

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Beth Holmes

Opinion No. 18-12WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

State of Vermont

For: Anne M. Noonan
Commissioner

State File No. AA-00186

OPINION AND ORDER

Hearing held in Montpelier on April 9, 2012

Record closed on April 24, 2012

APPEARANCES:

Beth Holmes, *pro se*

William Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Has Claimant reached an end medical result for her compensable July 2008 work injury and if so, when did this occur?
2. Are Claimant's cervical spine complaints causally related to her compensable July 2008 work injury and if so, to what workers' compensation benefits is she entitled?
3. Did Claimant willfully make a false statement or representation for the purpose of obtaining a workers' compensation benefit, in violation of 21 V.S.A. §708(a)?

EXHIBITS:

Joint Exhibit I: Medical records

Defendant's Exhibit A: *Curriculum vitae*, Nancy Binter, M.D.

Defendant's Exhibit B: *Curriculum vitae*, Richard Levy, M.D.

Defendant's Exhibit C: *Curriculum vitae*, William Boucher, M.D.

Defendant's Exhibit D: Independent Medical Evaluation Questionnaire

Defendant's Exhibit E: Surveillance videos (2 DVDs)

Defendant's Exhibit F: Deposition of Beth Holmes, February 3, 2010 (excerpted pages)

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640(a)

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 files relating to this claim.
3. Claimant worked as a licensed practical nurse at Defendant's Vermont Veterans' Home. Her responsibilities included administering medications and other general duties.
4. On July 11, 2008 Claimant slipped and fell down the last two stairs of a stairway at work. As reflected in the contemporaneous medical records, Claimant reported that she grabbed the banister with her right hand and struck her left buttock and lower back on the stairs. She did not report striking her neck in the fall, nor did she report any complaints or injury referable to that area. To the contrary, she complained solely of low back pain, which her primary care physician, Dr. Friscia, diagnosed as a left buttock contusion. As treatment, Dr. Friscia prescribed narcotic pain medications and physical therapy.
5. Over the course of the next three months, Claimant began complaining of more diffuse aches, not just in her lower back but also in her hips, groin, upper back, elbows and shoulders. Concerned about her ongoing symptoms, particularly in the context of continued narcotic pain medications and physical therapy, Dr. Friscia referred her to Dr. Robbins, an orthopedic surgeon, for further consultation.
6. Claimant previously had treated with Dr. Robbins in September 2000, for a two-month history of neck pain with radicular-type symptoms in her right arm. Claimant underwent little if any treatment for these complaints, which she described at hearing as a "horrible" stiff neck and which Dr. Robbins diagnosed as C6 radiculopathy.¹ Apparently her symptoms resolved on their own. In the intervening years leading up to her July 2008 fall at work, Claimant did not seek medical treatment for any further cervical spine-related complaints.
7. Dr. Robbins evaluated Claimant on October 27, 2008. During that evaluation, for the first time Claimant complained of neck pain in addition to her other symptoms, reporting that she felt her body had been "out of alignment" since her fall at work some three months earlier.

¹ Claimant acknowledged this prior episode of neck pain at hearing, and explained that she failed to do so in her deposition either because she forgot or because she did not consider a stiff neck to be an "injury." No matter what the specific explanation, I find that Claimant's deposition testimony did not indicate a willful attempt to defraud or mislead for the purpose of obtaining a workers' compensation benefit.

8. In addition to her increasingly diffuse pain complaints, in the years since her injury Claimant has suffered from anxiety and depression as well. The medical records reflect that she had long treated for these conditions in the past, as a consequence of stress related to financial difficulties and the responsibilities of single parenting. Those stressors have continued, and now include chronic pain and decreased function as well. Claimant has not worked since her injury. She has been receiving social security disability benefits for the past two years.
9. Notwithstanding that the contemporaneous medical reports do not reflect it, Claimant has become convinced that she likely struck her neck in the course of her July 2008 fall down the stairs at work, and that this accounts for both the neck pain and the diffuse upper extremity symptoms of which she has complained since. Based in part on the varying descriptions of the fall to which Claimant testified at formal hearing and in part on the clear and concise history reported in the earliest, most reliable medical records, I find that Claimant's recollection of events is likely no longer accurate. For that reason, I question the extent to which some of her treating doctors, most notably her osteopath, Dr. Woodworth, and her neurologist, Dr. Edwards, have relied upon this version of events in formulating their theories as to the etiology of Claimant's current complaints.
10. Though neither testified at formal hearing, both Dr. Woodworth and Dr. Edwards have stated their causation opinions in writing. Both believe that Claimant's cervical condition is a direct result of her July 2008 fall at work. Dr. Edwards in particular is convinced that Claimant's neck and upper extremity symptoms are attributable to a free disc fragment compressing on her spinal cord at the C6-7 level, as indicated in a May 2011 MRI study. Two prior MRI studies, one in March 2009 and one in September 2009, had documented disc degeneration and/or protrusion at that level, but no extruded disc fragments.
11. Aside from stating that Claimant's cervical disc herniation is "consistent with" her July 2008 fall, Dr. Edwards provided no other rationale for his conclusion that the two are causally related. In fact, previously Dr. Edwards had acknowledged that because he had not reviewed Claimant's prior medical records, he lacked sufficient information to make any determination at all as to causation. In his earlier statement, Dr. Edwards also had noted the lack of a temporal relationship between Claimant's fall and her neck pain as a further barrier to establishing causation. With no explanation for the apparent shift from these prior statements to his current opinion, I find it difficult to credit Dr. Edwards' position as to causation.
12. As treatment for her cervical disc herniation, and particularly given his concern that she was exhibiting symptoms of myelopathy, or spinal cord compression, Dr. Edwards strongly recommended that Claimant undergo a neurosurgical evaluation. This she did, with Dr. Simmons in November 2011. Interestingly, although Dr. Simmons stated that he was "not overly impressed" with the amount of spinal cord deformation evidenced on MRI, nevertheless he recommended that Claimant undergo a C6-7 disc fusion. The purpose of that surgery, which Claimant was scheduled to undergo in the weeks following the formal hearing, is primarily to prevent any myelopathy from progressing, not necessarily to improve her current symptoms.

13. Credible medical evidence exists in support of another explanation for Claimant's diffuse complaints, including those involving her neck and upper extremities – fibromyalgia, possibly exacerbated by a bout of Lyme disease in 2009. Among the medical professionals propounding this theory was Dr. Friscia, Claimant's primary care physician from 2003 through 2010. In Dr. Friscia's opinion, the disc disease documented on Claimant's MRI studies was not nearly severe enough to account for her varied symptoms. Coupled with the fact that Claimant's neck and upper extremity complaints did not arise until some months after her initial injury, Dr. Friscia concluded that a causal relationship between the two was unlikely. I find Dr. Friscia's reasoning credible in all respects.
14. Not surprisingly, all of Defendant's independent medical examiners have concluded likewise. The first of these, Dr. Boucher, an occupational medicine specialist, examined Claimant in February 2009. Among his pertinent findings:
 - Claimant exhibited only minimally decreased cervical range of motion, with no evidence of radiculopathy;
 - Claimant did not complain of any tenderness in her left buttock, and exhibited normal low back and hip motion, all of which indicated that her original injury – a left buttock contusion – had resolved;
 - Claimant's diffuse complaints, which included statements such as “all over pain” and “everything is different than before my injury,” were almost certainly psychogenic in origin and completely unrelated to her work injury; and
 - Claimant exhibited a high degree of symptom magnification and somatic overlay, as well as possible drug-seeking behavior.
15. Dr. Boucher concluded to a reasonable degree of medical certainty that Claimant had reached an end medical result for her work-related injury, with no permanent impairment and an unrestricted work capacity.
16. Claimant underwent a second independent medical examination, this time with Dr. Levy, a board certified neurologist, in March 2010. As Dr. Boucher had, Dr. Levy concluded that Claimant's work-related injury consisted solely of a left buttock contusion, which had long since resolved. In addition, according to Dr. Levy:
 - There is no scientific evidence that fibromyalgia is traumatically induced; therefore, there is no basis for concluding that Claimant's buttock contusion evolved in that manner;
 - Had Claimant traumatized a cervical disc in her July 2008 fall, she likely would have experienced significant neck pain and radicular symptoms shortly thereafter, not three months or more later; and
 - Claimant's cervical radiculopathy is likely due to the natural progression of age-related degenerative disc disease, not trauma.

17. I find the rationale underlying Dr. Levy's opinions persuasive in all respects.
18. Most recently, at Defendant's request Dr. Binter, a board certified neurosurgeon, conducted a medical records review in January 2012.² Dr. Binter concluded to a reasonable degree of medical certainty that Claimant's current cervical complaints are not causally related to her July 2008 fall at work in any respect. Her rationale was essentially the same as that propounded variously by Drs. Friscia, Boucher and Levy, that is:
 - With a prior medical history of cervical complaints dating back to 2000, and no mention of new cervical symptoms until many months after her July 2008 fall, it is unlikely that the fall caused a cervical injury;
 - Neither the March 2009 nor the September 2009 MRI studies showed pathology significant enough to explain the global pain and diffuse symptoms of which Claimant was complaining at the time;
 - More than two years later, the May 2011 MRI study revealed a new disc herniation, which given the passage of time would not likely be related to Claimant's original injury; furthermore, even that herniation is not causing enough cord compression to account for her symptoms; and
 - Claimant's longstanding history of anxiety, depression and Lyme disease might explain her hypersensitivity to pain and subsequent fibromyalgia-type symptoms.
19. In formulating her opinion, Dr. Binter particularly noted that some of her observations would not have been apparent to those who had not reviewed Claimant's prior medical records, including both Dr. Woodworth and Dr. Edwards. I concur that analyzing Claimant's prior medical history is critical to a full understanding of the causation issues in this case.
20. Dr. Binter recommended against fusion surgery as treatment for Claimant's current condition. With a longstanding history of smoking, global pain complaints and narcotic medications, in Dr. Binter's opinion the prognosis for post-surgical improvements in either pain or function is poor. I find this reasoning credible, though I acknowledge that a treating neurosurgeon, in close consultation with his or her patient, might weigh the potential risks and benefits differently.

² Claimant had been scheduled to undergo an independent medical examination, but failed to appear.

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. The primary disputed issue here is whether Claimant's current cervical condition is causally related to her July 2008 work injury. The parties presented conflicting medical opinions on this issue. In such circumstances, 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).
3. I conclude that the opinions of Drs. Friscia, Boucher, Levy and Binter are more credible than those of Drs. Woodworth and Edwards. In reaching this conclusion, I note the following:
 - As Claimant's treating primary care provider for many years both before and after her July 2008 fall, Dr. Friscia was best positioned to evaluate her symptoms from a global perspective, more so than either Dr. Woodworth or Dr. Edwards;
 - Drs. Friscia, Boucher, Levy and Binter reviewed all of Claimant's prior medical records, whereas Drs. Woodworth and Edwards failed to do so; this omission is particularly relevant in a case such as this, where the prior records contain information pertinent to other possible causes for her current condition; and
 - Drs. Woodworth and Edwards' causation opinions relied in large part on Claimant's recollection as to the mechanism of her fall, which I have found to be unreliable; in contrast, Drs. Friscia, Boucher, Levy and Binter's opinions were more objectively based and accounted more completely for the global symptoms she reported.
4. I conclude that Claimant has failed to sustain her burden of proving that her current cervical condition is causally related to her July 2008 fall at work. I further conclude that Claimant had reached an end medical result for her work injury – a left buttock contusion – at least as of the date of Dr. Boucher's independent medical examination, February 2, 2009, with no permanent impairment and no need for further medical treatment.

5. Having found that Claimant's cervical condition is not work-related, I need not decide whether Dr. Simmons' proposed fusion surgery is reasonable. Under the particular circumstances of this case, this is a matter best left to Claimant and her treating providers to decide.
6. To the extent that Claimant now suffers from anxiety and depression causally related to her chronic pain and decreased function, I conclude that these conditions were neither caused nor aggravated by her July 2008 work injury and are not compensable.
7. Last, I conclude that Defendant has failed to establish that Claimant's deposition testimony, in which she denied having treated previously for neck pain, constituted a willful intent to defraud or misrepresent for the purpose of obtaining a workers' compensation benefit. Therefore, there has been no violation of 21 V.S.A. §708(a).

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for additional workers' compensation benefits causally related to her July 2008 work injury, and specifically for benefits referable to her current cervical condition, is hereby **DENIED**.

DATED at Montpelier, Vermont this 21st day of June 2012.

Anne M. Noonan
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.