

Rebecca Roy v. The Howard Center

(January 10, 2013)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Rebecca Roy

Opinion No. 02-13WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

The Howard Center

For: Anne M. Noonan
Commissioner

State File No. CC-60675

OPINION AND ORDER

Hearing held in Montpelier, Vermont on October 1, 2012

Record closed on November 21, 2012

APPEARANCES:

William Skiff, Esq., for Claimant
Erin Gilmore, Esq., for Defendant

ISSUES:

1. Did Claimant suffer a compensable work-related psychological injury on or about October 18, 2010?
2. If yes, was Claimant's inability to work from April 15, 2011 to July 30, 2011 causally related to that work injury?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Dr. Warnock deposition, September 18, 2012

Claimant's Exhibit 2: Affidavit of probable cause, *State v. Pazos*

Defendant's Exhibit A: *Curriculum vitae*, Albert Drukteinis, M.D., J.D.

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640
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 since August 1999. Since August 2006 she has been a residential counselor at its "Branches" group home. As part of her regular duties, Claimant was one of two employees who dispensed medications to the residents. The other employee who dispensed medications was Kathleen Smith. If the residents did not receive their medications in a timely manner, they could become psychotic.

Claimant's Personal and Medical Background

4. Claimant's husband is an outgoing, friendly and demonstrative person. Her birth family is more reserved. Although their relationship with Claimant's husband was civil, and they appeared to welcome him into the family, they thought he was overbearing. At times, family members told Claimant she would be better off if she divorced her husband. Due to the personal conflicts with her family, Claimant and her husband had engaged in couples counseling since they began dating.
5. Claimant and her husband have a five year-old son, Sebastien, who suffers from autism. As a result, he presents with special needs that are consuming in terms of time, energy and emotion. Sebastien requires a special diet and constant attention. Sometimes he behaves aggressively towards Claimant. Despite these and many other challenges, Claimant was very credible when she described Sebastien as her greatest joy.
6. Notwithstanding the challenges that raising her son presented, prior to the events at issue in this claim Claimant was able to work full time effectively and to take care of the household duties. These included cooking, housecleaning and doing the laundry. On the latter tasks, she did not receive much help from her husband.
7. With regard to her medical history, Claimant has suffered from insomnia virtually all her life. Prior to October 2010, her insomnia was well-controlled by Lunesta and she was able to sleep for up to seven and a half hours nightly. Claimant also suffered from asthma, which was well controlled prior to October 2010.

The Events of October 17 and 18, 2010

8. On Sunday, October 17, 2010, Claimant's supervisor called to advise that her co-employee, Kathleen Smith, had not shown up for work that day. The supervisor asked Claimant for Ms. Smith's cell phone number. Later that day, another of Defendant's employees called Claimant to say he was going to Branches to dispense medications to the residents.

9. The next morning, the overnight counselor at Branches called Claimant and advised her that Ms. Smith had not arrived at 8:00 AM as she usually did. Because Claimant's shift did not start until 9:00 AM, she decided to drive by Ms. Smith's house in the hopes of ascertaining her whereabouts. Prior to doing so, she called the hospital to see if Ms. Smith had been admitted, but she had not.
10. Claimant did drive down Ms. Smith's street on her way to work, but she had trouble locating the correct house. By the time she found it, it was after 9:00 AM. At that point, Claimant decided to continue on to Branches to dispense the medications for the residents, as no one else could do that.
11. After speaking with her supervisor, and with her supervisor's agreement, Claimant left Branches and returned to check on Ms. Smith's well-being.¹ When she arrived at the back door to Ms. Smith's house, she discovered Ms. Smith's murdered, bloody body and her lifeless dog. During the course of the hearing Claimant described what she found at Ms. Smith's apartment. Her credible description was extremely emotional and difficult for her.

Claimant's Treatment After October 18, 2010

12. Claimant's supervisor instructed her to go home and take care of herself. After being on paid leave for two weeks, Claimant returned to work. She was concerned about the female residents at Branches, because with Ms. Smith now gone she was the only female residential counselor. Moreover, when she was at home, she alternated between being numb and crying. For these reasons, Claimant credibly stated that it was easier for her to be at work.
13. Claimant initially assessed her ability to cope at work as "white knuckling it." However, as time wore on, she cried frequently, was forgetful, depressed, irritable and disorganized. These traits were all quite the opposite of Claimant's personality prior to discovering Ms. Smith's body. I find Claimant's description of her changed personality to be very credible.

(a) *Claimant's Psychological Treatment*

14. Claimant began treating with Aida Luce on October 20, 2010 and continued to see her through October 2011. Over the course of her treatment, Claimant attended 17 group sessions. Most of these sessions focused on her attempts to deal with the trauma of having discovered Ms. Smith's body. Ms. Luce chronicled how initially Claimant appeared to be capable of handling her grief, but later began having flashbacks of the incident, to the point where she became increasingly unable to cope and required ongoing psychological support.

¹ By this time it also had become known that Ms. Smith had not attended a mandatory training the previous Friday. That made four consecutive unexplained absences from work for her.

15. There were two sessions with Ms. Luce that focused on issues other than Ms. Smith's murder. One was in January 2011, when Claimant and her family were going through an exceptionally difficult physical move to an apartment. The other was in February 2011, when she expressed concern about her husband's inability to complete tasks and her feeling that she was emotionally undernourished in their relationship.
16. Claimant also saw Larry Hall, a psychologist, between October 27 and November 30, 2010 for neurofeedback, a type of biofeedback involving the brain. Based on these sessions, Mr. Hall diagnosed Claimant with post traumatic stress disorder (PTSD). Included in this diagnosis were elements of (a) emotional instability fluctuating between grief, anger and numbness; (b) replaying the discovery of Ms. Smith's body over and over; (c) worsened insomnia; (d) memories of the trauma triggered by driving; and (e) the need to consciously use tricks to redirect her intrusive thoughts.

(b) Claimant's Medical Treatment

17. Claimant consistently saw a medical professional from March 2007 through the time of the formal hearing. She had preexisting asthma, other respiratory complaints and hypothyroidism, all of which required ongoing treatment. Prior to October 18, 2010 all of Claimant's physical ailments, including the stresses related to her son and other family relationships, were well controlled.
18. Dr. Warnock, a naturopath, was Claimant's primary care physician between February 2009 and August 2010. During that time she made six office visits. Dr. Warnock reported that Claimant typically slept for seven hours nightly, and did not present with any psychological or psychiatric issues.
19. After October 18, 2010 a totally different picture emerged of Claimant's health, both physical and mental. In December 2010, her primary care provider, Dr. Goering, reported that Claimant had been suffering from chronic respiratory problems since Thanksgiving. She was anxious, cried easily and felt overwhelmed from having found Ms. Smith's slain body. Dr. Goering diagnosed Claimant with adjustment disorder with mixed anxiety and depressed mood. She prescribed an anti-anxiety medication for Claimant.
20. In February 2011 Claimant saw her physician's assistant, Peter Nobes. Mr. Nobes reported that Claimant was experiencing traumatic event nightmares, flashbacks and recurrent thoughts of finding Ms. Smith's body. Her affect was very flat. Consistent with Mr. Hall's diagnosis in November 2010, Mr. Nobes as well diagnosed Claimant with PTSD.
21. Claimant returned to see Mr. Nobes on April 15, 2011 for an acute asthma attack, primarily due to an episode with her son. Mr. Nobes reported that Claimant was very depressed, teary and moody. She was finding it increasingly difficult to go to work and was planning to pursue a paid leave due to her inability to cope. Mr. Nobes recommended that Claimant see a psychiatrist and, as of this visit, concluded that she was unable to work.

22. Claimant resumed treating with Dr. Warnock in March 2012 and continues to see him presently. Dr. Warnock credibly testified that Claimant presented as a much different patient in March 2012 than she had been when he last saw her in August 2010. Dr. Warnock diagnosed Claimant with PTSD causally related to the trauma of having found Ms. Smith's body. He convincingly described her as "an emotional wreck" as a result of that incident.
23. Since he began treating her again, Dr. Warnock's goal has been to taper Claimant off her psychotropic medications and transition her to more natural supplements. Claimant improved dramatically from March 2012 until July 2012, when she was being prepared for the formal hearing in this matter. Realizing that she would have to recount the details surrounding Ms. Smith's death again, she became anxious and could not sleep.

Expert Medical Opinions

(a) Dr. Powell

24. Claimant began treating with Dr. Powell, a board certified psychiatrist, in late April 2011 at the recommendation of Larry Hall and Mr. Nobes. She saw Dr. Powell on a regular basis through July 2012, a total of 35 office visits. Dr. Powell credibly opined that in order to make an accurate diagnosis, it is critical for a psychiatrist to hear a patient tell his or her own story so that nuances such as body language can be interpreted and assessed. Having had numerous occasions to do so, Dr. Powell diagnosed Claimant with both PTSD and an adjustment disorder including anxiety and depression.
25. Dr. Powell acknowledged that Claimant had many stressors in her life prior to October 2010, including (a) an autistic child on a special, time consuming diet; (b) her family's longstanding dislike of her husband; and (c) her mother-in-law's poor health. However, even given these stressors, Claimant was able to function very well, both at home and at work. Her mood and appetite were good, she enjoyed going to work every day, she was close to both her mother and her brother, and her insomnia was well controlled. With these facts in mind, Dr. Powell credibly concluded that Claimant's inability to work from mid-April through July 2011 was not due to any of these preexisting stressors. I find her analysis in this regard convincing.

26. In Dr. Powell's opinion, Claimant's inability to work was directly attributable to PTSD. In reaching that conclusion, Dr. Powell relied on evidence showing the extent to which Claimant decompensated, both physically and mentally, in the months following Ms. Smith's murder in October 2010:

- She had difficulty eating, and lost a significant amount of weight;
- She suffered from severe insomnia, which did not respond to accepted medications even at high doses;
- She exhibited impaired concentration, focus, memory and decision-making abilities;
- She suffered from nightmares and flashbacks; and
- She constantly felt overwhelmed.

27. As treatment for Claimant's severe symptoms, Dr. Powell first addressed her insomnia. With her body more rested from sleep, Claimant was better able to engage in both psychotherapy and pharmacologic treatment. She successfully returned to work on August 1, 2011.

(b) Dr. Drukteinis

28. At Defendant's request, in October 2011 Dr. Drukteinis, a board certified psychiatrist, reviewed Claimant's medical records. He also testified at the formal hearing. Prior to his testimony, Dr. Drukteinis reviewed the depositions of Claimant, her husband, Dr. Powell and Dr. Warnock. Dr. Drukteinis did not personally interview or evaluate Claimant.

29. Dr. Drukteinis acknowledged in his formal hearing testimony that Claimant does suffer from PTSD as a result of having discovered Ms. Smith's body in October 2010. He considers this to be a secondary diagnosis, however. In his opinion, Claimant's primary diagnosis is adjustment disorder causally related to other preexisting stressors in her life.

30. In Dr. Drukteinis' opinion, Claimant's inability to work from mid-April through July 2011 was not due in any way to her PTSD. Rather, it was the myriad of ongoing stressors in her life that caused her to leave work. In support of this opinion, Dr. Drukteinis asserted first, that Claimant's PTSD symptoms should not have worsened over time, especially when she was receiving appropriate treatment. Second, he noted the two therapy sessions with Ms. Luce in January and February 2011 in which Claimant never spoke of finding Ms. Smith's body but rather discussed other stressors in her life.

31. While it is true that the two entries upon which Dr. Drukteinis focused did not mention Ms. Smith's murder, his opinion fails to take into account the many entries in the medical records in which that event and Claimant's subsequent PTSD symptoms are well chronicled. I find this reliance on only two of many, many psychological session entries troubling. Dr. Drukteinis' opinion also fails to account for the fact that Claimant was well able to manage her other life stresses before the events of October 18, 2010 but increasingly unable to do so thereafter. For this reason as well, I find his opinion unpersuasive.
32. Dr. Drukteinis agreed with Dr. Powell as to the value to a psychiatrist of personally interviewing and assessing a patient. It allows the evaluator to do more than just gather facts, but also to gauge the patient's emotional response from observing facial expressions and body language.

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. There are two disputed issues in this case. The first is whether Claimant suffered a compensable work injury when she discovered her slain co-worker while on work time but at the worker's home. Claimant argues that with her supervisor's agreement, she left Branches, found her slain co-worker and suffered post traumatic stress disorder as a result.
3. The starting point for any workers' compensation claim is whether the injury arose out of and in the course of employment. 21 V.S.A. §618; *McNally v. Department of PATH*, 2010 VT 99, ¶10. This is a two-pronged test, requiring a sufficient showing of both (1) a causal connection (the "arising out of" component); and (2) a time, place and activity link (the "in the course of" component) between the claimant's work and the accident giving rise to his or her injury. *Cyr v. McDermott's, Inc.*, 2010 VT 19; *Miller v. IBM*, 161 Vt. 213 (1993).
4. The "in the course of" prong of the compensability test is met when an injury is shown to have occurred "within the period of time when the employee was on duty at a place where the employee was reasonably expected to be while fulfilling the duties of [the] employment contract." *Miller, supra* at 215, quoting *Marsigli Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95, 98 (1964).

5. In this case, Claimant was one of two workers on the weekly daily shift who were authorized to dispense medications to the residents at Branches. Thus, both Claimant and Ms. Smith were essential employees at that job site. When Ms. Smith did not show up for work for several days, both Claimant and her employer had cause to be extremely concerned. It was to her employer's benefit, and with her supervisor's direct approval, that Claimant left her post at Branches on October 18, 2010 in order to check on Ms. Smith's well-being. It was at this time that she made her horrific discovery. I conclude that because this event occurred during the period of time when Claimant was on duty and in a place where she was reasonably expected to be while fulfilling a duty related to her employment, she has met the "in the course of" component of compensability.
6. With respect to the "arising out of" prong, the two psychiatric experts did not disagree that Claimant developed PTSD as a result of finding Ms. Smith's body. Therefore, I conclude that this element of the compensability test is satisfied as well.
7. Having met both the "arising out of" and the "in the course of" tests, I thus conclude that Claimant's PTSD was causally related to her work and is compensable. What remains to be decided is whether Claimant's disability from work between April 15, 2011 and August 1, 2011 was causally related to that injury. Claimant argues that it was. Defendant counters that the real cause of Claimant's emotional condition and consequent inability to work was the many other stressors in her life.
8. The parties presented conflicting psychiatric evidence on this issue. 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).
9. Based on the first, third and fourth factors, I conclude that Dr. Powell's causation opinion is the most persuasive. Dr. Powell had the opportunity to examine and evaluate Claimant over the course of 35 therapy sessions. Her opinion that in the seven months after October 2010 Claimant's PTSD caused her to steadily decompensate, both physically and mentally, was clear and thorough. It was objectively supported by evidence documenting Claimant's dramatic weight loss, severe insomnia, impaired intellectual functioning and persistent nightmares, flashbacks and feelings of overwhelming anxiety. I find convincing her opinion that these symptoms were indicative of PTSD and that until effectively treated, they rendered Claimant totally unable to work.
10. In contrast, Dr. Drukteinis' opinion was not objectively supported and did not adequately account for the marked changes in Claimant's personality, mood and ability to cope after October 2010. For these reasons, I conclude that it is unpersuasive.
11. In summary, I conclude that Claimant has sustained her burden of proving that she was temporarily totally disabled from working as a result of her compensable PTSD from April 15, 2011 through July 31, 2011.

12. 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(e). Claimant has submitted a request for expenses totaling \$1,721.59 and attorney fees totaling \$9,309.00 (64.2 hours at \$145.00 per hour). Defendant has not filed specific objections to any of the requested costs or fees. An award of costs to a prevailing claimant is mandatory under 21 V.S.A. §678(a). 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. Temporary total disability benefits from April 15, 2011 through July 31, 2011 pursuant to 21 V.S.A. §642, with interest as calculated pursuant to 21 V.S.A. §664;
2. Medical benefits covering all reasonable medical services and supplies causally related to treatment of Claimant's post traumatic stress disorder, in accordance with 21 V.S.A. §640; and
3. Costs in the amount of \$1,721.59 and attorney fees in the amount of \$9,309.00 in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 10th day of January 2013.

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.