Tammy Randall v. Health Services Group (March 12, 2013)

STATE OF VERMONT
DEPARTMENT OF LABOR

Tammy Randall

v.

Health Services Group

Opinion No. 09-13WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. AA-59997

OPINION AND ORDER

Hearing held in Montpelier, Vermont on October 15, 2012
Record closed on December 24, 2012

APPEARANCES:

Mark McQuerry, Esq., for Claimant
David Berman, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant's cervical spine condition causally related to her February 9, 2009 compensable work injury?

2. If so, does Dr. Robbins' proposed cervical surgery constitute reasonable medical treatment under 21 V.S.A. §640(a)?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: *Curriculum vitae,* Dr. Robbins

Defendant's Exhibit A: *Curriculum vitae,* Dr. Kirkpatrick

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640(a)
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 worked for Defendant as a cook and kitchen aide.

Claimant's Prior Medical History

4. In October 2007 Claimant sustained an injury at work, when two trays of food fell off a delivery cart while she was bending over and hit her in the back of her head. Claimant treated for this injury at the Southwestern Vermont Medical Center emergency room, where she was noted to have matted food in her hair, tenderness in the back of her head and temporarily blurred vision. She did not lose consciousness, and her symptoms resolved quickly.

Claimant's Work Injury and Course of Treatment

5. Claimant credibly described that while working her normal shift on February 5, 2009 she had occasion to retrieve a box of bagels from Defendant's walk-in freezer. The bagels were on a shelf that was shoulder high, and she did not realize that two five-gallon tubs of ice cream were resting on the back of the box. As she pulled the box off the shelf, one of the ice cream tubs fell forward towards her. To avoid being hit in the face, Claimant jerked her head back and away. As she did so, she heard a pop in her shoulder and immediately felt burning pain from her left neck into her shoulder and down her left arm.

6. On February 9, 2009 Claimant presented to her primary care physician, Dr. Carroll, with what she described as steadily increasing left shoulder pain that had begun four days ago. At the time, Claimant did not report having suffered a specific injury as a result of the February 5th incident. Dr. Carroll prescribed oral steroids and determined that she was unable to work. Claimant has not returned to work since.

7. At her next two visits to Dr. Carroll, Claimant reported that her symptoms included tingling up to her neck and around the back of her shoulder. In early March 2009 she described tenderness when her left trapezius was palpated. The trapezius is the main stabilizing muscle that attaches to the base of the skull and runs all the way to the shoulders and down the middle of the back. I find that when Claimant reported tenderness in that area, she thus was implicating both her shoulder and her neck.

8. Claimant's symptoms failed to improve with conservative treatment, and in fact worsened with physical therapy. In March 2009 she was referred to Dr. Nofziger, an orthopedic surgeon and shoulder specialist, for further evaluation.

9. At her first visit with Dr. Nofziger, Claimant described her pain as being all around her left shoulder blade, around the shoulder and down her arm. An MRI study showed no evidence of a frank rotator cuff tear, but did reveal a labral tear. Dr. Nofziger prescribed conservative treatment, but still Claimant failed to improve.

10. Fearing a cervical or brachial nerve component to Claimant's pain, in July 2009 Dr. Nofziger recommended that she undergo electrodiagnostic testing. This she did, in August 2009. Both EMG and nerve conduction tests were negative.

11. Conservative therapies having proved ineffective at resolving her pain, in November 2009 Claimant underwent surgery, during which Dr. Nofziger repaired her labral tear and compressed her shoulder.

12. Claimant's condition did not improve with surgery, and her symptoms persisted throughout 2010. In January 2011, she underwent a second shoulder surgery. Thereafter, the pain in her shoulder joint improved, but the pain she described over her shoulder blade and in her neck continued. I find that by these descriptions Claimant likely was referring to the same symptoms of which she had complained since shortly after her February 2009 work injury.

13. In June 2011 Dr. Nofziger recommended that Claimant undergo a cervical spine MRI to ascertain whether there might be a cervical component to her pain. Although this was the first treatment recommendation specifically targeting her neck, I find that the symptoms that prompted Dr. Nofziger's suggestion had been ongoing since Claimant's February 2009 work injury. The MRI revealed a congenital fusion at the C4-5 disc level, with significant disc space narrowing and a rather large bone spur at C5-6. Thereafter, Dr. Nofziger referred Claimant to Dr. Robbins, a spine specialist, for further evaluation.

14. In February 2012 Claimant first saw Dr. Robbins. She described neck pain that radiated into her left shoulder, and when Dr. Robbins examined her she was tender to touch both over the left trapezius and at C5-6. A Spurling's test, which is used to diagnose cervical nerve root compression, was positive at the C5 level. There were negative impingement signs in the left shoulder, however, indicating that this likely was not the source of her ongoing pain.

15. At a second office visit with Dr. Robbins in April 2012, Claimant exhibited identical symptoms. As treatment, Dr. Robbins has recommended surgery to decompress the C5 nerve root, excise the existing C5-6 bone spur and fuse the discs at that level.

16. Supported by its own medical expert, Dr. Kirkpatrick, in March 2012 Defendant sought to terminate both temporary total disability and medical benefits (including coverage for Dr. Robbins' proposed surgery), on the grounds that Claimant's cervical condition was not causally related to her work injury. The Department approved the discontinuance effective March 15, 2012.

Expert Medical Opinions

(a) Dr. Robbins

17. Dr. Robbins is a board certified orthopedic surgeon, specializing in the spine. As noted above, he saw Claimant on two occasions. He also reviewed her medical records.

18. In Dr. Robbins' opinion, as a result of the February 2009 incident at work Claimant likely suffered an injury to her cervical spine, which resulted in the C5 nerve root compression now apparent on MRI. He based this opinion on the following:

- The mechanism of Claimant's injury – jerking her head back and away to avoid being hit in the face by the falling tub of ice cream – was consistent with an extension and rotation injury at the C5 level;

- As is documented in virtually every physician's office note after the February 2009 incident, Claimant consistently complained of trapezial pain, that is, pain both between the shoulder blades and in the neck. The trapezius is the main referral point for neck pain, and therefore this is exactly where a compression-type injury to the C5 nerve root would manifest itself; and

- Claimant's positive Spurling's test on examination constituted objective evidence of C5 nerve root compression.

19. I find Dr. Robbins' analysis as to the causal relationship between Claimant's February 2009 work injury and the compression of her C5 nerve root to be very persuasive. I also find persuasive Dr. Robbins' conclusion that neither Claimant's pre-existing C5 bone spur nor her congenital C4-5 fusion are likely causes of her ongoing trapezial and neck pain. These conditions were completely asymptomatic prior to February 2009.

20. I acknowledge that at one point in his testimony Dr. Robbins mistakenly confused the details of Claimant's October 2007 work-related injury, Finding of Fact No. 4 *supra*, in which falling meal trays hit her in the head and caused her hair to become matted with food, with those of the February 2009 incident at issue here. His erroneous reference to these records does indicate some inattention to detail. However, Dr. Robbins' grasp of Claimant's medical records from February 2009 forward evinces a clear understanding of both the mechanism of her injury and the symptoms she consistently reported thereafter. Thus, taken in context I find his mistake inconsequential.

21. With regard to his proposed treatment, Dr. Robbins believes that surgical decompression, excision and fusion at the C5-6 level will likely relieve Claimant's neck pain. In his opinion, initially Claimant's shoulder injury was both more obvious in its presentation and more significant; as a result, for many years her neck injury was "running along as a step-child." Now that Dr. Nofziger's surgeries have alleviated at least some of the pain in Claimant's shoulder joint, the pain that remains is likely cervical in origin and should respond to surgical treatment. I find this reasoning persuasive.

(b) *Dr. Kirkpatrick*

22. Dr. Kirkpatrick is a board certified orthopedic surgeon. At Defendant's request he conducted two independent medical examinations of Claimant, one in August 2011 and the other in May 2012. Dr. Kirkpatrick also reviewed Claimant's pertinent medical records prior to his testimony.

23. Dr. Kirkpatrick diagnosed Claimant with shoulder impingement syndrome causally related to her February 2009 work injury. In his opinion, her cervical symptoms are not causally related to that injury, for the following reasons:

- The medical records contemporaneous to Claimant's February 2009 injury do not report any complaints, signs or symptoms of neck pain; and

- Claimant's mechanism of injury does not support a finding of neck trauma.

24. Rather than her work injury being the catalyst for Claimant's neck symptoms, in Dr. Kirkpatrick's opinion it is more likely that her congenital C4-5 fusion and C5-6 bone spur, both of which pre-existed her work injury, caused stress to her C5 nerve root and resulted in the symptoms that Dr. Nofziger first addressed in June 2011. Thus, Dr. Kirkpatrick believes that Claimant's current course of treatment, as well as Dr. Robbins' proposed surgery, have been necessitated by her pre-existing conditions, not by her February 2009 work injury.

25. I do not find Dr. Kirkpatrick's opinion persuasive. Claimant's medical records from February 2009 forward are replete with entries in which Claimant complained of pain between her shoulder blades and was noted on examination to be tender to palpation in her left trapezius. As noted above, Finding of Fact No. 18 *supra*, the trapezius muscle is a referral point for neck pain, and therefore these references do in fact encompass the C5 nerve root symptoms later documented on MRI.

26. Dr. Kirkpatrick did agree that the motion involved in forcefully jerking one's neck potentially can cause a cervical injury. He further agreed that after Claimant's first shoulder surgery her left shoulder was no longer a pain generator.

27. In Dr. Kirkpatrick's opinion, Dr. Robbins' proposed cervical surgery is not reasonable, both because it is not causally related to her work injury and because it is not likely to be successful. In his analysis, Claimant already has undergone two shoulder surgeries, both of which he would characterize as failures. A third surgery to address her neck condition is likely to be unsuccessful as well. In fact, however, Claimant's neck pain has only recently become the focus of any specifically directed treatment, separate and apart from treatment targeted at her shoulder joint. That being the case, Dr. Kirkpatrick has not explained adequately how it is that the benefit Claimant derived (or not) from her shoulder surgeries is likely to be an accurate predictor of whether she will (or will not) benefit from cervical surgery. For that reason, I find his opinion less persuasive than Dr. Robbins'.

(c) Dr. Nofziger

28. Dr. Nofziger is a board certified orthopedic surgeon specializing in the shoulder. In April 2012, at the request of Defendant's attorney, he wrote a letter in which he stated to a reasonable degree of medical certainty that Claimant's neck problems were worsened or exacerbated by her shoulder injury. Dr. Nofziger did not detail the reasons for his opinion or the factual evidence supporting it. Therefore, I do not find his opinion persuasive on the causal relationship issue.

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 first issue presented here is whether Claimant's cervical spine condition is causally related to her February 2009 work injury. Claimant asserts that it is, as the injury she suffered encompassed both her shoulder and her neck. Defendant argues to the contrary. It asserts that Claimant's cervical symptoms are the result of her congenital fusion at C4-5 and her pre-existing bone spur, both chronic, pre-existing conditions.

3. The parties presented conflicting expert medical evidence as to 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).

4. Based primarily on the third factor, I conclude that Dr. Robbins' opinion is the most persuasive. His analysis of the mechanism of Claimant's injury as consistent with a resulting C5 nerve root compression was convincing. In addition, his conclusion that Claimant's complaints of pain in and around her shoulder blade and trapezius muscle likely encompassed cervical pain was credible as well.

5. I conclude that Claimant has sustained her burden of proving that her current neck symptoms and cervical condition are causally related to her February 2009 work injury.

6. The second issue is whether Dr. Robbins' proposed cervical surgery constitutes reasonable medical treatment. I conclude that it is.

7. Vermont's workers' compensation statute, 21 V.S.A. §640(a), obligates an employer to pay only for "reasonable" medical treatments. 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, 2011). Having already concluded that Claimant's cervical condition is causally related to her compensable injury, the only remaining question is whether the proposed surgery is medically necessary and appropriate.

8. Again, I conclude that Dr. Robbins' opinion on this issue is more persuasive than Dr. Kirkpatrick's. Dr. Robbins aptly recognized the extent to which Claimant's neck injury was largely ignored for more than two years, while the primary treatment focus remained on her left shoulder. As a result, Claimant has only recently had the benefit of treatment directed more specifically at her neck. Conservative therapies having failed, cervical spine surgery is now an appropriate option.

9. In summary, I conclude that Claimant has sustained her burden of proving that her current cervical condition is causally related to her accepted February 2009 work injury. I further conclude that she has not yet reached an end medical result, and that Dr. Robbins' proposed surgery constitutes reasonable treatment.

10. 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 $2,857.58 and attorney fees totaling $6,187.50. 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), and therefore these are awarded. 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 retroactive to March 15, 2012 in accordance with 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 cervical spine condition, in accordance with 21 V.S.A. §640; and

3. Costs totaling $2,857.58 and attorney fees totaling $6,187.50, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 12th day of March 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.