

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

MARY JANE MORGAN)
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 v.)
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 C&S WHOLESALE GROCERS)
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File No. A-13422
By: Frank E. Talbott, Esq.
Contract Hearing Officer
For: Barbara G. Ripley
Commissioner
Opinion No. 24-93WC

APPEARANCES

Michael Hertz for the claimant
Glenn S. Morgan and John Valente for the defendant

ISSUES

1. Whether the claimant's medical condition had improved to the fullest extent possible unless she has surgery, as of the date temporary total payments were stopped on August 9, 1992.
2. Whether payments being made to the claimant since notice of termination of compensation are advances of permanent partial disability compensation or temporary total disability compensation.
3. Whether the claimant's injury of June 1992, when she fell off a dam while fishing, leading to a fractured wrist, is compensable.
4. Whether the automobile accident of October, 1989, is an intervening, superseding cause.
5. Whether the medical services provided by Dr. Owens from December 31, 1987 to October 17, 1989, were reasonable and necessary.
6. Whether the medical services provided by Dr. Owens after September 3, 1992, are causally related to the compensable injury in this matter, and whether they were reasonable and necessary.
7. Whether the claimant's travel expenses to Dr. Owens are compensable.

8. Whether the claimant's treatment for her psychological problems is causally related to the accident in this case and, whether the charges for treatment by mental health practitioners, including Dr. Maxine Cartwright, Ph.D and the Institute for Living are reasonable and necessary.
9. Whether the claimant has reached a medical end result with regard to her psychological condition.
10. Whether the charges for massage therapy in 1988 totalling approximately \$600.00 were causally related to her work injury, and were reasonable and necessary.

THE CLAIM

1. Temporary total disability compensation under 21 V.S.A. § 642 from August 9, 1992 to date.
2. Medical and hospital benefits under 21 V.S.A. § 640, including massage therapy bills.
3. Attorney fees and costs under 21 V.S.A. § 678(a).

STIPULATIONS

1. On December 14, 1987:
 - a. The claimant, Mary Jane Morgan, was employed by the defendant, C&S Wholesale Grocers, Inc., of Brattleboro, Vermont.
 - b. The defendant was an employer within the meaning of the Workers' Compensation Act.
 - c. The claimant suffered a personal injury when she slipped on liquid that spilled in the driveway.
 - d. The claimant's injury arose out of and in the course of employment with the defendant.
 - e. The CIGNA Insurance Company was the workers' compensation carrier on that date.
 - f. The claimant's average weekly wage for the twelve weeks preceding the accident was \$352.18, resulting in a weekly compensation rate of \$234.79 (plus \$10.00 for each dependent).
 - g. The claimant had no dependents under the age of 21.

2. On December 23, 1987, the defendant filed a first report of injury.
3. On January 11, 1988, the claimant filed a Notice of Injury and Claim for compensation.
4. On November 8, 1988, 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 \$234.79 a week beginning on December 18, 1987.
5. On July 1, 1988 the claimant's compensation was increased under 21 V.S.A. § 650(d) to \$248.31; on July 1, 1989, to \$262.79; on July 1, 1990, to \$270.02; on July 1, 1991, to \$285.95; and on July 1, 1992, to \$294.64.
6. On August 8, 1992, the defendant discontinued temporary total disability compensation being paid the claimant on the basis that the claimant had reached a medical end result with a permanent partial disability of 15%. A Form 27, Notice of Intention to Discontinue Payments, was mailed to the claimant on July 30, 1992. This Form 27 was rejected by the Commissioner on August 10, 1992.
7. Defendant has continued to make weekly compensation payments to the claimant since August 8, 1992, which it asserts are advances towards permanent partial disability benefits which may be due to the claimant.
8. On August 11, 1992, the claimant filed a Notice of Application for Hearing.
9. Judicial notice may be taken of the following documents in the Department's file:

Form 1 : Employer's First Report of Injury
 Form 5 : Notice of Injury and Claim for Compensation
 Form 25 : Wage Statement
 Form 10 : Certificate of Dependency
 Form 21 : Agreement for Temporary Total Disability Compensation
 Form 28 : Notices of Changes in Compensation Rate
 Form 27 : Notice of Intention to Discontinue Payments dated July 30, 1992, together with medical report of Dr. William H. Druckemiller,
 Form 6 : Notice and Application for Hearing dated August 4, 1992

FINDINGS

1. Stipulations 1 through 9 are true.

2. During the hearing the following exhibits were admitted into evidence:

Joint Exhibit A	:	Binder containing all relevant medical records
Joint Exhibit B	:	Binder containing all relevant medical bills
Claimant's Exhibit A	:	Transcript and Exhibits of the Deposition of Guy Owens, M.D.
Claimant's Exhibit B	:	Transcript and Exhibits of the Deposition of Maxine Cartwright, M.D.
Claimant's Exhibit C	:	Summary of Medication and Receipts
Claimant's Exhibit D	:	Summary of Charges from North Central Connecticut Mental Health Services
Claimant's Exhibit E	:	Mileage Summary
Claimant's Exhibit F	:	Invoices for Taxi Fare to Dr. Owens' office
Claimant's Exhibit G	:	Invoices for Taxi Fare to North Central Connecticut Mental Health
Claimant's Exhibit H	:	None; exhibit was withdrawn pursuant to stipulation
Claimant's Exhibit I	:	Affidavit of Attorney Hertz regarding fee agreement and statement of charges for legal services
Claimant's Exhibit J	:	Summary by Eva Mondon
Defendant's Exhibit 1	:	Transcript and Exhibits of Deposition of William Druckemiller, M.D.
Defendant's Exhibit 2	:	Transcript and Exhibits of Deposition of Walter Bordon, M.D.

3. On December 14, 1987, while the claimant was working as a guard for the defendant, a semi-tractor-trailer had an accident in the yard. The trailer turned over and the contents of the load spilled. Soap, and other liquids spilled on the yard, making the surface area slippery. The claimant slipped on this material and fell backwards.

4. The claimant initially sought treatment only for a sprained ankle resulting from the fall. Within a few weeks of the fall, however, she was complaining of pain in her neck area. Shortly after this the claimant complained of pain radiating into her shoulder. The claimant's physician, Dr. Guy Owens, as well as the Defendant's independent physician, Dr. Robert F. Norwood, relate the claimant's neck pain and shoulder pain to the incident at C & S Wholesale Grocers, and I so find.

5. By May 10, 1988, the right ankle sprain had resolved.

6. The claimant traveled from Brattleboro, Vermont to New Britain or Hartford, Connecticut for treatment by Dr. Guy Owens. Dr. Owens is a neurosurgeon. The claimant had treated with Dr. Owens prior to December, 1987. The claimant seeks reimbursement for 4,284 miles of travel between Vermont and Connecticut through 1989. There was no evidence presented as to any medical need for the claimant to travel to Connecticut from Vermont for appointments with Dr. Owens. Dr. Owens provided what appears from his records to have been routine medical care which could have been provided by any qualified orthopaedic surgeon in the Brattleboro area or by any neurosurgeon in larger cities closer to Brattleboro than is Hartford or New Britain, Connecticut. I find such travel expenses to be unreasonable.

7. Dr. Owens prescribed massage therapy for the claimant. This did apparently help the claimant some with her cervical tightness. However, it was discontinued at Dr. Owens' recommendation because it did not change the claimant's condition. The claimant seeks reimbursement of \$600.00 for this therapy. It was reasonable and necessary.

8. Dr. Owens treated the claimant with various modalities, including prescriptions for Percocet, Darvocet and Methadone. The claimant had a history of narcotic and alcohol abuse and major psychiatric problems. Peter D. Upton, M.D., is of the opinion that Dr. Owens treatment of the claimant was not usual and customary in that it did not constitute proper medical care by any physician; no physician should have prescribed narcotics for pain control to a person with such a history of substance abuse, alcoholism and psychiatric problems as had the claimant. Dr. Walter A. Bordon, a psychiatrist, also believes that Dr. Owens' treatment was counterproductive. It is clear from the record that Dr. Owens' treatment of the claimant exacerbated her drug addiction and was not reasonable and necessary treatment for this

claimant. The treatment was certainly not geared toward returning her to work and instead lead to her repeated admissions to psychiatric hospitals for drug abuse and psychiatric problems.

9. In June, 1989, the claimant slipped and fell at a wedding, causing pain to the thoracic region of her back. Prior to this incident, the claimant was not reporting to Dr. Owens any specific pain in her thoracic region. There is no evidence that this incident aggravated the claimant's pain in her cervical region.

10. On June 11, 1989, the claimant was admitted to The Institute of Living, Hartford, Connecticut because of paranoid delusions. She was again admitted in August, 1989, for detoxification from Darvocet. In September, 1989, the claimant was admitted for the third time.

11. The claimant has a complicated and tumultuous past. She is an alcoholic and was a serious substance abuser. She abused narcotics, heroine and alcohol. She has struggled with abuse as a child and later in her marriage. The physical abuse she received from her husband was quite serious. The claimant has been hospitalized for psychiatric treatment about twenty times dating back to approximately the early 1960's. The claimant suffered from chronic depression, mixed personality disorder and polysubstance abuse before the injury in these proceedings.

12. The claimant's initial admission to the Institute of Living was substantially related to the claimant's chronic neck pain. She was diagnosed as suffering from amphetamine-induced delusional disorder, alcohol abuse and amphetamine abuse. Dr. Owens was prescribing Fastin for her. This medication is an amphetamine that would contribute to making the claimant paranoid and cause hallucinations.

13. The claimant's admission in August, 1989, was for Darvocet detoxification. Dr. Owens had been prescribing Darvocet for the claimant's pain control.

14. The admission to The Institute of Living in September, 1989, was again to address the claimant's abuse of Darvocet. The admission assessment at this time was that it was becoming increasingly apparent that the claimant's relapse is "very much due to her continuing neck pain." Within weeks of the claimant's release from detoxification in August, 1989, Dr. Owens was again prescribing Darvocet for the claimant's pain control, causing relapse to the claimant's abuse of her pain control narcotics.

15. The admissions to The Institute of Living in June, August and September, 1989, were substantially related to the claimant's use of drugs being prescribed by Dr. Owens. The total charges for these admissions is \$13,984.97.

16. On October 9, 1989, the claimant was evaluated for suitability of a chronic pain program at Mount Sinai Hospital. The impression of the physicians there was that the claimant suffered from chronic neck, back and left upper extremity pain complicated significantly by narcotic addiction and significant emotional overlay, and that the claimant would benefit from admission to the Pain Management Unit. However, the claimant did not receive this treatment, as it was later determined that she was not an appropriate candidate for this program because of claimant's psychiatric problems.

17. On October 24, 1989, the claimant was in her car, parked along the side of the road, when a tractor-trailer ran into her car. According to the claimant, this collision was serious. The tractor trailer ripped off the door of the claimant's car, causing the claimant to be "jerked and slammed" against the inside of the car, causing her neck to snap. The claimant suffered from extreme pain because of this, and believes that this accident aggravated her neck pain.

18. The claimant was seen in the emergency room of the hospital because, as a result of the car accident, coughing and sneezing produced pain along her entire spinal axis. Dr. Owens believes that this motor vehicle accident aggravated the claimant's injuries such that it increased the claimant's permanent impairment of her spine by at least 5%.

19. As a result of the motor vehicle accident, and beginning in 1990, Dr. Owens began treatments of injections of Xylocaine, and began prescribing Valium. Dr. Owens continued to treat the claimant for her pain using drugs.

20. In December, 1989, the claimant received treatment at Elmcrest Hospital for psychiatric problems. She was discharged without maximum benefits due to resistance to treatment.

21. In January, 1990, the claimant was admitted to Mount Sinai Hospital for drug overdose secondary to Amitriptyline and other medications as well as alcohol.

22. Also in January, 1990, the claimant was admitted to Rockville General Hospital because of a suicide attempt by self inflicted poisoning by alcohol and drugs, including Methadone, Darvocet, and Amitriptyline.

23. On February 1, 1990, the claimant was admitted to Cedarcrest Regional Hospital for psychiatric diagnosis and treatment due to her overdose leading to hospitalization at Rockville General Hospital.

24. Subsequent to February, 1991, the claimant has been treated by various physicians at various hospitals for depression,

chronic pain, substance abuse, and her other psychiatric problems. She returned to The Institute of Living several times.

25. The claimant also suffered an additional accident. In June, 1992, the claimant was fishing with her husband. She was standing on a steep bank of a river. As she reached back to cast her pole, she lost her footing, and fell down the 35 foot bank, breaking her wrist. The claimant asserts that this fall was due to a muscle spasm in her neck. The claimant's testimony was not credible on this point.

26. The claimant is seeking the following medical benefits:
- a. \$600.00 for massage therapy between May and September, 1988;
 - b. Medications prescribed between June 1992 and August 1993, totalling \$623.81. These prescriptions were primarily for Methadone.
 - c. \$1,195.00 charged by North Central Connecticut Mental Health Services for services from August 15, 1990, to November 14, 1990.
 - d. \$332.50 charged by Brattleboro Memorial Hospital for physical therapy prescribed by Dr. Owens in early 1988.
 - e. \$1,680.00 charged by Dr. Owens for treatment from December 1987 to October 17, 1989.
 - f. Additional charges by Dr. Owens for services since November 14, 1989.
 - g. Charges by The Institute of Living totalling \$13,984.97 for admissions in June, August and September, 1989, and \$16,844.95 for admissions subsequent to January 1, 1990.
 - h. \$3,820.53 for services at Johnson Memorial Hospital in December 1991 and \$2,390.65 for services at this hospital in January 1992 for drug abuse and psychiatric problems.
 - i. \$4,711.48 for services at Manchester Memorial Hospital from January 9, 1992, through January 10, 1992 for drug abuse and psychiatric problems.
 - j. \$15,439.10 for services at Johnson Memorial Hospital in January 1992 for drug abuse and psychiatric problems.

- k. \$599.56 for services at Saint Francis Hospital in April 1992 for psychiatric problems.
- l. \$150.00 for psychotherapy services by Dr. Stephanie Mullany in July and August 1989.
- m. \$4,177.50 for therapy services by Maxine Cartwright, M.D., between January 1991 and July 1993.
- n. \$526.90 for services at Winsted Memorial Hospital for emergency room services on June 7, 1992, for a wrist injury.
- o. \$175.00 for services by Jonathan Isreal, M.D., in June 1992 relating to the claimant's wrist injury.
- p. \$27.00 for radiology services by Hospital Radiologists relating to the wrist injury.
- q. \$244.00 for services from Windham Orthopaedics from June to December 1992 relating to the claimant's wrist.

27. The claimant is also requesting reimbursement of \$418.00 for taxi fares to North Central Connecticut Mental Health Services in 1990, and mileage to Dr. Owens from Broad Brook, Connecticut (approximately 40 miles each trip) from September 1992 to July 1993, totalling 949 miles.

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).

2. The claimant is entitled to compensation for injuries that arise out of and in the course of employment. Moody v. Humphrey and Harding, Inc., 127 Vt. 52, 54-55, 238 A.2d 646 (1968). When an injury is shown to have arisen out of and in the course of employment, all natural consequences that flow from the injury likewise arise out of and in the course of employment, unless the consequences are a result of an independent intervening cause. 1 Larson Workmens' Compensation Law, §13.00 (1993). If a subsequent, nonindustrial episode triggers an aggravation of a compensable injury, the aggravation is compensable "so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances." Id., at §13.11(a), p. 3-517. That is, "once the work-connected character of an injury, such as a back injury, has been established, the

subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause." Id., at 3-510.

3. The claimant's automobile accident on October 24, 1989, was an independent nonindustrial cause of the claimant's increased cervical and thoracic pain and her shoulder pain. All of the medical services and supplies claimed by the claimant subsequent to October 24, 1989, are substantially related to the claimant's neck, back and shoulder pain, which was aggravated by this October 1989 motor vehicle accident.

4. There was no evidence that the claimant had recovered to the fullest extent possible without surgical intervention as of August 9, 1992. Nevertheless, any claim for compensation after the date of the automobile accident on October 24, 1989, would not be compensable.

5. The evidence does not establish a causal connection between the claimant's fall down a bank leading to a fractured wrist and her work related injury.

6. An aggravation of a primary injury because of medical treatment, is compensable. Larson's Workmens' Compensation Law, §13.21(a) (1993). This includes aggravation by or in the forum of narcotic addition where the drugs are used in treatment of a compensable injury. Id., at §13.21(e).

7. Aggravation of symptoms of a psychological neurosis which is caused in substantial part by a workers' compensation injury constitutes an accidental injury arising in the course of employment. McKane v. Capital Hill Quarry Co., 100 Vt. 45, 47 (1926); see also Jackson V. True Temper Corp., 151 Vt. at 595 - 597 (1989). If a disability caused by a compensable physical injury is increased because of a pre-existing mental condition, it is uniformly held that the full disability is compensable. Larson, Workers' Compensation Law, § 42.22(a) (1993). A pre-existing neurotic tendency does not lessen the compensability. Id., at § 42.22(b). However, there must be a substantial causal connection between the work-related physical injury and the resulting mental condition. Id., at § 42.22(c).

8. The claimant's psychiatric problems were exacerbated by her increased pain and the medication prescribed by Dr. Owens. The claimant's medication increased after the October 1989 motor vehicle accident, as did her chronic pain. Indeed, the claimant began using Valium after the motor vehicle accident. Therefore the treatment to the claimant relating to the abuse of drugs she was being prescribed by Dr. Owens for her pain is compensable up to the date of the motor vehicle accident. Because of the claimant's increased pain, drug use and permanent impairment resulting from the motor vehicle accident, the treatments relating

to the drug abuse and related psychiatric problems are not compensable after the motor vehicle accident. Therefore, the charges by the Institute of Living are compensable but all other medical and hospital charges incurred after the motor vehicle accident are not.

9. The medical services provided by Dr. Owens were not reasonable and necessary. Indeed, the treatment provided by him exacerbated the claimant's pre-existing psychiatric and drug abuse problems and was ill advised.

10. There is insufficient evidence on which to reach a conclusion as to whether the claimant had reached a medical end result with regard to her psychiatric condition. However, this conclusion is not material since all claims relating to her drug abuse problems and psychiatric problems after the motor vehicle accident are not compensable.

11. The claimant has requested an award of attorney's fees. The purpose of 21 V.S.A. § 678(a) is to discourage any unnecessary expense and unreasonable delay in the resolution of the workers' compensation claims. Morrisseau v. Legac, 123 Vt. 70, 79, 181 A.2d 53 (1962). An award of attorney's fees is discretionary under 21 V.S.A. §678(a). This claim is very complicated. For the most part, the claims made by the claimant are not compensable due to the October*1989 motor vehicle accident. Claimant can not be said to have substantially prevailed, and the request for an award of attorney's fees is denied.

ORDER

It is therefore ORDERED that the defendant immediately pay to the claimant the following:

1. \$600.00 for massage therapy;
2. \$332.50 for physical therapy at Brattleboro Memorial Hospital;
3. \$13,984.97 for charges by The Institute of Living;

It is further ORDERED that the remainder of the claims are DENIED. The defendant is to receive credit for all benefits paid for disability compensation for any period subsequent to October 24, 1989, and medical services or supplies prescribed subsequent to October 24, 1989.

DATED at Montpelier, Vermont this 29th day of December, 1993.


Barbara G. Ripley, Commissioner