

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

Delores Davis) File # C-10560
)
 v.) By: Frank E. Talbott
) Contract Hearing Officer
Walter Friedman)
) For: Barbara G. Ripley
) Commissioner
)
) Opinion #11-93WC

Hearing held June 3, 1993, at Montpelier, Vermont.

APPEARANCES

James Ritvo for the claimant
Glenn Morgan for the defendant

ISSUES

1. Whether the claimant reached maximum medical improvement or her pre-injury medical status when temporary total payments were stopped on November 11, 1992;
2. Whether the claimant has refused medical treatment or vocational rehabilitation such as to justify termination of temporary benefits;
3. Whether the claimant's current disability from working is caused by rheumatic diseases not related to her work injury; and
4. Whether the medical bills remaining unpaid were for reasonable and necessary medical treatment, i.e., were they causally related to the claimant's work-related injury.

THE CLAIM

1. Temporary total disability compensation under 21 V.S.A. § 642 from November 11, 1992 to date;
2. Medical and hospital benefits under 21 V.S.A. § 640.

3. Attorney fees and costs under 21 V.S.A. § 678(a).

FINDINGS

1. On November 1, 1989:
 - a. The claimant, Delores Davis, was employed by the defendant, Walter Friedman, as a private nurse.
 - b. The defendant was an employer within the meaning of the Workers' Compensation Act.
 - c. The claimant suffered a personal injury when she lifted a paraplegic patient into a shower chair.
 - d. The claimant's injury arose out of and in the course of employment with the defendant.
 - e. The Fidelity and Casualty Co. of New York was the workers' compensation carrier for the defendant on November 1, 1989.
 - f. The claimant's average weekly wage for the twelve weeks preceding the accident was \$425.00, resulting in a weekly compensation rate of \$283.33 (plus \$10.00 for each dependent).
 - g. The claimant had one dependent under the age of 21, identified as: Tishawna Davis, born 3/5/72.
2. On March 7, 1990, the claimant and the defendant entered into an Agreement for Temporary Total Disability Compensation (Form 21) in which the defendant agreed to pay the claimant \$293.33 a week, including dependency benefits of \$10.00, beginning on November 4, 1989, for an injury to her back.
3. On July 1, 1990, the claimant's compensation was increased under 21 V.S.A. § 650(d) to \$301.12; on July 1, 1991 to \$318.30; on July 1, 1992 to \$327.67.
4. On November 11, 1992, the defendant discontinued temporary total disability compensation being paid the claimant on

the basis that an independent medical examination by Dr. Spear showed no evidence of true disability and Dr. Spear questioned if any disability existed, and said that the claimant could have returned to work six to twelve weeks following her injury.

5. Judicial notice is taken of the following documents in the Department's file:

- Form 1 : Employer's First Report of Injury
- Form 25 : Wage Statement
- Form 10 : Certificate of Dependency
- Form 21 : Agreement for Temporary Total Disability Compensation
- Form 28 : Notices of Change in Compensation Rate dated August 27, 1990, September 11, 1991, and August 10, 1992.
- Form 27 : Notice of Intention to Discontinue Payments dated October 30, 1992, together with medical report of Dr. Ivan M. Spear, M.D.
- Form 6 : Notice and Application for Hearing.

6. During the hearing the following Exhibits were received in evidence without objection:

- Joint Exhibit 1 : Medical Records & Reports
- Claimant's Exhibit A : Progress Notes of Lawrence M. DuBuske, M.D. dated March 16, 1993, and May 4, 1993, along with the Curriculum Vitae of Lawrence M. DuBuske, M.D.
- Claimant's Exhibit B : Medical records from University of Massachusetts Medical Center
- Claimant's Exhibit C : Medical Bills
- Claimant's Exhibit D : Employer's First Report of Injury
- Claimant's Exhibit E : Letter of September 18, 1991, from Sheldon A. Keitel to Delores Davis and Lisa Brown

Claimant's Exhibit F : Letter of September 12, 1991
from Donald A. MacLeod, D.C.

Claimant's Exhibit G : Note from New Hampshire
Physiatry dated July 23, 1990

Defendant's Exhibit 1 : Transcript of Deposition of
Dr. Ivan M. Spear, and
deposition exhibits

7. On November 1, 1989, the claimant was working as a Certified Nurse's Assistant for the Defendant. On that date, the claimant suffered an injury to her back while attempting to lift a paraplegic patient. The claimant initially sought treatment from Dr. Harry L. Haroutunian on November 2, 1989. She was diagnosed as having suffered thoracic spine pain resulting from this lifting incident.
8. Between November 1, 1989, and April 19, 1990, the claimant underwent routine physical therapy and treatment at the Hitchcock Clinic in Nashua, New Hampshire. The claimant was seen by Dr. Irina F. Barkan of New Hampshire Institute of Physical Medicine on April 19, 1990, due to the lack of progress with the routine physical therapy methods and the persistence of her symptomatology. The claimant complained of pain in her back radiating towards her left shoulder and into her shoulder blades.
9. In September, 1990, after treatment at the New Hampshire Institute of Physical Therapy, Dr. Barkan wrote that she observed in the claimant a "significant lack of motivation in reference to return to work, and questionable compliance with the treatment protocol." She further wrote that the claimant had reached the point where she was capable of performing full-time, light duty work. Again on December 5, 1990, Dr. Barkan wrote that the claimant had reached maximum medical improvement. At that time Dr. Barkan found that the claimant had an "overall body permanent partial impairment" of 44%. In January, 1991, Dr. Barkan clarified here rating, stating that she was suspect of the test results because of lack of participation and cooperation by the claimant, "due to hidden secondary goal." In such a case, Dr. Barkan would reduce the permanent partial disability rating to 22%.

10. The claimant also began treating with a chiropractor, Donald MacLeod, D.C., on August 23, 1990. The claimant's complaints at that time were pain into her lower back and up into her neck. In addition to the claimant's thoracic/lumbar strain, Dr. MacLeod diagnosed the claimant as suffering a left acromioclavicular strain. This is the first time the claimant had been diagnosed with a shoulder problem. There is no indication in Dr. MacLeod's notes that this shoulder problem is causally related to the lifting incident in November, 1989.
11. Dr. Lawrence DuBuske began treating the claimant on June 18, 1991. Dr. DuBuske is a specialist in Allergy and Rheumatology medicine. In March, 1992, Dr. DuBuske referred the claimant to the University of Massachusetts Medical Center.
12. At the University of Massachusetts the claimant underwent a host of diagnostic, treatment and evaluation processes, and was seen by several physicians, including Dudley Ferrari, M.D., Assistant Professor Department of Orthopaedics, Dr. Srdjan Nedeljkovic, a pain specialist, Dr. Karen Anderson, Ph.D., psychology, Dr. Roy Opsahl, a pain specialist, and Dr. Grace Park, a pain specialist.
13. Initially, the claimant reported to Dr. Ferrari that when she lifted the patient in 1989 she felt a "pull down on her arm" resulting in "pain that was in the back of her shoulder." After a second attempt to lift the patient, the shoulder pain went over the back of her shoulder down into her dorsal spine area. This description of pain when lifting the paraplegic patient in November, 1989, differs from earlier descriptions by the claimant in that earlier descriptions involve only pain in the back radiating into the shoulder blades. Based on the claimant's subjective complaints and his physical examination of the claimant, Dr. Ferrari diagnosed the claimant as having possible impingement rotator cuff injury. However, in May, 1992, Dr. Ferrari reported that x-rays of the claimant's left shoulder revealed acromioclavicular arthritis, with possible degeneration of the rotator cuff versus a tear of the rotator cuff. An MRI of the claimant's spine in June, 1991, also revealed arthritis at the L5-S1 and L4-L5 facet joints.

14. The claimant continued to treat at the University of Massachusetts Medical Center, and as of November 3, 1992, the claimant was still undergoing physical therapy for left shoulder pain and low back pain. However, her physicians there felt that the claimant's symptomatology in her shoulder and low back were "of unclear etiology."
15. The claimant also began treating with Terry Nicola, M.D., in October, 1991. Initially Dr. Nicola suspected a rotator cuff tear. However, electrodiagnostic studies in April, 1992, revealed that although the claimant had a "significant rotator cuff strain, a complete tear did not manifest on the MRI."
16. As of July 21, 1992, Dr. Nicola believed that the claimant's limitations in the use of her left shoulder were due largely to the claimant's own guarding of the left arm. The claimant was reported to be "incredibly reluctant to perform any self-exercises." At that time, Dr. Nicola said that the claimant was "fully capable of all light duty labors that do not involve the use of the left upper extremity for any overhead motion."
17. On October 28, 1991, the claimant was seen by Richard B. Hawkins, M.D., who diagnosed the claimant as having a lumbosacral strain with bulging discs L4-L5 and L5-S1, and a left shoulder strain with small partial tear of rotator cuff. Apparently, Dr. Hawkins was relying on medical records in which a rotator cuff tear was diagnosed. This diagnosis was recanted after the April, 1992 MRI showed no rotator cuff tear. Dr. Hawkins further reported that "from the history provided by the patient, there appears to be a causal relationship between the injury at work of November 1, 1989, and her subsequent disability." However, he felt that further treatment was not warranted since she had basically reached an end result and could not be expected to improve with further conservative treatment. Dr. Hawkins' opinions must be discounted based upon the opinions, diagnosis and tests by the claimant's physicians at University of Massachusetts Medical Center.
18. In September, 1992, a second Independent Medical Examination was conducted, this time by Ivan M. Spear, M.D., of Worcester, Massachusetts. Dr. Spear reported

that he felt the claimant's left shoulder problem was "primarily a functional problem not based on physical disability or disease," and the claimant "could have returned to work within six to eight weeks from the date of injury had an overzealous treatment program not been initiated."

19. Currently, the claimant is still seeing Dr. DuBuske for five problems: 1. chronic range of motion deficit in the left shoulder; 2. lumbar spine degenerative arthropathy and degenerative disc disease; 3. fibromyalgia; 4. onychomycosis; and 5. tenosynovitis of the right wrist. He has reported that the claimant has a history of chronic bursitis of the left shoulder. In his opinion, the claimant suffers from impingement of the rotator cuff secondary to her acromioclavicular joint arthropathy. She also suffers from arthritis in her feet and wrist.
20. No where in Dr. DuBuske's notes does he attribute the claimant's chronic shoulder pain to the lifting incident in November, 1989.
21. Since November 1992, Dr. DuBuske has been prescribing treatment plans for the claimant's left shoulder, arthralgia in her feet, hand joints and left wrist, onychomycosis in her toes, and fibromyalgia. As of October 3, 1992, Dr. DuBuske would not rule that the claimant was at medical end result. However, his assessment took into account "the combination of back problems and shoulder discomfort plus other problems that she has, including some difficulties with chronic arthralgia in the feet, left wrist and problems related to the fibromyalgia combined." However, during this period Dr. DuBuske has noted that the claimant still has some pain and discomfort in her lower back. He has prescribed medication for pain, apparently associated with all aspects of the claimant's rheumatological problems, but he has not prescribed any further therapy or treatment for the claimant's back pain and limitations.
22. In summary, the claimant has seen a host of physicians. Her initial pain and treatment was localized to her back. Complaints of pain in her left shoulder are not present in the medical records until much later. Her physicians attribute her left shoulder pain to acromioclavicular

arthritis and possible degeneration of the rotator cuff.

A tear in the rotator cuff has been ruled out. None of the physicians relate the left shoulder pain to the lifting incident except Dr. Hawkins, an independent medical examiner, who was relying upon mistaken diagnoses of a rotator cuff tear which was ruled out by consulting physicians after Dr. Hawkins' examination.

23. Taking into account the various releases the claimant has received to return to full time work, and the diagnoses from two physicians that the claimant has reached a medical end result, the weight of the medical evidence supports the defendant's contention that as of the date temporary total payments were stopped on November 11, 1992, the claimant had reached medical end result as to her lower back condition.

CONCLUSIONS

1. The claimant has the burden of proof in establishing her injury and disability. King v. Snide, 144 Vt. 395, 399, 479 A.2d 752 (1984). If the injury and the resultant disability are not in dispute, the burden of proof is on the employer to establish the facts justifying termination of compensation. Merill v. University of Vermont, 133 Vt. 101, 105, 329 A.2d 65 (1974). The defendant has never conceded that the claimant suffered an injury to her shoulder in the November 1, 1989 lifting incident. Therefore, the burden of proving the injury and the resultant disability is on the claimant.
2. 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 Awannee, Inc., 116 Vt. 172, 71 A.2d 569 (1950). Where the causal connection between an accident and injury is obscure, and a lay-person would have no well grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berno's Inc., 137 Vt. 393, 395-96, 406 A.2d 390 (1979).
3. A lay person cannot make the causal connection in this case between the claimant's arthritis in her shoulder and the lifting incident in 1989. The claimant did not start complaining about pain in the shoulder until well after

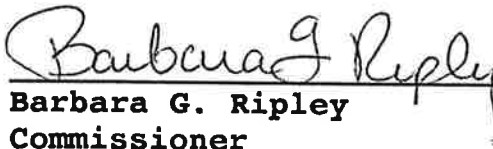
the accident. The claimant obviously has rheumatic problems throughout her body unassociated with the accident. At least two of the physicians who have seen the claimant do not specifically attribute the shoulder condition to the lifting incident. The other physicians have not given a definitive opinion on etiology of the arthritis in her shoulder.

4. The claimant did not sustain her burden of proof that her arthritis in her shoulder is causally related to the accident in this case. There must be created in the mind of the trier of fact something more than a mere possibility, suspicion, or surmise that the incident complained of was the cause of the injury, and the inference from the facts proved must be at least the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).
5. The claimant is entitled to temporary total disability compensation until she either reaches a medical end result or successfully returns to work. Wroten v. Lamphere, 147 Vt. 606, 523 A.2d 1236 (1987). As it appears from the medical evidence that the claimant had reached medical end result as to her lower back at least as of November 11, 1992, the claimant is not entitled to any further temporary total payments after that date.
6. The claimant is entitled to reasonable and necessary medical benefits. 21 V.S.A. § 640. In dispute are the charges for treatment by Dr. DuBuske and charges for the Spaulding Rehabilitation Center in Boston. The Spaulding Rehabilitation Center was prescribed by Dr. DuBuske for physical therapy of the claimant's left shoulder. Thus, those medical services are not reasonable and necessary treatment for the claimant's work-related injury. Dr. DuBuske's treatment has been primarily for complaints other than the claimant's work-related injury. As such, they are also not reasonable and necessary medical services for the claimant's work-related injury.
7. There is no evidence that the claimant refused medical treatment. Whether she refused vocational rehabilitation such to justify termination of temporary total benefits as of November 11, 1992 is not relevant give the other conclusions in this order.

ORDER

It is therefore ORDERED, that since the defendant has paid all benefits through November 11, 1992, the claimant's claim for additional compensation is denied. However, any further treatment for the claimant's back condition must be paid for by the defendant. The parties specifically left open the question of permanent partial impairment resulting from the accident. The defendant shall pay all compensation, medical benefits, and other benefits under the Workers' Compensation law consistent with this Order.

DATED at Montpelier, Vermont this 7th day of September, 1993.



Barbara G. Ripley
Commissioner