

S. C. v. Springfield Hospital

(October 8, 2008)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

S. C.

Opinion No. 40-08WC

v.

By: Jane Gomez Dimotsis, Esq.  
Hearing Officer

Springfield Hospital

For: Patricia Moulton Powden  
Commissioner

State File No. Y-52398

**OPINION AND ORDER**

Hearing held in Montpelier on October 10, 2007

Record closed May 23, 2008

**APPEARANCES:**

Craig Jarvis, Esq., for Claimant

James O'Sullivan, Esq., for Defendant

**ISSUES PRESENTED:**

1. Was Claimant's low back injury causally related to her employment, and if so, to what benefits is she entitled?
2. Is Claimant precluded from receiving temporary total disability benefits for any period of time subsequent to her acceptance of retirement pension benefits from Defendant?

**EXHIBITS:**

Claimant's Exhibit 1: Medical records

Claimant's Exhibit 2: Wage records

Defendant's Exhibit 1: 8/25/06 e-mail from Claimant

Defendant's Exhibit 2: Medical records

**CLAIM:**

Temporary disability benefits pursuant to 21 V.S.A. §642

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

Permanent partial disability benefits pursuant to 21 V.S.A. §648

Interest, attorney's fees and costs pursuant to 21 V.S.A. §§664 and 678

## **FINDINGS OF FACT:**

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.
2. At the time of her injury Claimant had worked for Defendant as an operating room nurse for 30 years. Her duties in the OR varied depending on whether she was assigned to be the scrub nurse or the circulating nurse for any particular surgery. The scrub nurse assisted the surgeon directly, by transferring the patient to and from the operating table, moving surgical equipment around and handing instruments to the surgeon. The circulating nurse was responsible for entering information into the operating room computer once the surgery began.
3. On the morning of Monday, August 14, 2006 Claimant fell in the parking lot on her way into work. Her right foot slipped out from under her and she landed on her buttocks with her left arm outstretched. Claimant stayed on the ground for a few moments and then got up and proceeded inside. Her left leg and ankle were visibly scraped, as was her left elbow.
4. Claimant's co-employee, Ruth Hassard testified that she recalled Claimant coming into the break room and advising that she had just fallen in the parking lot. Ms. Hassard recalled that Claimant stated that she had landed hard and that her hip hurt.
5. Ms. Hassard, who was also an operating room nurse, worked with Claimant that Monday, and for the remainder of the week as well. Ms. Hassard recalled that Claimant complained that she was sore and in a lot of pain throughout the week. By mid-week, Ms. Hassard testified, Claimant was complaining of numbness in her left leg. She was having difficulty standing and maneuvering patients on and off the operating table. So that Claimant would not have to stand or lift as much, Ms. Hassard informally alternated job duties with her, rotating in as scrub nurse so that Claimant could sit and perform circulating nurse responsibilities instead for at least part of her shift.
6. Claimant testified that she was stiff and sore from Monday on, but she continued to work throughout the week. Claimant had received a written warning for an allegedly unexcused absence earlier in the year, and she was afraid that if she missed additional time from work she might be fired. At night she used a heating pad and took Motrin and Flexeril, but with little symptom relief.
7. On Friday, August 18<sup>th</sup> Claimant was called in at 2:30 AM to assist at an emergency cesarean section surgery. She returned home at 7:00 AM and went to bed. She awoke at 2:30 PM and went downstairs to check on some laundry. After doing so, she began to proceed back upstairs. Claimant testified that as she put her left leg on the first step to ascend the stairs, she felt a popping sensation in her low back, "as if something twisted and then let go." Claimant felt excruciating pain and had to crawl up the stairs. Once there, she telephoned a friend to take her to the Emergency Room.

8. The progression of Claimant's symptoms – from generalized achiness and pain centered primarily in her hip to severe low back pain and radicular symptoms down her left leg – is central to the dispute over work-related causation. It is instructive, therefore, to review in some detail what the evidence reflects in this regard. Claimant testified that she began to experience low back and left leg pain during her shift on Monday, August 14<sup>th</sup>, and that by Wednesday, August 16<sup>th</sup> she had developed numbness down her left leg and into her left toes. This testimony is corroborated by that of her co-worker, Ms. Hassard, who stated that Claimant was complaining of numbness in her left leg by "mid-week."
9. The August 18<sup>th</sup> Emergency Department Initial Interview record gives a somewhat different history. It states:

**Chief Complaint:** Excruciating left leg pain; states she fell in parking lot about 4 days ago. Had back pain 2 days later and then today went to climb stairs and "feels like something tore." Patient in tears, appears to be in very severe pain.

10. The Emergency Department Patient Progress Note, also dated August 18<sup>th</sup> and recorded by S. Jewett, RN, states:

**Mechanism of injury:** Fell about 4 days ago. Some back pain since but as climbed stairs today felt sudden "tear" in L low back and developed severe pain down outside of L leg into L foot.

11. Last, the ER note, again dated August 18<sup>th</sup> and recorded by William Hoser, PA-C, states:

**Chief Complaint:** Excruciating back pain and left leg pain

**Subjective:** The patient . . . reports that she had fallen in the parking lot here about 4 days ago and injured her left ankle. She reports that she had some back pain two days subsequent to that but that it went away until this afternoon, when she had turned to go up a step and, "she felt something tear." She reports that she immediately had excruciating left lower back pain and pain down her left leg, which feel[s] similar to sciatica pain.

12. Both Claimant's testimony and that of Ms. Hassard, therefore, are somewhat at odds with the medical records taken upon Claimant's presentation to the Emergency Department on August 18<sup>th</sup>. Those records do not document any history of radicular pain or symptoms following the August 14<sup>th</sup> fall in the parking lot until Claimant went to ascend her stairs at home on August 18<sup>th</sup>. In contrast, as noted above, at the formal hearing both Claimant and Ms. Hassard testified that Claimant began experiencing radicular pain and numbness down her left leg on Wednesday, August 16<sup>th</sup>.

13. After being referred to her primary care physician, Claimant underwent an MRI of her lumbar spine on August 28, 2006 which revealed a large extruded left L4-5 disc herniation with resultant nerve compression. On September 20, 2006 she underwent an L4-5 discectomy performed by Dr. Rudolf, an orthopedic surgeon. Claimant did well initially post-surgery, but in November 2006 her leg pain recurred. On November 22, 2006 she underwent additional surgery, this time for a repeat L4-5 disc excision and multi-level fusion.
14. At Defendant's request, on February 21, 2007 Claimant underwent an independent medical evaluation with Dr. Ensalada, a specialist in both pain medicine and occupational medicine. In Dr. Ensalada's opinion, Claimant suffered two separate, distinct and essentially unrelated injuries in August 2006. The first one occurred at work on August 14<sup>th</sup> and was not associated with any leg pain or radicular symptoms. The second one occurred at home on August 18<sup>th</sup> and caused severe low back and left leg pain and other radicular symptoms. According to Dr. Ensalada, the absence of any radicular symptoms following the first incident means that Claimant must not have herniated her disc at that time, but rather probably suffered nothing more than a minor soft tissue injury. In contrast, the fact that following the second incident Claimant felt a "pop" and then the immediate onset of severe low back and radiating leg pain means that she probably herniated her disc at that moment. In Dr. Ensalada's opinion, although the two incidents may have been related temporally, in the sense that one followed fairly closely on the heels of the other, there is no basis logically to conclude that they were causally related medically.
15. As to end medical result, Dr. Ensalada testified that Claimant was still treating as of the date he examined her in February 2007, but surmised that she would have reached end medical result within six months after her second surgery, that is, by May 22, 2007.
16. At Claimant's own behest, on July 30, 2007 she underwent an independent medical examination with Dr. Gennaro, a board-certified orthopedic surgeon. Dr. Gennaro's opinion as to causation contrasts sharply with Dr. Ensalada's. He concluded that Claimant's herniated disc most likely was caused by her fall at work on August 14, 2006. In reaching this conclusion, the factor Dr. Gennaro found most significant was that the mechanism of Claimant's August 14<sup>th</sup> injury – falling to the ground and landing on her buttocks – was one that likely would have resulted in an axial load on her spine sufficient to cause her disc to herniate. That it might have taken a few days after that for a disc fragment to extrude and impinge on her nerve root, thereby causing severe pain and radicular symptoms, is not uncommon. According to Dr. Gennaro, the axial load on Claimant's spine that might have been caused by climbing a step on August 18<sup>th</sup> was of a far lesser magnitude, and therefore unlikely to have had any impact on the development of her symptoms on that day.

17. As to end medical result, Dr. Gennaro opined that Claimant had reached end medical result at least by the time he examined her on July 30, 2007 but would not speculate as to any earlier date. Dr. Gennaro rated Claimant with a 23% whole person impairment referable to her spine.<sup>1</sup>
18. Claimant has not worked since August 18, 2006. The medical records document that she was temporarily totally disabled from that date at least until some time after her November 2006 surgery. No functional capacity evaluation or other testing was done to evaluate her work capacity thereafter, and no doctor has yet released her to return to work.
19. Claimant accepted retirement pension benefits from Defendant beginning in October 2006, and social security disability benefits beginning in February 2007.
20. Claimant's average weekly wage at the time of her injury was \$1,147.91, resulting in an initial compensation rate of \$765.27. This would have been updated to \$795.88 as of July 1, 2007.
21. Pursuant to the Department's interim order, Defendant paid temporary total disability benefits from August 18, 2006 until March 16, 2007.

#### **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. The dispute between the parties here involves a question of medical causation. Claimant contends that she suffered a herniated disc when she slipped and fell in the parking lot at work on August 14, 2006. Defendant argues that the work-related slip-and-fall resulted in nothing more than a minor soft tissue injury, and that the symptoms she suffered at home on August 18<sup>th</sup>, though admittedly indicative of a disc herniation, were not causally related to the earlier episode at all.

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<sup>1</sup> Dr. Ensalada concurred generally with Dr. Gennaro's impairment rating, though he disputed that it was causally related to the August 14, 2006 work injury as opposed to the August 18<sup>th</sup> injury.

3. 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). With these factors in mind, the key question is which expert medical opinion is the most credible? *Bonenfant v. Price Chopper*, Opinion No. 13-07WC (May 8, 2007).
4. I find that Dr. Gennaro's opinion as to medical causation is more persuasive than Dr. Ensalada's. Dr. Gennaro's hypothesis as to the significant axial load on Claimant's spine that probably resulted from her fall at work on August 14, 2006 provides a sufficient link between that incident and the subsequent evidence of disc herniation to justify a finding of compensability. The only possible intervening event – climbing a single step at home on August 18, 2006 – qualifies as the type of normal, routine activity that does not operate to sever the link between a work-related accident and the natural consequences flowing from it. *Correll v. Burlington Office Equipment*, Opinion No. 64-94WC (May 1, 1995).
5. Turning to the question whether Claimant's receipt of retirement pension benefits disqualifies her from receiving temporary total disability benefits as well, I conclude that there is no legal basis for such automatic disqualification. While the result may be a double recovery of sorts for an employee who chooses to retire during a period of temporary total disability, as Claimant did here, the solution lies within the ambit of pension plan provisions, not workers' compensation. Defendant lawfully could have opted to integrate its employees' right to retirement funds with their right to workers' compensation benefits by prohibiting them from receiving the former at the same time as the latter. *Alessi v. Raybestos-Manhattan*, 451 U.S. 504 (1981). For whatever reason, it opted against such an integration provision.
6. Furthermore, although Claimant's decision to retire constitutes some evidence that she did not intend to return to work, be it for Defendant or for anyone else, absent companion evidence showing that she had been released to return to work and had failed unreasonably to do so (as that concept is defined in Workers' Compensation Rule 18.1300), there is insufficient basis for discontinuing her temporary disability benefits on those grounds.
7. I conclude that Claimant was entitled to receive temporary total disability benefits until she reached an end medical result. I find Dr. Gennaro's opinion in this regard to be more persuasive than Dr. Ensalada's, as it was based on his own examination at the time rather than merely an estimate of future recovery. Thus, I find that Claimant reached an end medical result on July 30, 2007.

8. I also accept Dr. Gennaro's opinion as to the extent of Claimant's permanent impairment, and conclude that she is entitled to permanent partial disability benefits in accordance with a 23% whole person impairment referable to the spine.
9. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$2,046.30 and attorney's fees based on a contingent fee of 20% of the recovery, not to exceed \$9,000.00, in accordance with Workers' Compensation Rule 10.1220. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded. As for attorney's fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded as well.

**ORDER:**

Based on the foregoing, Defendant is hereby **ORDERED** to pay:

1. Temporary disability benefits from the date these were discontinued, March 16, 2007, until the date Claimant reached an end medical result, July 30, 2007;
2. Medical benefits covering all reasonably necessary medical services and supplies causally related to the compensable injury;
3. Permanent partial disability benefits in accordance with a 23% whole person impairment referable to the spine;<sup>2</sup>
4. Interest on the above amounts in accordance with 21 V.S.A. §664; and
5. Costs in the amount of \$2,046.30 and attorney's fees totaling \$9,000.00.

**DATED** at Montpelier, Vermont this 8<sup>th</sup> day of October 2008.

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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.

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<sup>2</sup> These benefits constitute compensation for a permanent impairment that will affect Claimant for the rest of her life. Therefore, although paid in a lump sum the award shall be prorated over Claimant's life expectancy. Claimant's remaining life expectancy as of the date of end medical result (July 30, 2007) was 21.27 years, or 255.24 months. Claimant has produced a fee agreement documenting that her attorney is entitled to a contingent fee totaling one third of the awarded permanency and attorney's fees. Thus, after payment of attorney's fees Claimant shall be entitled to an award of \$73,119.21. This award shall be considered to be \$286.47 per month for the remainder of Claimant's life.