI demonstrated a lower lumbar degenerative change with a protrusion at L4-5 and L5-S1 without nerve compression. Dr. Kois noted that he wanted to review the films with Dr. Wepsic.
26. In December 1999, the claimant sought psychiatric care from Mark Schultz, M.D., a psychiatrist who had treated her in the past. In a letter to claimant's counsel, Dr.Schultz noted that the claimant "described how work has always been a foundation for her self-esteem and sense of self-worth."
27. At the hearing, Dr. Schultz testified that he first treated the claimant in 1993 for life stresses, which did not affect her ability to work. He saw her again in 1995 for other life stresses, including the death of her mother and a divorce, but again, her symptoms did not affect her ability to work. When he saw her again in 1996, her employment was not affected. Not until he saw her on December 8, 1999 when she sought help to cope with back pain did he note that she was unable to work.
28. In March of 2000, the claimant's longstanding massage therapist, Walter Zeichmer, noted that in the previous four sessions he had observed increased swelling in her lower back and that she had complained of increased tenderness and discomfort in her lower back and down the outside of her right leg. Because of the continued pain, the massage sessions were halted.

29. On June 14, 2000 James G. Wepsic, M.D. evaluated the claimant. He noted that she had extensive therapy following her surgery, including two sessions of physical therapy, aquatic therapy, pain clinic treatment and massage therapy "all without particular improvement." He recorded her reports of pain in the low back that had increased in severity and which worsened greatly if she stands for any period of time or walks for more than 10 to 15 minutes. On examination, Dr. Wepsic noted that she was uncomfortable sitting and needed to change positions several times. Her deep tendon reflexes were hyperactive throughout. Straight leg test was negative bilaterally. She could bend over and almost touch her toes, but extension was limited to 10 degrees. Dr. Wepsic concluded that the claimant was disabled from any form of work and opined that she was not at a medical end result.

30. On June 29, 2000, Dr. Schultz wrote a letter stating in part that:

Madelin Colbert is an intelligent, compassionate woman whose current disability is the direct result of an injury that prevents her from being able to engage in the one life activity that has always sustained her: work. Working has always been the foundation of her self-esteem and sense of worth. Not being able to work imposes a huge psychological burden on her—she truly is someone who would be working if at all possible. Current psychiatric diagnosis is major depressive disorder complicated at this point by posttraumatic stress disorder (from the aftereffects of her injury).

31. On August 9, 2000, Dr. Michael Kenosh evaluated the claimant. He found that she was at a medical end result with a 10% permanent partial impairment. He agreed with Dr. Lapinsky that additional massage therapy and further treatment were not reasonable and necessary. Furthermore, he opined that the massage therapy would not result in any change in her permanency rating.

32. In Dr. Kenosh's opinion, the claimant's psychiatric problems should not keep her from working.

33. On October 18, 2000 Dr. Wepsic commented on the X-rays and MRI scan, which he believed confirmed the "presence of some degree of nerve root irritation at the L4-5 level and scarring at L5-S1."

34. In a letter to claimant's counsel dated November 20, 2000, Dr. Wepsic wrote that the MRI showed two areas of continued nerve involvement. He wrote that the first, at L4-5, could be approached surgically, "although the track record for such lateral herniations is not terribly good...." The second area, at L5-S1, also could be approached surgically, but the "odds of improvement with a re-operation of

this type are not good." Since he did not think that surgery would be "overwhelmingly successful," Dr. Wepsic recommended continued conservative management with medication and adjustment of activities. Additionally, Dr. Wepsic commented on the opinion offered by Dr. Kenosh, who he believed did not review the diagnostic studies and therefore would not be in a position to comment on whether there is an underlying physical cause for the claimant's symptomatology.

35. At the request of the employer, Albert M. Drukteinis, M.D., J.D. saw the claimant for a psychiatric evaluation on November 22, 2000. Dr. Drukteinis reviewed the claimant's medical records, administered psychological tests to the claimant, interviewed her and diagnosed her condition. The claimant testified that during her interview with Dr. Drukteinis, she stood up then fell backwards into a glass wall. She said she was tired from the drive to office and that the test was long. Therefore, Dr. Drukteinis suspended the interview and gave her the paper and pencil test to take at home and mail back to him.
36. Dr. Drukteinis agreed with the claimant's theory that her psychological problems began with her work-related physical injury. He specifically wrote, "there is no basis to psychiatrically conclude that Ms. Colbert's symptoms are primarily or even substantially due to psychological factors." On the other hand he observed that the claimant exhibited significant pain behavior and signs of symptom magnification.
37. Overall, Dr. Drukteinis concluded that the claimant's depression was insignificant, and her anxiety only mild to moderate. He opined that she had no additional impairment based on a psychiatric disturbance.
38. At the hearing, Dr. Drukteinis testified that the claimant does not have a psychological condition that prevents her from working. He also testified that his testing revealed that the claimant was not motivated to make somatic complaints.
39. The claimant submitted a claim and supporting evidence for \$18,528.15 in medical bills. Included are bills for prescriptions and over the counter medications and those from: Fletcher Allen Health Care, in 1998 and 1999, Vermont Radiologists, Champlain Sports Medicine, Long Trail Physical Therapy, Excel Physical Therapy, Walter Zeichner, massage therapist, The Medical Store, Dr. Thomas Busby, Southern New Hampshire Regional Medical Center, Associated Radiologists, Dr. Wepsic and Dr. Mark Schultz.
40. The claimant submitted a statement indicating that her attorneys worked 203.70 hours and expended \$746.32 in the pursuit of this claim.

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, Morse Co.*, 123 Vt. 161 (1963). She must establish by sufficient credible evidence the character and extent of the injury as well as the causal relationship between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
2. Where the causal connection between an accident and an injury is obscure and the layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.* 137 Vt. 393 (1979).
3. In this case, there is no dispute that the claimant suffered a compensable work-related injury. The dispute centers on if and when she reached a medical end result as well as the nature and extent of the injury. End medical result is "the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." Rule 2(h), Vermont Workers' Compensation and Occupational Disease Rules.
4. It is only once the recovery process has ended or the worker has achieved the maximum possible restoration of her earning capacity that the injured worker is no longer entitled to temporary disability benefits. *Sawyer v. Mt. Snow, Ltd.*, Opinion, No. 22-97WC (Aug. 13, 1997), citing *Bishop v. Town of Barre*, 140 Vt. 564, 571 (1982).

Physical Injury

5. The defendant argues that the claimant had reached a medical end result at the time of Dr. Foerster's examination in November 1998, when Dr. Lapinsky examined her in August 1999 or, at the latest, when Dr. Kenosh examined her in August 2000. The claimant relies on the opinions of Dr. Schultz and Dr. Wepsic in support of her position that she has not yet reached medical end.
6. Despite Dr. Wepsic's conclusory finding that the claimant has not reached medical end result, the overwhelming evidence is that she has. Objective evidence indicates that the claimant had successful back surgery, although pain persisted afterwards. She then sought several medical opinions in her search for a surgical solution to her continued problems, but none was forthcoming. Dr. Krag did not think that further surgical intervention was indicated. Dr. Hazard did not think that surgery would help. Dr. Cummings, Dr. Foerster and Dr. Lapinsky agreed that she was not a surgical candidate. Even the claimant's most recent consultant, Dr. Wepsic, concurs with what is a unanimous opinion that surgical intervention is not recommended.

7. Dr. Wepsic opined that the claimant would benefit from and significantly improve her quality of life and degree of pain with a continuing program of conservative non-surgical medical management. However, because the medical records demonstrate that the claimant's condition has been stable for years, continued treatment to relieve her pain is palliative care, which although compensable if reasonable and necessary, does not preclude a finding of medical end result.
8. The defendant argues that the claimant reached medical end result at the time it filed the first Form 27 in 1998. However, that form was properly rejected because the opinion on which it was based suggested that further improvement was expected. However, Dr. Lapinsky's report of 1999 that she had reached medical end is well supported by the records, which show that she had reached a plateau. Therefore, I accept as valid the Form 27 of September 1999.

Physical-Mental Injury

9. The claimant maintains that her psychological condition disables her and in support relies on the opinion of Dr. Schultz. She argues that she suffers from a disabling, work-related physical-mental condition. For the claimant to succeed on a physical-mental claim, she must prove causal connection between the psychological impairment and a compensable injury. *Brosseau v. North Country Vending*, Opinion No. 5-96WC (Mar. 13, 1996); *Blais v. Church of Jesus Christ of Latter Day Saints* Opinion No. 30-99WC (July 30, 1999)
10. Dr. Schultz diagnosed the claimant with "Adjustment Reaction with Depressed Mood" as a result of her physical work-related injury. His opinion as to causation is not seriously challenged. The defense expert, Dr. Drukteinis, agrees that her psychological condition followed the work-related injury. However, Dr. Schultz's opinion that her psychological condition disables her is based on the claimant's telling him so. Because the claimant's opinion regarding her abilities is unreliable, an expert opinion on that subject can not be accepted.
11. The more credible diagnosis is that provided by Dr. Drukteinis of a non-disabling depression. Therefore, although the claimant is entitled to payment for the psychiatric care Dr. Schultz provides, which is clearly reasonable and necessary, she is not entitled to temporary total disability benefits for her mental condition.

Compensability of Other Treatment

12. 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); *Smith v. Whetstone Log Homes*, Opinion No. 70-96WC (Nov. 25, 1996). In determining what is reasonable under 21 V.S.A. § 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

13. In this case, the claimant's care providers initially held out hope that chiropractic treatments and massage therapy would improve her symptoms, but that hope proved illusive. Because the evidence fails to prove the chiropractic treatments and massage therapy she received after September 1999 improved her symptoms or helped her maintain functional abilities, they are not compensable.
14. The medical records are replete with references of the claimant's pain for which she has been prescribed numerous medications. Because those medications are necessary palliative care to relieve pain, they are compensable.
15. Treatments in 1998 from both Long Trail and Excel Physical Therapy are compensable because Dr. Binter prescribed them as reasonable adjuncts to the surgery she performed.
16. In the claimant's search for a surgical solution to her problem, she consulted with several physicians at Fletcher Allen Health Care. As evidenced by the content of the notes, those assessments were appropriate and therefore, reasonable under 21 V.S.A. § 640.
17. However, the claimant must bear the financial burden of the assessments by Dr. Kois at the Southern New Hampshire Medical Center and the evaluations from Dr. Wepsic. By the time the claimant obtained those evaluations, many physicians had told her that a surgical option was not available to her. Yet, she persisted only to obtain the same evaluation from her final experts. Those opinions do not constitute reasonable or necessary compensable medical treatment.
18. As mentioned above, the care by Dr. Schultz is compensable.
19. Pursuant to 21 V.S.A. § 678, claimant's entitlement to necessary costs is a matter of law; her right to reasonable attorney's fees is a matter of discretion. Because the claimant has partially prevailed, an award of fees in proportion to her success is appropriate. Her attorney fees, therefore, are 20% of this award. *Workers' Compensation Rule* 10(2) (B). Additionally, because the expenses incurred were necessary for the claimant to prevail on her claim for medical expenses, they are awarded in the amount of \$767.34.

ORDER:

Based on the Foregoing Findings of Fact:

1. The defendant is ordered to pay the claimant's medical bills as outlined above;
2. The defendant is ordered to pay the claimant attorney fees of 20% of the amount paid for medical bills and costs in the amount of \$767.34.
3. Claimant's claim for temporary total disability benefits after September 1999 is DENIED.

Dated at Montpelier, Vermont this 26th day of February 2001.

R. Tasha Wallis
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of the fact or mixed questions of law and fact to a superior (county) court or questions of the law to the Vermont Supreme Court. 21 V.S.A. §§ 670,672.