J. D. v. Employer R (August 2, 2007)

STATE OF VERMONT
DEPARTMENT OF LABOR

J. D.

v.

Employer R.

Opinion No. 22-07WC

By: George K. Belcher
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. X-00111

OPINION AND ORDER

Hearing held in Montpelier on March 23 and 24, 2007. Proposed findings and documentation of attorneys' fees were received on May 16, 2007. The record was closed on June 1, 2007.

APPEARANCES:

Christopher McVeigh, Esq., for the Claimant
William B. Skiff, II, Esq., for the Defendant

ISSUES PRESENTED:

1. Whether the Claimant's psychological condition is caused by her work injury on June 30, 2005;
2. Whether the Claimant has reached a medical end result for her right-sided back, leg and knee injuries suffered in her June 30, 2005 fall at work;
3. Whether the Claimant's right shoulder condition is related to the injury at work on June 30, 2005 and has the right shoulder reached a medical end result.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records, Medical Bills, and Prescription Summary

Joint Exhibit II: Civil Complaint
Joint Exhibit III: Dept. of Labor Form 25, Wage Statement

Claimant's Exhibits:

Claimant Exhibit I:	Photograph of Storage Area
Claimant's Exhibit II:	Photograph of bar area
Claimant's Exhibits III:	Photograph of bruising of Employee's right hip
Claimant's Exhibits IV:	Photograph of bruising of Employee's right ankle
Claimant's Exhibits V:	Photograph of bruising of Employee's right knee
Claimant's Exhibit VI:	Envelopes, checks and notations
Claimant's Exhibit VII:	Kinney Prescriptions

STIPULATIONS:

1. The Claimant had an appointment with Dr. Mercia for a physical evaluation which was scheduled in September of 2006 and cancelled by counsel for the Defendant.

2. The caption of this case will not identify the Claimant or the Defendant because of the sensitive nature of the history of sexual abuse of the Claimant.

FINDINGS OF FACT:

1. The Claimant is an employee within the meaning of the Vermont Workers' Compensation Act.

2. The Defendant is an employer within the meaning of the Vermont Workers' Compensation Act.

3. The Claimant is a 52 year old married woman. She began working for the Defendant in December of 2003. Her job was as a daytime bartender.

4. She worked for almost a year and half for the defendant without incident. During this time she was a good employee with no discipline problems or noticeable emotional problems. She got along well with the customers and the staff. Her duties included service at the bar and some waitressing in the bar area. She would clean the bar area in the mornings. She was also active in decorating and arranging special events at the bar on holidays and on birthdays for the regular customers.

5. On June 30, 2005 she was working at the bar in advance of the July Fourth celebration. She was moving from the bar area to a narrow storage area at the rear of the bar at about 10:50 AM. She tripped and fell. As she fell forward she twisted onto her right side. Some boxes fell onto her. The fall was significant and for some period of time (between five and twenty minutes) she lay on the floor. She was discovered by another employee. Following the fall she was in pain and upset. She drove herself to the home of a friend and called her husband. She then went to her primary medical care provider, Molly Backup, PAC, at Evergreen Family Health.

6. Molly Backup, PAC, had been the Claimant's regular, primary, medical provider for about eight years. Ms. Backup has an undergraduate degree from Harvard University in Social Anthropology in 1972 and a two year Physician's Assistant Certification from Yale University in 1974. She has worked at Evergreen Family Health since 1998 with prior experience in other family practices. She works under the supervision of three medical doctors in her practice, but she sees patients, examines them, diagnoses them and treats them without the physicians necessarily being present. She does not prescribe Class V drugs (such as heroin), but she prescribes all other classes of drugs. She does not have hospital privileges. She diagnoses and treats most types of ailments. She does not deliver babies. She diagnoses mental illnesses when a psychiatric consult is not available or not warranted.

7. PAC Backup observed the Claimant on June 30, 2005 (the same day as the fall) as limping and in apparent severe pain in her right hip, right leg, and right shoulder with a decreased range of motion in her right shoulder. Ms. Backup prescribed pain medication and ordered further diagnostic tests. (See Evergreen Family Health note of June 30, 2005). At their next appointment on July 14, 2005, Ms. Backup noted bruises over the Claimant's right knee, hip and right shoulder and decreased sensation in her right leg. The bruising indicated the severity of the injury. The pain in the right side of the back and the right leg were totally new to the Claimant. On July 6, 2005 the Claimant had a series of x-rays which were normal except for mild degenerative changes. An MRI performed on July 10, 2005 was likewise showing no objective evidence of a noticeable change from an MRI done before the fall.

8. The Claimant's husband photographed the bruising of her right hip, ankle and knee. (See Claimant's Exhibits 3, 4, and 5).

9. Following the fall, the Claimant attempted to return to work several times. Each time the pain was too significant. On July 11-13 she worked but could not stand the pain and could not return to work.

10. Between the time of the fall on June 20, 2005 and mid July 2005, the Claimant was asked by her treating medical providers for a Workers' Compensation number so that they could present their bills to the insurer.

11. The Claimant later contacted the Department of Labor and was told that no first report of injury had been filed by the Defendant. The Defendant filed a First Report of Injury on July 28, 2005. The Claimant filed her own Form 21 and Form 25 in September of 2005. She was contacted by one of the principals of the Defendant and was asked whether she had private disability insurance. She was told by this person that the Defendant would get back to her, which did not happen. In early August, 2005, the Claimant was told by the Department of Labor that the Defendant had no Workers' Compensation insurance. According to the Department's file, the Workers' Compensation insurer cancelled the Defendant's Workers' Compensation policy for non-payment of premium on December 26, 2003. A representative of the Defendant testified that they were unaware that they had no insurance.

12. The Claimant was unable to work and was surprised to learn that the Defendant had no Workers' Compensation insurance.

13. One of the principals of the Defendant (B.M.) promised to call her every Friday and did not do so. Also no payments to the Claimant were forthcoming until August 23, 2005, at which time one of the principals of the Defendant came to the home of the Claimant and presented a check for the accrued Workers' Compensation benefits. Thus, the first check which was delivered covered a period of time of almost seven weeks.

14. The next check received by the Claimant was received on October 8, 2005, covering a six week period. On October 21, 2005, the Claimant, a representative of the Defendant, and a representative of the Department of Labor, had a conference in which it was resolved that the Defendant would pay the Claimant a disability check every two weeks henceforth.

15. Of the 28 checks for compensation delivered to the Claimant between August 24, 2005 and October 31, 2006, the average delay between the end of the payment period and the mailing or delivery of the check was 13 days. The checks were consistently late without explanation. When asked about the tardiness of the checks, one of the principals of the Defendant (S.M.) stated that the Claimant could have come to the employer's place of business to pick up the check, despite no evidence that this was ever her obligation or the arrangement for delivery of the checks. In addition to the tardiness of the checks, many of the checks were written to the Claimant with her name spelled incorrectly. Starting with a check written in February of 2006, the memorandum section of some of the checks contained language such as "out since June pay-deep bruising" (2/1/06), "on going injury"(5/22/06),"Deep bruising/psychological"(6/5/06), "deep bruising from a simple fall" (6/20/06), "ongoing deep bruising" (8/11/06), "unbelievable" (8/31/06), "rip-off" (10/19/06). See CL. Ex. 6. These comments on the checks were written by SM, a principal of the Defendant.

16. There was little contact between the Defendant and the Claimant and no one specifically called her to find out how she was doing.

17. During the previous years in which Ms. Backup had treated the Claimant, she had never suspected that the Claimant was clinically depressed. She had never before asked her to complete a depression questionnaire. Ms. Backup first suspected that the Claimant was becoming depressed on July 29, 2005. She administered a questionnaire to test for depression but the Claimant, at that time, did not meet the clinical definition of depression. Ms. Backup again administered the depression test to the Claimant on September 22, 2005. She determined, at that time, that the Claimant met the definition of clinical depression.

18. The Claimant continued to experience right sided back pain, right leg pain and right shoulder pain. She was given a no-work slip and was not able to work.

19. By October or November of 2005, the Claimant began staying in bed, feeling like she was being treated as a "nobody". During periods during the fall of 2005 she would not answer the telephone and "could not face anything."

20. In March of 2006 the Claimant was admitted to the Fletcher Allen Hospital psychiatric ward where she was evaluated and treated by Dr. Richard Bernstein, who is a board certified psychiatrist and a member of the University of Vermont Medical School faculty, teaching and practicing general psychiatry. He diagnosed the Claimant as having "Major Depressive Disorder and Post Traumatic Stress Disorder". This admission was from March 20, 2006 through April 3, 2006. The Claimant was admitted to the same psychiatric ward on the following dates: May 8, 2006 through May 16, 2006; June 20, 2006 through June 26, 2006; August 19, 2006 through August 21, 2006; and December 14, 2006 through December 21, 2006. These admissions were voluntary, but it is clear from the records that the Claimant was severely depressed, anxious, withdrawn, and unable to function at the time of most of her admissions. Several of her admissions were accompanied by suicidal ideation.

21. The Claimant had a history of right shoulder pain and treatment before her fall of June 2005. The medical records report right shoulder problems going back to October, 1997. In May of 2003 her right shoulder was causing her pain and she received an injection; In November of 2003 her right shoulder was still causing her some pain.

22. In the opinion of Ms. Backup the right shoulder injury, which is the subject of the instant case, was a sprain to the right rotator cuff, with spasms. This diagnosis was distinct from the prior right shoulder diagnosis which was "calcific tendonitis" of the right shoulder. A distinguishing factor between the two injuries was that the previous condition seemed to respond to therapy by injections whereas the right shoulder problem which arose from the June 30, 2005 injury did not respond as well to this treatment.

23. PAC Backup was quite certain in her medical opinions. The right shoulder, the right hip and back and right leg pain were causally related to the fall on June 30, 2005. Moreover, the Claimant's depression was causally related to the fall as well. She explained her opinion by pointing out that the Claimant had never sought to be out of work in prior injuries. She was always anxious to return to work. She had never presented as a depressed patient before the fall. The depression developed soon after the fall and during the period when the Workers Compensation benefits were in question.

24. The Claimant has been in physical therapy for her right-sided back and right leg pain since the injury on June 30, 2005. She did a series of 18 visits with Long Trail Physical Therapy between July 19, 2005 and August 29, 2005. She then treated with Porter Rehab and Ortho Services at Porter Medical Services Inc. She started treatment there on August 9, 2006. In a report of September 26, 2006 the physical therapist noted in the assessment section of her report, "Pt is reporting slow gains" and, "She is very motivated and has realistic goals."

THE EMOTIONAL AND MEDICAL HISTORY OF THE CLAIMANT BEFORE JUNE 30. 2005

25. In order to evaluate the causation and extent of the compensable injuries, the pre-injury medical, emotional, and employment history of the Claimant becomes relevant.

26. The Claimant was born in Vermont and her father died at an early age. She moved to Connecticut and Massachusetts. At the age of 15 she was the subject of sexual abuse by her step-father. She was made to drop out of high school and was home-schooled. She suffered the sexual abuse between the ages of 15 and 25 during which time she lived at home. She had been threatened by her step-father and felt that by staying in the home she might preclude her younger sister from being molested by him. Her step-father died when she was 25 years old and the abuse stopped. She later learned that he had abused at least one of her other sisters. She did not often disclose the abuse. It was not disclosed to the medical professionals such as Molly Backup, or to the psychiatric professionals such as Dr. Bernstein or Dr. Erickson, until it became a matter of a public disclosure on June 14, 2006.

27. At age 30 she married. She worked at a milk hauling business for 15 years doing a variety of jobs including scheduling, routing, dispatching, and bookkeeping. She was responsible for thirty truck drivers. She later divorced from her first husband but she remained on good terms with him.

28. She then worked at a local Vermont restaurant for seven years as a waitress/manager. She worked hard and had to be fast to keep up. She met her current husband in 2000 while working at this restaurant and he described her as the best waitress, being very capable. This was a busy job which was physically demanding. On April 24, 2002 she had an L-5/S-1 laminectomy/discectomy in order to treat increasing pain in her left back. This surgery left her with some nerve damage. She also had some bursitis in her left hip. She was almost fully recovered from her hip surgery and she was preparing to return to work, when she was involved in a motor vehicle accident on July 10, 2002. In the motor vehicle accident she injured the left side of her back. She also "banged" her right shoulder. Following the accident she had chronic pain on her left side in her back and her left leg. She also developed pelvic floor pain.

29. Following her motor vehicle accident she returned to work again at her prior job in September of 2002. She worked there for about a year but she was not able to keep up with the fast pace. Also, some of the other waitresses were not willing to return her to the prime shifts. She voluntarily left this job in September of 2003. In December of 2003 she was hired by the Defendant as a bartender. She disclosed her prior back problem to the employer but she clearly felt that she could do this job which required less lifting and running. She continued to work at the job without problem until June 30, 2005.

30. In 2003 and 2004 she had injections to her right shoulder for pain.

31. Prior to the incident on June 30, 2005 the Claimant usually had a positive disposition. She was spontaneous. She had friends and liked to engage with her close friends. She was active in Weight Watchers and was concerned about her weight and her grooming. While she occasionally had ordinary ups and downs, neither her husband nor two close friends who testified, noticed what they would call clinical depression. The Claimant had never been treated for significant depression by a therapist or psychiatrist before the accident and she had never been on anti-depressants for a significant period of time as a treatment for depression. [1] Most importantly, she had never been depressed in a way which interfered with her ability to work and to function in her personal life.

32. The Claimant had a history of increasing left back pain and left leg pain which had continued from the surgery in 2002 to the time of the fall in 2005. She was referred to Dr. Tarver at the Fletcher Allen Health Care pain clinic in June of 2005 concerning this ongoing pain. Similarly the Claimant had a gradual and consistent rise in her prescription of Hydrocodone from June in 2001 at the rate of 12 per month, to 150 per month as of May 2005. On June 29, 2005 (the day before the work injury) the Claimant was seen at Evergreen Family Health complaining of increasing pain and the need for more pain medication. During that visit her discomfort was obvious with her sitting sideways on the edge of her chair. She reported that it was hard to work with the pain. Nonetheless, she went to work the following day.

[1] The Claimant did take a low dose of an antidepressant for a short time following the death of a relative several years before her fall. This was insignificant to the issues being considered in this action.

33. It is clear that as a result of her spine surgery and motor vehicle accident she had chronic pain in her left back and left leg. She also had lower pelvic pain, rectal and vaginal pain, which also affected her sexual life.

34. There was some evidence introduced that the Claimant may have had some level of depression before the fall in June of 2005. When the Claimant was admitted to the Fletcher Allen Health Care mental health unit it was noted that the claimant had a "four year history of intermittent depression, PTSD, and chronic, severe low-back pain". See Fletcher Allen Health Care note of March 22, 2006. The entry was repeated in several of the ongoing medical records of the Claimant during subsequent days during this admission and in other admissions. It was the position of the Defendant that the Claimant had a preexisting condition of depression, chronic pain syndrome, post-traumatic stress disorder, and sexual abuse history and that it was a combination of these factors (unrelated in any way to the fall on June 30, 2005, which caused her psychiatric hospitalizations). This concept was refuted by Dr. Bernstein.

35. Dr. Bernstein testified that this first note of a "four year history of depression, PTSD, chronic, severe low back pain" was likely made by the weekend on-call psychiatrist, without the level of specificity which would be done by a treating psychiatrist for a regular in-patient. It was clear that even though Dr. Bernstein had signed as having reviewed these notes, he did not agree that the Claimant had a four year history of depression. She had not been treated for depression before her admission, there was no medical history of treatment, and even if she were to have such a history, it did not interfere with her ability to work. There were no independent medical or psychiatric records from other providers which corroborated such a history.

36. The Claimant had not disclosed to her psychiatrists her history of sexual abuse until it was disclosed in June of 2006. Since the sexual abuse had not been disclosed, and since there were inconsistencies in the medical records, the Defendant argues that the subjective information given by the Claimant to her medical providers was suspect, inconsistent and incredible. Therefore, the Defendant argues, the opinions which were in large part based upon this information were likewise unsupported.

THE MEDICAL AND PSYCHIATRIC OPINIONS

37. Molly Backup, PAC, was of the opinion that the Claimant's right-sided back pain, leg pain and shoulder pain were related to the fall on June 30, 2005. She noted that the right-sided, low back pain and leg pain had never been experienced before by the Claimant and that the right shoulder pain seemed to be different from the previous "intermittent" right should problem which had responded well to treatments. It was also her opinion that the Claimant's depression was related to the fall of June 30, 2005 and the aftermath of frustration with the compensation issues. In her opinion, the injuries and pain, coupled with a feeling of betrayal by the treatment by the employer, was a primary cause of the Claimant's depression. Finally, when asked whether the Claimant was at a medical end result for the injuries suffered in the fall, she stated that she "hoped not". She went on to explain that it was her belief that the ongoing physical therapy would help the Claimant continue to improve. She testified that the Claimant was "definitely not" at an end result concerning the depression. It was her opinion that the Claimant is not able to work at the present time due to her depression and her medication.

38. Dr. Brian Erickson is a licensed psychiatrist, in the State of Vermont. He is a 1987 graduate of the University of Minnesota Medical School and did his psychiatric residence at the University of Vermont in 1991. He did ten years of general psychiatry in Minnesota before returning to Vermont in 2001. He is the Medical Director for Electro-convulsive Therapy at Fletcher Allen Health Care and also works at the Center for Pain Medicine which is a chronic pain clinic. He was board certified in 1993. His special areas of practice are ECT and chronic pain.

39. The Claimant was referred to Dr. Erickson on November 22, 2005 by Drs. Fenton and Tarver for back problems and pain associated with a 2002 laminectomy/discectomy, the 2002 motor vehicle accident and the 2005 fall. Dr. Tarver made the referral associated with a pain assessment and Dr. Fenton made the referral associated with PTSD surrounding the motor vehicle accident. Dr. Erickson is one of the treating psychiatrists of the Claimant and he has continued to treat her since the referral. During the time that the Claimant was treating with him he noted an increasing depression which eventually resulted in her hospitalization. It was the opinion of Dr. Erickson that the Claimant's depression was causally related to her fall at the Defendant's place of employment. More than the pain, the Claimant's feeling that she was betrayed by her employer re-ignited feelings which had been suppressed concerning low self-esteem and fear. He diagnosed her as having depression, "pain disorder with psychological factors and medical condition", and post-traumatic stress disorder. In his opinion, the post-traumatic stress disorder was a product of the motor vehicle accident and not a product of, or aggravated by, the fall at work. He testified that her PTSD symptoms are less now than they were, and that he is not now treating her for PTSD. The pain disorder diagnosis was the result of pain from the laminectomy/discectomy, the motor vehicle accident and the fall, but he could not say how much each of these contributed to her overall pain condition.

40. Dr. William Mercia is a Vermont medical doctor who received his undergraduate degree and medical degree from the University of Vermont. He became a medical doctor in 1977. He works in the area of occupational health at Occupational Health and Rehabilitation, Inc.

41. The Defendant asked Dr. Mercia to give a second opinion concerning the Claimant's condition. He examined the Claimant on March 6, 2006 and reviewed many of her medical records. While he gave the Claimant a physical examination, he did not examine her right shoulder, which was an oversight on his part. His report dated March 20, 2006 concluded that the Claimant had a right low back injury and right knee injury and the injury was ongoing. See Medical Records Exhibit, Tab 12. According to the report,

> The right lower back and right extremity symptoms do appear to be causally related to her work injury of 6/30/05. This appears to represent a mechanical low back problem that has been resistant to skilled PT and, with exacerbation of chronic low back pain and sciatica, appears to require substantial doses of narcotic analgesics and muscle relaxants. Her recovery has been negatively impacted by overlying depression and anxiety. I would characterize her present rehabilitation potential as fair, because of the psychosocial factors. If she is to be successful in returning to work in a meaningful way, I feel a multidisciplinary, function-oriented program will be necessary.

The report went on to recommend further tests and the use of another program. If she were to decline, he then would suggest an Independent Medical Exam to assess the claim "in a more comprehensive manner" and to comment on whether she has reached a medical end result. A second evaluation was scheduled for the Claimant to visit Dr. Mercia, but before the evaluation could occur, Dr. Mercia disclosed to Defendant's counsel that it was his opinion that the Claimant was not at a medical end result. Thereafter, the second examination was cancelled by Defendant's counsel. In his first report he determined that the Claimant's right shoulder problem was related to the fall, but after consulting with counsel for the Defendant, he changed his opinion. It is his current opinion that the Claimant has lost function and physical fitness and coping skills as a direct result of the fall at work. His opinion is that she had chronic pain syndrome before the fall at work and that she had this condition after her fall. He agrees that the fall exacerbated her chronic pain syndrome. He now believes that the Claimant is now at a medical end result.

42. Dr. John R. Johansson is a Doctor of Osteopathy. He completed his training in Osteopathy in 1982. He is board certified in family medicine and he works at Champlain Sports Medicine. He regularly treats musculatoskeletal injuries. He also does independent medical examination and impairment ratings. He did not physically examine the Claimant. Rather, he did a record review of her medical records. Dr. Johansson issued a report on September 18, 2006 (Medical records, Tab 18). In this report it was his conclusion that the Claimant received a bruise from her fall and that the "majority of her physical findings subsequent to that fall were related to her chronic lower back condition, which was actively treated before and subsequent to this accident." In making this determination he relied heavily upon Dr. Fenton's report of August 30, 2005 was made following a complete physical examination of the Claimant. Dr. Johansson also opined that the Claimant's right shoulder problem was unrelated to her fall. On October 10, 2006 he added an addendum to his report without additional findings to the effect that the "contusion she sustained associated with the work injury has reached a medical end result." See Tab 18, Medical Records. Dr. Johansson testified that most sprains or strains heal within 4-6 weeks and that most bones heal within three months. He admitted that some of the records upon which he relied in his opinions were not clearly identified in his report. He also admitted that a physical examination is preferable to a record review in making a determination of medical end result.

43. Dr. Johansson's report states in part,

> I have reviewed thoroughly all the medical records that were provided and mentioned in my initial paragraph. It is my opinion within a reasonable degree of medical certainty, that the patient had no findings, either objective on clinical examination throughout the records, or more specifically, MRI findings, that indicate objective worsening of her condition as a result of the fall she sustained at the [Defendant's place of work].

This statement ignores the significant bruising of the right hip, right knee and right shoulder which was observed by Molly Backup and the decreased range of motion in the right shoulder observed by Ms. Backup. Dr. Johansson's opinion is contradicted by the opinion of Dr. Mercia, who like Dr. Fenton did a physical exam and determined that: (1) the fall on June 30, 2005 created an ongoing injury as of March, 2006; (2) the fall caused a lumbosacral sprain which affected the right side and right knee; (3) and that the fall on June 30, 2005 exacerbated her existing chronic pain syndrome. Finally, Dr. Johansson's opinions are greatly swayed by the examination of Dr. Fenton. Dr. Fenton did an IME of the Claimant on August 30, 2005. Dr. Fenton's report was done at the request of the attorney representing the Claimant in her motor vehicle accident claim. Dr. Fenton's report did not address the Claimant's complaint of right leg and right back pain. It did not specifically address the right shoulder pain. Because Dr. Fenton found no objective evidence of injury which would explain the right sided pain, and because his report did not deal with her complaints, Dr. Johansson concluded that the right-sided problem was simply not there.

44. Rebecca Winokur, MD, was of the opinion on November 8, 2006, that the Claimant had: (1) a right rotator cuff sprain with chronic spasms of the rhomboids and trapezium; (2) multiple psychiatric co-morbidities including [the Claimant's] challenges in coping with the injuries and chronic pain she has had. See Joint Medical Exhibit, Tab 9. This is the same diagnosis of the right shoulder problem that was made by Molly Backup, PAC.

45. Dr. Richard Bernstein graduated with a BS from Dartmouth College, a Medical Degree from Boston University and a residency in psychiatry from the University of Vermont. For many years Dr. Bernstein has been on the faculty at the University of Vermont Medical School. He has practiced psychiatry for over thirty years and is a staff psychiatrist at the Fletcher Allen Health Care Adult-In-Patient Unit. He was the treating psychiatrist for the Claimant during her various admissions as an in-patient at FAHC. He is Board Certified in general adult psychiatry. He diagnosed the Claimant with "major depressive disorder' and post-traumatic stress disorder. In his opinion the depression is causally related to the fall at work. In his opinion the Claimant's prior sexual abuse did not contribute to her depression except that it made up part of her history. He rationalized that she had been a productive person and had "moved on" in her life from the sexual abuse. It was also his opinion that pain, and chronic pain, can be a stressor which is associated with depression. When asked whether the past complications of the Claimant's life (her prior sexual abuse and its recent disclosure, her chronic pain from 2002, the motor vehicle accident of 2002, the loss of sexual function from the motor vehicle accident) were the <u>real</u> cause of the Claimant's depression and hospitalization, Dr. Bernstein was quite clear. She had been able to cope with many of these events and she had remained functional. It was the fall at work, her ultimate pain and unemployment, and the feeling of disloyalty from her employer, which were the true causes of her depression, on his opinion.

46. The Claimant's attorney expended 240.8 hours in representation of the Claimant in this matter and costs in the amount of $4,623.31. The Claimant executed a written fee agreement with her counsel. The bill for legal services, costs and fee agreement were filed on or about May 30, 2007. The amount of time expended by the Claimant's attorney at first blush seems unusually large, however the nature of this claim, the complexity of the Claimant's medical history and the legal issues involved persuade me that the fees are reasonable. There was an objection that the fees were not billed in increments of one-tenth of an hour, however the one-tenth of an hour increment was used. There were simply no charges of less than two tenths of an hour.

CONCLUSIONS OF LAW:

1. In Worker's 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 proven must be the more probable hypothesis. *Burton v. Holden and Martin Lumber Co.* 112 Vt. 17 (1941).

3. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical opinion is necessary. *Lapan v. Berno's Inc*., 137. Vt. 393 (1979).

4. To establish a physical-mental claim, the claimant must prove a causal nexus between a compensable physical injury and psychological impairment. See *Blais v. Church of the Latter Day Saints*, Op. No. 30-00 WC (1999).

5. When evaluating between conflicting expert opinions, this Department has weighed several factors: 1) whether a medical expert has had a treating physician relationship with the claimant; 2) the professional education and experience of the expert; 3) the nature of the evaluation performed, including whether the expert had all the medical records in making the assessment; and 4) the objective bases underlying the opinion. See *Yee v. IBM*, Op. No. 38-00 WC (2000); *Miller v. Cornwall Orchards*, Op No. 20-97 WC (1997).

6. In this case, Physician's Assistant Molly Backup, Dr. Erickson, and Dr. Bernstein all testified that the Claimant's depression was related to the injury and its aftermath. They are all in a treating physician relationship with the Claimant. Drs. Johansson and Mercia were not in a treating relationship with the Claimant.

7. Clearly, Ms. Backup had the longest association with the Claimant before the accident and afterward. She had the ability to evaluate the functional capability of the Claimant through all of her complex injuries and medical problems. Her strong and unequivocal opinion is entitled to great weight. (See *Drew v. Northeast Kingdom Human Services*, Op. No. 47-06 WC (2007) in which the testimony of a nurse practitioner, supported by two other physicians, was more credible than a countervailing expert opinion by a medical doctor.)

8. An employer takes each employee as is, and is responsible under Workers' Compensation for an injury which disables one person and not another. *Paton v. State of Vermont Dep't of Corrections,* Op. No. 4-04 WC (2004) (citing *Morrill v. Bianchi*, 107 Vt. 80 (1935).

9. Larson's Workers' Compensation Law, Sec. 10, Synopsis to Chapter 10 provides in the section captioned "Range of Compensable Consequences" as follows:

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. More specifically, the progressive worsening or complication of a work-connected injury remains compensable, so long as the worsening is not shown to have been produced by an intervening, nonindustrial cause.

Slayton v. Consolidated Memorials, Op. No. 49-06 (2007)

10. The Claimant has produced credible expert testimony that her disabling depression was caused by the work related injury, the resulting pain and inability for her to work, and her upset caused by the employer's inability to process her workers' compensation claim in a timely and professional manner. There was no expert testimony introduced by the Defendant that the Claimant's depression and five hospitalizations were not related to her fall at work. Likewise there was no significant question raised as to the sincerity of the Claimant's descent into a very serious depression following the injury. While the Defendant highlights several inconsistent medical records and the Claimant's failure to disclose her past sexual abuse, these problems with Claimant's case were either explained or were understandable given the nature of Claimant's history. (Contrast *Carpenter v. Bell Atlantic,* Op. No. 03-04 WC (2004) where claimant's symptoms were found to be erratic and magnified.) I conclude that the psychological injury of depression is related to the fall at work. The Claimant also has a diagnosis of post traumatic stress disorder but this psychological injury is not related to the fall at work and has not interfered with her capacity for work.

11. Concerning the right shoulder injury, again the testimony of Molly Backup, PAC, was particularly persuasive. She had treated the Claimant's right shoulder for a long period of time. The intermittent problem of calcific tendonitis was distinct and separate from the post-fall diagnosis of rotator cuff sprain with spasms. Her opinion as to diagnosis was buttressed by Dr. Winokur. The right shoulder injury is causally related to the injury at work.

12. On October 17, 2006, the Department partially accepted a Form 27 (Employer's Notice of Intent to Discontinue Payments) in response to the report and opinion by Dr. Johansson on October 10, 2006. Essentially Dr. Johansson determined that the Claimant had suffered only simple bruising in her fall and that the bruising had long since healed. Dr. Mercia also testified that the Claimant had reached a medical end result for her injuries.

13. "Medical end result means 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 2.1200.

14. While the Claimant has the burden of proof in the first instance, once the claim is accepted and benefits are paid, the employer must show that the Claimant has either returned to work or that the discontinuance of the benefits is warranted. 21 VSA Sec. 643a. The burden of proof to terminate a claim which has been accepted is upon the employer. *Merrill v. University of Vermont*, 133 Vt. 101 (1974). I find that the Defendant has not met its burden of proof concerning medical end result for the right back and right leg problem. It was on or around September, 2006 when Dr. Mercia's appointment was cancelled when it became known that he felt the Claimant was not at end result. Dr. Johansson's opinion about end result never really addressed the Claimant's right sided pain as a new development, or the fact that her injury to the right side aggravated her existing, left-sided, low back pain. Ms Backup explained that she felt the physical therapy was helping the Claimant.

15. The Claimant provided evidence that the right shoulder injury is improving with physical therapy (according to Molly Backup).The Defendant did not address right shoulder maximum medical improvement since Dr. Johansson and Dr. Mercia simply determined that the right shoulder problems were unrelated to the fall. Neither of them examined the right shoulder. I conclude that the Claimant has not reached a medical end result from the overall injuries which were proven since she is still functionally unable to work as a result of her depression and that this psychological injury has not reached maximum improvement.

16. The Claimant has prevailed in her claim for compensability of the psychological condition, causation related to the right shoulder and the issue of end result. She is entitled to the requested attorney fees and costs pursuant to 21 VSA Sec. 687 and WC Rule 10.000.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to adjust this claim including the payment of:

1. Medical benefits associated with the right arm;
2. Medical benefits associated with the psychiatric hospitalizations;
3. Past temporary total benefits from the date temporary total benefits ceased until a medical end result is reached or until the Claimant returns to work, whichever is earlier;
4. Interest on the unpaid temporary total benefits from the date such benefits should have been paid consistent with this order.
5. Attorney's fees in an amount of $21,672.00 and costs of $4,623.31.

Dated at Montpelier, Vermont this 2nd day of August 2007.

_____

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. Sec. 670, 672.