

STATE OF VERMONT

DEPARTMENT OF LABOR AND INDUSTRY

Charlene Knight) File No. D-15116
)
 v.) By: Jill Broderick, Esq.
) Contract Hearing Officer
 Ames Department Store)
) For: Barbara G. Ripley
) Commissioner
)
) Opinion No. 1-93WC

Heard in Montpelier, Vermont on February 8, 1993.
Record Closed: March 5, 1993

APPEARANCES

Attorney for Claimant - John C. Holme, Jr., Esq.
Attorney for Defendant - William C. Dagger, Esq.

ISSUES

1. Are the Claimant's back problems since October 31, 1991 related to her work-related injury?
2. Has the Claimant reached an end medical result?
3. Did the Claimant unreasonably refuse reasonable medical treatment?

THE CLAIMANT SEEKS

1. Temporary total compensation from October 31, 1991 and continuing;
2. Payment of medical bills; and
3. Attorney fees and costs.

STIPULATIONS

The parties have entered into the following stipulations:

1. The Claimant was an employee of the Defendant, Ames Department Store on January 30, 1991.
2. The Defendant is an employer within the meaning of the Workers' Compensation Act and is self-insured with respect to claims under the Act.
3. The Claimant's January 30, 1991 injury arose out of and in the course of her employment.
4. Medical bills in the amount of \$5,367.08 are reasonable and the treatment was reasonably incurred. (Whether the treatment was related to the injury caused by the accident is in dispute.)
5. The Claimant's average weekly wage and weekly compensation rate was \$165.49.
6. The exhibits set forth below were submitted without objection.

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|-----------------|--|
| Joint Exhibit 1 | Five status reports from Disability Management Associates. |
| Joint Exhibit 2 | Medical bills in the amount of \$5,367.08 and letter from Attorney Holme dated January 19, 1993. |
| Joint Exhibit 3 | Dr. Hughes' letter dated April 16, 1992, and office notes. |
| Joint Exhibit 4 | Dr. Gates' office notes and letter dated May 21, 1992. |
| Joint Exhibit 5 | Dr. Savoy's letters dated September 15, 1992, and March 5, 1991, and office notes. |
| Joint Exhibit 6 | Dr. Goldkamp letter dated May 26, 1982. |
| Joint Exhibit 7 | Dr. Carr's letter dated October 29, 1992, and office notes. |

- Joint Exhibit 8 Office notes of Drs. Coombs and Loker.
- Joint Exhibit 9 Dr. Davis' letters dated March 25, 1991, and October 7, 1992.
- Joint Exhibit 10 Work Capacity Evaluation dated September 4, 1992, Work Hardening Discharge Summary dated January 20, 1993, and Work Hardening Progress Summary dated December 30, 1992.
- Joint Exhibit 11 Comprehensive Rehabilitation Associates reports dated September 25, 1992, October 16, 1992, November 12, 1992, and December 9, 1992.
- Joint Exhibit 12 Dr. Bernini's office notes dated July 23, 1991.
- Joint Exhibit 13 Notes from Crown Point Physical Therapy.
- Joint Exhibit 14 Document entitled "Further Explanation #29."
- Joint Exhibit 15 Deposition transcript of Dr. Hughes.
- Joint Exhibit 16 Deposition transcript of Dr. Gates.
- Joint Exhibit 17 Affidavit of attorney's fees.

7. I take judicial notice of the following Forms:

Form 1, Employer's First Report of Injury dated January 1, 1991.

Form 1, Employer's First Report of Injury dated February 23, 1991, with attached letter from Claimant.

Form 21, Temporary Total Disability Agreement dated October 31, 1991.

Form 27, Notice of Discontinuance due to achieving medical end result, dated October 23, 1991.

Form 6, Notice and Application for Hearing dated February, 1992.

FINDINGS

Based on the evidence and testimony presented at the hearing, I find:

1. The exhibits listed above are admitted into evidence.
2. The stipulations set forth above are true.
3. The Claimant was injured at work on January 30, 1991, when a circular clothing rack on which she was arranging clothes became unbalanced and fell over. As the rack started to fall away from her, the Claimant tried to prevent it from falling by holding onto the clothing on the top portion of the rack. While the Claimant was holding on, the weight of the falling rack pulled her to the floor, where she ended up on her hands and knees with her right foot pinned between the circular base of the rack and the floor. She extricated her foot and got up. With the help of another employee, she then pulled the rack into a standing position and replaced the clothing on it.
4. The Claimant went to the employee's lounge, put ice on her foot, and rested for a short time. She then filled out a First Report of Injury, mentioning the injury to her foot. The Claimant completed her schedule that day and did not feel any pain in her back.
5. The next day was the Claimant's regular day off and she stayed home from work. She experienced severe pain in her back as soon as she got out of bed.
6. In the evening she and her sister went to the Ames store, where she is employed, to buy a baby gift for a shower the Claimant was hosting the next evening. Her supervisor, Terry Richards, asked her how her foot was. She told him "my foot is OK, but my back is really hurting me." Then due to the pain in her back she left the store to sit in the car while her sister completed her purchases.
7. Terry Richards testified that he did not remember the Claimant telling him her back hurt on January 31, 1991, but she may have done so.
8. The Claimant worked the next day, Friday, February 1, 1991, although she was experiencing a great deal of pain. She limited her physical activity to paperwork and phone calls.

9. For the next two days the Claimant was unable to be very active. She spent a good deal of time lying down because she was uncomfortable sitting up.
10. The Claimant reported for work at 8:00 a.m. Monday, February 4, 1991, but left work after an hour and a half because of intense back pain. She managed to drive herself home, but was unable to stand up straight. Once inside the house she dropped to her hands and knees and crawled to her bed. She phoned her regular physician, Dr. Hughes, an internist, and made an appointment with him for later that day.
11. A friend and her friend's husband helped the Claimant into the car, and drove her to Dr. Hughes' office while she laid down in the car.
12. The Claimant testified about incidents of back pain prior to her accident at work. She stated that she saw Dr. Goldkamp for pain between her shoulder blades due to her scoliosis, that he gave her exercises to do and the pain disappeared. Also, she stated that in April and June of 1990 she experienced muscle spasms and pain in her very low back or buttock area when she tried to move heavy objects while working for the Defendant. Both times her back pain resolved itself after a short time and she did not file workers' compensation claims.
13. The Claimant did not tell Dr. Hughes about the accident at work during the February 4, 1991 office visit. She testified that she was in intense pain during the office visit, was making a great effort not to cry, and simply wanted to get home as quickly as possible. She also expected to be able to recover quickly, as she had with her two other back incidents in April and June of 1990, and was not concerned with a workers' compensation claim at that time. At the February 4, 1991 office visit, she reported to Dr. Hughes that her one year old granddaughter had crawled into her lap and that she had to have the child get down because her back hurt.
14. I find the Claimant to be a very credible witness.
15. Dr. Hughes has been the Claimant's treating physician for four years. His notes from the February 4, 1991 office visit indicate the Claimant told him "she had some low back pain, but after several episodes of lifting, including some

wiggling kids this weekend, she has now had a severe low back pain, worse on the left without real radiation or neuropathic symptoms, incontinence, etc..." He testified that he did not pursue in detail with the Claimant what had precipitated her back pain and did not ask her to describe the lifting incidents. He testified that he concentrated instead on "getting her better." I find that the Claimant's comments regarding "wiggling kids" and "episodes of lifting" (other than lifting the clothing rack on January 30) were given as examples of actions which increased her pain since the accident, rather than as the initial cause of injury.

16. On Dr. Hughes' orders the Claimant did not go to work for the next few weeks and spent most of the time lying down. The Claimant phoned her supervisor several times during those weeks and told him she was unable to work because of her back injury.
17. On February 20, 1991, Dr. Hughes informed the Claimant that her MRI taken on February 15, 1991, indicated that she might have a herniated disc. At that point the Claimant realized that her injury was more serious than "pulled muscles" and she told Dr. Hughes about the January 30 work incident. She then called her supervisor, Terry Richards, and told him that her back injury was more severe than she had thought and explained the MRI result. Mr. Richards suggested she complete a second report of injury, which she did.
18. Dr. Hughes testified that the Claimant's scoliosis is distinguishable from the pain caused by the 1991 accident because the scoliosis is in the mid back (thoracolumbar) rather than the low back (lumbosacral). He believes that the cause of the Claimant's back pain since January 30, 1991 was her accident at work on that date.
19. Dr. Hughes diagnoses the Claimant as having an intraspinal ligament strain or sprain and the possibility of a herniated disc with a strong component of myofascial syndrome.
20. Dr. Hughes does not believe the Claimant has reached an end medical result because there is "hope for a significant amount of improvement with management or continued management."
21. The Claimant met with Dr. Coombs and Dr. Loker at Dartmouth-Hitchcock Pain Clinic regarding treatment for her back pain. They recommended a series of injections of Lydocaine and

steroids into the intraspinous ligaments.

22. Dr. Hughes encouraged the Claimant to undergo the injections. He stated that the chances that the injections would be beneficial were "significant" and that they might alleviate her back pain for weeks or even months. He stated that the occurrence of adverse side effects such as infection, bruising and exacerbation of pain, and severe allergic reaction, and death were very rare. However, he believed the Claimant's refusal of injection treatment was reasonable.
23. Dr. Philip Davis, an orthopedic surgeon, conducted an independent medical examination of the Claimant on March 25, 1991. He found that her back pain was causally related to the January 30 work incident.
24. Dr. Davis examined the Claimant again on October 7, 1991 and found her to be at an end medical result. Based on this report, the Defendant terminated temporary total compensation payments as of October 31, 1991.
25. The Claimant has scoliosis, and prior to her January 30, 1991 accident had received treatment for back pain in her thoracolumbar area due to her scoliosis from Dr. Goldkamp and Dr. Bernini. She still sees Dr. Bernini every three years for her scoliosis.
26. Dr. Goldkamp stated in a letter to the Claimant dated May 26, 1982, that her scoliosis was causing her pain near her left rib cage.
27. Dr. Bernini saw the Claimant on July 23, 1991, for an office visit. In his opinion, her scoliosis is "right thoracic, left lumbar of approximately 30/21" and has shown no progression since he saw her several years ago. He also noted the bulge and narrowing at L5-S1 shown on her MRI "compatible with disc degeneration."
28. Dr. Savoy, a neurosurgeon who saw the Claimant on March 5, 1991, and April 15, 1991, stated that the Claimant had a "chronic lumbosacral strain." He noted that the Claimant's MRI showed the possibility of a disc herniation to the left of L5-S1.
29. The Claimant has seen Dr. Carr, at the Physical Medicine and Rehabilitation Department of Dartmouth-Hitchcock, on a number of occasions. Dr. Carr stated that her current back pain is

directly related to the work accident and that she has not yet reached an end medical result. I note, that it appears from Dr. Carr's most recent letter of October 29, 1992, that he is applying some criteria that are not relevant to a determination of end medical result, such as "Participate in vocational counseling and have an agreement on what her vocational goal is at or below the light physical demand level."

30. Dr. Gates, an orthopedic surgeon, conducted an independent medical examination of the Claimant on May 21, 1992, and diagnosed the Claimant as having myofascial pain syndrome with tenderness at approximately the L2, L3 region of her back. He did not believe that the problem with the L-5, S-1 disc space shown on the MRI caused the symptoms the Claimant has experienced since the work accident. He stated that it was "no more likely medically" that the myofascial syndrome was the result of her 1991 work accident than it would be to be the result of her scoliosis.
31. Dr. Gates stated in his letter of May 21, 1992 that the Claimant had not reached an end medical result.
32. Dr. Gates estimated that the injection therapy at the Pain Clinic would have had a two-thirds chance of reducing the Claimant's back pain. He stated that "generally speaking, after a series of such injections, it's possible to get prolonged relief with these" but that they do not always afford long term relief. He stated that he did not know of any good "medical basis" for refusing treatment, but declined to say that refusal was unreasonable.
33. Both Dr. Gates and Dr. Hughes testified that it is not unusual for the onset of back pain to be delayed for 24 hours or so for people who suffer back injuries of the kind experienced by the Claimant.
34. The Claimant's attorney filed an Affidavit of Attorney's Fees and Expenses, to which the Defendant stipulated. The Claimant's attorney spent 103 hours on the case and incurred expenses of \$1,253.55.

CONCLUSIONS

Based on the foregoing findings of fact, I conclude the following:

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 (1984). The claimant must establish by sufficient, competent evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. Rothfarb v. Camp Awanee, Inc., 116 Vt. 172 (1949).
2. The Defendant maintains that the Claimant's current back problems are the result of scoliosis. There is some confusion in the record regarding the location of the Claimant's back pain at various times since 1990. Much of the confusion stems from nonuniform uses of the terms "very low back", "low back" and "mid back" by the Claimant and Drs. Hughes, Gates, Bernini and Carr. The record indicates, however, that the Claimant's scoliosis caused pain in her thoracolumbar area. The April and June 1990 incidents of lifting at work caused pain in the Claimant's sacral or buttock area; on both occasions that pain resolved within a short time. The January 30, 1991 accident caused pain in the general area of L5-S1, with pain radiating upward into the L3 and L2 region. I conclude, therefore, that the Claimant's scoliosis and her back difficulties in 1990 are distinguishable from her current myofascial pain syndrome.
3. The Defendant also maintains that the Claimant's current back problems are not related to the January 30, 1991 accident, because of the delay in completing a second "First Report of Injury." The record indicates that the Claimant filled out a First Report of Injury immediately after the accident on January 30, 1991. Her back did not begin to bother her until the next morning. She had experienced muscle spasms in her lower back from two incidents at work in April and June of 1990, both of which resolved after a few days. She never completed injury reports for those incidents and, therefore, did not believe it would be necessary to do so for the January 30, 1991 accident. I conclude that the Claimant knew at the onset of her back pain on January 31, 1991, that it was due to the work incident, and reported her back pain to her supervisor that evening. She did not discuss the work incident with Dr. Hughes until he told her about her MRI results because until that time she expected to recover quickly and return to her normal work routine. The back pain the Claimant has experienced are distinguishable from the pain caused by her scoliosis and brief periods of low back pain she had in 1990. The record supports a finding that the

January 30, 1991 accident caused the Claimant's current back disability.

4. The Defendant asserts that the Claimant's refusal to undergo the injection therapy was unreasonable and should bar further compensation under the Act. Dr. Hughes and Dr. Gates both felt the injection therapy had minimal risks and a good chance of providing significant benefit to the Claimant. However, Dr. Hughes felt the Claimant's refusal to undergo the therapy was reasonable. When asked if the Claimant's refusal was reasonable, Dr. Gates simply replied "I don't know of any good medical basis for refusing treatment." I conclude that the Defendant failed to prove that the Claimant's refusal of injection therapy was unreasonable. In addition, the Defendant offered no evidence that the Claimant's refusal extended her period of temporary total disability.
5. Dr. Davis examined the Claimant on October 7, 1991 and found her to be at an end medical result. Based on this report, the Defendant terminated temporary total compensation payments as of October 31, 1991. However, the Defendant's expert, Dr. Gates, stated that he did not believe the Claimant had reached an end medical result as of May 21, 1992. In addition, neither Dr. Hughes nor Dr. Carr believe the Claimant has reached an end medical result, although one of Dr. Carr's criteria for reaching an end medical result for the Claimant - "participate in vocational counseling and have an agreement on what her vocational goal is at or below the light physical demand level" - is improper. Establishing vocational rehabilitation goals is not a criterion for determining end medical result. End medical result is the point at which the claimant's condition is not likely to improve. I find sufficient evidence, however, to conclude that the Claimant has not yet reached an end medical result.

ORDER


Therefore, based on the foregoing CONCLUSIONS and FINDINGS the Defendant is hereby **ORDERED** to:

1. Pay the Claimant's medical bills related to treatment for her back pain.
2. Pay the Claimant temporary total disability compensation for the period beginning October 31, 1991, to the present and

continuing.

3. Pay attorneys fees in the amount of \$3,605.00.
4. Pay the Claimant's costs in the amount of \$1,253.55.

DATED at Montpelier, Vermont this 5th day of May, 1993.



Barbara G. Ripley
Commissioner