Nada Avdibegovic v. University of Vermont (February 23, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Nada Avdibegovic

v.

University of Vermont

Opinion No. 06-09WC

By: Jane Gomez-Dimotsis, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. W-50166

OPINION AND ORDER

Hearing held in Montpelier on August 8, 2008.
Record closed on September 5, 2008.

APPEARANCES:

Steve Robinson, Esq. for Claimant
Glenn Yates, Esq. for Defendant

ISSUES PRESENTED:

1. Was Claimant's January 10, 2008 spinal fusion surgery reasonable and necessary medical treatment pursuant to 21 V.S.A. §640(a)?

2. If yes, is Claimant entitled to any reimbursement for, or interest on, the medical expenses incurred in connection with such surgery?

EXHIBITS:

Claimant's Medical Exhibit and attachments
Defendant's Medical Exhibit and attachments
Deposition of Dr. Martin Krag
Article coauthored by Dr. Scott Tromanhauser entitled "Low Back Pain with Risk Factors for Compromised Recovery"

CLAIM:

Compensation for the differential in medical expenses between the amounts paid by Claimant's group health insurance coverage and the amounts required to be paid according to the Workers' Compensation Medical Fee Schedule;

Interest pursuant to 21 V.S.A. §664;

Costs and attorney's fees pursuant to 21 V.S.A. §678.

FINDINGS OF FACT:

1. Judicial notice is taken of all forms and correspondence contained in the Department's files relating to this claim.

2. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.

3. On June 19, 2004 Claimant injured her lower back while doing janitorial service work for Defendant. Claimant had worked for Defendant for approximately six years prior to her date of injury. She had no prior history of injury or other problems in her back or legs. Claimant suffered an acute lumbar spine injury as a result of her work injury. Defendant accepted this injury as compensable and began paying workers' compensation benefits accordingly.

4. Since the date of injury Claimant has seen numerous doctors. In September 2004 Dr. Binter, a neurosurgeon, performed a bilateral laminotomy and discectomy at L4-5. Claimant did not believe the surgery was successful because she continued to have both lower back and leg pain thereafter. Following the surgery Dr. Binter recommended physical therapy. She also referred Claimant to Dr. Abdu, another spine surgeon, for a second opinion. As of the formal hearing, Dr. Binter had not seen Claimant in almost four years.

5. In March 2005 Dr. Abdu evaluated Claimant for the purposes of rendering a second opinion as to her options for relieving the low back and right leg pain she was continuing to experience. Dr. Abdu noted that although Claimant had undergone physical therapy, pool therapy and injections, these treatments had not alleviated her ongoing pain complaints successfully. Dr. Abdu did not recommend fusion surgery at that point but instead suggested that Claimant undergo a functional restoration program.

6. Dr. Binter disagreed with Dr. Abdu's treatment recommendation. She opined that Claimant's best pain control options were continued physical therapy, pool therapy and work hardening.

7. At her attorney's suggestion, Claimant underwent an evaluation with Dr. Gennaro, an orthopedic surgeon, in May 2005. Dr. Gennaro felt that Claimant had a number of treatment options, including additional physical therapy, medication, pool therapy and lumbar fusion surgery. As to the last option, Dr. Gennaro strongly suggested that Claimant stop smoking prior to undergoing any future surgeries. Cigarette smoking delays the healing process following a fusion and also increases the risk of infection.

8. Claimant is a lifetime smoker. At various periods in her life she has smoked from a half a pack of cigarettes daily to as much as two packs daily. As a result of concerns raised by her medical providers, however, Claimant reduced her smoking to four cigarettes per day. She has maintained herself at that lower level for several years.

9. At Defendant's request, in June 2005 Claimant underwent an independent medical examination with Dr. Jonathan Fenton. Dr. Fenton suggested a pain management regimen. In that context, he referred Claimant to Dr. Cummings for prolotherapy, a treatment that involves injecting sugar water into the ligaments. Claimant attended two appointments with Dr. Cummings, but did not obtain any significant relief of her pain. Dr. Cummings refused to treat her subsequently because she was involved in a workers' compensation case.

10. In 2007 Claimant pursued another course of physical therapy, again without success. By this time she was suffering from depression due to her pain and her limited ability to resume her normal activities.

11. For several years Claimant took significant dosages of pain medications, including methadone and fentanyl patches, in an effort to reduce her pain levels. These medications prevented her from thinking clearly and enjoying her life.

12. Claimant next was referred to Dr. Rinehart for another surgical consult. Dr. Rinehart in turn referred Claimant to Dr. Krag. Dr. Krag is a board certified orthopedic surgeon with many years of experience. He is well published on the topic of fusion surgery. Dr. Krag reviewed Claimant's history and conducted diagnostic testing, including a provocative discogram.

13. Dr. Krag recommended that Claimant undergo fusion surgery. Among the factors he considered was the fact that the discogram revealed excessive angular motion between the L4-5 vertebrae. Dr. Krag also found relevant the fact that Claimant had failed to improve with conservative care such as physical therapy over a period of years.

14. Defendant disputed the reasonable necessity of the fusion surgery recommended by Dr. Krag and instead referred Claimant to Dr. Tromanhauser, a board certified orthopedic surgeon, for an independent medical evaluation. Dr. Tromanhauser later opined that fusion surgery was a reasonable medical option, but not one that he would recommend for Claimant. In his opinion, the results of such a surgery would be unpredictable given Claimant's smoking, her prior lumbar surgery and her difficulty coping with pain.

15. With Dr. Tromanhauser's opinion as support, Defendant refused to pay for the fusion surgery recommended by Dr. Krag. Claimant underwent the surgery nonetheless, on January 10, 2008. As of the formal hearing, she was approximately seven months post-surgery.

16. In Dr. Krag's opinion, the surgery was successful. It reduced Claimant's pain to a more reasonable level, albeit not to the extent she had hoped it would. Claimant continues to struggle with pain but needs less medication and thus is less mentally affected by her medication. She is trying to reconcile her expectations with reality and hopes that she will continue to improve.

17. As Defendant had denied coverage for the fusion surgery, Claimant submitted the medical bills for coverage under her husband's group health insurance provider, Blue Cross/Blue Shield. Claimant's husband also works for Defendant, and receives group health insurance coverage as an employee benefit. There is no evidence that Claimant herself paid any portion of the medical expenses related to her surgery out of her own pocket.

18. Claimant has submitted a claim for costs totaling $1,042.59 and attorney's fees. As to the latter, Claimant argues that her attorney's fees should be based on a contingent fee amounting to either 20% of the total cost of her fusion surgery, estimated to be more than $45,000.00, or $9,000.00, whichever is less.

CONCLUSIONS OF LAW

1. At issue in this claim is whether the spinal fusion surgery Claimant underwent in January 2008 was reasonably necessary. If it was, a secondary issue exists as to whether Claimant is entitled to monetary compensation for the difference between the amounts paid to her medical providers under her husband's group health insurance coverage and the amounts that Defendant would have been obligated to pay under the Workers' Compensation Medical Fee Schedule. Claimant also seeks interest as to any such amounts determined to be due.

2. 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).

3. Vermont's workers' compensation statute obligates an employer to pay only for "reasonable" medical services. 21 V.S.A. §640(a). The Commissioner has discretion to determine what constitutes "reasonable" medical treatment given the particular circumstances of each case. Where the employer has denied responsibility for the treatment *ab initio*, the burden of proving reasonableness rests with the claimant. *P.M. v. Bennington Convalescent Center*, Opinion No. 55-07WC (January 2, 2007).

4. The reasonableness of a medical procedure must be determined from the perspective of what was known at the time the treatment decision was made. *MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009). Expert medical testimony is required to make this determination. *See Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979).

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).

6. Defendant argues that Claimant's spinal fusion surgery was not reasonable because four out of five spine surgeons determined she was not a good candidate for it. Defendant claims that Dr. Krag only agreed to perform the surgery because he "stretched" the case in favor of it.

7. Defendant's argument is unpersuasive. First, none of the four surgeons to which it refers rendered an opinion as to the reasonableness of fusion surgery after all of the diagnostic tests had been completed, as Dr. Krag did. Dr. Binter had not evaluated or treated Claimant for almost four years prior to Dr. Krag's decision to proceed. Drs. Abdu and Gennaro did not see her after 2005. Dr. Tromanhauser saw Claimant in 2007, but his evaluation occurred before the diagnostic studies considered by Dr. Krag were completed.

8. In the intervening years, Claimant's situation changed. Most notably, she significantly reduced the extent of her cigarette smoking, which had been one of Dr. Gennaro's primary concerns in 2005, when he listed fusion surgery as an option but not a recommendation. Claimant also underwent additional attempts at conservative therapy, all of which failed to reduce her pain complaints to more reasonable levels. Dr. Krag noted this consideration as a key factor to his decision to proceed with surgery.

9. It also is significant that while Dr. Tromanhauser did not recommend fusion surgery, he acknowledged that it was a reasonable medical option. By its plain language, §640 requires no more than that.

10. I find Dr. Krag's opinion to be the most credible. It was timelier than any of the other experts' opinions. It adequately considered both the progression of Claimant's subjective complaints despite various attempts at conservative therapy and her objective findings. As a neurosurgeon, Dr. Krag has performed many surgeries of the type he performed for Claimant. His post-surgical determination was that the surgery was successful and that Claimant was experiencing less pain. Although such hindsight is not conclusive on the reasonableness issue, it is noteworthy nonetheless.

11. Claimant testified credibly as to the impact her condition has had on her life, the pain she experienced and the functional limitations she endured. She committed herself to conservative treatment measures, but those failed. Claimant has sustained her burden of proving that the surgical treatment option was a reasonable one for her to pursue.

12. Claimant has no basis, however, for demanding that Defendant pay her the difference between the amounts that her husband's group health insurance carrier paid to her medical providers and the amounts Defendant should have paid pursuant to the Workers' Compensation Medical Fee Schedule. This is a matter for resolution solely between the group health insurance carrier and Defendant.

13. Similarly, there is no basis for awarding Claimant interest. The statute directs that interest be paid on the total amount of "unpaid compensation" awarded to a prevailing claimant. 21 V.S.A. §664. Claimant herself has been awarded nothing, as she did not herself incur any medical expenses. To award her interest under these circumstances would result in a windfall neither contemplated nor intended by the statute. Rather, should any interest be awarded, it should flow to the group health insurance carrier, as it was the one that actually expended the funds that Defendant should have paid. Again, however, that is a matter to be determined between Defendant and the group health insurance carrier, one in which Claimant plays no role.[1]

14. Claimant has prevailed on her claim that her fusion surgery was reasonably necessary, but not on her claim for interest or other monetary compensation. Under these unique circumstances, I find that she is entitled to recover her costs, but not her attorney's fees.

[1] To the extent that this conclusion conflicts with the Commissioner's determination in *Clark v. Consolidated Memorials, Inc.*, Opinion No. 54C-06WC (June 6, 2007), that opinion is now expressly overruled.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED**:

1. Upon request, Defendant shall reimburse the group health insurance carrier, or any other third-party payer, for all medical benefits paid or payable that are related to the January 2008 fusion surgery; and

2. Defendant shall pay costs totaling $1,042.59.

DATED at Montpelier, Vermont this 23rd day of February 2009.

_____
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.