

G. R. v. State of Vermont, Vermont State Hospital (January 4, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

G. R.

Opinion No. 36-07WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

Vermont State Hospital

For: Patricia Moulton Powden
Commissioner

State File No. X-02471

OPINION AND ORDER

Hearing held in Montpelier on July 10, 2007

Record closed on August 17, 2007

APPEARANCES:

Mark H. Kolter, Esq. for Claimant
Nathaniel Seeley, Esq. for Defendant

ISSUES:

1. Does Claimant have a compensable injury for her right knee?
2. If so, when did Claimant reach a medical end result?
3. Were Claimant's medical treatments for her accepted back injury reasonable and necessary after June 15, 2006?
4. When did Claimant reach medical end result for her back injury?
5. What, if any, are the correct permanent impairment ratings for Claimant's alleged knee and back injuries?
6. What benefits is Claimant entitled to?

EXHIBITS:

Claimant's Exhibits

1. Initial Injury Reports (4) which include Defendant's Exhibit C
2. 5 Gallon Water Bottle
6. Unrelated Incident Reports, 1997-2005
7. Dr. Bucksbaum Curriculum Vitae
9. Form 27, Dated 2/9/06 with Claimant's Letter
11. Medical Illustrations (11 pages)
12. Dr. Joseph Abate's Medical Reports of Claimant
13. Central Vermont Medical Center Notes of Claimant
14. Central Vermont Medical Center Emergency Room Report of Claimant

Defendant's Exhibits

- A. Telephonic Reports, State of Vermont Workers' Compensation
- B. Nursing Education of Claimant (9 pages)
- C. Vermont State Hospital Employee First Report of Injury Form
- D. SOV Risk Management Division Claim Questionnaire
- E. Independent Medical Evaluation Questionnaire
- F. Dr. Robert Boucher's Curriculum Vitae

Joint Medical Exhibit of Claimant's Medical Records Filed 7/10/07

CLAIM:

1. All medical treatments for Claimant's right knee.
2. TTD for right knee injury from 10/12/06, the date of knee surgery, until 5/18/07 when Claimant reached medical end result.
3. PPD of 5% whole person for right knee injury.
4. All medical treatments for Claimant's low back injury from June 14, 2006 until August, 26, 2007.
5. PPD of 5% whole person for low back injury.
6. Attorney's Fees and Costs.

FINDINGS OF FACT:

1. On November 7, 2005, Claimant was an employee under the Worker's Compensation Act and Vermont State Hospital was her employer under the Act. Claimant has her high school diploma and is a licensed nurse's aide. She is 47 years old and married. She is psychiatric technician III. The highest level achievable is level IV. Claimant has worked at the State Hospital for 11 years.
2. The parties have stipulated that Claimant injured her lower back in the course of her employment at the Vermont Hospital on November 7, 2005. Claimant was found to be at medical end result for her back injury on June 14, 2006 by Defendant's expert, Dr. Robert Boucher. Temporary Benefits for her back were terminated at the end of June, 2006. Claimant alleges that her back was not at medical end result and that she also injured her right knee at the time of her accident at work.
3. On November 7, 2005, Claimant was retrieving a bin weighing approximately forty pounds containing a patient's belongings and located in a locked kitchen/storage room at the Vermont State Hospital. Employees kept a full five gallon water bottle to use as a doorstop when they needed to retrieve items and re-enter the room quickly. The door was opened by a key but locked automatically. The door opened inward from the hallway.
4. Claimant entered the locked room by pushing the door inward and to the left and using her right leg and the inside of her right foot slid the water bottle across the floor and pushed it to use as a doorstop.
5. When she entered the kitchen/storage room, Claimant searched through bins and had to bend, lift, squat and twist to move items around. After retrieving what Claimant believed to be the appropriate bin and carrying it, Claimant used her right leg and the outside of her right foot to push the water bottle out of the way to allow the door to close and lock.
6. While carrying the bin and then putting it down, Claimant felt a "twinge" in her back. Unfortunately, the bin was not the correct one, and Claimant had to return to the locked room and again start the process of unlocking the door and using her right leg and foot to move the water bottle in place. When she bent over to return the bin, Claimant felt an immediate tightening in her back. She could not move for several minutes. When she was able to stand, she left the room, and again pushed the full five gallon water bottle with her leg. She entered the corridor where she stood with her back to the wall experiencing shooting pain from her low back through her right buttock and leg. She completed an injury report and sought medical treatment the following day. By the time she sought treatment her symptoms were worse.

7. Within a day of her injury and consistently thereafter, the Claimant reported pain running from her low back, down through her right buttocks and right leg, and experienced tingling in her right foot. A diagnosis of right leg sciatica and a possible herniated disc were made in the Emergency room at Central Vermont Medical Center the day following the incident. Dr. David Indenbaum, the emergency room doctor, noted that the Claimant complained of right leg pain on the November 8, 2005 visit. Claimant's primary physician Robert Davidson, Certified Physician's Assistant (PA-C), initially felt these diagnoses were reasonable and opined that further testing was not immediately needed.

Claimant's Knee Injury

8. Claimant was out of work after her injury. She was on bed rest and medicated with Percocet which, at first, masked the extent of her knee injury. Her back injury was an accepted claim and the insurance company approved treatments and benefits. When Claimant began physical therapy her knee symptoms increased which led her physical therapist to detect Claimant's knee injury. This led her to see her regular provider, Robert Davidson, PA-C, who examined her knee on December 12, 2005. He ordered an MRI which showed a medial collateral tear in her right knee.
9. Robert Davidson, PA-C, has been Claimant's primary care provider for approximately ten years. He has treated her extensively before and after her injury. Mr. Davidson diagnosed Claimant's right knee injury as a torn medial collateral ligament. Prior to Mr. Davidson's treatment for Claimant's right knee at Vermont State Hospital in 2005, he had not treated her for any knee injuries. Mr. Davidson believed it medically logical that the leg motions Claimant used to move the water bottle caused the injury to her knee. He determined the knee injury to be work related.
10. Claimant also saw Dr. Christian Bean, an orthopedic surgeon, who also concluded that her right knee injury was work related. Dr. Bean stated that the acute symptoms and presentations of the Claimant support a medial collateral ligament injury from a work event, not overuse or chronic use.
11. Dr. Joseph Abate, an orthopedic surgeon, performed arthroscopic right knee surgery on October 12, 2006 on Claimant's right knee. Dr. Abate's diagnosis was similar to Dr. Bucksbaum's diagnosis which follows. Claimant again underwent physical therapy after surgery. Claimant could not return to work until May 21, 2007.

12. Dr. Mark Bucksbaum, a Certified Independent Medical Examiner as well as a Diplomat of the American Board of Physical Medicine and Rehabilitation, performed two Independent Medical Examinations of the Claimant's injuries. He conducted comprehensive examinations of Claimant's knee and reviewed all available records. He diagnosed Claimant's mechanical low back pain and three post traumatic knee injuries. He diagnosed a medial collateral tear, patello femoral arthritis and medial plica syndrome. Dr. Bucksbaum opined that the arthritis was caused by trauma to the knee and not by natural aging. His diagnosis was not based solely on the MRI, but also from Claimant's physical examination which showed Claimant was unable to rock back on her heel, unable to complete a gait test and her stress testing showed laxity in her knee and her explanation of how the injury occurred.
13. Dr. Bucksbaum based his opinion on the objective medical evidence as well as his own medical examination and years of experience treating knee injuries. His opinion was, in part, based on an MRI of Claimant's knee which was taken on December 15, 2005. Based on his analysis of the MRI, Dr. Bucksbaum concluded that there was a complete tear of the medial collateral ligament with edema present in the surrounding tissue. He also wrote in his notes "1. Small osteochondritic defect anterior aspect lateral femoral condyle. 2. tear medial collateral ligament".
14. Dr. Bucksbaum also spoke at length to the Claimant about how her injury occurred. He stated that the description she gave him of her activities on December 7, 2005 were consistent with the injuries she sustained. In particular, Dr. Bucksbaum explained that the knee is not mechanically able to move well laterally. It is made to move forward and backwards. He finds that lateral movements compromise the knee.
15. Dr. Bucksbaum has extensive experience in treating knee injuries. He has treated over a thousand cases similar to the Claimant's injury. Prior to his medical training and career, he was an engineer who helped develop certain medical imaging devices. He is an expert in knee injuries. He found the Claimant's knee injuries work related to a degree of medical certainty.
16. Dr. Bucksbaum also explained the knee injury's relationship to Claimant's back injury and the reason why the knee injury was not immediately apparent. The day after Claimant's injury the doctors thought Claimant's knee pain was related to her back injury. Dr. Bucksbaum agreed with Robert Davidson's assessment as well as with Dr. Bean's opinions. He explained why it took some time to uncover the separate knee injury and found it reasonable.
17. Both Dr. Mark Bucksbaum and Mr. Davidson, PA-C, found Claimant at medical end result on May 18, 2007 for her knee. Six months was considered a normal recovery period for knee surgery for a woman of Claimant's height and weight.
18. Dr. Bucksbaum gave the Claimant a 5% whole person permanent impairment rating for Claimant's right knee. He chose the most conservative rating under current AMA Guides. Dr. Bucksbaum gave a lengthy credible explanation for his rating.

19. Dr. William Boucher performed two medical examinations on the Claimant's knee for the defendant. The first was on March 9, 2006. Dr. Boucher opined that Claimant's right knee problem was a right medial collateral ligament strain. He determined that the strain was not work related because the mechanism of the injury as described by the Claimant could not have reasonably caused a right knee injury. However, Dr. Boucher, on cross examination, did not fully understand the mechanics of how the Claimant's injury occurred. In Dr. Boucher's first medical report he wrote that the right knee injury pre-existed Claimant's work related injury. At the hearing, Dr. Boucher stated that the Claimant's knee injury was caused by arthritis. Dr. Boucher did not view the MRI film but determined that it must be in error.
20. Dr. Boucher has sixteen years experience in performing Independent Medical Evaluations and Permanent Impairment Ratings. He is Board Certified in Preventive Medicine, Occupational Medicine and as an Independent Medical Examiner. He co-wrote a portion of the A.M.A. Guidelines with Christopher Brigham, M.D. Currently, Dr. Boucher spends 90% of his time performing Independent Medical Examinations.
21. Dr. Boucher opined that Claimant's knee injury was unrelated to her incident in November of 2005 at work. He did not believe that the knee had an MCL tear based on Dr. Abate's surgery notes and the way in which he understood the injury to have occurred.
22. Dr. Boucher's examination of the Claimant on June 14th, 2006 followed her branch block injection administered to her the prior week to relieve her pain. Dr. Boucher, however, did not find the injection affected his evaluation of the Claimant.
23. Dr. Boucher also opined in his hearing testimony that the Claimant had chronic right calf atrophy but his report on March 9, 2006 stated "there was no muscle atrophy".

Claimant's Back Injury

24. As previously stated, the insurance company for the Vermont State Hospital, found Claimant's back injury compensable and paid for treatment until the end of June, 2006. Her original diagnosis from the Emergency Room physician, Dr. Indenbaum, was that there was a question of whether the Claimant had a disc herniation. It was discovered after a CT scan of the spine that the Claimant had a mild annular bulge of the L4-5 disc. Her treating provider, Robert Davidson, determined that she had lumbar strain with right leg radiculopathy. It was recommended that Claimant receive physical therapy and manual therapy as well as medications. Claimant engaged in physical therapy as well as aquatic therapy. Neither was particularly helpful to her. However, as of May 2, 2006, she was still experiencing pain. The end date for compensable treatment of the Claimant's back injury was based on Dr. Boucher's examination.
25. After Dr. Boucher's examination of Claimant's back on March 6, 2006 he determined that she had a lumbar sprain and was not at maximum medical end result. He determined that exercise and further treatment would improve her condition.

26. On June 14, 2006, Dr. Boucher did another medical examination of the Claimant and determined that her lumbar strain had resolved. However, Claimant was still having back pain. Dr. Boucher believed that the Claimant was depressed and magnifying her symptoms. He did state on cross examination that symptom magnification does not mean that the Claimant was falsifying her symptoms. Dr. Boucher could not account for why other doctors believed her to still need treatment unless she had suffered another back injury. However, the facts are clear that she did not have another back injury.
27. On June 29, 2006, Dr. Michael Borrello, from the Pain Management Division of Fletcher Allen Health Care stated that the Claimant had not yet reached medical end result for her back. He and Dr. Timothy Waring administered bilateral medial branch blocks for pain in Claimant's lower back on June 8, 2006. Dr. Borrello opined on June 29, 2006 that a continuation of radiofrequency procedures would be helpful to the Claimant to control her pain. Claimant had another treatment on July 6, 2006.
28. Claimant had a work enhancement evaluation done at Fletcher Allen Health Center's Work Enhancement Rehabilitation Center (WERC) on July 18, 2006. She was referred by Dr. Robert Monsey. It was determined by this evaluation that the Claimant was functionally limited by pain. She also presented with significant psychological distress that appeared to be limiting her ability to cope with her current functional limitations. The Claimant was determined to be a good candidate for the three week program offered at WERC.
29. Dr. Bucksbaum believed the Claimant would have benefited from more medial branch block treatments as well as the Level 4 Functional Restoration Program. However, the insurance company would not pay for further treatment due to Dr. Boucher's opinion. Dr. Boucher did not find the treatment medically necessary even though he believed the Claimant had symptom magnification. The WERC program would have addressed these issues. Dr. Monsey, Dr. Borrello and Dr. Bucksbaum all disagreed with Dr. Boucher's opinion.
30. Dr. Bucksbaum stated that Claimant's low back injury was mechanical and that the musculature system problem was affecting the ligaments in her back. He stated that these types of injuries to the low back comprise about 85% of his practice. He found nothing abnormal or atypical or unreasonable about the Claimant's treatment for her back. Dr. Bucksbaum also stated that permanent impairments can arise from mechanical low back pain.
31. Dr. Bucksbaum and Robert Davidson both found Claimant's medical end result for her low back injury to be August 26, 2006. Dr. Bucksbaum testified in detail about how he determined, using the current AMA Guides that Claimant had a 5% permanent impairment from her back injury.

32. Attorney's fees for Claimant were requested in the amount of 160 hours at \$90.00 per hour. Defendant objected that some of Claimant's attorney's fees appeared to be "blocked billed". Although the defense attorney argues that some of the matters billed for were not disputed issues by the time the case got to hearing, they still had to be dealt with until resolved. After reviewing the Claimant's attorney's billing submission in detail and in consideration of the fact that the bill had voluntarily been reduced, the Department finds the bill is reasonable and necessary in this case. Para-legal billing of 11 hours at \$60.00 per hour is also found reasonable and necessary. Although the Claimant requested \$65.00 per hour, Workers' Compensation Rules cap para-legal hours at \$60.00 per hour.
33. Claimant's attorney submitted a bill for costs in the amount of \$7,476.18. Defendant objected to this amount both on the issue of whether the costs were necessary and that some exceeded the amount allowable under Department rules. Department rules allow medical professionals to be paid at the rate of \$300.00 for the first hour with an additional \$75.00 for every 15 minute time period. Thus, two hours of medical testimony would be paid at the rate of \$600.00. Claimant's bills for Dr. Bucksbaum exceed this rate. Claimant's attorney needs to adjust his costs to reflect Department Rule 40. The other costs are determined reasonable and necessary.

CONCLUSIONS OF LAW:

1. It is uncontested that Claimant suffered a compensable injury to her back on October 7, 2005. However, Defendant is contesting treatment of Claimant's back and permanency after Dr. Boucher found her at medical end result on June 14, 2006 with no permanent impairment.
2. Defendant is also contesting any benefits for Claimant's alleged knee injury. On June 15, 2006, Dr. Boucher found no objective evidence of Claimant's knee injury. Dr. Boucher opined that to the extent Claimant had a knee injury; it was resolved by June 15, 2006.
3. 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). Once an injury has been accepted as an employment injury, however, the defendant then bears the burden of proof to show subsequent injury-related treatments are not reasonable and necessary under 21 V.S.A. § 640(a). *See, e.g. J.C. v. Eveready Battery Co.*, Op. No. 12-07WC (April 3, 2007).

4. In the instant case, the medical opinions are conflicting. To evaluate the expert evidence and choose between conflicting 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).
5. The medical experts in this case that determined Claimant's knee injury to be work related are primarily her treatment provider, Robert Davidson, Dr. Joseph Abate and Independent Medical Examiner, Dr. Mark Bucksbaum. Robert Davidson, PA-C was Claimant's medical provider for approximately ten years and knew her medical history as well as her current medical problems. Dr. Bucksbaum's qualifications are well documented in the findings of fact. Dr. Abate, an orthopedic surgeon, operated on the claimant's knee which resolved her knee problems. The only physician who disagreed was Dr. Robert Boucher, a medical examiner hired by the Defendant, who found the knee injury was not work related. Dr. Boucher has excellent credentials. However, in this case, Dr. Boucher did not spend as much time with the Claimant as the other experts did, he did not have all the medical records and did not review the MRI of the Claimant's knee. He was also the only medical expert who saw the Claimant only a week after she had been given an injection for her pain that may have masked some of her symptoms. Dr. Boucher had placed Claimant at medical end result prior to her knee surgery and physical therapy.
6. Therefore, based on all of the evidence, the medical expert's testimony and their qualifications as well as their relationship with the Claimant, the Department determines that the Claimant's knee injury was compensable and the date of medical end result for her knee was May 18, 2007. The Claimant is found to have been totally disabled from work from the date of her right knee surgery by Dr. Abate on October 12, 2006 until May 18, 2007. All of the treatments for Claimant's right knee are determined reasonable and necessary as testified by Dr. Mark Bucksbaum who was found to be the most persuasive on this issue. Claimant is also determined to have a 5% permanent impairment rating for her right knee as Dr. Bucksbaum determined based on the current AMA Guidelines.
7. The defendant did not meet his burden of proof regarding the medical end result date for the Claimant's low back or her permanency rating. Dr. Boucher found medical end result at June 14, 2006. Claimant's treatment provider and medical expert were found more credible regarding the reasonableness and necessity of further treatments for Claimant's back. This is particularly true when combined with Dr. Monsey and Dr. Borrello's assessments. Medical end result is found to have been achieved for Claimant's back on August 26, 2006. The department also finds Dr. Bucksbaum's determination of 5% permanency more persuasive than Dr. Boucher's 0% finding for all of the reasons previously stated.

ORDER

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

1. Temporary Total Disability Benefits from the October 12, 2006 until May 18, 2007 for Claimant's right knee injury,
2. Medical benefits for Claimant's right knee from October 12, 2006 through May 18, 2007.
3. Medical Benefits for Claimant's low back from June of 2006 until August 26, 2006,
4. Partial Permanency Disability in the amount of 5% of the whole person for Claimant's right knee,
5. Partial Permanency Disability in the amount of 5% for the whole person for the Claimant's lower back injury,
6. Attorney's fees for 160 hours at \$90.00 per hour and para-legal fees for 11 hours at \$60.00 per hour which were found reasonable and necessary,
7. Costs in the amount of \$ 7,476.18 minus expert fees adjusted in accord with Department Rule 40.

DATED at Montpelier, Vermont this 4th day of January 2008.

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.