Thomas J. Kibbie v. Killington/Pico Ski Resort (February 5, 2013)

STATE OF VERMONT
DEPARTMENT OF LABOR

Thomas J. Kibbie

v.

Killington/Pico Ski Resort

Opinion No. 03-13WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. Z-58225

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

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

ISSUE PRESENTED:

Is there a genuine issue of material fact as to whether the parties' previously approved settlement agreement shields Defendant from responsibility for the medical treatment Claimant seeks, or is Defendant entitled to judgment in its favor as a matter of law?

EXHIBITS:

Claimant's Exhibit 1:	Prescriptions and Request for Pre-Authorization
Claimant's Exhibit 2:	Occupational and physical therapy notes
Claimant's Exhibit 3:	Report of William Druckemiller, M.D., July 22, 2009
Claimant's Exhibit 4:	Report of Albert Drukteinis, M.D., July 9, 2012
Defendant's Exhibit 1	Modified Form 15 Settlement Agreement with Addendum and Workers' Compensation Rule 17 letter
Defendant's Exhibit: 2	Letter from Attorney Valente to Attorney Mabie, March 20, 2012
Defendant's Exhibit: 3:	Interim Order, Memorandum and Referral to Formal Hearing Docket, August 3, 2012

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Claimant as the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. On January 12, 2008 Claimant was engaged as a volunteer/ambassador at Killington Ski Resort. While snowboarding down to complete his day's duties, he fell, causing injuries

to his right ankle, right elbow/bicep, neck and head. Claimant also suffered a traumatic brain injury (TBI) in the accident.

2. On September 15, 2010, while Claimant was represented by counsel, the Department approved a modified Form 15 settlement agreement pertaining to his snowboard accident.

4. As executed by the parties and approved by the Department, Claimant agreed to accept $50,000.00 in return for a full and final settlement of "[a]ll claims occurring as a result of the work incident including but not limited to right ankle, head/TBI and right elbow/biceps, while leaving open all related future medical treatment pursuant to the Rules necessary for the treatment of [his] cognitive or other head injury, including neurological, psychological, ophthalmological, TBI care and treatment; and prior care for his covered injuries."

5. Defendant's responsibilities as to future medical benefits were restated in an addendum to the Form 15 as follows: "As part of this agreement, the carrier agrees it will continue to furnish all reasonable and related future medical treatment pursuant to the Rules, necessary to for [sic] the treatment of his cognitive or other head injury, including neurological, psychological ophthalmological, TBI care and treatment; and to pay for care for his covered injuries prior to the time of settlement."

6. Since his injury, Claimant has received both occupational and physical therapy services. The latter services have at times included manual techniques, massage and cervical traction. It is unclear from the record to what extent these modalities were directed at head as opposed to neck pain. For example:

- While undergoing physical therapy in March 2008, Claimant described headaches emanating from the base of his skull to his right frontal area; treatments included both sub-occipital release and upper trapezius massage;

- In November 2008 Claimant's in-patient rehabilitation treatment providers commented that he would benefit from "manual therapy to neck/head" as treatment for a primary diagnosis of "TBI" and a treatment diagnosis of "head pain, headaches;"

- In September 2009 Claimant again underwent in-patient rehabilitation treatment for a primary diagnosis of "TBI" and a treatment diagnosis of "head and right upper extremity pain, headaches, decreased oculomotor skills." His treatment providers reported that he was suffering from "severe headaches in the back of the head," that moving his eyes caused "instant headache," and that he had pain both in the back of his head and in his forehead. Without specifying which modalities were recommended for which symptoms, the treatment plan included therapeutic exercises, neuro re-education, manual therapy and home exercises.

7. Dr. Druckemiller, a neurosurgeon, performed an independent medical evaluation of Claimant in July 2009. Dr. Druckemiller reported that Claimant complained of pain on the right side of his neck, with radiation into his head and severe headaches on a continuing basis. His diagnosis was closed head injury, though he noted that Claimant

was "having more symptoms than I would expect for this type of injury." Dr. Druckemiller did not specify whether Claimant's headaches were a consequence of his closed head injury, his neck injury, or some combination of the two.

8. On October 7, 2010 Dr. Miller, Claimant's treating physiatrist, referred him for physical therapy, including both manual techniques and massage. The diagnosis stated on the referral form was "TBI/HA/neck pain." Dr. Miller did not specify whether the prescribed therapy was directed at one, two or all three of these diagnoses. Subsequently, on November 8, 2010 Dr. Miller completed a second physical therapy referral form. This form as well was for both manual therapy and massage, but the stated diagnosis read simply, "cervical pain."

9. Claimant attended physical therapy sessions in November and December 2010. In the therapist's November 19, 2010 initial evaluation, the assessment stated a diagnosis of "chronic neck pain, headaches, [right] sub-occipital pain [secondary to] TBI [January] 2008 while working at ski resort in Vermont. [Patient] presents with limited ROM and headaches." The problems identified were: "1. pain; 2. headaches; 3. limited cervical spine ROM." The treatment plan was for physical therapy consisting of manual techniques, patient education, mechanical traction and spinal mobility. The record does not specify which of the therapist's services were to be directed at which symptoms.

10. On December 19, 2010 Dr. Miller issued a third physical therapy referral, this time to "assess and order" a cervical home traction unit. The diagnosis stated on this referral form was "TBI, neck pain." It is unclear from the record whether this referral was directed at one or both of these diagnoses.

11. On November 28, 2011 Dr. Miller issued the following prescription: "P.T. – 2x/wk for 4 wks for manual therapies, cervical traction, modalities." Stated at the top was the following notation: "Dx: neck/back pain, HA."

12. On December 28, 2011 Dr. Miller issued a prescription for "neuro-optometry for visual eval and therapy." Stated at the top was the notation, "Dx: TBI."

13. Defendant maintained that Dr. Miller's physical therapy referrals of October 7, 2010, November 8, 2010 and December 19, 2010, as well as his November 28, 2011 prescription, were necessitated by Claimant's neck pain rather than his TBI. Therefore, it asserted, under the terms of the parties' settlement agreement it was not obligated to pay for them.[1] The Department's Workers' Compensation Specialist disagreed, and in January 2012 ordered that Defendant issue payment for those and other outstanding medical bills. Defendant complied.

14. At Defendant's request, in July 2012 Claimant underwent an independent medical evaluation with Dr. Drukteinis, a psychiatrist.

[1] Defendant accepted responsibility for Dr. Miller's December 28, 2011neuro-optometry referral as causally related to Claimant's TBI, and therefore still covered even notwithstanding the parties' settlement agreement.

15. Dr. Drukteinis agreed that Claimant was properly diagnosed with residual TBI causally related to his January 2008 snowboarding accident. However, he did not render an opinion whether Claimant's headaches were a symptom of TBI. Dr. Drukteinis hypothesized that the headaches "may or may not just be an exacerbation" of the occasional migraines from which Claimant had suffered before the work injury, but acknowledged in either event that they "are no doubt impacted by his disturbed emotional state." As for the efficacy of and expenses related to physical therapy, Dr. Drukteinis viewed this as a medical determination, not a psychiatric one, and therefore did not state an opinion.

DISCUSSION:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank,* 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).

2. At issue here is whether the parties' executed and approved settlement agreement shields Defendant from responsibility for the specific physical therapy services that Dr. Miller has prescribed. Defendant argues that under the terms of the settlement agreement it is obligated to provide only those medical treatments that represent reasonable and necessary treatment for Claimant's "cognitive or other head injury." It contends that the uncontradicted evidence establishes that the services at issue have been prescribed to address cervical pain and/or headaches, not a cognitive impairment or head injury. Therefore, it asserts, as a matter of law they do not qualify for ongoing coverage under the agreement.

3. There is certainly evidence from which to infer that the physical therapy Dr. Miller has prescribed is most likely directed at Claimant's cervical pain, and/or that Claimant's headaches are most likely cervical in origin. Were I to accept this evidence as the most credible, then by virtue of the parties' settlement agreement Defendant would indeed be absolved of responsibility. However, considering the evidence in the light most favorable to Claimant, I find ample grounds from which to infer the opposite – that Claimant's headaches are not cervical, but rather are a consequence of his closed head injury, oculomotor deficits and/or TBI. If the most credible evidence establishes that to be the case, then Defendant will be obligated to pay for the treatment at issue.

4. The sole purpose of summary judgment review is to determine if a genuine issue of material fact exists. If such an issue does exist, it cannot be adjudicated in the summary judgment context, no matter how unlikely it seems that the party opposing the motion will prevail at trial. *Fonda v. Fay*, 131 Vt. 421 (1973); *Southworth v. State of Vermont Agency of Transportation*, Opinion No. 45-08WC (November 12, 2008). However tenuous or unlikely the evidence in support of Claimant's claim that the medical treatment at issue here is directed at his "cognitive or other head injury" rather than at a cervical spine-related condition, he is entitled nonetheless to present his case and litigate the question. Summary judgment against him is not appropriate.

ORDER:

Defendant's Motion for Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont this 5th day of February 2013.

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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.