

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

)	State File No. R-04517
)	
Linda Wood)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
Pamela Hoiles)	Commissioner
)	
)	Opinion No. 30R-02WC

RULING ON CLAIMANT'S MOTION FOR RECONSIDERATION

Following the issuance of Opinion No. 30-02WC, dated July 10, 2002, Claimant, by and through her attorney, Heidi Groff, Esq., moves for reconsideration of the attorney fee award. The employer, by and through her attorney, William Blake, Esq., opposes the motion.

The discretionary fee award in this case pursuant to 21 V.S.A. § 678(a) was for \$757.80, based on 10% of the total hours worked. Claimant prevailed on her claim for limited medical benefits, but not on the claim for temporary total disability benefits. She now argues that her success is for fully half of the claim, and seeks an award of \$3,424.50.

The defense accurately explains that the stated two issues in the published opinion do not accurately reflect the full extent of the litigation in this case. On the morning of the hearing, Claimant withdrew her claim for an alleged cervical injury, which was a matter of considerable dispute and discovery.

The ultimate order was for limited treatment recommended by Dr. Block. That award was a small fraction of what was claimed and litigated, thereby justifying an award of 10% of what was claimed in fees.

Therefore, Claimant's motion to reconsider that award is DENIED.

Dated at Montpelier, Vermont this 7th day of October 2002.

R. Tasha Wallis
Commissioner

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Hearing held in Montpelier on April 30, 2002
Record Closed on June 4, 2002

APPEARANCES:

Heidi A. Groff, Esq. for the Claimant
William J. Blake, Esq. for the Defendant

ISSUES:

1. Are the medical treatment modalities Dr Block proposes, including iliotibial band treatment, physical therapy and chiropractic treatment, compensable?
2. When did the Claimant reach medical end result?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	Transcript of deposition of Dr. Robert Block
Defendant's Exhibit A:	Dr. Bucksbaum's CV

FINDINGS OF FACT:

1. Notice is taken of all Department forms. The exhibits are admitted into evidence.
2. Claimant was an "employee" and Defendant Pamela J. Hoiles her "employer" within Vermont's workers compensation law.
3. The Travelers was the Ms. Hoiles's workers' compensation carrier at the time of Claimant's injury.

4. Claimant is fifty-four years old and resides in Wells, Vermont. She is a high school graduate with a history of jobs picking apples, doing food service, working in data processing and cleaning houses.
5. At the time of her injury, Claimant was working in the home of Pamela Hoiles. On August 21, 2000, while trying to control two of her employer's dogs—a large English Mastiff and small Maltese puppy---she suffered a twisting injury. She was then evaluated by Mary McVean, nurse practitioner at Northshire Medical Center (NMC).
6. The note from NMC for August 21 documents an injury to the Claimant's right hip and right shoulder. On examination, claimant could barely stand or raise her leg from the floor. Her right hip was tender and both legs weak. An examination of her right shoulder suggested a rotator cuff tear that was later ruled out.
7. Claimant treated for her injuries and the carrier paid for the medical treatment until September 2001. The treatment included physical therapy and pool therapy, modalities discontinued in December 2000. It also included chiropractic treatment that claimant thought was counterproductive. After those treatments were discontinued, however, she determined that they had actually helped her.
8. A December 4, 2000 physical therapy note indicates that the Claimant's shoulder pain had improved, although she still had back pain intermittently.
9. A December 18, 2000 functional capacity evaluation (FCE) concluded that Claimant has a sedentary to light capacity for work, that she would benefit from a transitional return to work program starting at 2-3 hours per day and increasing 1-2 hours a day on a weekly basis. The carrier did not inform the Claimant of any duty to perform a good faith job search at that time. Dr. Block concurs with the FCE conclusions, but maintains that she has not reached medical end result.
10. On January 15, 2001, Ms. McVean released the Claimant to sedentary work. By January 29, 2001, she concluded that Claimant had reached medical end result and that she would need physical therapy and chiropractic for a number of years.
11. On January 29, 2001, Ms. McVean placed the Claimant at medical end result for her right shoulder, low back and right hip injury.
12. On February 13, 2001, James Hollingshead, Physician Assistant at the Vermont Orthopaedic Clinic, noted that the Claimant was in no acute distress, that she moved well, demonstrated "surprisingly good range of motion of the lumbar spine," was able to easily touch her hands to the floor, had good lumbar extension and negative straight leg tests. Dr. Vargas, an orthopedic surgeon, also examined the claimant briefly at that visit and reviewed x-rays. She was assessed with soft tissue injury of the shoulder and arthritic changes in the neck, but she had no evidence of disc problems in the lumbar spine.

13. Dr. Robert Block is an orthopaedic surgeon. He has held Certification from the American Board of Orthopaedic Surgeons since 1979.
14. On March 13, 2001 Dr. Block examined the Claimant, noting excellent spinal flexibility and pain in the biceps area. He injected the Claimant's right biceps groove, recommended that she continue pool therapy and that she discontinue chiropractic since she felt it was making her worse. On April 20, 2001 Dr. Block noted that the shoulder injection was "very helpful" although she developed a gastrointestinal upset afterwards.
15. Dr. Block prescribed Neurontin that helped decrease the Claimant's back pain. He also prescribed Celebrex, ice packs and exercises. By May of 2001 he determined that the Claimant injuries had continued to improve. Yet in June her pain was increased after she spent three hours riding a lawnmower.
16. Because the Claimant declined further steroid injections, Dr. Block prescribed more medication to treat heartburn and inflammation.
17. On June 18, 2001 Dr. Block recommended chiropractic treatment for the Claimant's shoulder and neck stiffness. He opined that mechanical stretching would help relieve the tightness in her shoulder and limited the recommendation to a maximum of eight weeks, with one to two sessions weekly.
18. In addition, Dr. Block noted tightness in the Claimant's iliotibial band—a band that runs on the outside of the thigh from the hip to below the knee and concluded that the tightness is a reaction to her work-related low back injury. For relief of the tightness, Dr. Block recommended a physical therapy technique in which cortisone is driven through the skin to the tight area. In Dr. Block's opinion, a four to six week course of treatment should relieve the stiffness in the IT band. His experience led him to the estimate of a 75% to 85% chance of success.
19. In addition, Dr. Block recommended further treatment for Claimant's shoulder problem, including ice, a stretching program and perhaps a repeat injection.
20. On August 24, 2001 Dr. Block released the Claimant to sedentary work with no lifting, pushing or pulling. That was the first work release he gave the Claimant.
21. Because Travelers denied payment for the treatment he was recommending, Claimant has not seen Dr. Block since September 2001.
22. In Dr. Block's opinion, until the Claimant saw him she had not reached medical end result because she had been in a passive, "hands off" program. He recommended a much more aggressive approach.

23. Because the Claimant has not been able to do the additional treatment Dr. Block recommended, he believes she is not yet at medical end result because the additional treatment might cause significant additional improvement in Claimant's condition.
24. Dr. Block's disagreement with Dr. Bucksbaum's medical end result determination turns on his opinion that the lack of aggressive medical management has kept her from achieving significant potential improvement.
25. Dr. Mark Bucksbaum, is Board Certified in the areas of Physical Medicine and Rehabilitation, Pain Management and Independent Medical Examination.
26. On March 15, 2001, two days after Dr. Block injected the biceps groove, Dr. Bucksbaum examined the claimant for the defendant. Claimant made no mention of the injection and complained of upper back, lower back, right shoulder, right hip and leg and left hip. Dr. Bucksbaum diagnosed Claimant's conditions as chronic bicipital tendonitis and a lumbar strain. He also concluded that she had reached medical end result with a 14% whole person impairment, reflecting a combination of 7% for chronic low back pain (DRE category II plus 2% for pain) and 7% for right bicipital tendonitis with restricted range of motion. In Dr. Bucksbaum's opinion, no further treatment of diagnostic work up was necessary at the time he examined the Claimant.
27. Dr. Bucksbaum's opinion that further treatment is not necessary is based on the chronicity of the Claimant's problems. In the acute stage of an injury, the proposed treatment might have been effective, but when time passed and she reached a chronic stage, usually after six months, therapies lost effectiveness. In time fibrous tissue forms that is refractory to the proposed treatments. Although the proposed injections and chiropractic treatment may have helped the Claimant in the acute stage, in Dr. Bucksbaum's opinion they are not likely to help her now.
28. Further, Dr. Bucksbaum noted that he saw the Claimant only two days after Dr. Block had administered an injection, yet the Claimant complained of shoulder pain. Had the injection been effective, she would have realized relief within those forty-eight hours.
29. Claimant initially received relief from chiropractic treatment, relief that waned as time went on, prompting her to discontinue it. Dr. Bucksbaum explained that the treatments lost their effectiveness as her condition became chronic.
30. In his examination of the Claimant, Dr. Bucksbaum found no abnormality when he tested the IT band. She had neither the restricted range of motion or a pain response necessary for a positive finding. Even if she had a positive finding in this area, Dr. Bucksbaum determined that topical cortisone treatment in the form of iontophoresis would not be an effective treatment.

31. Overall, Dr. Bucksbaum predicted that at best the proposed treatment would give the Claimant short-term benefit, which would last a day or two, but not a long-term effect.
32. Although the AMA Guides to Permanent Impairment does not rate tendonitis, Claimant's demonstrated restricted range of motion at the shoulder joint convinced him that the rating in this case is warranted.
33. Although Dr. Bucksbaum had the Claimant's old medical records, he did not have records from the Claimant's primary care providers and did not know that she was treating with Dr. Block.
34. Claimant submitted a copy of her fee agreement with her attorney, evidence of 84.2 hours litigating this claim and \$1,907.92 in costs.

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*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
2. 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 inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. An employer "shall furnish reasonable surgical, medical and nursing services and supplies to an injured employee." 21 V.S.A. § 640 (a).
4. This claimant is entitled to temporary total disability benefits under 21 V.S.A. § 642, while she is either: (1) in the healing period and not yet at a maximum medical improvement, *Orvis v. Hutchins*, 123 Vt 18 (1962), or (2) unable as a result of the injury either to resume her former occupation or to procure remunerative employment at a different occupation suited to his or her impaired capacity, *Roller v. Warren*, 98 Vt 514 (1925). It is only when maximum earning power has been restored or the recovery process has ended that the temporary aspects of the workers' compensation are concluded. See, *Moody v. Humphrey*, 127 Vt. 52, 57 (1968); *Orvis v. Hutchins*, 123 Vt. 18, 24 (1962); *Sivret v. Knight*, 118 Vt. 343 (1954).

5. Medical end result is the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected regardless of treatment. WC Rule 2. The fact that some treatment such as drug or physical therapy continues to be necessary does not preclude a finding of medical end result if the underlying condition causing the disability has become stable and if further treatment will not improve that condition. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996).
6. "[A] claimant may reach medical end result, relieving the employer of temporary disability benefits, but still require medical care associated with the injury for which the employer retains responsibility. *Pacher v. Fairdale Farms* 166 Vt. 626, 629 (1997); *Coburn*, 165 Vt. at 532. The necessity of treatment such as physical therapy or medications is not inconsistent with finding medical end result. *Pacher*, 166 Vt. 626.
7. Palliative care means medical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition. *Id.*
8. In this case the parties have offered divergent expert opinions on the crucial issues of medical end result and medical treatment from Dr. Robert Block, for the Claimant, and from Dr. Mark Bucksbaum, for the Defendant.
9. 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, including the length of time the evaluator provided treatment; 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 objectivity and logical support underlying the opinion. *Yee v. International Business Machines* Opinion No. 38-00WC (Nov. 9, 2000); *Miller v. Cornwall Orchards* Opinion No. 20-97WC (Aug. 4, 1997); *McEnany v. Shoreline Corp.* Opinion No. 31-97 WC (Oct. 4, 1997).

10. Dr. Block has had a treating physician relationship with the Claimant since March of 2001 whereas Dr. Bucksbaum has only examined her once. Neither physician saw the Claimant at the time of her injury in August of 2000 or within a short period of time afterwards. Therefore, the advantage in favor of the Claimant's expert on the first criterion is only slight. Both physicians are well-qualified to render opinions in this case, Dr. Block with his expertise in orthopaedics, Dr. Bucksbaum in the area of pain management and rehabilitation. Therefore, neither has an advantage in the area of education and experience. Both physicians took complete histories, but Dr. Bucksbaum did not have available for his review the records from the Northshire Medical Center where the Claimant had treated immediately after the injury. However, Dr. Bucksbaum has the advantage of greater neutrality in the case and more objective underpinnings for his opinions.
11. When all the evidence is considered as a whole, it demonstrates that the Claimant continues to have pain from her work related accident. Dr. Block's opinion that the Claimant has not reached medical end result is based on his observation that she has had "considerable improvement," but that improvement has been in symptoms, as there is no objective evidence to prove that her underlying condition remains unstable. Therefore, the objective evidence evaluated in light of *Coburn*, supports Dr. Bucksbaum's opinion that Claimant had reached medical end result for her August 2000 work related injury by March of 2001. 165 Vt. 533 ("The fact that [chiropractic] care later improved Claimant's symptoms is not inconsistent with finding medical end result earlier in time.")
12. Next is the question whether the treatment modalities recommended by Dr. Block—chiropractic, physical therapy IT treatment and possibly more injections-- are reasonable and necessary. Dr. Block's recommendations are based on his clinical understanding of this Claimant, his goal of moving her from her current pain state and his experience with the proposed modalities. The academic disagreement between the two qualified experts on this subject does not render the treatments unreasonable. In this case, deference will be given to the treating doctor to administer and monitor the treatments with the expectation that they will provide the Claimant with the desired relief.
13. In sum, this Claimant had reached medical end result by March of 2001. The treatment modalities now proposed are reasonable and necessary and, consequently, compensable.
14. Attorney fees to a prevailing claimant are a matter of discretion; necessary costs a matter of law. 21 V.S.A. § 640(a); WC Rule 10. Because the Claimant has prevailed on part of her claim, she is awarded fees based on 10% of the hours worked in this case, for a total fee of \$757.80 ($84.2 \div 10 \times \$90 = \757.8) Rule 10 a (2)(A) (2001). A review of the expenses submitted shows that all were necessary for success on the reasonableness of the medical treatment. Therefore, Claimant is awarded \$1,907.92 in costs.

ORDER:

THEREFORE, Based on the Foregoing Findings of Fact and Conclusions of Law,

1. Claimant's claim for temporary total disability benefits from April 19, 2001 to the present and continuing is DENIED;
2. Defendant is ORDERED to pay:
 - a. Expenses associated with the treatment proposed by Dr. Block;
 - b. Attorney fees of \$757.80 and litigation costs of \$1,907.02.

Dated at Montpelier, Vermont this 10th day of July 2002.

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 court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.