STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	By: Margaret A. Mangan Hearing Officer
Marie White	)	
	)	For: R. Tasha Wallis Commissioner
v.	)	
	)	Opinion No. 23SJ-02WC
	)	
Porter Hospital;	)	State File No. K-12718;
Champlain Farms;	)	State File Nos. R-13279; S-378;
New England Woodcraft;	)	State File Nos. R-12585; S-377;
Metromail	)	State File No. R-13277

MOTIONS FOR SUMMARY JUDGEMENT

Submitted on briefs.
Record Closed on April 19, 2000.

APPEARANCES:

Joseph Galanes, Esq. for the claimant
Phyllis Severance, Esq. for Workers' Risk Services
Joshua L. Simonds, Esq. for Porter Medical/Wausau
Eric Johnson, Esq. for New England Woodcraft/Acadia
John W. Valente, Esq. for Experian/Travelers
William Blake, Esq. for New England Woodcraft/Royal and Sun Alliance
Christopher McVeigh, Esq. for Champlain Farms

ISSUES:

1. Is claimant entitled to summary judgment on her physical-mental claim against Porter Hospital/Wausau?

2. Is any defendant entitled to judgment as a matter of law?

FACTS (to be considered for the pending motions for summary judgment only):

1. On December 6, 1996 claimant Marie White was injured in the course of her employment at Porter Hospital where she worked in shipping and receiving. Almost immediately afterwards, she began treating for shoulder pain. A Form 21 confirms Wausau's acceptance of the shoulder injury in February 1997, with approval by this Department in April 1997.

2. Claimant was diagnosed with a pain syndrome attributable to her December 6, 1996 injury as early as January 21, 1997.

3. Claimant ceased to work at Porter Hospital on March 3, 1997.

4. Dr. Larson assessed medical end result on April 2, 1997, finding a 5% upper extremity and 3% whole person impairment.

5. On June 19, 1997 Dr. Rosenzweig found medical endpoint and no permanent impairment.

6. In July of 1997, Dr. Rosenzweig recommended psychological treatment for claimant's condition.

7. From May 13, 1997 until December 31, 1998 claimant worked at Champlain Farms as a cashier, a job that also included mopping and sweeping. Champlain Farms was insured by Reliance and TIG during that time. Claimant complained of and treated for pain during much of that period, and worked a medically recommended part-time schedule for a number of weeks.

8. In April of 1998 Dr. Steven Mann documented a significant psychological overlay that prevented resolution of claimant's shoulder pain.

9. New England Woodcraft/Acadia employed the claimant from May 15, 1999 until September 22, 1999. During that time, claimant did not report any work-related injuries and did not seek medical treatment, although she later reported to Dr. Linder that she experienced increasing pain and injured her shoulder during that period.

10. Experian-Metromail employed the claimant from October 1999 through January 2000 in a job that involved lifting twenty-pound boxes every twenty minutes. During that time, claimant did not report any work-related injuries, but complained of pain.

11. Claimant returned to the employ of New England Woodcraft in May of 2000 when Royal was on the risk. During the six days she worked, she did not report an injury to her employer. However, she later reported to Dr. Linder that she hurt her shoulder while pulling fabric.

12. On May 19, 2000 claimant reported to Dr. Barnard that she had re-injured her shoulder again and had been having problems with persistent shoulder pain for about a year.

13. On June 13, 2000 Dr. Barnard noted that claimant's shoulder pain was so great she could barely move her shoulder.

14. Dr. Bucksbaum then saw claimant on August 1, 2000 for an IME when he noted an exacerbation of previous symptoms but that she was still at medical end result with no change in her level of impairment.

15. In 2001 claimant asserted her claim for psychological injury arising out of the December 6, 1996 physical injury. In response, Wausau engaged Dr. Robert Linder, a psychiatrist, to evaluate the claimant and determine whether claimant suffered from a psychological impairment and, if so, whether that impairment resulted from her December 6, 1996 work-related injury.

16. Dr. Linder in 2001 determined that claimant suffers from depression secondary to a medical condition. Specifically, he noted that claimant had difficulties that "began with the left shoulder injury on December 6, 1996... [t]he recurrent pain developed into a pain syndrome... [p]sychiatric treatment was suggested as early at [sic] July 1997 but no coordinated treatment was initiated." Dr. Linder suggested that it was "possible" that, had the claimant not reintroduced her shoulder to stress, the pain "may" have subsided and depression "may" not have developed the way it did.

17. Claimant submitted evidence that her attorneys expended 19.40 hours in pursuit of this claim and incurred $2,074.24 in necessary expenses.

DISCUSSION:

1. Claimant seeks summary judgment against Wausau on her physical-mental claim. Wausau denies liability and, in the alternative, argues that another employer is liable. All other employers/insurers seek summary judgment on the basis that Wausau is liable for this claim.

2. Summary judgment is appropriate when the moving party establishes that there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. *Murray v. White,* 155 Vt. 621, 628 (1991); V.R.C.P. 56 (c) (3). The central purpose of summary judgment is "to avoid a useless trial." *Sykas v. Kearns*, 135 Vt. 610, 612 (citing 6 J. Moore, Federal Practice P 56.15 at 56-391 (2d ed. 1976)). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather an integral part of the... Rules as a whole which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Morrisseau v. Faytette*, 164 Vt. 358, 363 (1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

3. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse & Co.,* 123 Vt. 161, 166 (1962). She must establish by sufficient credible evidence the character and extent of the injury as well as causal connection between the injury and the employment. *Bowen v. Jobsite Services*, Opinion No. 23-00WC Jul. 31, 2000) (citing *Egbert v. The Book Press*, 144 Vt. 367, 369 (1984)). To succeed on a physical-mental claim, the claimant must prove a causal connection between the psychological impairment and a compensable injury. *Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99WC (Sept. 28 & July 30, 1999).

4. Because this is an issue on which a layperson would have no well-founded knowledge, medical testimony is necessary. See, *Merrill v. University of Vermont*, 133 Vt. 101, 104 (1974). Expert medical testimony must meet a standard of reasonable probability or a reasonable degree of medical certainty. *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31, 34. (1980). Dr. Linder clearly drew the causal connection. There is no factual dispute that 1) claimant suffered a compensable physical injury on December 6, 1996, and 2) the physical injury caused a psychological injury including chronic pain.

5. Wausau cannot deny responsibility for the initial physical injury because it accepted liability, as the Form 21 of 1997 illustrates. However, Wausau argues that another employer should be responsible for the mental-physical claim. "Whenever payment of a compensable claim is refused on the basis that another employer or insurer is liable, the commissioner... shall order that payments be made by one... insurer until a hearing is held and a decision is rendered... [T]he employer or insurer at the time of the most recent personal injury for which the employee claims benefits shall be presumed to be the liable insurer..." 21 V.S.A. § 662 (c). The employee claims benefits for the injury occurring on December 6, 1996, making Wausau the liable insurer for the purposes of § 662 (c), even though it is not the most recent employer because of the medical evidence presented.

6. In order to relieve itself of its obligation to pay benefits, Wausau bears the burden of proving that the claimant's injury is an aggravation rather than a recurrence. See, *Bushor v. Mower's News Service*, Opinion No. 75-95 WC (Oct. 16, 1995). An aggravation is an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events, while a recurrence is the return of symptoms following a temporary remission. Vermont Workers' Compensation and Occupational Disease Rules 2.1110, 2.1312.

7. Wausau is the responsible carrier if the claimant suffered a recurrence of her initial psychological injury, that is, if Wausau fails to prove that claimant's work subsequent to March 1997 causally contributed to her disability. See, *Pacher v. Fairdale Farms*, 166 Vt. 626, 627 (1997). On the other hand, another carrier is responsible if Wausau proves that claimant's work subsequent to March 1997 aggravated her pre-existing impairment to produce a disability greater than what would have resulted from the December 6, 1996 injury alone. See id. at 627-28.

8. Wausau's medical expert placed responsibility on its insured, suggesting only a possibility that subsequent work may have worsened the psychological condition. However, "[i]n determining whether material facts exist for trial, we must resolve all reasonable doubts in favor of the party opposing summary judgment." *Rennie v. State*, 171 Vt. 584,___, 762 A.2d 1272, 1274 (2000). The facts raise reasonable doubts as to whether work conditions at claimant's jobs subsequent to March 1997 contributed independently to her final disability. Dr. Linder's evaluation in particular indicates that the claimant reported she experienced shoulder injuries on two occasions following her employment at Porter Hospital. These reports raise doubts that are sufficient to preclude summary judgment on the question of aggravation/recurrence.

9. A prevailing claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678 (a).

CONCLUSIONS:

1. Claimant has met her burden of proving that there are no genuine issues of material fact, and she is entitled to judgment as a matter of law on her physical-mental claim.

2. Because the employee makes the claim directly against Wausau, and the weight of the evidence at this juncture points to Wausau as the liable insurer, justice requires Wausau to adjust the claim at this point and proceed against the other carriers.

3. There are issues of material fact on the question of aggravation/recurrence that would justify a hearing on Wausau's attempt to shift responsibility to other employers. Therefore, the case will be set for a pretrial conference.

4. As prevailing claimant, Ms. White is entitled to attorney fees and costs. Given the dispute in this action, 19.40 hours are reasonable for the legal work involved, entitling the claimant to $1,746.00 ($90.00 x 19.40). WC Rule 10 (a) (2) (A). The costs of $2,148.24 were necessary in the successful pursuit of this claim.

ORDER:

Wausau is ORDERED to:

1. Adjust this physical-mental claim;
2. Pay the claimant's attorney fees of $1,746.00 and costs of $2,148.24.

Dated at Montpelier, Vermont this 24th day of May, 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.

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