P. K. v. Addison-Rutland Supervisory Union (August 2, 2007)

STATE OF VERMONT
DEPARTMENT OF LABOR

P. K.	Opinion No. 20-07WC
v.	Phyllis Severance Phillips, Esq. Hearing Officer
Addison-Rutland Supervisory Union	Patricia Moulton Powden Commissioner
	State File No. W-57184

OPINION AND ORDER

Hearing held in Montpelier on March 26, 2007

APPEARANCES:

Christopher McVeigh, Esq. for Claimant
David Berman, Esq. for Defendant

ISSUES PRESENTED:

1. Whether Claimant suffered a compensable injury in the course and scope of her employment for Defendant on January 3, 2005; and

2. If yes, to what benefits is she entitled, and at what compensation rate.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records

Claimant's Exhibits:

Claimant's Exhibit A: Teacher Contract

Defendant's Exhibits:

Defendant's Exhibit 1: Curriculum Vitae of Todd P. Lefkoe, M.D.
Defendant's Exhibit 2: Addison-Rutland Supervisory Union Calendar for 2004-05
Defendant's Exhibit 3: Pauline Kearney Sick Time

CLAIM:

1. Temporary total disability benefits under 21 V.S.A. §642 from January 3, 2005 through January 28, 2005;

2. Temporary partial disability benefits under 21 V.S.A. §646 from February 1, 2005 through February 28, 2005;

3. Permanent partial disability benefits under 21 V.S.A. §648 in an amount to be determined based on the extent of Claimant's permanent impairment;

4. Interest on the above under 21 V.S.A. §664; and

5. Attorney's fees and costs under 21 V.S.A. §678.

FINDINGS OF FACT:

1. At all times relevant to these proceedings Claimant was an employee of Defendant, and Defendant was Claimant's employer, within the meaning of Vermont's Worker's Compensation Act.

2. Claimant has worked as a librarian at the Fair Haven Graded School since 1988. Her duties include teaching and reading with students, purchasing, stacking and shelving books and generally maintaining the library.

3. The bookcases in the school library are about four feet tall, with shelves ranging from the floor up to the four-foot height. Re-shelving books requires frequent carrying, bending, twisting, reaching and stooping, particularly to replace books on the lower shelves. Students who borrow books are discouraged from re-shelving them; thus Claimant is solely responsible for this task.

4. Claimant has a history of low back pain, diagnosed as lumbar spinal stenosis, dating back to 1996. Her symptoms at that time were right-sided low back and buttock pain radiating to her right groin and knee. She treated with Joseph Corbett, M.D., a neurosurgeon, who performed an L4-5 laminectomy in December 2006.

5. Claimant recovered well from her 1996 surgery. From 1996 until January 2005 she experienced only minor episodes of low back, hip and/or lower extremity pain. Specifically:

   (a) In July 1997 Claimant reported to Dr. Corbett that she had been experiencing some discomfort in her left buttock and knee, which resolved with conservative treatment and home exercise;

   (b) In October 2002 Claimant treated with Robert Larson, D.C., a chiropractor, for left leg pain radiating from her sciatic notch to her knee. Dr. Larson diagnosed lumbar radicular syndrome at the L4 nerve root and degenerative spondylolisthesis at L4. He prescribed a lumbar stretching and stabilization program. Dr. Larson re-examined Claimant on December 2, 2002 and reported that her symptoms had improved significantly. On December 20, 2002 he reported that Claimant's symptoms had resolved completely and she was released from treatment;

   (c) On November 10, 2004 Claimant again sought treatment with Dr. Larson, this time for right hip pain. She missed one day of work. Dr. Larson performed manual therapy and her symptoms resolved.

6. The Fair Haven Graded School closed for the Christmas holiday from December 22, 2004 until January 3, 2005. During this time Claimant wrapped gifts, prepared Christmas dinner, performed ordinary household tasks and visited with her family. She did not engage in any strenuous outdoor activities or travel long distances. She did not suffer any injuries, did not experience any low back, hip or lower extremity pain and did not seek any medical treatment.

7. The Christmas break ended on January 3, 2005 and Claimant returned to work. Claimant arrived at the school at 8:00 AM and began re-shelving books. Because many students had returned books borrowed over the holiday break, Claimant had more books to re-shelve than usual. She spent the morning doing so.

8. Over the course of the morning, Claimant began to experience discomfort in her left lower back. At noon, she went to the school nurse's office. The school nurse on duty that day, Mary Waite, R.N., gave Claimant four ibuprofen. Claimant took two pills immediately and two more one-half hour later.

9. By 1:00 PM Claimant was experiencing what she described as excruciating, unbearable pain radiating from the left side of her back down her left leg and into her left big toe. Claimant felt nauseous from the pain and decided to leave work immediately. She asked a co-employee to go to the office for her and report that she was leaving.

10. Claimant secured an emergency appointment with Dr. Larson for 3:30 PM on January 3, 2005. Dr. Larson's note reflects that Claimant reported that "her symptoms all began earlier today, while at work," and that they "began during the course of her usual duties around mid morning." Dr. Larson noted that Claimant's pain seemed to follow the L4 distribution, but was left-sided this time, in contrast to the right-sided pain Claimant had experienced in 1996. Dr. Larson performed a chiropractic manipulation, but when that failed to relieve Claimant's pain he determined that Claimant needed medications for immediate pain control. Because Dr. Corbett was not available, Dr. Larson recommended instead that Claimant go to the hospital emergency room. In addition, Dr. Larson scheduled an MRI for the next day, January 4, 2005 and an appointment with Dr. Corbett for January 14, 2005.

11. Claimant went to the Rutland Regional Medical Center Emergency Department at 6:00 PM on January 3, 2005 and was examined by Steven Stein, M.D. Dr. Stein's note states that Claimant "woke up with her back feeling stiff" and that it "progressively got worse with pain radiating into her left buttock and down into the left calf." Dr. Stein administered pain medications and steroids and discharged Claimant to follow up with Dr. Corbett.

12. In her formal hearing testimony Claimant disputed Dr. Stein's report that her symptoms began before work on January 3, 2005. She stated that she told Dr. Stein that the discomfort in her low back began "in the morning," and he implied from that statement that it was present when she awoke, which was not the case.

13. Claimant's pain subsided with the medications Dr. Stein administered, but the following day she began to experience numbness in her left leg, foot and toe. On that day, January 4, 2005, she turned her left ankle while walking and sprained her foot. Claimant testified that she did not slip, trip or stumble, but that her ankle turned because it was numb and difficult to control.

14. Claimant underwent an MRI on January 4, 2005 which revealed degenerative disc changes at L4-5, slightly greater than on previous exam in 1996.

15. Claimant next treated with Dr. Larson on January 5, 2005. Dr. Larson reviewed the MRI scan and noted that the results correlated well with Claimant's clinical picture of combined L4-5 symptoms and neurological deficits. Dr. Larson reported that Claimant's low back and leg symptoms had improved significantly and that there was no evidence of acute nerve root tension. However, Dr. Larson noted profound weakness in Claimant's left ankle muscles. He prescribed an ankle brace as treatment and later added a self-guided ankle rehabilitation program as well.

16. Dr. Larson determined that Claimant was totally disabled from working from January 4, 2005 until February 1, 2005 as a result of both her low back and left leg pain and her left ankle sprain.

17. On the evening of January 4 or 5, 2005 Claimant called the school nurse, Mary Waite, R.N., at home to report that she had injured herself at work and that Dr. Larson had taken her out of work for the month. Ms. Waite acknowledged receiving this call but could not recall any of its details.

18. Ms. Waite testified that it was unusual for a school employee to call her at home to report a work-related injury. She testified that under normal circumstances when an employee reports a work-related injury to her, she gives him or her a First Report of Injury form to fill out, with instructions to return the form to her within three days. If the employee fails to do so, it is Ms. Waite's responsibility to follow up.

19. Ms. Waite testified that she did not record every request by an employee for ibuprofen. Nor did she keep a record of an employee's complaint of pain or discomfort if she did not understand it to be work-related.

20. Ms. Waite did not provide Claimant with a First Report of Injury form, either on January 3, 2005 when she gave Claimant ibuprofen for her low back pain, or following Claimant's telephone call on the evening of January 4 or 5, 2005.

21. Claimant did not file a First Report of Injury form until February 2, 2005 upon her return to work part-time.

22. Dr. Larson treated Claimant for her ankle sprain and foot drop throughout the months of January and February 2005. He prescribed a home therapy program and continued use of an ankle brace.

23. Dr. Corbett examined Claimant on January 14, 2005 and again on February 14, 2005. He noted Claimant's left foot drop, with left-sided dorsiflexion weakness and some numbness as well. Ultimately, Dr. Corbett determined that Claimant had improved with lumbar flexion exercises and therefore did not require either epidural steroid injections or surgery. Aside from a final re-check on May 3, 2005 Claimant has not sought further treatment from Dr. Corbett.

24. Dr. Larson released Claimant to return to work half-days from February 1, 2005 through February 27, 2005. He released her to return to work full-time, full-duty on February 28, 2005.

25. Both Dr. Corbett and Dr. Larson theorize the progression of Claimant's symptoms as follows:

    (a) Claimant had a degenerative condition in her lumbar spine at the L4-5 region for which she underwent surgery in December 1996;

    (b) This degenerative condition caused Claimant to be more vulnerable to pinching a nerve in her lumbar spine;

    (c) The bending, squatting, stooping and twisting Claimant performed while re-shelving books on January 3, 2005 are the types of activities that can cause an L-5 nerve root to become pinched, and based on the temporal relationship between these activities and the onset of Claimant's severe low back and leg pain it is likely that this is in fact what caused Claimant's L5 nerve root to become pinched;

    (d) The nerve damage caused by the pinched L5 nerve root caused Claimant to suffer dorsiflexion weakness in her left foot, resulting in numbness and an inability to pick up the front of her left foot;

    (e) This "foot drop" caused Claimant's left ankle to be easily inverted, as happened on January 4, 2005 when she sprained her ankle.

26. At Defendant's request, on March 1, 2005 Claimant underwent an independent medical evaluation with Todd Lefkoe, M.D., a physiatrist. Dr. Lefkoe reviewed all pertinent medical records and conducted a thorough physical examination. Dr. Lefkoe reported that Claimant described "going about her normal work activities, squatting and shelving books," that "within a few hours of starting work, she became aware of some discomfort in the low back," and that "over the course of the next 1 to 1-1/2 hours, pain became 'excruciating' in the left low back." Dr. Lefkoe also remarked that Claimant "reported her symptoms to the school nurse, but [was] unsure whether an official report of injury was made."

27. Dr. Lefkoe's diagnosis was left L5 radiculopathy, L4-5 spondylolisthesis and L4-5 central stenosis secondary to spondylolisthesis and facet arthropathy.

28. As to causal relationship, Dr. Lefkoe opined that these conditions were not related to Claimant's work activities on January 3, 2005 but rather were solely degenerative in nature. Dr. Lefkoe based this opinion primarily on the lack of a temporal relationship between Claimant's work and the onset of her symptoms. Significantly, in reaching this conclusion Dr. Lefkoe relied on the January 3, 2005 Emergency Department record noting that Claimant had awoken with back pain on that day. In doing so, he chose to disregard Claimant's own version of events as well as Drs. Larson and Corbett's records, which reported that Claimant's symptoms began at mid-morning on January 3rd, after she already had been at work for some time.

29. Since 2005 Claimant has continued to experience left ankle weakness, fatigue and instability. She continues to use an ankle brace. According to Dr. Larson, her symptoms are stable and are not expected to improve with further treatment.

30. Claimant's employment contract with Defendant for the 2004-2005 school year provides as follows:

    1. This agreement . . . is hereby made for the school year beginning July 1, 2004 and ending June 30, 2005.

    2. The period of service shall begin August 23, 2004 and continue for not more than 180 teaching days. In addition, the teacher agrees to attend educational meetings and inservice programs for a period of time not to exceed five (5) additional days during or immediately following the school year, as directed by the Superintendent of Schools.

    3. [T]he teacher's total compensation under this contract [is determined] to be $43,815.

31. During the school year, Claimant received her pay on a bi-weekly basis. During the summer months, Claimant had the option of receiving the remainder of her annual salary in a lump sum rather than continuing with biweekly payments. Claimant chose the lump sum option.

CONCLUSIONS OF LAW:

Compensability

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993). Sufficient competent evidence must be submitted verifying the character and extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

2. It is black-letter law that an employer takes its employee as it finds him or her, and that therefore the work-related aggravation of a pre-existing condition is compensable. *See Pacher v. Fairdale Farms*, 166 Vt. 626 (1997); *J.M. v. Vencor/Starr Farm Nursing Center*, Opinion No. 09-04WC (Feb. 12, 2004); *Moran v. City of Barre*, Opinion No. 33-02WC (July 31, 2002).

3. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (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). With these factors in mind, the key question is which expert medical opinion is the most credible? *Bonenfant v. Price Chopper*, Opinion No. 13-07WC (May 8, 2007).

4. The disputed issue in the current claim centers on whether the left foot drop from which Claimant now suffers, which followed the episode of severe low back and left leg pain she experienced on January 3, 2005 is causally related to her book re-shelving activities on that day. Drs. Larson and Corbett say yes; Dr. Lefkoe says no.

5. At the heart of the doctors' dispute as to causation is the existence, or lack thereof, of a temporal relationship between the onset of Claimant's symptoms and her work activities on January 3, 2005. Drs. Larson and Corbett's opinion as to causation stems in large part from their belief that Claimant's symptoms arose at work. Both doctors concluded that the type of activities in which she was engaged at the time – bending, squatting, twisting and stooping – involved movements that reasonably could be expected to cause her to suffer a pinched nerve in her lumbar spine, particularly given her pre-existing degenerative condition. The symptoms she experienced, including both the severe pain she suffered on January 3rd and the left foot drop that developed subsequently, were consistent with their causation theory. Their opinions were clear, thorough and objectively supported by medical fact and anatomical reality.

6. In contrast, Dr. Lefkoe's causation opinion takes as its starting point that Claimant's symptoms began when she awoke on January 3, 2005 and therefore already were present when she arrived at work on that day. Were that fact true, Dr. Lefkoe's conclusion that Claimant's symptoms were not causally related to her work would be more convincing, and her claim might fail.

7. I find no reason to disbelieve Claimant's version of events, however. Her testimony at formal hearing was both credible and consistent with what she had reported to both Drs. Larson and Corbett and, in fact, to Dr. Lefkoe as well. The only discrepancy in the medical record comes from Dr. Stein's Emergency Department report. I find it reasonable to surmise that Dr. Stein simply misunderstood.

8. It is true that a temporal relationship alone may be insufficient to support a finding of medical causation. *Norse v. Melsur Corp.*, 143 Vt. 241, 244 (1983). However, if evidence of a temporal relationship is combined with (1) a pre-existing condition that makes the resulting injury more likely to occur; and (2) work activity of a type that is likely to cause the symptoms that in fact result, the necessary causal connection may be established. *See McMillan v. Westaff*, Opinion No. 52-03 (Dec. 17, 2003).

9. I find that Drs. Larson and Corbett's opinions as to causation are credible and convincing. I conclude, therefore, that Claimant injured her lower back and developed a left foot drop while engaged in the course and scope of her employment for Defendant on January 3, 2005. Her claim, therefore, is compensable.

Average Weekly Wage and Compensation Rate

10. Having concluded that Claimant suffered a compensable injury, the remaining issue concerns the appropriate average weekly wage and compensation rate. Claimant argues that her average weekly wage should be calculated on the basis of a 43-week annualized salary, as this was the period of service specified in her teacher contract. Defendant argues that Claimant's average weekly wage should be calculated on the basis of a 52-week annualized salary. Defendant's calculation yields the average weekly wage that Claimant actually received during the 12 weeks preceding her injury. Claimant's calculation yields a higher average weekly wage than what she actually received during that 12-week period.

11. A claimant who is temporarily disabled as a result of a work-related injury is entitled to receive weekly compensation benefits equal to two-thirds of his or her average weekly wages. 21 V.S.A. §642. Average weekly wages "shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the twelve weeks preceding an injury." 21 V.S.A. §650(a).

12. Although many states have adopted an annualized basis for determining a claimant's average weekly wage and compensation rate, Vermont is not one of them. By determining that the twelve weeks preceding the injury must be used to compute the average weekly wage, the legislature provided a "bright line direction," one that "favors ease of administration over proration." *Smith v. Rock of Ages*, Opinion No. 19-98WC (Apr. 15, 1998).

13. To use a 43-week annualized salary as the basis for determining Claimant's average weekly wage would contradict the clear language of §650(a). Using such a method could lead to other unanticipated consequences as well. Imagine, for example, that Claimant was disabled for an entire year and therefore receiving temporary disability benefits for 52 weeks. Using the calculation mandated by §650(a), her workers' compensation benefits would total $29,224:

Annual salary	=	$43,815
AWW for 12 weeks pre-injury (based on 52-week year)	=	$ 843
Compensation rate (2/3 AWW)	=	$ 562
52 weeks TTD ($562 x 52)	=	$29,224 = 2/3 annual salary

Using the calculation suggested by Claimant, however, her workers' compensation benefits would total $35,360:

Annual salary	=	$43,815
AWW based on 43-week year	=	$ 1019
Compensation rate (2/3 AWW)	=	$ 680
52 weeks TTD ($680 x 52)	=	$35,360 = 80% annual salary

Under this scenario, the compensation awarded Claimant on the basis of her proposed method of calculation – 80% of her annual salary – would violate the statutory mandate that a claimant's compensation benefit equal two-thirds of her average wage. 21 V.S.A. §642. There is no basis for allowing a claimant to reap such a windfall, particularly in light of clear legislative intent and statutory language to the contrary.

14. In support of her argument, Claimant cites to a training manual published by this Department in 2001 that states: "To determine the average weekly wage for a teacher, the amount of the contract is divided by the number of weeks in the employment contract." *2001 Vermont Workers' Compensation Training Manual*, Indemnity Benefits, Paragraph H. Given that this instruction has never been codified into an administrative rule, and more importantly, given that it directly conflicts with the plain language of the statute, I cannot consider it to be valid legal authority.

15. Claimant also cites to a number of cases from other jurisdictions in support of her position. The statutes at issue in those cases differ in important respects from Vermont's statute, however. Most significantly, in none of them is the time period to be used in determining a claimant's average weekly wage specified in the same manner as in §650(a). For example, in *Powell v. Industrial Commission*, 451 P.2d 37 (Ariz. 1969), the statute provided for a claimant's compensation rate to be based on his or her average monthly wage, and did not specify the number of months to be used in the calculation. Importantly, the statute required that the average wage be based on a reasonable representation of the claimant's earning *capacity*, not the claimant's *earnings*, as is the case under §650(a). *See also Magnet Cove School District v. Barnett*, 97 S.W.3d 909 (Ark. App. 2003)(time period for computing average weekly wage not specified); *Lynch v. U.S.D. No. 480*, 850 P.2d 271 (Kan. App. 1993)(statute provided specific guidance in cases where wage rate was not fixed by year, month, week or hour).

16. I conclude, therefore, that Claimant's compensation rate must be based on her average weekly wages for the twelve weeks preceding her injury, as required by §650(a), so that it does not conflict with the two-thirds limitation contained in §642.

Attorney's Fees and Costs

17. Claimant has submitted a request under 21 V.S.A. §678 and Workers' Compensation Rule 10.0000 for costs totaling $679.99 and attorney's fees representing 78.5 hours of legal services performed.

18. An award of costs to a prevailing claimant is mandatory under 21 V.S.A. §678; awarding attorney's fees, however, lies within the Commissioner's discretion. When a claimant has partially prevailed, a fee will be based on the degree of success. *J.R. v. Benchmark Assisted Living*, Opinion No. 46A-05WC (Nov. 23, 2005).

19. The key dispute in this claim centered on compensability, and in fact this is reflected in the attorney's itemized billing statement. Although Claimant did not succeed on the average weekly wage issue, I find that she has substantially prevailed on her claim as a whole. Therefore, I award attorney's fees in the full amount, 78.5 hours at the rate mandated by Rule 10.1210, $90 per hour, for a total of $7,065.

ORDER:

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

2. Temporary total disability benefits for the period from January 3, 2005 through January 28, 2005;

3. Temporary partial disability benefits for the period from February 1, 2005 through February 28, 2005;

4. Permanent partial disability benefits in an amount to be determined based on the extent of Claimant's permanent impairment;

5. Interest on the above amounts in accordance with 21 V.S.A. §664;

6. Costs in the amount of $679.99; and

7. Attorney's fees in the amount of $7,065.

All disability benefits are to be paid at a compensation rate calculated based on Claimant's average weekly wage for the twelve weeks prior to her injury. Claimant's claim for compensation benefits to be paid at a higher rate is DENIED.

Dated at Montpelier, Vermont this 2nd day of August 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.