Susan Tanner v. Town of Dorset (March 24, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Susan Tanner	Opinion No. 08-09WC
v.	By: Jane G. Dimotsis Hearing Officer
Town of Dorset	For: Patricia Moulton Powden Commissioner
	State File No. F-20121

OPINION AND ORDER

Hearing held in Montpelier on October 1, 2008
Record closed on November 14, 2008

APPEARANCES:

Patrick Biggam, Esq. for Claimant
Jason Ferreira, Esq. for Defendant

ISSUES:

Is Claimant's medical treatment after 1997 causally related to her 1993 injury and thus, compensable under the Workers' Compensation Act?

If yes, did Claimant subsequently suffer a non-work-related intervening injury that broke the chain of causation and/or aggravated Claimant's work injuries?

EXHIBITS:

Joint Exhibit I: Joint medical exhibit

Claimant's Exhibit 1: *Curriculum vitae,* Dr. George White

Defendant's Exhibit 1: *Curriculum vitae,* Dr. Dominic Belmonte
Defendant's Exhibit 2: Police Accident Report, April 21, 2008

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640
Costs and attorney's fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. 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.

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

Summary of Claim

3. On February 13, 1993 Claimant suffered a work injury to her low back. Claimant's back pain required her to do exercises to strengthen her back that eventually led to a second claim in 1995 related to her right knee. Defendant accepted both injuries as compensable and paid benefits.

4. On July 10, 1997 the parties signed a Form 22 Agreement for Permanent Partial Disability Compensation, stating that Claimant had reached an end medical result for her work-related back and knee conditions. In accordance with that agreement, Defendant paid permanency benefits for both her back and her right knee.

5. On April 21, 2008 in a non-work-related incident, Claimant was struck by a tractor-trailer while driving. As a result of the accident, Claimant asserts she suffered additional knee and back pain for which she is requesting workers' compensation benefits.

Prior Medical Conditions and Treatment

Pre-existing Back Condition and Treatment

6. Claimant testified that she has experienced some form of back pain for the past 27 years. She was diagnosed with significant scoliosis of the spine at age 14, a condition that progressively worsened over the next thirty years prior to her work injury. Claimant also was involved in a head-on car collision with another vehicle when she was 17 years old. She suffered low back pain as a result, which she treated with chiropractic care. In the 1970's Claimant suffered another injury to her low back when she fell down a flight of stairs at work. In the late 1980s she suffered a cervical spine injury while performing clerical work when she turned her head and felt a snapping sensation. This injury caused Claimant to lose time from work and to undergo temporary medical treatment. Last, in February 1987 Claimant complained of both neck and low back pain following a family altercation when she was struck and kicked.

7. In January 1992, a year prior to her work injury, Claimant discussed working as a nurse's aide with her primary care physician, Dr. Novotny. Dr. Novotny wrote that although Claimant had "some medical problems that will place her at increased risk of back problems . . . she has indicated a willingness to work with me to minimize her medical risk factors and . . . in reducing her risks by proper body dynamics. Her increased risk of back problems can be mitigated by appropriate attention to her medical risks and occupational attention to appropriate lifting dynamics."

Pre-existing Knee Condition and Treatments

8. Claimant had bilateral knee injuries at an early age. She had surgery on her right knee in 1967 and on her left knee in 1969 for what was described as "loose ligaments." After surgery and up to the present date, Claimant often wears a knee brace to give her a sense of stability. Although she was able to engage in sports prior to her work injury in 1993 she also needed Ibuprofen to control her knee pain.

Work Injury and Medical Care

9. Shortly after the consultation with Dr. Novotny noted above, Claimant began work for Defendant as a home health aide. As previously stated, she was injured at work while trying to lift a patient. In the course of doing so, Claimant felt two popping sensations in her back and was in a great deal of pain.

10. In April 1993 Dr. Block, an orthopedic surgeon, diagnosed Claimant with right S1 radiculopathy down her right leg from a "probable" L5-S1 disc injury causally related to the lifting incident at work. Eventually it was determined that Claimant had an L4-5 disc bulge.

11. In 1994 Claimant underwent a decompressive laminectomy at L4-5 with disc excision and spinal fusion that included the placement of five facet screws into her spine. Defendant accepted the surgery as compensable and paid workers' compensation benefits accordingly. Unfortunately, the surgery did not alleviate Claimant's back pain significantly. It subsequently was referred to as a "failed" surgery.

12. In order to treat Claimant's continued back pain, in December 1995 Dr. Block removed the spinal hardware that previously had been inserted. Again, Defendant accepted this surgery as compensable and paid workers' compensation benefits accordingly. Claimant had significant pain reduction following this surgery.

Claimant's Right Knee Injury

13. In January 1995 Claimant complained of right knee pain that she related to exercises she had been prescribed to strengthen her low back.

14. Claimant treated for her right knee pain with Dr. Vargas, an orthopedist. Dr. Vargas noted Claimant's long history of knee pain, as well as her prior knee surgeries. He diagnosed chondromalacia of the patella. Chondromalacia of the patella is the abnormal softening of the cartilage under the kneecap. It occurs when the kneecap is aligned poorly over the femur, causing the cartilage there to deteriorate. The condition is sometimes referred to as patellofemoral syndrome or condition. In Claimant's case, the condition relates back to the bilateral knee surgeries she underwent in the 1960's.

15. Following the January 1995 incident of right knee pain, Claimant underwent an MRI, which showed a large *congenital* chondral defect in the lateral patella facet consistent with chondromalacia of the patella.

16. Based on the results of a CT scan, knee surgery was recommended and performed by Dr. Robbins in October 1996. It involved cutting and repositioning the bone in Claimant's right knee, and then drilling and placing screws into the joint. Dr. Robbins' post-surgery diagnosis included patellofemoral pain, arthritis and previous reconstruction of Claimant's knees with tendonitis. Defendant accepted this surgery as a compensable outgrowth of Claimant's original 1993 work injury as aggravated by the 1995 back strengthening exercises. It is not a subject of the current dispute.

17. Claimant continued to have knee pain after the surgery and she was observed to have degenerative arthritis bilaterally in her patellofemoral joints. Nevertheless, she was declared to be at end medical result for both the 1993 back injury and the 1995 right knee injury and returned to work part-time.

18. As noted, in July 1997 the parties signed a Form 22 Agreement for Permanent Partial Disability Compensation, pursuant to which Defendant paid permanency benefits for a 29% impairment to Claimant's low back and a 10% impairment to her right knee.

Claimant's Medical Treatment After July 1997

Back Treatment

19. Claimant had significant pain relief for two or three years after her 1995 back surgery. She did continue to have some pain when the weather was bad and the barometric pressure was low. However, she was able to work at a variety of jobs as a store clerk and prep cook. Medical records indicate that Claimant was the most improved she had been in a long time, and that she hoped to begin yoga and tai chi classes.

20. Claimant did continue to complain of episodic low back pain. In November 1998 her treating osteopath, Dr. Woodworth prescribed ongoing narcotic pain medication for her chronic pain. Dr. Woodworth expected that Claimant would need these medications indefinitely. Claimant has taken Percocet and Oxycontin continuously for her back and knee pain and Soma for muscle spasms.

21. Claimant continued to treat with a variety of providers for her chronic low back pain. In 1999 she underwent nerve conduction studies with Dr. Kloman, who diagnosed her with atypical fibromyalgia syndrome and chronic pain syndrome. Dr. Kloman did not distinguish between the medical problems Claimant had as a result of her work injury and her other, non-work-related medical issues, including depression, pain from her scoliosis, and arthritis.

22. Claimant treated her chronic back pain with chiropractic manipulations. Later, when she moved to New York to live with her mother she treated with Dr. Hardies, a primary care doctor, Dr. Cecil, an orthopedist, and Dr. Whalen, an orthopedic surgeon. All of these providers attributed Claimant's condition primarily to her scoliosis, which they described as "severe." For example, in 2005 Dr. Hardies noted that Claimant's scoliosis had become so severe that it was compromising her ability to have adequate respiratory function and was producing severe back and lower extremity pain. Later, in 2006 Dr. Whalen stated that Claimant's "severe degenerative progressive scoliosis" was the "major problem" with her back.

Knee Treatment

23. Claimant also continued to suffer from right knee pain after being declared at an end medical result for her work injury. She treated with numerous orthopedists, including Dr. Boynton, Dr. Matheny and Dr. Czajka. All recommended conservative treatment, including stretching and strengthening exercises. None of the these doctors provided opinions to the necessary degree of medical certainty as to the cause of Claimant's right knee symptoms but all agreed that that it involved patellofemoral arthritis.

24. By 2004 Claimant was experiencing pain in both knees. An MRI in September 2005 revealed degenerative osteoarthritis bilaterally.

25. Claimant continued to follow up with a number of doctors. Throughout this period she took a variety of medications for her pain, including Soma, a muscle relaxant that also reduces the way the brain perceives pain, Lyrica for muscle spasms, Oxycontin, a narcotic pain medication, and Percocet, a narcotic medication for "break-through" pain. Claimant has been taking these medications continuously since the late 1990s.

Alleged Intervening Event and Treatment

26. On April 21, 2008 Claimant was involved in a motor vehicle accident in New York when she was struck by a tractor-trailer. Claimant was transported by ambulance and treated at the hospital Emergency Department. She testified that her lumbar spine muscles "locked up" and that she could not feel her legs.

27. Claimant's immediate complaints were neck pain and numbness in her legs. She sought treatment for these symptoms with Dr. Hardies, her primary care provider. Dr. Hardies noted that as a result of the motor vehicle accident Claimant had sustained injuries to both her knees, right more painful than left, and to her back, primarily her cervical spine. Dr. Hardies recommended physical therapy, medications and x-rays.

28. Claimant went only twice to physical therapy and then decided she could do her exercises at home. Consistent with Dr. Hardies' notes, the physical therapy records indicate that her primary problem areas were her cervical spine and bilateral knees.

29. In May 2008 Claimant underwent a lumbar spine MRI, which revealed a right-sided paracentral disc protrusion at L3-4. The medical experts later disagreed as to whether this finding represented a new injury causally related to the motor vehicle accident.

30. Claimant last treated for the injuries she sustained in the motor vehicle accident in June 2008. At that time, Dr. Cecil, her orthopedist, related her current bilateral knee pain to her pre-existing arthritis. Claimant testified that three months after the accident she was back to her "old rotten self."

Independent Medical Examinations

31. At Defendant's request, Claimant underwent an independent medical examination of her right knee with Dr. Bernini, an orthopedic surgeon, in December 2001. Dr. Bernini noted that Claimant had suffered bilateral knee pain ever since her surgeries in the 1960's. Notwithstanding her pre-existing condition, however, Dr. Bernini concluded that Claimant still had not recovered from her more recent work-related knee surgery therefore had not yet returned to her baseline condition.

32. Claimant underwent a second independent medical evaluation in August 2002, this time with Dr. Kinley, another orthopedist. Dr. Kinley concluded that Claimant's low back symptoms were causally related to her 1993 work injury, but that her knee complaints were not. Specifically, in Dr. Kinley's opinion, Claimant's knee complaints most likely were related to subluxation of her patella, a congenital condition neither caused nor aggravated by the 1995 back strengthening exercises. Dr. Kinley also noted arthritis in both of Claimant's knees, which again he felt predated her work injuries. In September 2002 Dr. Kinley stated that Claimant had reached her "pre-accident" status and was at end medical result for any work-related injury to her knees.

33. At Defendant's request, in January 2007 Claimant underwent an independent medical evaluation with Dr. Belmonte, an occupational medicine specialist. Dr. Belmonte concluded that Claimant had suffered an acute lumbar strain as a result of her 1993 work injury. However, he determined that after her spinal surgery her low back condition stabilized. He therefore concluded that Claimant's current back pain was due to her pre-existing progressive scoliosis, which over time had caused her spine to become curved and misaligned. Dr. Belmonte related all of the medical treatment Claimant received after her second spinal surgery to the natural progression of this prior condition, and not to her 1993 work injury.

34. Regarding Claimant's right knee, Dr. Belmonte determined that following her 1996 surgery her symptoms resolved and she returned to "status quo." Dr. Belmonte opined that Claimant's current knee condition was related to arthritis caused by her prior knee injuries and had not been aggravated by the 1995 back strengthening exercises. On those grounds, Dr. Belmonte found that none of the treatment Claimant had undergone for her knee pain after 1996 was causally related to her work injuries.

35. Claimant argues that Dr. Belmonte did not have all of the medical records concerning her right knee when he issued his original report. However, by the time of the formal hearing, Dr. Belmonte had reviewed all of the records and his opinions remained constant.

36. In November 2007 Claimant underwent an independent medical evaluation with a doctor of her choice, Dr. White. Dr. White is an occupational medicine specialist who, like Dr. Belmonte is highly credentialed in that area. Dr. White evaluated Claimant for both her chronic back and knee conditions. At the time of his evaluation, however, he had little information about either Claimant's prior knee injuries or her scoliosis.

37. Dr. White concluded that Claimant's back pain was causally related to her 1993 work injury and not to her scoliosis. He noted that back fusion surgery can create a risk of adjacent disc degeneration and that therefore Claimant's low back symptoms probably resulted from her 1994 surgery. However, at the time Dr. White issued this opinion he was not aware either that Claimant had suffered from scoliosis in both her cervical and lumbar spine prior to the 1993 injury or that she had experienced low back pain previously as well. Given that Dr. White's conclusion was based at least in part on his assumption that Claimant's scoliosis was confined to her cervical spine, and that therefore it would not have been responsible for lumbar pain, this gap in his understanding of Claimant's medical history is significant.

38. As for her right knee, Dr. White concluded that Claimant did have a pre-existing pathology of patellofemoral chondromalacia. However, he found that the March 1995 injury Claimant sustained while doing back strengthening exercises had aggravated this prior condition, and that "there [had been] no change in that situation." Again, however, Dr. White's conclusion in this regard was based on an inaccurate understanding of Claimant's medical history, specifically Claimant's representation that she had not suffered from significant knee pain prior to 1995. For example, Dr. White was not aware that Claimant often wore a knee brace prior to her work injury or that she took pain medications for her knee symptoms. Dr. White's opinion also fails to account for the fact that while Claimant allegedly injured only her right knee in the 1995 incident she suffered from the same symptoms in her left knee as well.

IME Opinions Related to the 2008 Motor Vehicle Accident

39. After comparing the MRI study done after Claimant's 2008 motor vehicle accident with the one taken three years prior, Dr. Belmonte concluded that the car accident had aggravated the underlying condition of her lumbar spine. In his opinion, the more recent MRI revealed an increase in pathology in that area.

40. Dr. Belmonte also found that the car accident caused an increase in Claimant's right knee symptoms. As noted above, however, in Dr. Belmonte's opinion Claimant's right knee symptoms dated back to the injuries she sustained in the 1960's and therefore were never causally related to her 1995 work injury at all.

41. Dr. White disagreed with Dr. Belmonte's conclusions. In his opinion, Claimant's back and knee conditions were not significantly different after the 2008 motor vehicle accident from what had existed previously. Therefore, Dr. White concluded that the car accident caused only a temporary exacerbation, following which Claimant returned quickly to her baseline condition. Again, in reaching this conclusion Dr. White stated that Claimant had not told him that she had suffered from any low back pain prior to the 1993 work injury. Dr. White admitted that had his understanding of Claimant's prior medical history been more accurate his opinions might have changed.

42. Dr. White also concluded that the 2008 motor vehicle accident did not aggravate Claimant's underlying knee condition. Again, however, Dr. White's conclusion in this regard was based at least in part on his inaccurate understanding of Claimant's prior medical history. Specifically, Dr. White testified that Claimant's knees had been "wonderful" prior to her 1995 work injury. As noted above, he was unaware either that Claimant wore a knee brace prior to that injury or that she took pain medications.

43. Claimant's attorney has submitted a request for costs totaling $3,582.68 and attorney's fees totaling $7,101.00.

CONCLUSIONS OF LAW

1. Claimant asks that all medical treatment for her low back and right knee subsequent to July 1997 be found compensable. Defendant disagrees. It argues that any such treatment was necessitated by her pre-existing scoliosis and degenerative arthritis. Defendant further argues that the 2008 motor vehicle accident aggravated her underlying conditions and broke the causal connection between her ongoing symptoms and her 1993 and 1995 work injuries.

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. Once the employer accepts a claimant's injuries as compensable, as Defendant did here, the burden shifts to it to establish a sufficient basis for terminating compensation. *Merrill v. University of Vermont*, 133 Vt. 101 (1974).

4. 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).

5. Claimant refers to Dr. White's expert medical opinion in support of her claim, while Defendant relies on Dr. Belmonte. Both doctors performed independent medical evaluations in 2007 and then received additional information regarding the 2008 motor vehicle accident. Neither had a treating relationship with Claimant. Both were hired specifically to evaluate her knee and back injuries for the instant case.

6. Both physicians are highly credentialed in the area of occupational medicine. Dr. White has practiced occupational medicine for approximately twenty years. He is the staff physician for the Functional Capacity Evaluation Center and frequently performs independent medical evaluations. He also is the founder of Occupational Health Logic, a company that strives to provide solutions to businesses related to occupational health issues. For his part, Dr. Belmonte also has practiced in the field of occupational medicine for almost twenty years. He is board-certified both as an Independent Medical Examiner and as an occupational medicine specialist. His current practice includes consultations, occupational medicine program development and evaluations.

7. Issues arose at hearing regarding whether either medical expert had all of the relevant medical information at the time that they issued their opinions. As previously noted, at the time Dr. White evaluated Claimant he did not have detailed information about the back and knee problems from which she suffered even prior to her work injuries. He did not know that Claimant had used a brace continuously for her knee, or that she had been diagnosed with both lumbar and cervico-thoracic scoliosis.

8. At the time Dr. Belmonte wrote his report, he did not have all the medical records regarding Claimant's right knee. Unlike Dr. White, however, who admitted that his opinions might have changed had he had a more accurate picture of Claimant's prior medical history, Dr. Belmonte testified that even after reviewing the medical records he originally had lacked, his conclusions as to causal relationship remained constant.

9. I find Dr. Belmonte's opinions to be the most persuasive. He was aware of the extent of Claimant's prior back and knee conditions and the effect that arthritis, osteoporosis and degeneration from age would have on them. He determined that any evaluation or treatment for Claimant's back related back to her preexisting scoliosis, a progressive condition from which Claimant had suffered since the early 1960's, and not in any way to her 1993 work injury.

10. The fact that Claimant returned to work in 1996 lends further support to Dr. Belmonte's opinion. It shows that her back had stabilized to the point that she was able to be employed.

11. As for Claimant's current right knee pain, Dr. Belmonte testified that she continues to suffer from patellofemoral chondromalacia, a condition that pre-existed the injury she sustained while doing back strengthening exercises in 1995. In Dr. Belmonte's opinion, the 1995 incident aggravated Claimant's right knee symptoms only temporarily, following which her condition stabilized and returned to baseline. This conclusion is consistent with Dr. Kinley's findings. Dr. Belmonte therefore determined that any treatment Claimant received for her right knee after 1996 was causally related to her advanced arthritis, a condition that was neither caused nor aggravated by her work injury. Dr. Belmonte's opinion in this regard credibly accounts for the fact that notwithstanding the injury caused to Claimant's right knee as a result of the 1995 event, its condition subsequently was essentially the same as that of her left knee.

12. I conclude, therefore, that Claimant reached an end medical result for both her 1993 work-related back injury and her 1995 work-related right knee injury at least as of July 1997, when the parties executed a Form 22 Agreement for Permanent Partial Disability Compensation. Any medical treatment she received subsequently was causally related to her pre-existing conditions, and not to either of her compensable injuries.

13. I further conclude that Claimant's 2008 motor vehicle accident did not aggravate her work-related injuries in any way.

14. Claimant having failed to prevail on either of her claims, she is not entitled to an award of costs or attorney's fees.

ORDER

Based on the foregoing findings of facts and conclusions of law, Claimant's claim for workers' compensation benefits covering the medical treatment she has received since July 1997 is hereby **DENIED**.

DATED at Montpelier, Vermont this 24th day of March 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.