Lebeau v. Harbor Industries (11/17/03)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Tammy Lebeau	)	State File No. K-03970
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Harbor Industries	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 45-03WC

Hearing held in Montpelier on February 25 and 28, 2003
Record closed on May 5, 2003

APPEARANCES:

Frank Talbott, Esq. , for the Claimant
Glenn S. Morgan, Esq. and Marion T. Ferguson, Esq., for the Defendant

ISSUES:

1. Is the Claimant permanently and totally disabled as a result of the injury she suffered at Harbor Industries on August 19, 1996?

2. Are the Claimant's temporal mandibular joint (TMJ) problems causally related to her injury at Harbor Industries on August 19, 1996?

3. What is the date at which the Claimant reached a medical end result?

4. Is the Claimant entitled to any past temporary total disability benefits?

5. If the Claimant is found not to be permanently and totally disabled as a result of the work related injury, what is her appropriate permanent partial disability rating?

6. Does the Claimant suffer from a compensable psychological injury?

EXHIBITS:

Joint I:	Medical Records
Joint II:	Vocational and Case Management Reports
Claimant's 1:	Dr. Talley's Curriculum Vitae
Claimant's 2:	Greg LeRoy's Curriculum Vitae
Claimant's 3:	Report of Greg LeRoy
Claimant's 4:	Dr. Crandall's Curriculum Vitae
Claimant's 5:	Social Security Disability Determination
Claimant's 6:	i.d only
Claimant's 7:	Dr. Naylor's Curriculum Vitae
Defendant's A:	Dr. Bucksbaum's Curriculum Vitae
Defendant's B:	CRA Managed Care documents
Defendant's C:	Report of Myron Smith
Defendant's D:	Myron Smith's Curriculum Vitae

FINDINGS OF FACT:

1. Tammy LeBeau, the claimant, was born in Kentucky on March 31, 1968. She has a high school diploma and obtained an Associates Degree in dental lab technology from Lexington Community College in May 1989, attaining a B average. She worked as a dental lab assistant in Kentucky from 1989 to 1994 making crowns and bridges.

2. The claimant gave birth to her first child in 1993, before moving to Vermont with him and her husband in December of 1994. The couple decided to relocate to Vermont because her husband's family lived and owned a business in the state. The claimant and her husband felt that the husband's family could help them with their child, who suffered from allergies.

3. Claimant attempted to find a job in Vermont in her field of training beginning in 1995 and into 1996. She was, however, unable to find a job in her field of training. She eventually went to work at Harbor Industries as a spark tester in April 1996.

4. After four months at that job, on August 19, 1996,claimant was walking to her work area when she noticed spools of wire falling from approximately 12-13 feet. As she elevated her right arm to protect herself, one of the falling spools weighing approximately five pounds struck her right forearm. The claimant's arm had a tingling sensation and she felt light headed.

5. The claimant was treated at Fanny Allen Hospital for her injury. She was initially diagnosed with a soft tissue injury with pain along her wrist, hand and forearm and along the ulna. After the accident, the claimant attempted to return to light duty at work. She was unable to do so and has not worked since.

6. Within a month of the injury, the claimant's treating physician, Donald N. Weinberg, M.D., began to suspect that she was showing signs of Reflex Sympathetic Dystrophy (RSD). The physician referred her Dr. John Lawliss at Associates in Orthopedic Surgery and also sent her to physical therapy. The claimant received physical therapy at Advanced Physical Therapy in South Burlington from August to December of 1996.

7. The claimant initially met with John Lawliss, M.D. at Associates in Orthopedic Surgery on November 4, 1996. At that time, Dr. Lawliss stated that x-rays and a bone scan obtained by Dr. Weinberg were negative. His impression was a right forearm contusion and possible atypical presentation for mild RSD. Over time Dr. Lawliss came to the conclusion that conventional physical therapy was not producing enough positive results for the claimant. He felt that pain and numbness in her left arm were unrelated to her right arm injury. Dr. Lawliss eventually referred her to the Work Enhancement Rehab Center (WERC) for a more functional approach. He requested that WERC conduct a Functional Capacity Evaluation (FCE) to determine where she stood in terms of her job capacity functioning. Dr. Lawliss also referred the claimant to a neurologist for a consultation.

8. The claimant treated with Dr. Kenneth Ciongoli from December 1996 until May of 1999. EMG studies showed a mild carpal tunnel on the right and a trend towards one on the left. During the course of the claimant's visits, Dr. Ciongoli diagnosed the claimant with RSD.

9. In January 1997 claimant's father passed away. She then traveled to Kentucky for the funeral and returned to Vermont shortly thereafter.

10. On January 24, 1997 the claimant underwent an FCE at WERC with Joan VanSaun, MS, OTR. The results of the evaluation showed that the claimant was suffering from shoulder pain that had come about fairly recently. Based on the evaluation it was not only concluded that the claimant was incapable of performing her spark tester job, but she also did not even meet the criteria for sedentary level work. There was a suggestion made for further physical therapy with a progression into a Work Hardening Program. From March through May of 1997 the claimant underwent physical and occupational therapy, as well as the Work Hardening Program at WERC that had been suggested. At one point claimant reported that she had tried a TENS, but was sore afterwards. She was discharged from the program with "no significant improvements in mobility, strength, or function in her right arm." There were further recommendations for psychological counseling and a suggestion for cross dominance training.

11. On May 12, 1997, the claimant was evaluated for the appropriateness of pain management counseling by Nancy P. Siliberg, Ph.D., supervising psychologist and Deborah Sepinwall, psychology intern, at Fletcher Allen Health Care. Based on the DSM-IV diagnostic configuration, the claimant was found to have a pain disorder associated with psychological factors and a general medical condition. This type of diagnosis is considered a somatoform disorder. There was also a diagnosis of chronic arm pain. Although the evaluators stated "she may lack insight into the cause of her symptoms", they concluded that the claimant was an "appropriate yet challenging candidate for pain management counseling…."

12. The claimant saw Brian Calhoun M.D., at Anesthesia Pain Service in August of 1997. After examining the claimant, Dr. Calhoun initially diagnosed her with RSD. He performed a stellate ganglion block. It did not relieve her pain, but rather produced an increase in temperature of her extremity. This led Dr. Calhoun to believe that there may be neural involvement with the injury rather than RSD. He recommended medications to treat the neuropathic pain. He also referred the claimant to the Center for Musculoskeletal Medicine (CMM). However, the claimant testified that the insurance company refused to authorize the treatment at CMM, and an appointment was not made.

13. Beginning in September of 1997, the claimant went to five pain management counseling sessions with Carol A. McKenna, Ph. D. On November 18, 1997, Dr. McKenna wrote: "I feel that [claimant] is definitely 'doctor shopping' and seeking a medical 'fix' to her perceived physical limitations. Given this, her likelihood of success at pain management training is low."

14. The claimant was initially seen at Associates in Physical and Occupational Therapy on September 5, 1997, and again on October 3, 1997. As a result of these visits, there were some preliminary suggestions and recommendations made by the evaluators. Some of these suggestions included assistive devices to help the claimant care for herself and prepare meals at home and to become more cross dominant; and also adaptations to her car to allow her to drive more.

15. On August 26, 1997, one year after the work related injury, claimant weighed 180 pounds, the same as she weighed when she was eighteen years old.

16. Sometime around November of 1997, the claimant became pregnant. Dr. Ciongoli, who she was still treating with, reduced the claimant's medications during her pregnancy.

17. In December of 1997, the claimant was seen for an IME with Kuhrt Wieneke Jr., M.D., at The Orthopedic Center in North Adams, Massachusetts. Dr. Wieneke did not believe that the claimant needed further physical therapy. He recommended some "stress loading" exercises and believed that the claimant would be at medical end result after eight to twelve weeks if she did those exercises. Dr. Ciongoli echoed this recommendation.

18. On February 20, 1998, Mark Bucksbaum, M.D., a physiatrist, performed an IME of the claimant. Dr. Bucksbaum's evaluation was based on a direct interview and examination of the claimant as well as the medical records provided by Advance Physical Therapy, Work Enhancement Rehab Center, Associates in Physical and Occupational Therapy and Drs. Weinberg, Lawliss Ciongoli, Siliberg, Calhoun, McKenna and Wieneke. He found the claimant was "somewhat hypersensitive throughout the right arm, despite a relatively normal physical evaluation, with the exception of a side to side temperature difference." After completing his examination, Dr. Bucksbaum concluded that the claimant had reached a medical end result. He did not feel that further diagnostic testing was warranted, nor did he think additional procedures would substantially change her condition. He diagnosed the claimant with a mild causalgia of the right forearm, in accordance with the American Medical Association Guide to the Evaluation of Permanent Impairment, 4th Edition. Finally, Dr. Bucksbaum gave the claimant a 5% impairment of the upper extremity, which equated to a 3% impairment of the whole person.

19. When claimant was pregnant with her second child, she made a trip by van to Kentucky. On at least two other occasions, she flew to Kentucky.

20. The claimant saw Douglas Kennedy, M.D. in Lexington, Kentucky on April 8, 1998. The claimant's sister, who worked for Dr. Kennedy, had recommended the doctor to the claimant. Dr. Kennedy suggested that after her pregnancy, the claimant should try several medications, including Baclofen, Klonopin, Tegretol, Depakote, and Tofranil. If none of those medications worked, Dr. Kennedy suggested the claimant explore whether she was a candidate for decompressive surgery of the radial nerve; and if that did not help he also suggested looking into whether she was a candidate for a peripheral nerve stimulator.

21. Dr. Kennedy determined that claimant had a 15% whole person impairment based on the 4th edition of the AMA Guides to the Evaluation of Permanent Impairment, Tables 3 and 34, and considering a reduction in her activities of daily living.

22. On July 10, 1998 Dr. Kennedy wrote a letter stating that claimant was not likely to improve over the following 12 to 24 months and that she could perform work at the capacity determined at the FCE as long as she did not do repetitive work.

23. The claimant gave birth to her second child on August 13, 1998. On September 17, 1998 she asked Dr. Ciongoli to prescribe some of the medicines suggested by Dr. Kennedy. However, Dr. Ciongoli convinced the claimant to wait until after she was finished nursing her child because the drugs would likely cross in the milk.

24. On October 7, 1998, Dr. Ciongoli wrote a letter to Sedgwick's Claims Management Services indicating that he did not believe that the claimant was at a medical end result. He suggested that the claimant be reevaluated in April of 1999 after she had tried Dr. Kennedy's suggestions.

25. In January of 1999, Dr. Ciongoli wrote a letter to Carol J. Huston, nurse case manager for Intracorp, outlining the medications that had been tried with the claimant. At that time, the claimant was taking Tegretol and Dr. Ciongoli suggested that if this medication did not work, he would try Depakote. He said he would reevaluate her in April to determine if she was at a medical end result.

26. In March of 1999 claimant complained to her primary care provider of a "sudden onset" of weight gain with a 15-pound gain in the previous month. At a visit in April of 1999, she weighed 216 pounds; in June it was up to 221 pounds. After weight loss attempts, it was down to 190 pounds in December of 1999.

27. On April 29, 1999, Dr. Ciongoli wrote another letter to the claims examiner at Sedgwick Claims Management Service, saying that the claimant had minor causalgia. He stated that the claimant had 75% upper extremity impairment, and that he believed it was permanent.

28. On June 18, 1999, the claimant returned to Dr. Bucksbaum for a second IME. He again found a temperature difference between her hands. He concluded that the claimant had "a clinical history and examination consistent with causalgia following the distal radial distribution." Dr. Bucksbaum repeated his conclusions that the claimant was at a medical end result and she had a 3% permanent impairment. He made a recommendation of "periodic physician visits for pain management."

29. Dr. Bucksbaum found the claimant's responses to various tests were consistent with non-physiologic reactions. All objective tests have been negative, including x-rays, bone scan and EMG. A stellate ganglion block, intended to influence her pain, did not have the intended effect. He concluded that claimant has a chronic pain syndrome that makes it impossible for her to give her best effort.

30. Dr. Bucksbaum did not change his opinions between the examinations he performed in 1998,1999 and 2002. Using objective criteria for a sympathetic mediated pain syndrome listed in the 5th edition of the AMA Guides to the Evaluation of Permanent Impairment (Guides), he noted that claimant had none. Furthermore, he opined that claimant has a work capacity.

31. On June 22, 1999, the claimant met with Dr. Calhoun again. He concluded that the claimant had a neuropathic pain syndrome, saying it was possibly complex regional pain syndrome type 1 or 2. He also suspected she had a radial nerve injury. Dr. Calhoun recommended that claimant have an EMG, or possibly, a dorsal nerve stimulator or peripheral nerve stimulator. He also suggested an exploration of her medication options. As a result, Dr. Fries performed a second EMG study. He found no nerve injury and diagnosed the claimant with regional pain syndrome.

32. On August 27, 1999, Dr. Calhoun wrote to Susan LaFlamme at the Department of Labor and Industry, indicating that the claimant had not reached a medical end result. He indicated that she should try a new medication, Klonopin, pursue a peripheral nerve stimulator and consider a spinal cord stimulator. On September 13, 1999, Dr. Calhoun wrote another letter to Sedgwick James Insurance Company, stating that he had consulted with Dr. Rathmill regarding the claimant's case. He made several recommendations, including: using Klonopin to decrease the burning pain of RSD; an evaluation with Dr. James V. Mogan to see if the claimant was a candidate for an operation on the cutaneous branch of the radial nerve; evaluation for a peripheral nerve stimulator or dorsal column stimulator.

33. Dr. Mogan met with the claimant on September 9, 1999. The doctor's notes from the visit state: "she is certainly tender to palpation over the radial tunnel area. She is willing to go through an exploration of this area. I feel she has a very low chance of being improved by surgery but she has had this problem for so long…I think it is worth doing a radial tunnel exploration and release." Her insurance company, however, denied authorization for the surgery.

34. On February 4, 2000, Dr. John Peterson evaluated the claimant and concluded that she had not yet reached medical end result.

35. After being denied authorization for further treatment by the insurance company, the claimant was referred to Nori Mayhew at Concerta Managed Care Services in May of 2000 for vocational rehabilitation. The claimant did not have a documented work capacity, so an FCE was arranged at Work Recovery Services.

36. The claimant underwent her FCE at Work Recovery Services on June 30, 2000. The evaluation found that the "evaluee (claimant) demonstrated a below sedentary work capacity, and therefore, cannot be gainfully employed at this time."

37. In July of 2000 claimant began noticing pain in her teeth and ears.

38. The claimant subsequently requested to change vocational rehabilitation providers. She met with RTW Vocational Counseling on August 2, 2000. On August 10, the RTW examiner wrote the claimant and stated: "Unless there are significant changes in your medical status, I do not see where there is gainful employment in the mainstream economy which you could perform competitively."

39. On October 25, 2000, Janet LaPerle, the Workers' Compensation Specialist handling the case at the Department of Labor and Industry, entered an interim order reinstating Temporary Total Disability (TTD) benefits, and ordered the insurance company to pay for surgery with Dr. Mogan.

40. On December 19, 2000, Dr. Mogan performed a radial tunnel release on the claimant. He then referred the claimant to Vermont Hand Therapy for physical therapy. That treatment lasted through April of 2001.

41. On October 4, 2001, Dr. Mogan reported on the results of the claimant's surgery. He stated: "She reports she is definitely improved from prior to her surgery. She no longer requires a TENS unit and only takes a few pills a day, but she is still limited by the pain from doing any housework. Dr. Mogan determined that the claimant was at a medical end result. He based this finding on his conclusion that she had a 4% impairment of her upper extremity and a 2% impairment of her whole person. He also referred the claimant to a physiatrist.

42. On July 31, 2002 claimant had weight reduction gastric bypass surgery.

43. On December 17, 2002, Dr. Talley determined that claimant had reached medical end result, although she opined that claimant should pursue an evaluation for cross dominance training. Dr. Talley calculated claimant's impairment rating at 41% whole person. And she opined that claimant "is totally disabled from working at this point in time and into the near future."

44. On a typical day, claimant prepares and eats her breakfast, takes a hot bath, does the laundry, handles the dishwasher, sees to it that her children eat, oversees homework, and the health and safety needs of her children.

45. Claimant has assistance with childcare and with driving. However, she is able to drive her daughter to school three days a week. She is physically capable of walking, maneuvering a car seat into her car and fastening the seat belt.

46. Carol Talley, M.D. is a treating physician board certified in Physical Medicine and Rehabilitation. In her opinion, claimant is permanently and totally disabled. She supports the opinion with the functional capacity evaluations that have been performed, analysis of medical records and her clinical knowledge of the claimant.

47. Dr. Bucksbaum disagrees with the functional capacity evaluator and believes claimant could perform full time work at the sedentary level.

48. In addition to his original assessment of a 3% whole person impairment, Dr. Bucksbaum indicated that the surgery Dr. Mogan performed in December 2000 would not have changed it because the nerve was completely intact and without restriction. The surgery had no impact on her ability to open her hand.

49. Myron Smith, vocational rehabilitation expert retained by the defense, opined that claimant could obtain a job with a benevolent employer who would allow her to take off as much time as she needed. Mr. Smith believes that not everything that can be done has been done. Specifically he recommends an intensive in-patient rehabilitation program such as that offered at Spaulding Hospital. No medical provider recommended or referred the claimant to such a program, although Dr. Bucksbaum agreed it might benefit the claimant.

50. At the request of the carrier, Walter Borden, M.D., a psychiatrist in West Hartford, Massachusetts, evaluated the claimant. Based on objective tests, a thorough review of the medical records and a lengthy interview with the claimant, Dr. Borden concluded that she was dealing with several long-term issues relating to her family that have caused her depression. Among those issues are the death of her father, the illnesses of both her children and pre-existing anxiety. He noted that one of her coping mechanisms was to dissociate from her emotions when something upsetting occurs, thereby causing them to be felt in physical symptoms. He diagnosed chronic depression expressed through somatoform disorder.

51. Further, Dr. Borden determined that claimant's depression was not caused by her injury at Harbour Industries. Objective evidence of a pain disorder related to that injury are lacking. Finally, Dr. Borden concluded that claimant is not permanently and totally disabled. She is intelligent, has a good attention span, and good comprehension and has an Associate's degree. Dr. Borden attributes her not working to lack of motivation because of two young children who have chronic health problems and to her passive personality.

52. Claimant's attorney submitted a copy of the fee agreement and evidence that he worked 196.54 hours on this case and that a paralegal worked 73.4 hours. Expenses claimed total $11,807.31.

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 (1963). 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. 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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

3. 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. *Lapan v. Berno's Inc*.,137 Vt. 393 (1979).

4. To establish a physical-mental claim, a claimant must prove a causal nexus between a compensable physical injury and psychological impairment. See *Blais v. Church of Jesus Christ of the Latter Day Saints*, Op. No. 30-99WC (1999).

5. When evaluating between conflicting expert opinions, this Department has weighed several factors: 1) whether a medical expert has had a treating physician relationship with the claimant; 2) the professional education and experience of the expert; 3) the nature of the evaluation performed, including whether the expert had all the medical records in making the assessment; and 4) the objective bases underlying the opinion. See *Yee v. IBM*, Op.No. 38-00WC (2000); *Miller v. Cornwall Orchards*, Op. No. 20-97 WC (1997).

6. In this case, both Doctors Borden and Naylor are qualified psychiatrists and have considerable experience working with patients with chronic pain syndrome. Dr. Naylor, a treating physician, and Dr. Borden, a consultant retained by the defense, both had access to all relevant medical records and performed extensive and relevant evaluations. They agree that few, if any, of the objective indicia of the CRPS syndromes are present. They agree that claimant is not malingering. They agree that claimant suffers from significant clinical depression. They disagree as to the cause of the depression and on the claimant's ability to work.

Causation

7. Dr. Naylor attributes all of claimant's problems to her work-related injury and associated pain and opined that claimant will never have a significant work capacity. Hers and other opinions in support of causation are based on the subjective history of the claimant, who clearly attributes myriad problems to her work related injury.

8. Since the work related injury, claimant has given birth to a second child who has health problems, her father passed away, she had gastric bypass surgery and follow-up surgery for post-operative complications.

9. In support of his opinion that claimant's problems are unrelated to her work related injury, Dr. Borden points to a history that includes obesity that predated the accident, but was treated with a gastric bypass after the accident, suggesting a mood disorder that predates any work related injury. Dr. Bucksbaum notes the numerous inconsistencies in the claimant's history, casting doubt on the reliability of that history.

10. The experts are unanimous in the conclusion that claimant has a pain disorder and a psychological condition that would benefit from treatment. The crucial issue for decision is whether these problems are causally related to the work related injury.

11. A careful review of the medical records convinces me to adopt the theories propounded by Dr. Borden as the most thorough, objective and logical. It defies logic to accept the claimant's theory that a relatively minor work-related injury set into motion a cascade of events when, in the interim her father died, she gave birth to a second child with a chronic illness and had weight reduction surgery. It was after those non work-related incidents that her symptoms worsened. The more convincing theory is that personal problems unrelated to work built up over time. That claimant attributes all of her problems to work may be a defensive mechanism. But her belief cannot support a claim for work related permanent total disability.

12. Therefore, even if I were to accept that claimant is permanently and totally disabled, this claim would fail because causation has not been proven.

13. Because the temporomandibular joint problems (TMJ) are related to the chronic pain disorder that I find is not causally related to work, it follows that the TMJ is not compensable either, because it is not causally related to work.

14. Next, is the question when claimant reached medical end result. Dr. Bucksbaum determined that she was at medical end result each time he saw her: On February 20, 1998, June 18, 1999 and March 22, 2002. Temporary total disability benefits were terminated pursuant to a Form 27 filed by the defendant effective November 7, 2001. The basis for the termination was Dr. Mogan's determination that she had reached medical end result from the surgery he had performed, a radial nerve release.

15. Medical end 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." *Workers' Compensation Rule* 2(h). The proper test to determine medical end result is whether the treatment contemplated at the time it was given was reasonable expected to bring about significant medical improvement." *Coburn v. Frank Dodge & Sons*, 165 Vt. 533 (1996).

16. Claimant argues that she could not have reached medical end result while her request for a peripheral nerve stimulator was pending. However, because that recommendation was for treatment of pain symptoms and cannot serve as a basis for continued temporary total disability benefits. The Form 27 filed in November 2001 is well supported and stands as valid. Equally valid was Dr. Bucksbaum's permanency evaluation of 3% whole person rating. Although it may be true that claimant currently has a higher permanency rating, any additional rating cannot be attributed to work, hence is not compensable.

ORDER:

THEREFORE, based on the foregoing findings of fact and conclusions of law, all claims are DENIED.

Dated at Montpelier, Vermont this 17th day of November 2003.

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Michael S. Bertrand
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.