P. B. v. The Store at Sugarbush (February 23, 2007)

STATE OF VERMONT
DEPARTMENT OF LABOR

P. B.	Opinion No. 10-07WC
v.	Phyllis Severance Phillips, Esq., Hearing Officer
Robert & Jacqueline Rose dba The Store at Sugarbush and Zurich Insurance	Patricia Moulton Powden, Commissioner
	State File No. P-17967

OPINION AND ORDER

Submitted on briefs without evidentiary hearing

APPEARANCES:

Patricia K. Turley, Esq. for Claimant
John W. Valente, Esq. for Defendant

ISSUE PRESENTED:

Whether Vermont's workers' compensation law precludes Defendant from relying on the opinion of a third independent medical examiner when the opinions of its first two independent medical examiners were deemed insufficient to support a termination of Claimant's workers' compensation benefits.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical records

Claimant's Exhibits:

Claimant's Exhibit 1: Various correspondence
Claimant's Exhibit 2: August 5, 2004 letter to Attorney Turley
Claimant's Exhibit 3: Affidavit of Attorney's Fees

STIPULATIONS:

1. On October 16, 2000 Claimant was employed by The Store at Sugarbush, which was insured by Zurich Insurance for workers' compensation purposes.

2. Claimant incurred an injury to her back at work (the "work injury"). Her average weekly wage from The Store at Sugarbush was $420.

3. Zurich accepted the claim and paid medical benefits associated with the work injury.

4. Claimant was taken out of work in October 2004 by Dr. Mahoney due to continued and escalating problems with her low back. In April 2005 Zurich paid TTD benefits retroactive to October 2004, without a reservation of rights.

5. Zurich sent Claimant to an IME with Dr. Philip Davignon on May 10, 2005.

6. Zurich filed a Form 27 to terminate Claimant's entitlement to TTD and chiropractic treatment, supported with Dr. Davignon's IME report. The Department rejected the Form 27 because "Dr. Davignon did not have the complete medical history to made (sic) an informed decision."

7. Zurich sent Claimant to another IME with Dr. Verne Backus on October 20, 2005.

8. Zurich filed a Form 27 to terminate Claimant's entitlement to TTD and chiropractic benefits after the first 12 visits, supported by Dr. Backus' IME report. The Department rejected the Form 27 because Dr. Backus "did not have all the medical records to review before making his determination."

9. Counsel for both parties discussed the situation and compiled a complete set of records.

10. Claimant arranged for her own IME with John Peterson, D.O. in August 2005. The report from this IME was provided to Zurich on October 13, 2005. Dr. Peterson opined that Claimant had reached maximum medical improvement, had an 8% whole person impairment for her back injury, and that she may need palliative chiropractic care in the future.

11. In May 2006 Zurich sent Claimant another IME notice for an evaluation with a third provider.

12. Claimant objected to the third IME provider, John Johansson, D.O. on May 11, 2006 and requested the Department schedule an informal conference to address the issue.

13. The third IME was rescheduled to June 21, 2006. Despite the rescheduled appointment, the Department did not rule on Claimant's objection prior to the appointment.

14. The carrier indicated it would file a Form 27 to terminate benefits if Claimant refused to attend the scheduled IME.

15. Faced with the filing of a Form 27, Claimant attended the third IME under protest, expecting that the Department would rule on the appropriateness of the third IME promptly.

16. No ruling on the objection was provided by the Department.

17. The carrier filed two Form 27s supported by the third IME report. The Department allowed the third IME report to be used as support for the termination of benefits, while it referred the ruling on the objection to the third IME to a formal hearing.

18. The Claimant contests the use of the third IME report for the discontinuance of certain medical benefits, where that discontinuance was only supported by the contested report and the previously rejected report of Dr. Backus.

19. Claimant does not contest the approval of the Form 27 which terminated her TTD benefits, as one of the records supporting the Form 27 was Dr. Peterson's report.

20. Claimant requested an expedited hearing to address the lack of a ruling on the propriety of a third IME with a third provider.

FINDINGS OF FACT:

1. Stipulations 1-20 above are accepted as true.

2. Claimant suffered a low back strain while in the course and scope of her employment for Defendant in March 1997. She treated with Sean Mahoney, D.C., a chiropractor, and Francis Cook, M.D. At their referral, she underwent physical therapy and also an evaluation at The Spine Institute of New England.

3. On October 16, 2000 Claimant suffered another work-related low back strain. She sought treatment with Dr. Cook on that day and resumed treatment with Dr. Mahoney the following day.

4. Claimant had treated on a regular and consistent basis with both Dr. Cook and Dr. Mahoney at least since 1997. Dr. Cook's treatment consisted primarily of prescription medications. Dr. Mahoney did spinal manipulations on at least a weekly basis from 1997 until March 2000.

5. Claimant also treated with Dr. Cook for a variety of other, non-work-related ailments.

6. From October 2000 through December 2004, Claimant treated with Dr. Mahoney on at least a weekly basis, often twice per week, for a total of more than 280 sessions.

7. On May 10, 2005 at Defendant's request, Philip Davignon, M.D. performed an independent medical examination (IME) of Claimant. As background medical information, Dr. Davignon had Dr. Mahoney's treatment notes from July 2004 through March 2005. He lacked the medical records relating to Claimant's treatment following her 1997 injury, including not only Dr. Mahoney's records from 1997 through June 2004, but also Dr. Cook's records, physical therapy notes, the records of Claimant's evaluation at The Spine Institute of New England and Dr. Kenneth Ciongoli's prior IME report.

8. Dr. Davignon noted in his IME report that he lacked sufficient medical documentation to comment on either (1) the causal relationship between Claimant's October 2000 low back injury and her 1997 injury; or (2) the reasonable necessity of her treatment to date. He did,

however, have sufficient information from which to conclude that Claimant had reached medical end result and had no ratable permanent impairment.

9. Dr. Davignon also noted a significant behavioral overlay to Claimant's symptoms, and recommended behavioral counseling as treatment. As to the efficacy of Claimant's ongoing chiropractic treatment, Dr. Davignon stated only that such treatment was not curative, but rather "more of a maintenance level." He did not address whether it was reasonable for Claimant to continue to receive chiropractic treatment and, if so, how often.

10. On June 20, 2005 Defendant filed a Form 27, seeking to discontinue its responsibility for chiropractic treatment on the basis of Dr. Davignon's IME report. On June 28, 2005 the Department rejected the Form 27, stating that Dr. Davignon lacked a complete medical history and therefore could not have made an informed decision as to the reasonable necessity of ongoing chiropractic care.

11. In late June and early July 2005, both Dr. Cook and Dr. Mahoney made referrals for Claimant to receive psychological treatment for depression resulting from her work-related low back injury. Dr. Cook's referral was for three to six months of psychological counseling; Dr. Mahoney's was non-specific. Both of the referrals were in keeping with Dr. Davignon's IME findings and recommendation that Claimant undergo behavioral counseling.

12. In August 2005 Claimant's attorney referred her to Jon Peterson, D.O., an osteopath, for an IME. Dr. Peterson determined that Claimant had reached medical end result, with an 8% whole person permanent impairment. Dr. Peterson noted that the passive treatment Claimant had received to date, including not only Dr. Mahoney's chiropractic treatment but also physical therapy, massage therapy, myofascial release, neuromuscular therapy and cranio-sacral sessions, was excessive. In his opinion, Claimant would be have been much better served by a referral to a multi-disciplinary program such as that at The Spine Institute of New England. Nevertheless, Dr. Peterson opined that 12 chiropractic visits per year would constitute reasonable ongoing palliative care for Claimant.

13. On October 20, 2005 Defendant referred Claimant to Verne Backus, M.D. for an IME. Dr. Backus had Dr. Mahoney's treatment notes from January 2005 forward to review, as well as the treatment notes relating to Claimant's recent psychological counseling. Based on these records, Claimant's reported history and his physical examination, Dr. Backus concluded that Claimant had reached medical end result and required no further medical care, surgical intervention or physical therapy related to her October 2000 injury. Dr. Backus further concluded that the chiropractic treatment and massage therapy Claimant had received was excessive and not reasonably necessary, and that her psychological treatment was not causally related to her work injury. As to permanency, Dr. Backus determined that Claimant's pain-related impairment was moderate, but did not give a permanent impairment rating *per se*.

14. With Dr. Backus' IME report as support, on December 14, 2005 Defendant filed a second Form 27, again seeking to discontinue its responsibility for Claimant's ongoing chiropractic treatment. The Department initially approved the discontinuance, but subsequently rescinded its approval. By letter dated January 4, 2006 the Department noted that Dr.

Backus lacked Claimant's complete medical history. On those grounds, the Department concluded that Dr. Backus' report was insufficient to support a discontinuance of benefits.

15. In November 2005 Dr. Cook gave Claimant a referral for massage therapy. In February 2006 Dr. Cook referred Claimant for a course of pool therapy. In March 2006 Dr. Cook recommended that Claimant undergo a functional capacities evaluation. Also in March 2006 Dr. Cook recommended that Claimant continue with psychological counseling.

16. In April 2006 Defendant notified Claimant that it had scheduled her to undergo another IME, this time with Jon Johansson, D.O., an osteopath. Claimant objected to the third IME on the grounds that Defendant was engaging in impermissible doctor-shopping. Claimant requested that the IME be postponed until the Department could rule on her objection. Defendant agreed to do so.

17. Dr. Johansson's IME was rescheduled until June 21, 2006. By the time that date had arrived the Department still had not ruled on Claimant's objection. Claimant attended the IME under protest, fearing that if she did not do so Defendant would seek to terminate her benefits for failing to present herself for examination.

18. Dr. Johansson was provided with a complete set of medical records in conjunction with his IME. Based on his review of those records as well as his physical examination, Dr. Johansson concluded that Claimant had reached medical end result with no ratable permanent impairment. Dr. Johansson further concluded that the chiropractic treatment Claimant had received was excessive, and that neither ongoing chiropractic care nor massage therapy was medically necessary.

19. On September 13, 2006 Defendant filed a Form 27 to discontinue Claimant's temporary disability benefits on the grounds that she had reached medical end result. As support for the discontinuance, Defendant cited its IME reports from Drs. Davignon, Backus and Johansson, as well as Claimant's IME report from Dr. Peterson. The Department approved the Form 27 on September 28, 2006.

20. Also on September 13, 2006 Defendant filed a second Form 27, in which it sought to discontinue responsibility for Claimant's chiropractic, massage, cranial-sacral and Reiki therapies. As support for this discontinuance, Defendant cited Dr. Johansson's and Dr. Backus' IME reports. The Department approved this second Form 27 on September 28, 2006.

21. Claimant did not object to the first discontinuance, relating to termination of her temporary disability benefits, because it was based in part on Dr. Peterson's medical end result finding. However, Claimant did object to the second discontinuance, relating to the termination of her medical benefits, on the grounds that it was based primarily on Dr. Johansson's IME report. Claimant argued that Defendant had no right to require her to attend Dr. Johansson's IME, that she had done so under protest, and that any medical opinions arising from that IME should not be considered in ruling on Defendant's discontinuance.

22. Claimant has submitted an affidavit of attorney's fees totaling $2,898.00.

CONCLUSIONS OF LAW:

1. Vermont's workers' compensation statute allows an employer to obtain its own independent medical opinion as to the nature and extent of a claimant's injury and disability. 21 V.S.A. §655 states:

> After an injury and during the period of disability, if so requested by his employer, or ordered by the commissioner, the employee shall submit himself to examination, at reasonable times and places, to a duly licensed physician or surgeon designated and paid by the employer. The employee shall have the right to have a physician or surgeon designated and paid by himself present at such examination. Such right, however, shall not be construed to deny to the employer's physician the right to visit the injured employee at all reasonable times and under all reasonable conditions during total disability.

2. Neither the statute nor the workers' compensation rules specify what constitutes a "reasonable" time, place or condition for conducting an examination under §655. Even without such clarification, certainly the term "reasonable" connotes that both parties' interests be balanced and safeguarded. On the one hand, the claimant has a right to be protected against excessive, unnecessary or unduly intrusive medical evaluations. On the other hand, the employer has the right to contest key medical findings or opinions with contrary opinions from its own appropriately credentialed experts.

3. Claimant argues that the reference in §655 to "*a* duly licensed physician" limits the employer to only one chosen expert for all of its IMEs. The Department has never read the statute so narrowly. It has considered IME opinions from multiple medical professionals in a number of formal hearing decisions. *See, e.g., Seguin v. Ethan Allen,* Opinion No. 28-02WC (June 26, 2002); *Pelkey v. Chittenden County Sheriff's Dept.,* Opinion No. 24-02WC (May 29, 2002); *Miller v. Moyer Building Systems,* Opinion No. 22-01WC (July 20, 2001); *Matheny v. Velan Valve,* Opinion No. 41-99WC (Sept. 21, 1999); *Robinson v. Vermont SubAcute Corp.,* Opinion No. 3-97WC (March 27, 1997); *Hall v. Maple Grove Farms, Inc.,* Opinion No. 33-95WC (Aug. 8, 1995); *Catani v. A.J. Eckert Co.,* Opinion No. 28-95WC (May 17, 1995). More likely, the legislature intended by use of the singular article that a claimant be subjected to only one independent medical evaluator per examination, not that the evaluator be the same for the duration of the entire claim.

4. Claimant also argues that §640(c) limits the employer's right to independent medical examinations. That section states that in situations where the employee has elected to treat with a medical provider other than the one initially designated by the employer, the employer "shall have the right to require other medical examinations as provided in this chapter." This language does no more than to make clear the employer's option to avail itself of the rights provided in §655 in circumstances where §640(c) has been triggered. It does not in any way limit the application of §655 solely to §640(c) situations.[1]

5. In cases in which the employer has requested multiple IMEs, striking the appropriate balance between the parties' competing interests requires that a number of factors be considered. How many IMEs has the claimant already attended? How much time has passed since the most recent IME? Has the claimant commenced treatment with a new medical provider in the interim, and/or have new treatments been proposed? Is there a legitimately "new" medical question to be addressed, or is the employer simply searching for a second IME opinion that is more favorable to its position than its first one?

6. Each of these questions must be considered in order to determine what is a "reasonable" request for an IME in any particular claim. Without making a blanket pronouncement on the issue, Department precedent establishes that the final question – whether the employer is simply searching for a more favorable opinion to buttress its position – carries great weight. A "yes" answer to that question means that the employer might be doctor-shopping. Absent other legitimate reasons to bolster its IME request, the Department should discourage that practice.

7. For example, in *Durand v. Okemo Mountain,* Opinion No. 41-98WC (July 20, 1998), the Department denied the employer's request to have the claimant undergo a fifth IME. The claimant already had submitted to four physical examinations by three prior IME physicians. The employer was dissatisfied with the most recent IME report, which concluded that the claimant had incurred a significant permanent impairment as a result of his work injury. The claimant did not challenge the IME physician's permanency rating and did not seek one of his own. The Commissioner determined that the issue in dispute arose from the conflicting IME opinions already solicited by the employer and therefore did not really involve the claimant at all. Citing the reasonableness requirement of §655 the Commissioner concluded, "Additional independent medical examinations are not reasonable when the claimant has accepted the carrier's independent evaluation and has never requested one of his own." *Id.*, Conclusion of Law #6. *See also*, *Therrien v. Lydall Central,* Opinion No. 50-02 (Dec. 19, 2002) (employer precluded from disavowing earlier IME opinions as to causation merely because it obtained a more favorable one subsequently).

[1] Claimant argues that Dr. Cook was Defendant's designated physician, and because she agreed to treat with him, §640(c) was never triggered, so therefore Defendant had no right to any IMEs at all. It is not clear from the evidence submitted, however, that Dr. Cook was Defendant's designated physician; Claimant had treated with him often in the past, for both work-related and non-work-related ailments. More importantly, the medical evidence establishes that Dr. Mahoney was Claimant's chosen treatment provider with respect to the October 2000 injury, as he was the one who assumed primary responsibility for directing Claimant's care. In effect, therefore, by opting to treat with Dr. Mahoney Claimant did in fact trigger the operation of §640(c).

8. This is not the case here. All of the IME physicians who examined Claimant at Defendant's request in the current claim agreed that the chiropractic care and other passive treatments she had received was excessive and that further treatments of this kind were not reasonably necessary. Were it not for Claimant's challenge and the Department's rejection of the first two IME reports submitted by Defendant on the grounds that they were based on insufficient medical documentation, Defendant would not have sought a third IME. Defendant was not "doctor-shopping" to find a different, more favorable opinion, it was endeavoring to prove its case to the Department's satisfaction.

9. Claimant argues that Defendant should have responded to the Department's rejection of its first two IME reports by providing the missing medical documentation to the IME physicians and soliciting an additional report from them. Certainly Defendant might have chosen this route. Unless the questions posed above as to the reasonableness of a requested IME under §655 mandate a different response, however, this is a matter of trial tactics in which the Department has no place.

10. As to the reasonableness questions posed above, all point to allowing the third IME. It had been eight months since the prior IME occurred. In the intervening period Claimant's providers had prescribed new treatments, such as massage and pool therapy, and had recommended that previously prescribed treatments, such as psychological counseling, be extended beyond their originally estimated completion date. Claimant also had undergone a functional capacities evaluation, to which Defendant was entitled to react. Last, Defendant was entitled to respond to the opinions of Claimant's own independent medical examiner, an osteopath, with an osteopathic opinion of its own.

11. Under these circumstances, the balance between Claimant's right to be protected from excessive, unnecessary or unduly intrusive medical evaluations and Defendant's right to obtain a timely, independent review of key medical issues and treatment recommendations tilts in Defendant's favor. Dr. Johansson's IME was reasonably scheduled for appropriate purposes, and it was permissible for the Department to consider his report in determining whether to approve Defendant's proposed discontinuance.

ORDER:

Claimant's request that the Department be precluded from considering Dr. Johansson's IME report in conjunction with Defendant's proposed discontinuance of medical benefits is DENIED.

Because Claimant has not prevailed on her claim, she is not entitled to an award of attorney's fees.

DATED at Montpelier, Vermont this 23rd 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.