

Rhonda Luff v. Rent Way

(February 16, 2010)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Rhonda Luff

Opinion No. 07-10WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Rent Way

For: Patricia Moulton Powden
Commissioner

State File No. Y-59829

OPINION AND ORDER

Hearing held in Montpelier, Vermont on October 12, 2009

Record closed on October 26, 2009

APPEARANCES:

Christopher McVeigh, Esq., for Claimant

John Valente, Esq., for Defendant

ISSUE PRESENTED:

Does Claimant's ongoing treatment since September 10, 2008 negate Defendant's previous end medical result determination?

EXHIBITS:

Joint Exhibit 1: Medical records

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

3. Claimant has worked for Defendant, a rent-to-own business, since 2004. Beginning in 2006 she was the manager of Defendant's Morrisville, Vermont store. As part of her job duties, Claimant was responsible for arranging and rearranging the showroom floor. This was a physically demanding job, which required her to move both furniture and appliances, sometimes without assistance.
4. On March 6, 2007 Claimant was rearranging the showroom floor. As she attempted to move a front-loading washing machine, her back "gave way." Claimant experienced the immediate onset of severe low back pain radiating down to her left leg.
5. Claimant was diagnosed with a herniated disc at L5-S1, for which she underwent lumbar spine surgery with Dr. Archambault on May 1, 2007. Following surgery Claimant experienced some relief of her back pain, but the pain and paresthesias in her left leg continued.
6. At Dr. Archambault's referral, in September 2007 Claimant underwent EMG testing with Dr. Roomet, a neurologist. Dr. Roomet reported normal findings, and questioned whether there might be a psychophysiological overlay to her ongoing complaints.
7. In October 2007 Claimant was referred to Dr. Penar, a neurosurgeon, for further evaluation and treatment. Dr. Penar in turn referred Claimant to Dr. Munoz, a pain management specialist. Dr. Munoz administered two epidural steroid injections, the first in January 2008 and the second in April 2008. Such injections serve both diagnostic and therapeutic purposes. Unfortunately, in Claimant's case they proved ineffective at relieving her left lower extremity symptoms.
8. Upon learning that the steroid injections had failed to alleviate Claimant's leg pain, in April 2008 Dr. Penar suggested that it might be appropriate to consider a spinal cord stimulator. This is a surgically implanted device comprised of electrodes that are placed in the epidural space of the spine. When the electrodes are activated, they prevent chronic pain signals from getting through. By doing so, the device provides long-term pain relief, even though it does not "fix" the underlying disc defect or nerve root injury in any way.
9. Not every chronic pain patient is an appropriate candidate for a spinal cord stimulator. Not only must the patient have tried and failed conservative treatment, but he or she also must be cleared psychologically. Even then, the device is not always effective at controlling pain. For that reason, before it is fully implanted surgically, a patient first must undergo an external trial.
10. Shortly after Dr. Penar's April 2008 evaluation, on April 25, 2008 Claimant was involved as a passenger in a motor vehicle accident. Claimant presented to the hospital emergency room complaining of both head and low back pain. X-rays were negative. Claimant testified that the accident exacerbated her pain for a few days; then it returned to its baseline level. None of the medical professionals who have treated and/or evaluated her since then have in any way attributed her ongoing symptoms to the motor vehicle accident.

11. In May 2008 Dr. Munoz discussed the spinal cord stimulator treatment option with Claimant. Without a more complete history and physical examination, as well as psychological clearance, Dr. Munoz felt unable at that point to determine whether Claimant was an appropriate candidate.
12. For her part, Claimant testified that her understanding of the spinal cord stimulator treatment as Dr. Munoz had described it was that the trial implantation would leave her essentially bed-ridden for at least two months. If the trial was successful, Claimant understood that following implantation of the permanent device her activities would be severely limited for an additional six months after that. With five children to care for, Claimant found this scenario untenable. She decided not to pursue the treatment.
13. At Defendant's request, on July 18, 2008 Claimant underwent an independent medical evaluation with Dr. Davignon, an occupational medicine practitioner. Dr. Davignon testified that he discussed the spinal cord stimulator option with Claimant, and she advised him she did not wish to proceed with it. With that in mind, Dr. Davignon determined that Claimant had exhausted her treatment options and thus was at end medical result, with a 12% whole person permanent impairment.
14. With Dr. Davignon's end medical result determination as support, Defendant discontinued Claimant's temporary total disability benefits effective August 15, 2008.
15. On September 10, 2008 Claimant presented for evaluation and treatment with Dr. Bonnabesse, a pain management and rehabilitation specialist. Dr. Bonnabesse diagnosed Claimant with lumbar radiculopathy, possibly due to a recurrent disc herniation, or to epidural scarring from her 2007 surgery, or to some combination of both.
16. In Dr. Bonnabesse's opinion Claimant was not at end medical result as of his September 10, 2008 evaluation. As treatment, he recommended another series of epidural steroid injections and possibly a trial of lumbar epidurolysis. Dr. Bonnabesse also considered a spinal cord stimulator trial to be a reasonable treatment option, though admittedly a last resort alternative in the event his other recommendations proved unsuccessful.
17. Claimant testified that as Dr. Bonnabesse described the spinal cord stimulator treatment, the trial period would last only five days. Were it to prove successful, after implanting the permanent device Claimant's activities would be somewhat restricted for approximately six weeks. Claimant found these timeframes to be far more manageable than what she had understood from Dr. Munoz. Consequently, she decided that the treatment was worth pursuing.

18. Upon learning that Claimant had “had a change of heart” and now wished to proceed with further therapy, including both injections and a spinal cord stimulator trial, Dr. Davignon reconsidered his end medical result determination. He doubted that further injection therapy would be of significant benefit to Claimant, though he acknowledged that that did not make it an unreasonable treatment option. As for the spinal cord stimulator, Dr. Davignon felt incapable of assessing whether it would be beneficial, but again acknowledged that it was a reasonable option for Claimant to pursue. As to the question of end medical result, however, Dr. Davignon refused to concede that Claimant’s “change of heart” had materially undermined his July 2008 determination. In his opinion, neither treatment was likely to result in significant improvement in her underlying condition.
19. Claimant has treated regularly with Dr. Bonnabesse (or with his nurse practitioner, Russell Jones) since September 2008. Dr. Bonnabesse’s records document the following:
- In January 2009 Claimant underwent another epidural steroid injection. Dr. Bonnabesse suspected that the injections Dr. Munoz had administered in 2008 may not have adequately covered the involved nerve root, and therefore felt that a repeat series with more precise needle placement was appropriate.
 - In March 2009 Claimant underwent another EMG study, which revealed abnormal findings indicative of nerve root compromise. Dr. Bonnabesse testified that the abnormal findings were very subtle and may have been present but undetected at the time of Dr. Roomet’s September 2007 EMG testing.
 - In May 2009 Dr. Bonnabesse recommended another injection, but Defendant refused to approve payment. At this point, Dr. Bonnabesse reported that Claimant was awaiting a neurosurgery consultation at Dartmouth Hitchcock Medical Center.¹
 - In August 2009 Claimant underwent a repeat MRI, which documented nerve root impingement in a manner consistent with Claimant’s symptoms.
 - In September 2009 Dr. Bonnabesse retracted his recommendation for another injection, as he believed this would at best give Claimant only temporary relief of her symptoms. Instead, Dr. Bonnabesse advocated for a spinal cord stimulator trial.
20. Dr. Bonnabesse testified that the goal of the spinal cord stimulator treatment is to achieve better long-term control of Claimant’s chronic pain, improve her ability to function and reduce her reliance on pain medications.

¹ At the formal hearing, which occurred on October 12, 2009, Claimant testified that she was scheduled to see Dr. Sengupta, a Dartmouth Hitchcock neurosurgeon, the following day. Claimant understood the purpose of this evaluation to be a second opinion as to whether surgery might be a viable treatment option for her.

21. At the formal hearing, Claimant described the pain in her left leg as “tormenting.” She testified that it is always present, and has had a severe impact on her daily life. Claimant expressed hope that the spinal cord stimulator will improve her ability to move about and function more comfortably. Dr. Davignon acknowledged in his testimony that if the spinal cord stimulator treatment successfully improved Claimant’s ability to perform daily living activities, this might result in a minor decrease in her permanent impairment rating.

CONCLUSIONS OF LAW:

1. In workers’ compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. Once a claim has been accepted and benefits have been paid, the party seeking to discontinue bears the burden of proving that it is proper to do so. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974).
3. Here, Claimant does not dispute that based on Dr. Davignon’s July 18, 2008 end medical result determination Defendant properly discontinued her temporary disability benefits in August 2008. Where the parties disagree is as to the legal significance of Claimant’s subsequent “change of heart” regarding the spinal cord stimulator treatment. Defendant argues that the spinal cord stimulator is a palliative treatment, one that might alleviate her pain symptoms but will not alter the underlying pathology in her lumbar spine in any way. Therefore, Defendant asserts, Claimant’s decision to pursue the treatment has not changed her end medical result status in any way. Claimant disagrees. She argues that if successful, the treatment will significantly improve her pain condition, increase her ability to function and thus advance her “medical recovery process.” This, she asserts, negates Defendant’s previous end medical result determination.

4. Vermont's workers' compensation rules define the terms "end medical result" and "palliative care" as follows:

"End medical 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. *Workers' Compensation Rule 2.1200*.

"Palliative care" means medical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition. *Workers' Compensation Rule 2.1310*.

5. The Vermont Supreme Court has applied these concepts to determine an employer's right to discontinue temporary disability benefits. In *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996), the Court was asked to reject an employer's discontinuance on end medical result grounds because the claimant was continuing to undergo chiropractic treatments designed to relieve his ongoing symptoms. The treatments improved his ability to walk, restored his sleep patterns, enabled him to work part time and allowed him to perform simple household chores. Nevertheless, the Court determined that the treatments, though medically necessary, did not negate a finding of end medical result because they were not "reasonably expected to bring about significant medical improvement" in his underlying condition. *Id.* at 533.
6. Defendant correctly notes that the Commissioner has applied the Court's reasoning in *Coburn* to at least one recent case involving palliative chiropractic care, *see N.C. v. Kinney Drugs*, Opinion No. 18-08WC (May 9, 2008). In another recent case, however, the Commissioner determined that the claimant's physician had proposed further treatments, including both spine injections and a spinal cord stimulator trial, which effectively negated the employer's end medical result determination. *M.A. v. Ben & Jerry's*, Opinion No. 44-08WC (November 5, 2008).
7. The difference between the two decisions lies in the nature of the treatments at issue. In *N.C. v. Kinney Drugs*, the chiropractic treatments the claimant was continuing to undergo were entirely open-ended time-wise, but yet provided only short-term, temporary symptom relief. To allow such treatments to negate a finding of end medical result effectively would have extended the claimant's right to temporary disability benefits indefinitely.

8. As is the case here, however, the therapies proposed in *M.A. v. Ben & Jerry's* involved relatively discrete, finite courses of treatment with anticipated long-term results. The distinction is critical. With a defined treatment period, the risk of delaying the point of end medical result beyond what is a reasonable time frame for gauging success is minimized. Because such treatments offer long-term symptom relief rather than just a temporary reprieve, furthermore, they provide real hope of significant improvement in the claimant's medical recovery process.²
9. The Supreme Court has directed that Vermont's workers' compensation law be liberally construed in keeping with its benevolent objectives and remedial nature. *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983). Interpreting the concept of a "medical recovery process" to include a finite course of treatment directed at an injured worker's long-term functional restoration accomplishes this goal. Excluding such treatment from consideration in the context of end medical result does not.
10. I conclude, therefore, that Dr. Davignon's July 2008 end medical result determination ceased to control Claimant's entitlement to temporary disability benefits as of September 10, 2008, the date she opted to pursue the course of treatment Dr. Bonnabesse recommended. Notably, Dr. Bonnabesse's treatment plan included not just spine injections and consideration of a spinal cord stimulator (both of which Dr. Davignon agreed were reasonable treatment options), but also further diagnostic testing. Considered as a whole, Dr. Bonnabesse's suggested course was reasonably calculated to lead to further improvement in Claimant's medical recovery. As of the date Claimant elected to proceed, therefore, she was no longer at end medical result.

² The Commissioner also has ruled that a claimant's participation in a functional restoration program negates a finding of end medical result. *Cochran v. Northeast Kingdom Human Services*, Opinion No. 31-09WC (August 12, 2009); *D.D. v. Northeast Kingdom Human Services*, Opinion No. 47-06WC (January 9, 2007). As the name suggests, the goal of such a program is to restore function, typically not by "fixing" the underlying condition but rather by teaching the patient how best to work through pain. Like the treatments at issue in the current claim, and unlike the chiropractic treatments at issue in both *Coburn* and *K.C. v. Kinney Drugs*, functional restoration programs involve a defined treatment period designed to achieve long-term results.

ORDER:

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

1. Temporary total disability benefits commencing on September 10, 2008 and continuing until properly discontinued pursuant to 21 V.S.A. §§643 and 643a, with interest in accordance with 21 V.S.A. §664; and
2. Costs and attorney fees in amounts to be established in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this ____ day of February 2010.

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.