STATE OF VERMONT
DEPARTMENT OF LABOR

Kathleen Lackey

v.

Brattleboro Retreat

Opinion No. 15-10WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. AA-50459

OPINION AND ORDER

Hearing held in Montpelier, Vermont on January 19, 2010
Record closed on February 3, 2010

APPEARANCES:

John Mabie, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant's proposed cervical surgery reasonable and necessary treatment causally related to her July 8, 2008 work injury?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum vitae,* Hulda Magnadottir, M.D.

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640
Costs and attorney 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 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 worked as a charge nurse at Defendant's in-patient mental health treatment facility. On July 8, 2008 she was responding to an emergency situation involving a patient who had tried to hang herself. The patient collapsed while Claimant was escorting her back to her room. As Claimant eased the patient to the floor, she felt pain both in her lower back and across her shoulder blades.

4. Claimant had a prior history of occasional low back pain, and over the course of the ensuing weeks her low back pain resolved back to its pre-injury baseline. Claimant's mid- and upper back pain did not resolve, however. She experienced persistent pain, stiffness and significantly reduced range of motion in her neck, with numbness and tingling radiating down both arms and into her hands and fingers.

5. Claimant's symptoms failed to respond to conservative therapy. An MRI of her cervical spine revealed degenerative changes at multiple levels, most notably C5-6 and C6-7. In October 2008 she consulted with Dr. McLellan, an occupational medicine specialist. Dr. McLellan suggested a cervical epidural steroid injection, but Claimant was reluctant to proceed. Instead, she sought a referral to a neurosurgeon, Dr. Magnadottir, for evaluation of possible surgical options.

6. Dr. Magnadottir first evaluated Claimant in February 2009. Her office note reflects that Claimant was complaining of pain "not so much in the neck itself" but rather in her shoulders and mid-back, radiating down both arms and into her fingers bilaterally. Dr. Magnadottir attributed Claimant's shoulder and thoracic region symptoms to myofascial pain, but felt that Claimant consistently described as well a C6-7 radicular pattern to the pain in her arms, hands and fingers.

7. Given the radicular nature of Claimant's upper extremity symptoms, Dr. Magnadottir suggested cervical disc fusion surgery as an appropriate treatment option. She stressed, however, that such a surgery likely would not have a significant impact on the myofascial-type pain Claimant was experiencing in her neck, upper back and shoulders. It might help in that regard, but there could be no guarantees.

8. Dr. Magnadottir acknowledged that it is difficult to predict how positive the surgical outcome will be in situations where a patient's symptoms are a mixture of both radicular and myofascial pain. Nevertheless, she expressed confidence that the surgery would alleviate the radiating pain and paresthesias in Claimant's arms, hands and fingers. Dr. Magnadottir testified that the surgery in question is one of the more common ones she performs, that she is very selective in choosing the patients to whom she offers it, and that it would be very unusual for a patient not to derive at least some benefit from it.

9. Dr. Magnadottir has reevaluated Claimant on two occasions since her initial evaluation in February 2009. She continues to believe that Claimant is an appropriate surgical candidate.

10. Defendant's medical expert, Dr. Ahn, disagrees. Dr. Ahn, an orthopedic surgeon, conducted an independent medical evaluation in April 2009. Noting that Claimant's MRI revealed disc degeneration at four levels in her cervical spine, Dr. Ahn predicted that Dr. Magnadottir's proposed fusion surgery, which would address only two levels, was unlikely to be successful. Dr. Ahn also questioned whether the proposed surgery would meet Claimant's expectations. According to him, Claimant reported that her neck symptoms were as problematic as her arm symptoms. In Dr. Ahn's opinion, surgery might help address the latter, but would be ineffective at relieving the former.

11. Both Dr. Magnadottir and Dr. Ahn testified that the cervical epidural steroid injection that Dr. McLellan proposed in October 2008 might be a viable treatment option for Claimant. According to Dr. Magnadottir, injections are not a pre-requisite to surgery, but merely another option for her to consider. In Dr. Ahn's opinion, such treatments as injections, chronic pain management and/or behavioral therapy pose less of a risk and present a greater likelihood of success than surgery does.

12. Claimant testified credibly at the formal hearing that she understands that the primary purpose of Dr. Magnadottir's proposed surgery is to address her radicular symptoms, not her myofascial pain. In that regard, her expectations appear to be realistic. Claimant testified that she experiences constant pain in her upper extremities and shooting pains down her arms and into her hands and fingers. Her fingers are consistently numb, and she often drops things while holding them. On a typical day she can engage in mild activity for approximately two and a half hours, after which she starts to lose function in her hands. She experiences frequent muscle spasms in her neck, forearms, hands and fingers. Sometimes her hands freeze up and she cannot use them at all.

13. Claimant expressed hope that Dr. Magnadottir's proposed surgery will alleviate her symptoms enough so that she can both increase her level of functioning and reduce her reliance on narcotic medications for pain relief. This is a critical consideration for someone in her profession, as for the most part registered nurses are precluded from providing direct patient care if they are taking narcotic medications.

14. In their written reports, both Dr. Magnadottir and Dr. Ahn concluded that Claimant's current symptoms most likely represent an exacerbation of her underlying degenerative disc disease causally related to her July 2008 work injury. Dr. Magnadottir reaffirmed this opinion in her formal hearing testimony. In his testimony, Dr. Ahn stated that Claimant's current symptoms were driven by a clearly degenerative condition that was ongoing, and in that sense the proposed surgery was not causally related.

CONCLUSIONS OF LAW:

1. Vermont's workers' compensation statute obligates an employer to pay only for those medical treatments that are determined to be both "reasonable" and causally related to the compensable injury. 21 V.S.A. §640(a); *MacAskill v. Kelly Services,* Opinion No. 04-09WC (January 30, 2009). The Commissioner has discretion to determine what constitutes "reasonable" medical treatment given the particular circumstances of each case. *Id.* A treatment can be unreasonable either because it is not medically necessary or because it is not related to the compensable injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010).

2. The treatment dispute at issue here is straightforward. Claimant's treating physician, Dr. Magnadottir, believes that cervical disc fusion surgery likely will alleviate at least some of Claimant's most troublesome symptoms, and that therefore it is medically appropriate to proceed. Defendant's medical expert, Dr. Ahn, believes that disc fusion surgery likely will be unsuccessful, and that therefore it should not be attempted.

3. 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).

4. Balancing all of these factors, I conclude that Dr. Magnadottir's opinion is the most persuasive. Dr. Magnadottir credibly described both the anticipated benefits of the proposed disc fusion surgery and its expected limitations. She is well experienced in surgeries of this nature and utilized a thoughtful selection process in determining that Claimant was an appropriate candidate. I accept as truthful her testimony that she would not offer Claimant a surgical option if she were not reasonably confident of a successful outcome.

5. Equally important, Claimant credibly testified that she understood which symptoms the surgery was designed to address, and which ones it likely would not alleviate. Claimant also credibly articulated the impact her current symptoms have had on her ability to function, both personally and professionally. The impact has been significant, and Claimant deserves the opportunity to improve her situation by undergoing the surgery that her treating physician has offered.

6. Although I am mindful of Dr. Ahn's misgivings, in the end I am unconvinced by his opinion. Certainly the proposed surgery will not cure all of Claimant's symptoms, but that does not render it an unreasonable treatment option. Indeed, the same might be said for the treatment options Dr. Ahn identified as well – injections, chronic pain management and/or behavioral therapy. The discretion I wield under the statute is limited to determining whether a treatment is "reasonable" under the circumstances. It does not necessarily extend to mandating which among a variety of reasonable treatment options a claimant might choose.

7. Nor do I accept Dr. Ahn's testimony that the proposed surgery is causally related to Claimant's underlying degenerative disc disease rather than to her July 2008 work injury. Both Dr. Ahn and Dr. Magnadottir acknowledged that Claimant's underlying condition had been exacerbated by her work injury. That work injury precipitated a progression of worsening symptoms, which has led directly to the current surgical treatment recommendation.

8. I conclude, therefore, that Dr. Magnadottir's proposed cervical disc fusion surgery constitutes reasonable and necessary treatment causally related to Claimant's July 2008 work injury.

9. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $1,398.08 and attorney fees totaling $8,600.85. An award of costs to a prevailing claimant is mandatory under the statute. Of the costs submitted, however, $1,125.00 represents Dr. Magnadottir's charge for 1.5 hours of formal hearing testimony, an hourly rate of $750.00. According to Workers' Compensation Rule 40.110, such charges are limited to $300.00 per hour. The maximum allowable charge for Dr. Magnadottir's testimony, therefore, is $450.00. After deducting the excess charge, Claimant is awarded $723.08 in allowable costs. As for attorney fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded as well.

ORDER:

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

1. All medical costs associated with the proposed cervical disc fusion surgery, including but not limited to hospital and physician charges and reasonable follow-up care;

2. Costs totaling $723.08 and attorney fees totaling $8,600.85.

DATED at Montpelier, Vermont this 21st day of April 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.