N. C. v. Kinney Drugs (May 9, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

N. C. Opinion No. 18-08WC

By: Phyllis Phillips, Esq.
Contract Hearing Officer

v.

Kinney Drugs For: Patricia Moulton Powden
Commissioner

State File No. X-57650

OPINION AND ORDER

Hearing held in Montpelier on January 24, 2008.

APPEARANCES:

David Lynch, Esq. for Claimant
John Valente, Esq. for Defendant

ISSUE PRESENTED:

Whether Claimant's ongoing symptoms are related to her compensable work injury, and if so, to what additional workers' compensation benefits, if any, is she entitled.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records

CLAIM:

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

FINDINGS OF FACT:

1. Claimant began working for Defendant in August 2005 as assistant manager in Defendant's retail store.

2. On January 22, 2006 Claimant was working in the stock room. After lifting a plastic bin and then turning to set it down, she straightened up and immediately experienced severe pain in her left lower back. Claimant managed to complete her work shift, but later that evening presented to the Porter Medical Center Emergency Department for treatment. She was diagnosed with an acute lumbar strain, prescribed ice, ibuprofen and pain medications and advised to follow up with her primary care provider if her symptoms did not abate.

3. Defendant accepted Claimant's injury as compensable and began paying benefits accordingly.

4. Claimant had a prior medical history of occasional musculoskeletal complaints, primarily in her neck and shoulder but some involving her lower back as well, dating back at least to 2000. Claimant treated regularly with Dr. Palmer, a chiropractor, for these complaints. Claimant testified, and Dr. Palmer's treatment notes confirm, that these aches and pains were not nearly as severe as the pain she experienced on January 22, 2006.

5. Claimant began treating with Dr. Palmer for her January 22, 2006 injury on January 23, 2006. Dr. Palmer initially diagnosed a lumbosacral strain/sprain and prescribed conservative treatment, including chiropractic manipulations, bed rest and limited-duty work, only 4 hours per day. X-rays taken in February 2006 revealed some minimal disc space narrowing and degenerative changes at L5-S1. A March 2006 MRI study showed a minor disc bulge at L4-5 as well, but the findings did not appear to be so significant as to account for Claimant's ongoing pain and symptoms. By the time of the MRI these symptoms had progressed to included occasional numbness into her left leg.

6. At Dr. Palmer's referral Claimant underwent a course of physical therapy in March and April 2006, but her symptoms did not abate. Dr. Palmer also referred Claimant for a second opinion with Dr. Binter, a neurosurgeon. Upon reviewing the March 2006 MRI, Dr. Binter concluded that Claimant was not a surgical candidate.

7. By April 2006 Dr. Palmer had determined that Claimant could not tolerate even half days working and therefore took her out of work completely.

8. In May 2006 Dr. Palmer referred Claimant to Dr. Vargas, another neurosurgeon, for additional evaluation and possible treatment. Dr. Vargas found no evidence of disc herniation or spinal stenosis on Claimant's x-rays or MRI, although he did note some facet arthritic changes in her lower lumbosacral spine. Dr. Vargas diagnosed L5 left radicular pain and recommended a left L5 lumbar epidural steroid injection as treatment. Claimant underwent this injection in late May 2006, but did not realize any significant pain relief from it.

9. In August 2006 Claimant presented to Fletcher Allen Health Care Emergency Department with complaints of increased low back pain radiating down to her lower calves and, significantly, an episode of urinary incontinence. She underwent a second MRI, which showed some degenerative disc disease at L4-5 and L5-S1, but again, insufficient disc space narrowing or protrusion to account for her symptoms.

10. In September 2006 Dr. Palmer referred Claimant to Dr. Ciongoli, a neurologist, for nerve conduction studies. Based on the results of this testing, which was normal bilaterally, Dr. Ciongoli diagnosed radiculitis only, not radiculopathy. Radiculitis refers to pain that is caused by nerve tissue that is inflamed or irritated. In contrast, radiculopathy refers to the pain pattern that occurs when a specific nerve root is impinged or damaged. For treatment, Dr. Ciongoli recommended possible epidural blocks and, given Claimant's intractable pain perhaps a surgical consult as well. As for Claimant's work status, Dr. Ciongoli opined that because Claimant had failed at a trial of half days, there was "no way" she could return to work currently.

11. In October 2006 Dr. Palmer referred Claimant to the Vermont Center for Occupational Rehabilitation (VCOR), a multi-disciplinary rehabilitation program headed by Dr. Johansson, an osteopath. Dr. Johansson diagnosed Claimant with mechanical low back pain, causally related to the January 22, 2006 work injury, as well as degenerative disc disease. As treatment, he recommended that Claimant undergo an intensive rehabilitation program, to include behavioral therapy, pool therapy, personal training, massage, patient education and osteopathic treatment.

12. Claimant began the VCOR program in mid-December 2006 and completed it on March 5, 2007. By all accounts, including her own testimony as well as Dr. Johansson's and Dr. Palmer's treatment notes, she found the program to be very beneficial while she was participating in it. Although her symptoms did not completely resolve, she made gains in both flexibility and core strength, and was able to walk and move about with less pain and effort.

13. At Defendant's request, Claimant underwent an independent medical evaluation with Dr. Gennaro, an osteopath, in December 2006. In Dr. Gennaro's opinion, Claimant had a moderate degree of pre-existing degenerative disc disease in her lumbar spine that was exacerbated by the January 22, 2006 work injury. Dr. Gennaro diagnosed Claimant with a lumbar strain and emerging chronic pain disorder, and concluded that her current symptoms were all causally related to the work injury. As for treatment, Dr. Gennaro agreed that Claimant's condition was not surgical and approved of Dr. Johansson's multi-disciplinary rehabilitation approach instead. Significantly, Dr. Gennaro noted that Claimant exhibited pain behaviors and believed herself to be considerably disabled. In his opinion, Claimant's prognosis for recovery was guarded.

14. Upon her completion of the VCOR program Dr. Johansson determined Claimant to be at end medical result and rated her with a 5% whole person permanent impairment. Dr. Johansson noted that Claimant had clearly demonstrated a work capacity within the light range during her time at VCOR, and thus he released her to return to work light duty for up to 8 hours daily.

15. Claimant testified, and the VCOR treatment notes reflect, that she was anxious to return to work as soon as possible. In early March 2007, shortly after completing the VCOR program, Claimant began working 3 hours per day, 3 days per week at a local deli. This return to work proved unsuccessful however, as the prolonged standing and walking necessitated by the job caused Claimant's pain to increase back up to a level she found unmanageable. In mid-March 2007, after only two weeks on the job, Claimant reported her increased symptoms to Dr. Palmer, who determined that she was not capable of working. Claimant has not worked since. As of the date of the formal hearing, Dr. Palmer believes that she has no work capacity and is still temporarily totally disabled.

16. Claimant testified that when she told Dr. Johansson that she could not tolerate the new job, he advised her to "just suck it up," as there was nothing more he could do for her. Dr. Johansson's recollection of this conversation is somewhat different. He acknowledged that he stood by his 8-hour-per-day work release notwithstanding Claimant's belief that this was too much for her, and recommended that Claimant continue with her home exercise program as the best treatment for her chronic pain. He also prescribed anti-inflammatories and pain medications. Claimant testified that on the advice of her pharmacist she decided not to take the medications Dr. Johansson prescribed, fearing side effects and/or addiction with prolonged use.

17. In Dr. Palmer's opinion the combination of Claimant's discontinuing the VCOR program and returning to work caused her condition to deteriorate. Dr. Palmer suspected that Claimant was suffering from a significant disc lesion that had not shown up on the prior MRI studies. Because Claimant's symptoms tended to worsen with prolonged weight-bearing activities such as standing or walking, Dr. Palmer recommended that Claimant undergo a standing MRI to replicate those conditions and possibly visualize further disc damage.

18. A standing, or weight-bearing, MRI is a relatively new technique for conducting lumbar spine imaging studies. The standard protocol is for lumbar spine MRI scans to be conducted with the patient lying down. A standing MRI requires special equipment that is available in Albany, New York but not in Vermont.

19. Dr. Johansson testified that he has never ordered a standing MRI and is unaware of any orthopedic surgeon or spine specialist who has. In his opinion such a test is not medically necessary in Claimant's case. Noting that Claimant had clearly demonstrated a light work capacity at the conclusion of the VCOR program, Dr. Johansson believes that Claimant's unsuccessful return to work thereafter was due to behavioral and/or psychological issues, not to any as-yet unvisualized disc lesion.

20. Both Claimant and Dr. Palmer testified that Claimant's pain continued to worsen after her failed return to work in March 2007. In April 2007 Dr. Palmer reported that Claimant's symptoms flared with any increase in physical activity. By September 2007 he reported that Claimant's left leg numbness had worsened.

21. In October 2007 Dr. Palmer referred Claimant to the Spine Institute of New England. Initially Claimant underwent an evaluation with Robert Hemond, a physician's assistant. Mr. Hemond posited that Claimant was suffering from an L5 radiculopathy. He reported that Claimant was not interested in pursuing his suggestion that she consider another lumbar epidural steroid injection, and instead expressed her desire to speak with a surgeon about possible surgical interventions. To that end, Claimant met with Dr. Ames, a Spine Institute surgeon, on October 19, 2007.

22. Dr. Ames found no evidence of disc herniation and did not believe that Claimant would benefit from disc surgery. She diagnosed Claimant with a pain pattern consistent with degenerative changes in her spine. Dr. Ames noted that Claimant has a prior history of psoriasis, and suggested that there might be some relationship between this condition and the "aggressive form" of degenerative disc disease from which Claimant was suffering. Notably, Dr. Ames did not comment at all on Claimant's January 2006 work injury and what role, if any, it played in either causing or aggravating her current symptoms.

23. As for treatment, Dr. Ames recommended a trial of medial branch blocks and if those proved successful, radiofrequency ablation to follow. Radiofrequency ablation is a process by which nerve pain is deadened, hopefully providing sufficient pain relief to allow a patient to rehabilitate a weakened condition.

24. Dr. Ames also suggested a generalized exercise program emphasizing an arthritis-based medication regimen and encouraged Claimant to continue her chiropractic care. Last, she noted that "we also would certainly be glad to have [Claimant] participate in the Level 4 rehabilitation program here at SPINE if she wishes to do so." The Level 4 rehabilitation program is a multi-disciplinary program similar to VCOR, though with some different treatment aspects.

25. In his testimony Dr. Johansson disputed the reasonable necessity of Dr. Ames' treatment suggestions. Particularly with respect to the Level 4 rehabilitation program, Dr. Johansson testified that it would be duplicative for Claimant to undergo another multi-disciplinary rehabilitation program in its entirety after already having completed the VCOR program. Dr. Johansson did acknowledge that he has had patients who underwent the entire VCOR program and then returned for additional treatments in specific areas, for example osteopathic manipulation or massage.

26. Dr. Johansson maintains that although Claimant's symptoms may have worsened since completing the VCOR program, her underlying condition has not changed. In his opinion, Dr. Ames' treatment recommendations all are aimed at managing Claimant's pain, not improving her condition. For that reason, Dr. Johansson stands by his February 22, 2007 end medical result determination.

27. Dr. Johansson believes that while the January 2006 work injury caused or aggravated some of Claimant's low back symptoms, she now has returned to her pre-injury baseline, and her condition is consistent with that of a person of her age and with her degree of pre-existing degenerative disc disease.

28. With the exception of the time during which she was undergoing the VCOR program, Claimant has treated frequently with Dr. Palmer, sometimes as much as 2 or 3 times per week. Dr. Palmer testified that at this point his treatment is supportive only, not corrective. Its purpose is not to "fix" or improve Claimant's condition, but rather to alleviate her pain and allow her to maintain some level of function. Unfortunately, that level of function remains decidedly low. Claimant testified that she cannot tolerate prolonged standing, walking or sitting, that it takes her all day to complete household chores such as vacuuming, and that she sleeps in a recliner because she cannot tolerate lying down in bed.

CONCLUSIONS OF LAW:

1. In this claim Claimant seeks workers' compensation coverage for various medical treatments, including a weight-bearing MRI, radiofrequency ablation, a multi-disciplinary intensive rehabilitation program and ongoing chiropractic modalities. Defendant contends that the proposed treatments do not constitute reasonably necessary treatment for her January 22, 2006 work injury.

2. The claimant in a workers' compensation claim has the burden of establishing all of the facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). Once the claim is accepted and benefits are paid, however, the burden shifts to the defendant to establish a sufficient basis for terminating compensation. *Merrill v. University of Vermont*, 133 Vt. 101 (1974).

3. When an employer seeks to terminate coverage for medical benefits, it has the burden of proving that the treatment at issue is not reasonable. *K.R. v. Mack Molding*, Opinion No. 34-07WC (December 11, 2007). A treatment may be unreasonable either because it is not medically necessary or because it is not related to the compensable condition or injury. *Id.*

4. Claimant presented expert medical testimony from Dr. Palmer to the effect that all of the treatments at issue here are both reasonably necessary and causally related to the January 2006 work injury. Defendant countered with expert testimony from Dr. Johansson, who testified that the proposed treatments either were not medically necessary or were not causally related to the work injury.

5. 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? *M.B. v. Price Chopper*, Opinion No. 13-07WC (May 8, 2007).

Weight-bearing MRI

6. I find that Defendant has sustained its burden of proving that a weight-bearing MRI is not reasonably necessary treatment. I am persuaded not only by Dr. Johansson's testimony that such an imaging study is not the standard protocol but also by the fact that none of the orthopedic surgeons or spine specialists who examined Claimant recommended such a scan.

Radiofrequency Ablation

7. I find that Dr. Ames' suggestion that Claimant would be an "excellent candidate" for medial branch blocks followed by radiofrequency ablation amounts to a credible treatment recommendation for Claimant's current pain, and in that sense it is reasonably necessary. Determining whether this treatment is causally related to the January 2006 work injury is complicated by Dr. Ames' silence on the issue. The burden of proof is on Defendant, and consequently Dr. Ames' silence is not dispositive. I am not convinced by Dr. Johansson's testimony that such treatments, if necessary at all, relate solely to Claimant's degenerative disc disease and not at all to the January 2006 work injury. I conclude, therefore, that Claimant is entitled to undergo this treatment.

8. Claimant's entitlement to this treatment does not negate the previous finding of end medical result, however. Both Dr. Palmer and Dr. Johansson agreed that the purpose of this treatment is to control Claimant's pain, not to improve her underlying condition. Ongoing treatment of this sort does not preclude an end medical result. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996).

Level 4 SPINE Program

9. I find that Defendant has sustained its burden of proving that the Level 4 SPINE program is not reasonably necessary treatment at this time. Dr. Johansson's testimony was credible as to the relative similarity of the SPINE program to the VCOR program Claimant already completed. For Claimant to undergo another full rehabilitation program would be duplicative. As Dr. Johansson has recommended for other patients, however, it is possible that Claimant might benefit from a refresher course focused on specific treatment modalities, particularly those that might maximize the chances of her successfully returning to work after what has evolved into an extended period of disability. Defendant is well advised to consider this possibility.

Ongoing Chiropractic Treatment

10. Dr. Palmer admitted that the chiropractic treatment he is providing Claimant is supportive only, not corrective. Unfortunately, the treatment appears to afford only scant and temporary relief of Claimant's symptoms and in that sense it is ineffective. Although I am mindful that Claimant has come to rely heavily on it, this is not the decisive factor in determining whether the treatment is reasonably necessary. *J.C. v. Eveready Battery*, Opinion No. 12-07 (April 3, 2007). I conclude that it is not.

11. It is possible, however, that some limited amount of supportive chiropractic care still might prove reasonably necessary in the context of Claimant's transition, hopefully, from total disability back to suitable work. There is insufficient evidence from which to conclude at this point that Claimant will be entitled to ongoing chiropractic care during this period, but Defendant might well consider offering it nonetheless. Should it decide to do so, the previous end medical result determination will not be negated, as the chiropractic care to be provided is palliative only. *Coburn, supra*.

Work Capacity

12. I find that the more credible evidence establishes that Claimant had a light duty work capacity as of her completion of the VCOR program. Dr. Palmer's conclusion to the contrary is based solely on Claimant's belief that she cannot work and not on any objective testing of her functional capacities.

13. More than a year has passed since Claimant's functional abilities were tested formally, however, and her pain level has increased significantly in the interim. There is insufficient evidence from which to determine what Claimant's current functional capacities are, therefore. To the extent that Defendant might be obligated to provide vocational rehabilitation services to Claimant, its first step must be to determine objectively the extent of her current functional abilities so that an appropriate return to work plan can be developed. Having said that, it may be appropriate for Defendant to wait to do so until Claimant has completed the treatments alluded to above.

Attorney's Fees and Costs

14. Claimant has requested an award of attorney's fees and costs pursuant to 21 V.S.A. §678. An award of costs to a prevailing claimant is mandatory under the statute; an award of attorney's fees lies within the Commissioner's discretion. Here, Claimant has only partially prevailed. I find it appropriate to award 50% of her allowable costs and attorney's fees. Claimant shall have thirty days from the date of this opinion to submit evidence of these in accordance with Workers' Compensation Rule 10.4000.

ORDER:

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

1. Medical benefits in accordance with Conclusion of Law #7 above;

2. All medical expenses associated with functional capacities testing to determine Claimant's current work capacity and possible entitlement to vocational rehabilitation services;

3. Fifty percent of Claimant's allowable litigation costs and attorney's fees.

DATED at Montpelier, Vermont this 9th day of May 2008.

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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.