S. S. v. the Book Press (February 21, 2007)

STATE OF VERMONT
DEPARTMENT OF LABOR

S. S.	Opinion No. 06-07WC
v.	Phyllis Severance Phillips, Esq. Hearing Officer
The Book Press	Patricia Moulton Powden Commissioner
	State File No. P-03893

OPINION AND ORDER

Hearing held in Brattleboro on November 2, 2006

APPEARANCES:

David Gibson, Esq. for Claimant
Keith Kasper, Esq. for Defendant

ISSUE PRESENTED:

Whether various medical conditions suffered by Claimant, including hypertension, hyperlipidemia, gout, edema, gastro-esophageal reflux disease (GERD) and/or metabolic syndrome, are causally related either to her original 1978 work injury or to its compensable sequelae.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records

Claimant's Exhibits:

Claimant's Exhibit 1: Record of prescriptions
Claimant's Exhibit 2: Deposition of Dr. Linda Singer, August 31, 2005
Claimant's Exhibit 3: Deposition of Paul J. Beisswenger, M.D., September 1, 2005

CLAIM:

Medical benefits under 21 V.S.A. §640(a)
Attorney's fees and costs under 21 V.S.A. §678

STIPULATIONS:

1. On November 1, 1978 Claimant was an employee of Defendant within the meaning of the Vermont Workers' Compensation Act (hereinafter "Act").

2. On November 1, 1978 Defendant was Claimant's employer within the meaning of the Act.

3. On November 1, 1978 Claimant suffered a personal injury by accident arising out of and in the course of her employment with Defendant.

4. Claimant's case has been the subject of three prior Department decisions: *Scranton v. The Book Press*, Opinion No. 77-81WC (April 6, 1981); *Scranton v. The Book Press*, Opinion No. 124-82WC (April 5, 1982); and *Scranton v. The Book Press*, Opinion No. 16-91WC (June 10, 1991), in which Claimant's diabetic condition was found to have been aggravated by her work injury.

5. On March 16, 2006 the Department rejected Defendant's Form 27 alleging that Claimant's medications and treatments for edema, GERD and blood pressure were not causally related to her 1978 work injury.

6. At issue in this case is whether Claimant's medications for edema, GERD and blood pressure are causally related to her 1978 work injury.

7. Claimant seeks a determination that her medical benefits in this matter are causally related to her work injury and, if successful, an award of attorneys fees and costs of the litigation process.

8. The parties agree to the submission of Joint Exhibit No. I, Claimant's medical records.

9. The Department may take judicial notice of all Department forms filed in this matter.

FINDINGS OF FACT:

1. Stipulations 1 through 9 are accepted as true.

2. Judicial notice is taken of the Commissioner's findings and conclusions in each of the three formal hearing decisions referred to in Stipulation No. 4 above.

3. On November 1, 1978 Claimant suffered an injury to her neck and right shoulder, arm and hand when she slipped and fell while in the course and scope of her employment for Defendant.

4. On April 6, 1981 the Department issued a formal hearing decision in which the Commissioner determined that Claimant had reached an end medical result on September 8, 1980. *Scranton v. The Book Press*, Opinion No. 77-81WC (April 6, 1981).

5. On April 5, 1982 the Department issued a second formal hearing decision in Claimant's case, in which the Commissioner determined that she had suffered permanent impairment to her right hand, arm, shoulder and neck. The Commissioner awarded permanent partial disability benefits accordingly. *Scranton v. The Book Press*, Opinion No. 124-82WC (April 5, 1982). Notably, the Commissioner rejected Claimant's claim for permanency benefits related to her complaints of low back pain. *Id.*, Finding of Fact #5.

6. In 1984 Claimant was diagnosed with Type II diabetes. Although she had a genetic predisposition to the disease, she alleged that the condition was either caused or aggravated by the pain, stress and physical inactivity that resulted from her 1978 work injury.

7. Claimant's diabetes was controlled by oral medication until 1986, when she became insulin dependent. Defendant had paid for Claimant's oral medications, but denied responsibility once she became insulin dependent. It argued that Claimant was genetically predisposed to diabetes, that she already was obese – another significant diabetic risk factor – at the time of the 1978 injury and that any stress related to the 1978 injury was too remote to be causally related in 1986.

8. The parties litigated the question whether Claimant's diabetes was causally related to her 1978 work injury, and in 1992 the Commissioner concluded that it was. *Scranton v. The Book Press*, Opinion No. 16-91WC (June 10, 1991). Specifically, the Commissioner found the following facts:

> "The claimant has a genetic predisposition to [Type II] diabetes. However, the claimant's obesity, chronic neck and shoulder pain, stress and inactivity are definite aggravating factors in the claimant's diabetic condition." *Id.*, Finding of Fact #6…
>
> "The claimant's physicians believe that control of the claimant's diet is a very important aspect of her treatment. While the claimant has always been a very heavy set person, the claimant has always been able to keep her weight at a reasonable level by exercise and physical activity. However, since her work-related injury, the stress and lack of physical activity caused by the injury significantly contributed to the claimant's lack of dietary compliance." *Id.*, Finding of Fact #7…
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> "Dr. Ford, Dr. Nathan, Dr. Beisswenger and Dr. Abney all are of the opinion that stress, pain, obesity and lack of exercise aggravate diabetes." *Id.*, Finding of Fact #9.

9. With these facts in mind, the Commissioner found as follows:

> "There is clear medical evidence that the claimant's diabetes, or her diabetic predisposition was aggravated or accelerated by stress, pain lack of exercise, and obesity, all caused or contributed to in substantial part by the claimant's original compensable neck and shoulder injury. And because [Defendant's workers' compensation insurance carrier] does not dispute the compensability of medication and medical attention for the conditions of stress and pain, there is no other conclusion that can be made than that the claimant's diabetic condition itself is compensable." *Id.*, Conclusion of Law #6.

10. Claimant has been wheelchair bound since 2004. For some period of time prior to that she used a cane and a walker. Claimant testified that she uses a wheelchair because she "does not walk good." She testified that she cannot lift her right leg, that she loses her balance and falls frequently.

11. The medical records document that Claimant has suffered from chronic back pain for years. *See* letter from Dr. Paul Beisswenger, June 9, 2003 (Claimant suffers from "chronic disabling back and extremity pain"); Dr. Linda Singer office note, August 28, 2003 ("chronic back pain with known degenerative joint disease," lumbo-sacral spine films to be updated); Dr. Linda Singer office note, August 26, 2004 (Claimant has suffered from back pain since the 1970s and has "limited capacities for 'walking'[1]"; electric wheelchair requested). Claimant also suffers from osteoarthritis in her right knee, *see* Dr. Hansen office note, January 2, 2004. As noted above, *see* Finding of Fact #5, the Commissioner previously determined that Claimant's low back pain was not causally related to her 1978 work injury. There is no evidence that Claimant's osteoarthritis is related either to the 1978 work injury or to its compensable sequelae.

12. From 1984 until 1995 Claimant was under the care of Paul Beisswenger, M.D. for treatment of her diabetes. Dr. Beisswenger is an internal medicine specialist with a subspecialty in endocrinology, diabetes and metabolism. He has been in practice at Dartmouth-Hitchcock Medical Center for 30 years, where he does a combination of practice, research and teaching. The focus of his research is on diabetic complications. In 1995 Dr. Beisswenger shifted the bulk of his practice away from direct patient care and towards more research. As a result, he reduced his patient load and stopped treating Claimant.

13. Dr. Linda Singer has been Claimant's primary care provider since 1995. Dr. Singer has been board-certified in internal medicine since 1982. A considerable part of her practice relates to treating patients who suffer from diabetes. As Claimant's primary care physician, Dr. Singer considers it her role to work in conjunction with the other doctors who are providing care to Claimant. These include Dr. Abney, a psychiatrist, Dr. Rothman, an endocrinologist, and until his recent retirement, Dr. Hansen, an orthopedist.

[1] Quotations in original

14. Coleman Levin, M.D. provided expert medical testimony on Defendant's behalf. Dr. Levin is board-certified in both internal medicine and independent medical examinations. His specialties include internal medicine and rheumatology. In the course of his practice he has treated many patients with diabetes. Dr. Levin did not examine Claimant in person because given the questions at issue he felt it was more valuable to review her medical records. Dr. Levin reviewed Claimant's medical records dating back 30 years.

15. Currently Claimant suffers from a number of medical conditions, many if not most of which often are associated either with diabetes or with obesity. These include hypertension (high blood pressure), hyperlipidemia, gout, edema and gastro-esophageal reflux disease (GERD). She takes a variety of medications to treat these conditions. Claimant did not take any of these medications prior to becoming diabetic.

16. Hypertension is a "comorbidity" of diabetes, meaning that it often is associated with diabetes. Patients with diabetes are "insulin resistant," meaning that the insulin produced by the body does not work as well as it does in non-diabetic people. Insulin resistance can cause the body to retain more sodium, which can lead to constricted blood vessels and higher blood pressure. Because of this relationship, the guidelines for managing patients with diabetes require better blood pressure control than in the general population.

17. Hypertension also can be associated with obesity, but the association is by no means guaranteed. Not every obese person suffers from hypertension, and not every person with hypertension is obese. In fact, the etiology of hypertension is unknown in most cases.

18. In the past, Claimant was prescribed Capoten for blood pressure control. Capoten is often prescribed to treat hypertension in diabetic patients, because it also helps protect against kidney disease, to which diabetic patients are more susceptible. Capoten is no longer readily available, however, so Claimant now takes Vasotec and Toprol for blood pressure control.

19. Hyperlipidemia occurs when the body fails to control the level of various fats such as cholesterol or triglycerides in the blood. Insulin is necessary to control the level of these fats. A person with diabetes is insulin resistant, so maintaining the appropriate levels is more difficult. Hyperlipidemia is another comorbidity of diabetes. As with blood pressure management, both cholesterol and triglyceride levels need to be managed more strictly in a diabetic patient so as to prevent diabetic complications.

20. Claimant has been prescribed Lopid to control her hyperlipidemia.

21. Gout is a disease that occurs when the level of uric acid in the blood increases beyond normal limits. Gout is usually a familial, inherited disease. It also can be associated with obesity and/or hypertension, particularly if the hypertension is treated with diuretics. Diuretics can raise the level of uric acid in the blood.

22. Claimant has been prescribed Allopurinol to treat her gout.

23. Claimant suffers from chronic edema, or swelling, in her lower extremities. Edema is caused by fluid retention, usually in the legs. Edema is not a disease. It is a symptom of any number of possible underlying conditions, including congestive heart failure, kidney disease and venus insufficiency. Venus insufficiency refers to a condition in which the valves in one's veins do not work properly. As a result, fluid leaks out and causes swelling in the surrounding tissues.

24. Edema is often associated with obesity and inactivity. Prolonged sitting can aggravate edema.

25. Claimant does not suffer from congestive heart failure and has no significant kidney problems. In her case, the chronic edema from which she suffers most likely is caused by venus insufficiency and aggravated by her obesity and inactivity.

26. Claimant takes both Lasix and K-Chlor (potassium chloride), a diuretic, to treat her chronic edema. Diuretics also are used to treat hypertension.

27. Gastro-esophageal reflux disease (GERD) is a condition that occurs when a person's esophageal sphincter works improperly, so that stomach acid is allowed to reflux back into the esophagus. Because the lining of the esophagus is not designed to resist acid, the condition causes inflammation and pain, often felt as heartburn. GERD is commonly associated with obesity.

28. Claimant takes Prilosec and TUMS to treat her GERD. In the past she took Riopan as well for this condition, but discontinued that medication in 2004.

29. Claimant has been morbidly obese at all times relevant to her workers' compensation claim. In 1975, three years before her injury, she weighed 270 pounds. In 1998, 20 years after the work injury, she weighed 280 pounds. In 2003, she weighed 322 pounds, a significant increase. Currently she weighs 320 pounds.

30. The constellation of conditions from which Claimant suffers – obesity, diabetes, hypertension, hyperlipidemia and gout – is called "metabolic syndrome." Metabolic syndrome is a diagnosis that is predictive in value. For example, a patient who is diagnosed with metabolic syndrome is more likely to develop cardiovascular complications. A doctor managing a patient with metabolic syndrome knows, therefore, to be wary of such complications and to provide preventive cardiovascular care if possible.

31. Each of the conditions that make up metabolic syndrome has its own risks. The risks are cumulative, and often the conditions work to aggravate one another. It would be inaccurate to say, however, that any one condition "causes" metabolic syndrome.

32. Defendant has paid for Claimant's diabetes medication at least since 1991, when the Commissioner found the condition to be compensable as an outgrowth of Claimant's 1978 work injury. Defendant also has paid for pain medications. Defendant paid for medications related to Claimant's other conditions – hypertension, hyperlipidemia, gout, edema and GERD – until 2003, when it sought to discontinue payments on the grounds that these conditions were not compensably related either to the original 1978 injury or to Claimant's diabetes. The Department denied Defendant's request and issued an interim order requiring Defendant to continue to pay for the medications at issue. Defendant seasonably requested a formal hearing. In the meantime, it has continued payments as ordered.

CONCLUSIONS OF LAW:

1. When an employer seeks to terminate coverage for medical benefits, it has the burden of proving that the treatment at issue is not reasonable. *Liscinsky v. Temporary Payroll Incentives, Inc.*, Opinion No. 9-01WC (March 22, 2001), *citing Rolfe v. Textron, Inc.*, Opinion No. 8-00WC (May 16, 2000).

2. A treatment may be unreasonable either because it is not medically necessary or because it is not related to the compensable condition or injury. *See, e.g., Morrisseau v. State of Vermont, Agency of Transportation*, Opinion No. 19-04WC (May 17, 2004). In this case, Defendant argues that Claimant suffers from only two compensable conditions – chronic neck and shoulder pain and diabetes. Defendant asserts that Claimant's other conditions – hypertension, hyperlipidemia, gout, edema and GERD – are not causally related to either of the compensable conditions. Therefore, Defendant argues, it is not responsible for any of the medications prescribed as treatment for these conditions.

3. In addition to the two conditions or injuries that Defendant acknowledges are compensable, Claimant would add a third – obesity. Claimant argues that in the Department's 1991 formal hearing decision the Commissioner conclusively found that her obesity was either "caused or contributed to in substantial part" by her original compensable neck and shoulder injury. *Scranton v. The Book Press*, Opinion No. 16-91WC (June 10, 1991), *see* Finding of Fact #9 above. Therefore, Claimant argues, the medications at issue now should be covered if the conditions for which they are prescribed are causally related either to her original neck and shoulder injury, or to her diabetes, or to her obesity.

4. It is true, as the leading workers' compensation commentator has stated that all of the medical consequences and sequelae that flow from an injured worker's primary compensable injury are themselves compensable as well. 1 *Larson's Workers' Compensation Law* §10.01. Determining which medical consequences flow from the primary injury and which do not, however, requires expert medical testimony. *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979). Establishing the requisite connection, furthermore, requires more than mere possibility, suspicion or surmise. Rather, the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

5. In claims involving conflicting medical evidence from expert witnesses, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive, considering (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn,* Opinion No. 37-03WC (Sept. 17, 2003).

6. Applying this test to the medical experts who testified in the current claim, Dr. Beisswenger's opinion is the most persuasive. Not only did he have a direct patient-provider relationship with Claimant for more than 10 years, but also his research experience focuses on diabetes complications, a central issue here. Dr. Singer shares the same patient-provider relationship with Claimant, and Dr. Levin has impressive internal medicine experience and credentials, but neither brings to the table the combination of both hands-on treatment and focused research that Dr. Beisswenger does.

7. With respect to the medications Claimant has been prescribed to manage her hypertension, the requisite connection to her diabetes has been established. All of the medical experts concur that a diabetic patient's cardiac status must be monitored more closely than that of a non-diabetic patient, because of the increased risk of cardiac complications that stems directly from a diabetic patient's insulin resistance. Whether Claimant's hypertension was "caused" by her diabetes or not, therefore, is not the central issue. Whatever its etiology, its existence in conjunction with Claimant's diabetes requires that it be strictly managed.

8. A similar analysis establishes the connection between Claimant's diabetes and her hyperlipidemia. Again, as Dr. Beisswenger testified, it is the diabetic patient's insulin resistance that makes it more difficult to maintain the appropriate levels of lipids in the blood, thereby requiring more strict management of both cholesterol and triglycerides.

9. The other conditions at issue – gout, chronic edema and GERD – are not linked in the same way to Claimant's diabetes. Diabetes does not "cause" these conditions, and there is no evidence that they are managed any differently in a diabetic patient than they are in a non-diabetic patient. To the extent that they often are associated with obesity, furthermore, neither Dr. Beisswenger nor the other medical experts was willing to establish a causal link among them. Without such a causal connection, there is no basis for holding Defendant responsible for treatment of these conditions.

10. Dr. Beisswenger did testify that the constellation of conditions, including both obesity and diabetes, that make up metabolic syndrome often work to "aggravate" one another. Indeed, his testimony as to the effect of a diabetic patient's insulin resistance on both hypertension and hyperlipidemia is a cogent example of that. Without explaining a similarly specific relationship between Claimant's obesity and her gout, chronic edema and/or GERD, however, his testimony as to aggravation is too general a basis upon which to find compensability. The etiology of these conditions is multifactorial, and their relationship to one another is complex. In light of this, to single out obesity as either the cause or an aggravating factor would be overly simplistic and unduly speculative.[2]

11. The most likely inference to be drawn from the medical evidence is that Claimant's current level of inactivity, particularly her difficulty walking and confinement to a wheelchair, is due in large part to her low back pain. In its 1982 decision, the Department specifically found that this condition was not related to Claimant's 1978 work injury. *Scranton v. The Book Press,* Opinion No. 124-82WC (April 5, 1982). To the extent that this level of inactivity and prolonged sitting causes or aggravates Claimant's chronic edema, clearly treating this symptom is not Defendant's responsibility.

12. I conclude, therefore, that the evidence is sufficient to establish the compensability of Claimant's treatment for hypertension and hyperlipidemia, because both require more strict management than they would if not for Claimant's diabetes. Defendant is responsible for paying for all medications prescribed as reasonably necessary treatment for these conditions, including Capoten, Vasotech, Toprol and Lopid.

13. I conclude that the evidence is insufficient to establish the compensability of Claimant's treatment for gout, chronic edema and/or GERD. Defendant is not responsible for paying for the medications prescribed to treat these conditions, including TUMS, Prilosec, Riopan and Allopurinol.

14. As to the two remaining medications at issue, K-Chlor and Lasix, the testimony was somewhat conflicting. Both medications are diuretics. All three doctors testified that diuretics are prescribed to treat edema and also to help control blood pressure. Dr. Singer specifically referenced K-Chlor as serving this dual purpose, but stated that she prescribed Lasix to treat Claimant's edema, with no reference to its use as a blood pressure medication as well. In this circumstance, the prescribing physician's opinion carries the greatest weight. Therefore, I conclude that Defendant is responsible for paying for K-Chlor because its purpose is at least in part to combat Claimant's hypertension, but not for Lasix, which has been prescribed solely to treat edema.

15. Claimant has requested an award of attorney's fees and costs. A prevailing claimant is entitled to reasonable attorney's fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. §678(a).

[2] Because I find that the evidence is insufficient to link any of Claimant's disputed conditions causally to her obesity, there is no need to decide the question whether collateral estoppel precludes Defendant from denying the compensability of the latter condition.

16. Although Claimant did not prevail on every aspect of her claim, the amount of time her attorney expended was reasonable, and probably would not have been different even if only the aspects of her claim upon which she did prevail had been litigated. I therefore award attorney's fees at the rate allowed by Workers' Compensation Rule 10.1210, $90.00 per hour, for a total of $7,560. Necessary costs in the amount of $377.73 also are awarded.

ORDER:

1. Based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to pay:

2. Medical benefits associated with treatment of Claimant's hypertension and hyperlipidemia, including payment for the prescription drugs Capoten, Vasotech, Toprol, Lopid and K-Chlor;

3. Attorney's fees in the amount of $7,560 and costs in the amount of $377.73.

4. Claimant's claim for medical benefits associated with treatment of gout, chronic edema and/or GERD, including her claim for payment for TUMS and the prescription drugs Prilosec, Riopan, Allopurinol and Lasix, is DENIED.

Dated at Montpelier, Vermont this 21st day of February 2007.

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Patricia Moulton Powden
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.