STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-04176
	)	
Pui Ling Yee	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
International Business Machines	)	Commissioner
	)	
	)	Opinion No. 38-00WC

Hearing held in Montpelier on June 8, 2000.
Record closed on July 3, 2000.

APPEARANCES:

Steven P. Robinson, Esq. for the claimant
Stephen A. Fegard, Esq. for the defendant

ISSUES:

1. What is the claimant's appropriate permanent partial disability rating?

2. Is the carrier liable for the claimant's continuing chiropractic care?

DEPARTMENT FORMS:

Form 1: First Report of Injury, filed August 26, 1997.
Form 6: Notice and Application for Hearing, filed November 30, 1999.
Form 25: Wage Statement dated November 20, 1997, filed October 25, 1999.
Form 27: Notice of Intention to Discontinue Payments, approved April 16, 1999.

EXHIBITS:

Joint Exhibit I: Medical Records of the claimant.

Defendant's Exhibit A: Curriculum Vitae of John R. Johansson, D.O.

STIPULATION OF UNCONTESTED FACTS:

1. Claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act ("Act") on June 10, 1997.

2. Defendant was an employer within the meaning of the Act on June 10, 1997.

3. Liberty Mutual was the workers' compensation insurance carrier for defendant on June 10, 1997.

4. On June 10, 1997 claimant suffered a strain in her upper back and neck due to daily use of keyboard and mouse in the course of her employment with defendant.

5. At the time of the accident and subsequently, the claimant had/has no dependents.

6. At the time of the accident claimant had an average weekly wage of $1542.93 resulting in a weekly compensation rate of $674.00 which was updated to $699.00 effective July 1, 1997.

7. On April 12, 1999 defendant filed a Form 27 based upon claimant's allegedly achieving medical end result with a 0% whole person impairment rating.

8. On April 14, 1999 the Department of Labor and Industry reviewed and approved the Form 27.

9. On June 24, 1999 claimant had her own impairment rating examination, which suggested that the claimant had a 5% whole person impairment rating.

10. On or about November 29, 1999 the claimant filed a Form 6 requesting a hearing for Permanent Partial Disability Compensation and Attorney's fees.

11. Claimant seeks all workers compensation benefits associated with the claim, specifically including permanent partial disability benefits, medical benefits relating to her upper back and cervical strains, and if successful, attorney fees and costs of the formal hearing process.

12. There is no dispute as to the qualifications of any of claimant's treating or examining health care professionals.

FINDINGS OF FACT:

1. The stipulated facts are accepted as true, notice is taken of all forms filed with the Department and the exhibits are admitted into evidence.

2. The claimant has worked for IBM since 1983. She testified that she is a tech assistant. In 1995 she had a short bout with neck pain that did not require any medical attention. No ongoing symptoms existed in the year that followed.

3. Two months before the stipulated date of injury the claimant's job responsibilities changed. Unlike her earlier position where she spent a limited time at a computer, her new job required her to be in front of a computer terminal eight hours a day.

4. A short time after she assumed the new position, the claimant began experiencing increased pain in her neck and shoulder area with pain radiating into her arm. She testified that her symptoms would increase as she worked and would subside over the weekend. She also testified that, despite her requests to her employer, IBM failed to alter her workstation. In the weeks that followed, she said, the pain became unbearable.

5. On June 10, 1997 the claimant sought medical attention with Kelly Rybicki, D.C. for symptoms that she related to use of the computer and mouse. During the course of that initial chiropractic treatment, the claimant took the initiative to implement workstation changes at her own expense. She testified that the modification helped dramatically, but that symptoms persisted.

6. During the course of treatment with Dr. Rybicki, the claimant lost no time from work. She explained that she relied on the ongoing chiropractic care, after work hours, to maintain her functional capacity.

7. On January 27, 1999 Dr. Rybicki wrote to Liberty Mutual explaining that the claimant would likely need several more treatments, but that she expected active care to end within the following two months.

8. On March 25, 1999, at Liberty Mutual's direction, the claimant saw Dr. John Johansson. She testified that she was never told the reason for the examination, which in her opinion was very limited. She said that Dr. Johansson did not use instruments to measure range of motion. The claimant further testified that Dr. Johansson recommended treatment in his own facility.

9. Later, the claimant was extremely upset to learn that Dr. Johansson had determined that she had reached maximum medical improvement (MMI) with 0% impairment. She testified that she had no idea what "MMI" or an "impairment rating" meant. To the claimant, Dr. Johansson had told the carrier something very different from what he had told her.

10. Dr. Johansson has had formal course work in the use of the AMA Guides and performs between 100 and 150 independent medical examinations in a year. He testified that he based his opinion on a physical examination, review of all the claimant's medical notes and the AMA Guides to the Evaluation of Permanent Impairment, specifically the "Injury Model" also called Diagnosis-Related Estimates ("DRE"). Dr. Johansson diagnosed the claimant with postural overuse syndrome involving the right parascapular and paracervical region. He found no muscle guarding.

11. When the claimant saw Dr. Johansson, she complained only of slight symptoms. On examination, she moved with ease and demonstrated completely normal range of motion. She had no significant paraspinal or parascapular spasm, although she had minor tightness. Her motor testing was normal. Dr. Johansson explained that he did not use an inclinometer to measure the claimant's range of motion, because her range of motion was clearly normal. Had he noticed anything other than normal motion, he explained, he would have been alerted to the need for measurement with an instrument.

12. The claimant told Dr. Rybicki how upset she was with Dr. Johansson's evaluation and asked her if she would also perform one. Dr. Rybiki also has taken formal course work in the performing impairment ratings. She performs approximately six to ten impairment ratings in a year.

13. On June 1999, Dr. Rybicki who at that time had been treating the claimant for two years, performed an impairment rating. Before rendering her opinion, Dr. Rybicki conducted a full range of motion examination with an inclinometer and goniometer. Her range of motion measurements were less than Dr. Johansson's normal ROM determinations. Referring to her office notes, Dr. Rybicki testified that she identified numerous objective clinical signs consistent with the claimant's work-related injury. A review of those notes demonstrates that the signs must have been muscle spasms and tightness. Dr. Rybick agreed that one's range of motion varies from day to day, but "significant" limitations indicate a problem. In her opinion, considering everything, findings from her examination of the claimant are significant. Dr. Rybicki concluded that claimant was at MMI with a DRE Category II or 5% whole person impairment.

14. Citing the Guides, Dr. Johansson stated that this claimant's injury could not be a DRE II because the claimant did not suffer a "specific injury." It is undisputed that the claimant's injury had a gradual rather than an acute onset.

15. In Dr. Johansson's opinion, continued chiropractic care is not necessary. He opined that the claimant should assume a more active self-treatment plan.

16. The claimant has sporadically, if at all, taken an active role in her own treatment.

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). The claimant 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. When determining the weight to be given expert opinions in a case, this Department traditionally has looked at several factors: 1) whether the expert has had a treating physician relationship with the claimant; 2) the professional education and experience of the expert; 3) the evaluation performed, including whether the expert had all medical records in making the assessment; and 4) the objective bases underlying the opinion.

4. As the treating physician, Dr. Rybicki clearly knows this claimant better than Dr. Johansson could. However, with an opinion as to permanency, a treating physician has no advantage over an independent evaluator. In this case in fact, the claimant's strong reaction to Dr. Johansson's opinion risked placing Dr. Rybicki in the role of a less than objective advocate. Both experts are well prepared to render opinions in this case. Dr. Johansson has an advantage over Dr. Rybicki because of the number of examinations he has performed. Both experts reviewed all the records, almost all of which are Dr. Rybicki's notes. Dr. Rybicki used objective instruments to measure the claimant's range of motion. Dr. Johansson used years of experience in assessing what he concluded was normal.

5. On balance, Dr.Johansson's opinion is the more objective one. It is based on clinical findings, medical records and familiarity with the use of the Guides. In contrast, Dr. Rybicki's is based on numerous subjective reports of the claimant and minimally on objective findings. That her range of motion measurements were worse than those taken by Dr. Johansson a few months earlier suggests at most a transitory change, not that Dr. Johansson's were inaccurate. He accurately determined that the claimant's impairment falls within Category I. That provision provides that there are " no significant clinical findings, no muscular guarding or history of guarding, no documentable neurologic impairment, no significant loss of integrity on lateral flexion and extension roentgenograms and no indication of impairment related to injury or illness."

6. In contrast, one with a DRE Cervicothoracic Category II impairment has "intermittent or continuous muscle guarding observed by a physician, nonuniform loss of range of motion or nonverifiable radicular complaints." *Guides* at 3/104. Because he found none of these findings on physical examination, Dr. Johansson rightfully rejected Category II.

7. Dr. Johansson's conclusion supports a finding that the claimant has a Category I impairment, a conclusion the claimant adamantly rejects. Yet the record does not support a finding that hers is a Category II impairment, one that encompasses even spinal fractures if they do not disrupt the spinal canal. Without objectively significant clinical findings when Dr. Johansson examined her, the impairment is Category I, O%.

8. On the issue whether continued chiropractic care is compensable under 21 V.S.A. § 640, I again accept the opinion of Dr. Johansson who testified that those treatments are not medically necessary and that the claimant would benefit more with an active self

treatment plan. By the claimant's own admission, her symptoms have not changed in years. In a January 27, 1999 letter, Dr. Rybicki expressed the opinion that the claimant would soon be released from active care. Yet the claimant continued with the treatments. Although palliative care is compensable under the Act, I am not convinced that it is reasonable and necessary for this claimant. In determining what is reasonable under § 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 claimant's symptoms and maintain her functional abilities. *Quinn v. Emery Worldwide* Opinion No. 29-00WC (Sep. 11, 2000). Ongoing chiropractic care in this instance does not meet that standard.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, the claimant's claims for 5% permanent partial impairment rating and continued chiropractic care are DENIED.

Dated at Montpelier, Vermont this 9th day of November, 2000

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R. Tasha Wallis
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.