STATE OF VERMONT
DEPARTMENT OF LABOR

Linda Souligny

v.

PB&J, Inc.

Opinion No. 02-17WC

By: George K. Belcher, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. DD-55680

OPINION AND ORDER

Hearing held in Montpelier, Vermont on November 8, 2016
Record closed on December 9, 2016

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
David A. Berman, Esq., for Defendant

ISSUE PRESENTED:

Does Claimant's ongoing chiropractic care constitute reasonable treatment for her October 17, 2011 compensable work injury?

EXHIBITS:

Joint Exhibit I: Medical records from January 24, 2001 through October 20, 2016

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 and correspondence contained in the Department's file relating to this claim.

3. Claimant is a 66-year old certified pre-school educator with a long history of pre-school childcare work. While working at Defendant's childcare center on or about February 28, 2008, she was lifting children onto stacked cribs and changing tables. Her back "went out" and she felt pain on her left side, with radiating pain and numbness into her left thigh.

4. Claimant was diagnosed with low back pain, with positive MRI findings for degenerative disc disease. As treatment, her primary care provider, Kim Ladue, APRN, referred her for chiropractic care. Thereafter, she treated with Dr. Gilbert, a chiropractor, until July 2008, when she began a clinical withdrawal from chiropractic care.

5. On October 17, 2011 Claimant suffered another back injury at work. In this incident, she was bending over a table to wash it, and was unable to straighten her back until she returned home.

6. Defendant accepted both the 2008 and the 2011 low back injuries as work-related, and paid workers' compensation benefits accordingly.

7. On October 26, 2011 Claimant again sought chiropractic care, this time with Dr. Shawn McDermott. She has continued to treat regularly with Dr. McDermott and Dr. Mustoe since that time, approximately once every one and a half to two weeks. She finds that the treatment is beneficial to her.

8. Claimant has not worked since September 2012.

9. Since her 2008 and 2011 work injuries, Claimant has pursued physical therapy, pool therapy, pain medications, surgical consultations, electro-stimulation therapy, chiropractic manipulations, radiographs and MRI studies. She has been treated or evaluated by nine medical doctors, including three orthopedic surgeons, two occupational medicine specialists and one neurologist, three chiropractors, one advanced practice nurse, one family nurse practitioner, a physical therapist and an occupational therapist. It is generally recognized in the medical records that she is not a surgical candidate.

10. Claimant has had a long history of low back and sciatic pain associated with her work injury. Her symptoms vacillate. Her current physical condition limits her ability to work and perform activities of daily living. To manage her symptoms, she takes anti-inflammatory medications and Tramadol, a narcotic pain medication. She also has taken muscle relaxants. She also derives some measure of pain relief from a TENS (transcutaneous electrical nerve stimulation) unit, which she has used for about three years. She currently performs self-guided pool therapy about two times per week, including walking fore and aft in the water (with high leg lifts going forward), doing several laps around the pool while performing a core muscle exercise, and hanging on a float for spinal traction. She also does a daily half-hour home exercise program, during which she uses a yoga ball and performs traction exercises on the floor.

11. Claimant testified that she often feels "locked up" before her chiropractic treatments. Her left leg feels shorter than her right one, and she fears tripping. She has pain and stiffness. Following her chiropractic visits she feels looser and the tightness is gone. She feels more stable and is better able to bend, walk up and down stairs and walk and sit for longer periods of time. Her pain is reduced. She feels that she is more functional after her chiropractic treatments and her activities of daily living are more attainable. She is better able to perform other movement activities as well after her chiropractic treatments. The benefit seems to last for one and a half to two weeks, at which time the symptoms return and she feels the need for additional treatment. I find this testimony credible.

12. The week prior to the formal hearing in this matter, Claimant saw a physical therapist to improve her strength-building pool exercises.

13. Claimant credibly testified that as between her chiropractic treatments and her pool therapy, she derives greater relief from her chiropractic visits.

14. Claimant credibly testified that during those periods in 2012 and 2015 when she was not receiving chiropractic care but was still engaged in pool therapy and home exercises, her pain and tightness returned, she suffered leg spasms and became less functional.

Dr. Rudolf's Testimony

15. Dr. Rudolf is an orthopedic surgeon specializing in spine and reconstructive surgery. He has practiced medicine in New Hampshire since 1987. Dr. Rudolf was jointly hired by the parties to evaluate Claimant. His charge was to review her diagnosis and medical course; in doing so he was not directed to focus on any particular aspect of her treatment, whether chiropractic or otherwise. Dr. Rudolf was paid for his evaluation jointly by the parties.

16. Dr. Rudolf evaluated Claimant in April 2016. In addition to his clinical examination, he reviewed her pertinent medical records.

17. Dr. Rudolf diagnosed Claimant with a "degenerative lumbar spine with several episodes of exacerbation resulting in increased back pain in the absence of any neurological deficit." In his opinion, her treatment to date had been appropriate. Going forward, he recommended that Claimant continue with pain medications as needed, anti-inflammatories, TENS and self-directed land and pool therapy.

18. As to chiropractic treatment, Dr. Rudolf asserted that there was apparently no "scientific basis" for continued chiropractic involvement, and that the "scientific literature" did not confirm any long-term benefit for treatment of degenerative lumbar spine conditions. According to his analysis, despite years of chiropractic treatment, Claimant had not enjoyed any "permanent or . . . long-term symptom control." With those considerations in mind, at hearing Dr. Rudolf testified that it was time for Claimant to be "emancipated" from further chiropractic care.

19. Dr. Rudolf was unable to cite to any specific study to support his reference to "scientific literature." He testified generally that long-term chiropractic care was not in Claimant's "best interests," but failed to describe in what way it was detrimental to her. He also failed to explain why the short-term pain relief Claimant derived from chiropractic care was any less desirable, efficacious or appropriate than the short-term relief provided by pain medications or a TENS unit. Last, he was unfamiliar with the meaning of the term "palliative treatment" in the workers' compensation context. For those reasons, I find his opinion unpersuasive.

Dr. Binter's Testimony

20. Dr. Binter is a board certified neurosurgeon. She maintained a private neurosurgery practice in Vermont for 24 years. At Defendant's request, she performed two independent medical examinations of Claimant – the first in April 2012 and the second in April 2015. In both evaluations, her diagnosis was essentially the same – chronic low back pain secondary to degenerative disease without neurological deficit. Also in both evaluations, as treatment Dr. Binter recommended anti-inflammatory medications and strengthening exercises.

21. In Dr. Binter's opinion, ongoing chiropractic care is not an appropriate treatment for Claimant's condition. Her reasoning was two-fold: first, there is no scientific basis showing that long-term chiropractic care is effective for low back dysfunction; and second, because such treatment is passive rather than active, it undermines the goal of increasing muscle strength rather than decreasing it. Specifically, Dr. Binter testified as follows:

> Q. (Mr. Berman): Do you see any harm or risk with chiropractic care?
> A. (Dr. Binter): My concern about long term chiropractic care is, number one, there is no scientific basis demonstrating that it is effective; number two, it encourages a passive treatment which in the long run is exactly the opposite of what we want patients to do. We want them to be stronger, independent and self-managing . . . so I would say the same thing about massage therapy or any other passive therapy. It has not been shown to be effective and the passive kind of behavior lifestyle that you can easily get into is, in fact, pretty deleterious because loss of muscle strength at any age, but particularly as you get older, is deadly.

22. Dr. Binter observed that at the time of her 2012 and her 2015 evaluations, Claimant was "deconditioned;" in her opinion, she was losing strength as well.

23. Dr. Binter disagreed with the concept that chiropractic care is necessary in Claimant's case because of any "mechanical dysfunction" in her lumbar spine. In her opinion, chiropractic adjustment might make Claimant feel better, but it does not change the "structure" of her spine in any way.

24. Dr. Binter acknowledged that according to the scientific literature, chiropractic care might provide short-term pain relief for a period of approximately two months following an acute injury.

25. When asked which scientific studies she had relied on to show that long-term chiropractic care was ineffective for treating low back dysfunction, Dr. Binter cited only one, entitled *Cochran Collaboration Spinal Manipulative Therapy for Chronic Low Back Pain, Update of Cochran Review*, 2011. She characterized this study as the best summary available, at the same time noting, "[T]his is a completely subjective environment, so it's a little bit difficult to apply hard science to completely subjective symptoms." She admitted that scientific evidence in the area of chiropractic manipulation "is very challenging to come by," and also that she spent "quite a bit of time looking for some kind of evidence" that she could reference in her testimony.

26. Dr. Binter did not recall asking during either of her evaluations whether Claimant was experiencing pain relief and/or increased functional ability as a result of her chiropractic care. Neither of Dr. Binter's reports reflected any such inquiry.

27. Dr. Binter did not specifically address whether temporary relief of Claimant's pain and other symptoms might enable her to increase activity and better manage self-directed land or pool therapy.

Dr. McDermott's Testimony

28. Dr. McDermott has been Claimant's treating chiropractor since October 2011. He is licensed in Vermont and has practiced general chiropractic care here since 1998.

29. Dr. McDermott has diagnosed Claimant with aggravation of preexisting lumbar spine arthritis with stenosis. His treatment has consisted of lumbar traction and manual spinal manipulation. Lumbar traction consists of restraining the patient's feet while extending the spine, thus decompressing it and relieving stress. With manual manipulation, in both prone and supine positions, Dr. McDermott adjusts Claimant's lumbar and sacroiliac joints. In his opinion, these treatments decrease Claimant's pain and improve her function and mobility.

30. Dr. McDermott disputed Dr. Binter's and Dr. Rudolf's opinions as to the efficacy of ongoing chiropractic care in Claimant's case. In his opinion, Claimant's condition is chronic, and she will never be pain-free. He expects she will need chiropractic treatment during her lifetime, as likely would be the case with pain medications. He credibly testified that when Claimant attempted to discontinue chiropractic care in 2012, her condition worsened and her baseline deteriorated. I find that the contemporaneous medical records corroborate this conclusion. Given this failed withdrawal attempt, in Dr. McDermott's opinion ongoing chiropractic care, with the palliative goal of maintaining Claimant's current level of pain and function, is reasonable and necessary.

31. Most recently, after examining Claimant and reviewing her imaging studies, in October 2016 her primary care physician, Dr. Loescher, recommended that she continue with chiropractic care, "which is helpful and therapeutic." I find that this further corroborates the efficacy of Dr. McDermott's care from a palliative perspective.

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). The Claimant 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).

2. Once a claim is accepted and benefits are paid, the burden shifts to the defendant to establish a sufficient basis for terminating compensation. *Merrill v. University of Vermont*, 133 Vt. 101 (1974). 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.* The Commissioner has discretion to determine what constitutes "reasonable" medical treatment based upon the circumstances of each case. *MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009).

3. Vermont's workers' compensation statute obligates an employer to provide reasonable surgical, medical and nursing services when an injury arises out of and in the course of employment. 21 V.S.A. §640(a). Chiropractic treatment is included in that obligation if reasonable and necessary. *J.C. v. Eveready Battery Co*., Opinion No. 12-07WC (April 3, 2007); *Quinn v. Emery Worldwide*, Opinion No. 29-00WC (September 11, 2000); *Smith v. Whetstone Log Homes*, Opinion No. 70-96WC (November 25, 1996).

4. In determining what is reasonable under §640(a), the decisive factor is not what the claimant desires or what he or she believes to be the most helpful. Rather, it is what is shown by competent expert evidence to be reasonable to relieve the claimant's symptoms and maintain his or her functional abilities. *Moyer v. Miller Building Systems*, Opinion No. 22-01WC (July 20, 2001); *Quinn v. Emery Worldwide, supra* (same).

5. Palliative medical treatment is compensable under §640(a). *Coburn v. Frank Dodge and Sons*, 165 Vt. 529, 532 (1996); *Smith v. Whetstone Log Homes, supra*. Workers' Compensation Rule 2.3400 defines "palliative care" as follows:

> "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. Palliative care is compensable if it is reasonable, medically necessary, and offered for a condition that is causally related to a compensable work injury.

6. Chiropractic treatment can qualify as compensable palliative care if it alleviates the patient's pain symptoms. *Smith v. Whetstone Log Homes, supra.*

7. 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 (September 17, 2003). With these factors in mind, the key question is which expert medical opinion is the most credible. *Bonenfant v. Price Chopper*, Opinion No. 13-07WC (May 8, 2007).

8. Considering the above criteria, I note that Dr. McDermott has been treating Claimant regularly for her work-related injuries since October 2011. Likewise, Dr. Loescher, who supports ongoing chiropractic care as "helpful and therapeutic," has been her primary care provider for some time as well. In contrast, because Drs. Rudolf and Binter were not treating physicians, they did not have a long-standing relationship with Claimant and thus lacked the opportunity to evaluate the efficacy of her chiropractic care over time. This fact detracts from their opinions and enhances Dr. McDermott's.

9. All of the doctors had access to the pertinent medical records, and therefore this factor does not favor any of them over the others.

10. Each doctor's opinion suggested both strengths and weakness as to its clarity, thoroughness and objective support. Dr. McDermott's analysis was based on his long experience with Claimant, including her demonstrated inability to maintain her baseline of pain and function after a trial treatment withdrawal. Nevertheless, his opinions may be biased by his desire to advocate for his patient and his commitment to the type of care he provides.

11. In their opinions, Dr. Binter and Dr. Rudolf both emphasized the fact that chiropractic care is not curative. However, they failed to clearly address the extent to which chiropractic treatment may provide palliative, pain-reducing benefit to a patient such as Claimant. Dr. Binter asserted that passive treatment was counterproductive as compared to more active treatment modalities, but her assertion lacked objective support. She seemed to assume that because Claimant was deconditioned and weak, this must have been because of her chiropractic care, yet again, I can find no objective support for that conclusion.

12. In the end, the only authority I can discern for Dr. Binter's and Dr. Rudolf's assertions that chiropractic care was negatively impacting Claimant's condition was the other's opinion. This is not convincing.

13. The parties have each cited to prior cases in which palliative chiropractic care was found to be either reasonable and necessary or not. *Compare Smith v. Whetstone Log Homes, supra* (palliative chiropractic care reasonable)*; M.M. v. State Department of Corrections*, Opinion 20-08WC (May 13, 2008) (same); *Nelson v. Federal Express Freight*, Opinion 19-16WC (November 1, 2016) (same); *Forrest v. Rockingham School District*, Opinion No. 30-96WC (May 16, 1996) (same) *with Burnah v. Carolina Freight Carriers*, Opinion 37-98WC (June 22, 1998) (palliative chiropractic care not reasonable); *J.C. v. Eveready Battery Co., supra* (same); *N.C. v. Kinney Drugs*, Opinion No. 18-08WC (May 9, 2008) (same); *McGraw v. Numanco, Inc*., Opinion No. 48-02WC (November 20, 2002) (same); and *Quinn v. Emery Worldwide, supra*.

14. Defendant cites to *J.C. v. Eveready Battery Co., supra*, for the proposition that palliative chiropractic care is detrimental because it impedes strengthening. In that case, there was expert medical testimony that chiropractic care stretches the ligaments of the spine, which can complicate a degenerative disc condition. Whatever the expert testified to in that case, in the case before me now the experts failed to offer sufficient credible evidence from which I might conclude that chiropractic care causes physical, structural harm to the patient. *See, e.g., Smith v. Whetstone Log Homes, supra* (medical expert's opinion that chiropractic treatment was structurally harmful discredited for lack of authoritative support). For that reason, I cannot accept their opinions as credible.

15. Defendant further argues that because Dr. McDermott has asserted that Claimant is unable to work and is disabled for social security purposes, his treatments must therefore be deemed ineffective. This argument ignores the benefit of palliative treatment, even for a patient whose functional trajectory may not encompass successful re-employment. As with all medical treatment in the workers' compensation context, palliative treatment is reasonable if it either relieves symptoms and/or maintains or improves function. *Morrisseau v. Hannaford Brothers*, Opinion No. 21-12WC (August 8, 2012) (internal citations omitted). As to the latter, the fact that a claimant remains unable to work is not necessarily disqualifying. Depending on the circumstances, treatment that allows a permanently disabled worker to maintain function in daily living activities may be equally important.

16. There may yet come a point when chiropractic treatment fails to provide sufficient pain relief to allow Claimant to maintain even her current level of function. Evidence of increased treatment frequency or an increased need for narcotic pain medications might establish that chiropractic care is no longer effective, for example, in which case other therapeutic treatment alternatives may present themselves as more reasonable. In the meantime, I am convinced that the palliative benefits of her current chiropractic care justify its continuation.

17. After carefully evaluating the specific evidence adduced in this claim, I conclude that Dr. McDermott's opinion is the most persuasive. I thus conclude that Defendant has failed to sustain its burden of proving that ongoing chiropractic care is no longer medically necessary.

18. As Claimant has prevailed on her claim for benefits, she is entitled to an award of costs and attorney fees in accordance with 21 V.S.A. §678. Claimant shall have 30 days from the date of this decision within which to submit her itemized request. Defendant shall have 30 days thereafter within which to file any objections thereto.

ORDER:

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

1. Medical benefits covering palliative chiropractic care, in accordance with 21 V.S.A. §640(a); and

2. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this ____ day of February 2017.

_____
Lindsay H. Kurrle
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.