STATE OF VERMONT
DEPARTMENT OF LABOR

Catherine Heller

v.

Bast & Rood Architects

Opinion No. 14-13WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. T-12409

OPINION AND ORDER

Hearing held in Montpelier, Vermont on March 11, 2013
Record closed on April 11, 2013

APPEARANCES:

Frank Talbott, Esq., for Claimant
Robin Ober Cooley, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to additional permanent partial disability benefits referable to her January 2003 compensable work injury?

2. If yes, what is the extent of the additional permanent impairment she has suffered?

3. Is Claimant entitled to reimbursement of Dr. Harvie's evaluation charges as a medical expense under 21 V.S.A. §640(a)?

EXHIBITS:

Joint Exhibit I:	Medical records
Joint Exhibit IA:	Medical records
Joint Exhibit II:	Medical records
Claimant's Exhibit 2:	*Curriculum vitae,* Keith Harvie, D.O.
Claimant's Exhibit 3:	Independent medical evaluation invoice, 2/28/2012
Defendant's Exhibit A:	*Curriculum vitae,* Thomas Grace, M.D.

CLAIM:

Permanent partial disability benefits pursuant to 21 V.S.A. §648
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 and correspondence contained in the Department's file relating to this claim. Judicial notice also is taken of the commissioner's prior decision in *Heller v. Bast & Rood Architects*, Opinion No. 32-10WC (October 5, 2010), *aff'd*, Vermont Supreme Court Docket No. 2010-405 (May Term, 2011).

Claimant's January 2003 Work Injury

3. Claimant worked for Defendant's architectural firm. On January 2, 2003 she slipped and fell on the icy driveway while maneuvering to get into her car at the end of her workday. In her First Report of Injury, Claimant described a backwards fall that "slammed" her onto the ice, causing injury to her back, neck, shoulders and hips.

4. Although it disputed the causal relationship between Claimant's fall and some of her subsequent complaints, Defendant accepted as compensable those referable to her lower back. It did so notwithstanding that she had a prior history of treatment for lower back pain following motor vehicle accidents in 1986 and 2001. In fact, x-ray studies undertaken some years before her 2003 work injury documented degenerative changes not only in her lumbar spine, but in her cervical and thoracic spine as well.

5. In 2010 the parties litigated the compensability of Claimant's other complaints, which included pain in her cervical and thoracic spine, her knees and her hips. Following a formal hearing, the Commissioner determined that only the bursitis in Claimant's left hip was causally related to the 2003 fall; her other complaints were all referable to preexisting injuries or conditions.

6. The parties also litigated the question whether proposed prolotherapy injections constituted reasonable treatment for Claimant's lower back injury. The Commissioner determined that they were.

Claimant's 2004 and 2005 Permanency Ratings

7. Claimant was first determined to have reached an end medical result for her compensable lower back injury in June 2004, following an independent medical examination with Dr. Grace, a board certified orthopedic surgeon retained by Defendant for this purpose.[1] Dr. Grace diagnosed Claimant with grade 1 spondylolisthesis, a degenerative condition, at the L4-5 level of her lumbar spine. Based solely on this diagnosis, in accordance with the *AMA Guides to the Evaluation of Permanent Impairment (5th ed.)*, he determined that Claimant had suffered a seven percent whole person permanent impairment referable to her 2003 work injury. Notably, during this examination Claimant demonstrated 70 degrees of lumbar spine flexion (forward bending) and 25 degrees of extension (backwards bending). According to the *AMA Guides*, these measurements were insufficient to qualify her for any additional impairment based on reduced range of motion.

8. Dr. Grace next examined Claimant in August 2005. This time he calculated her permanent impairment at ten percent whole person. The increase was attributable to two factors. First, consistent with another independent medical examiner's determination, Dr. Grace added one percent impairment for documented degenerative disc disease at L2-3, which he concluded was referable to Claimant's work injury along with the degeneration he previously had rated at L4-5. Second, because Claimant now was demonstrating only 40 degrees of lumbar flexion (down from 70 degrees in 2004), under the *AMA Guides* she now qualified for an additional two percent impairment on account of her reduced range of motion, which Dr. Grace determined was attributable to the work injury as well.

9. In June 2007 the Department approved the parties' Agreement for Permanent Partial Disability Compensation (Form 22), by the terms of which Defendant agreed to pay permanency benefits in accordance with Dr. Grace's August 2005 impairment rating. In the Agreement, the parties described the compensable injury as "degenerative disc disease and related symptoms."

Claimant's More Recent Treatment and Permanency Ratings

10. Following the Commissioner's determination in her favor as to the reasonableness of prolotherapy injections, Finding of Fact No. 6 *supra*, in 2010 Claimant resumed treatment for her compensable lower back condition. Between January and April 2011 she underwent both lumbar epidural and facet injections, the purpose of which was concurrently diagnostic – to help differentiate her spinal pathology from her hip pathology – and therapeutic. In June and July 2011 she underwent prolotherapy injections, which seemed to relieve some of the muscular dysfunction in her lower back, at least for a time. For the most part, however, her pain persisted.

11. In February 2012 Claimant presented to Dr. Harvie, a board certified osteopath and orthopedic surgeon, for evaluation. Claimant testified that her purpose for doing so was

[1] Dr. Grace first evaluated Claimant in January 2004, but determined that she was not yet at end medical result. For that reason, he estimated but did not conclusively rate her permanent impairment at that time.

to gain a better understanding of how the dysfunction in her lower back was evolving and to learn whether a surgical solution might ultimately become necessary. I find that it was appropriate for Claimant to seek out Dr. Harvie for this purpose, and also that it was necessary for him both to review her voluminous medical file and to conduct a thorough examination in order to provide well-reasoned and considered medical advice.

12. However, it is apparent from her attorney's referral letter that the purpose of Dr. Harvie's evaluation was also to render an opinion regarding a variety of other medical and legal issues facing Claimant, only some of which were related to her compensable lower back condition. For example, in addition to soliciting a current permanent impairment rating referable to her lower back, the attorney also asked Dr. Harvie to respond to questions concerning the dysfunction in her right hip and right and left knees, all conditions that the Commissioner previously had decided were not compensable. From reviewing Dr. Harvie's report and formal hearing testimony, I find that he likely devoted at least one-third of his time to issues that were unrelated to Claimant's compensable injury.

13. Dr. Harvie rated the extent of Claimant's current whole person impairment referable to her lumbar spine at 16 percent.[2] As compared with the ten percent impairment that Dr. Grace found in 2005, the difference lies in Claimant's inability to extend backwards during Dr. Harvie's examination. According to the *AMA Guides*, this range of motion deficit alone qualified her for an additional seven percent impairment. Using the *AMA Guides'* combined values chart, Dr. Harvie combined this impairment with (a) two percent impairment for deficits in flexion; and (b) seven percent diagnosis-related impairment to arrive at his final rating.

14. Dr. Grace also rendered an updated impairment rating, after conducting another independent medical examination in April 2012.[3] He too found that Claimant's range of motion had decreased since his 2005 exam, although the particulars were somewhat different from Dr. Harvie's.[4] Dr. Grace's final whole person impairment rating referable to the lumbar spine was fifteen percent. The one-percent difference between the two ratings relates to the manner in which the *AMA Guides'* combined values chart was applied; I find that Dr. Grace's methodology was the correct one.

[2] Dr. Harvie also rated a three percent impairment referable to Claimant's compensable left hip condition. Permanency benefits for this impairment were previously paid and are not currently at issue.

[3] Dr. Grace also evaluated Claimant in 2007, for reasons unrelated to her lower back injury.

[4] Whereas Dr. Harvie measured 45 degrees of flexion and zero degrees of extension in his evaluation, Dr. Grace measured only 30 degrees of flexion, but ten degrees of extension. Added together, in both cases the resulting impairment attributable to range of motion deficits is nine percent.

Expert Opinions as to Causation of Increased Impairment

15. Diagnostic imaging studies have documented that the degenerative disease in Claimant's lumbar spine has worsened in the years since Dr. Grace's 2005 permanency evaluation. Both Dr. Harvie and Dr. Grace attribute the increased range of motion deficits they measured, and consequently Claimant's increased permanent impairment, to the progression of this condition. Where the two doctors differ is as to the role, if any, that Claimant's 2003 work injury has played in the process.

16. According to Dr. Harvie, a backwards fall onto the buttocks, such as the one Claimant described, can result in significant trauma to the spine. In his opinion, that event likely has had a "profound" impact on the rate at which the preexisting degenerative disease in her lumbar spine has progressed.

17. Other factors likely have played a role in the progression of Claimant's degenerative disease as well. Dr. Harvie acknowledged that weight gain, lack of exercise and core strength, family history and the aging process in general all have probably contributed. He admitted that it would be impossible to quantify the extent to which any one factor has caused the disease to accelerate. As a result, he could not break down the increase in Claimant's permanent impairment between 2005 and 2012 to that portion attributable to trauma from her fall and those portions attributable to other causes.

18. Because Claimant's condition is by its very nature a degenerative process, it likely will continue to progress in the years to come. Notably, Dr. Harvie predicted that if she were to lose weight she might be able to decrease the rate at which her range of motion worsens over time. If she does not do so, her permanent impairment likely will continue to increase.

19. Dr. Grace concurred with Dr. Harvie's analysis as to the many factors that have contributed to cause the degeneration in Claimant's lumbar spine to worsen over time, including prior injury, body mass, age and genetics. He acknowledged that the 2003 fall likely played a role in the process. However, he disagreed that trauma from the fall reasonably can be held accountable at this point for whatever ongoing degeneration has occurred. Instead, he pointed to the aging phenomenon as the most likely causal factor. With age come increased joint stiffness as well as arthritic degeneration, and therefore decreased range of motion. In Dr. Grace's opinion, it is difficult to speculate whether Claimant would have exactly the same range of motion in her lumbar spine now even if she had not suffered her 2003 work injury, but certainly she would have some additional deficits as compared with 2005.

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).

Modification of Permanency Award Based on "Change in the Conditions"

2. Claimant here seeks additional permanent partial disability benefits on the grounds that her work-related lower back injury has progressed to the point of causing further permanent impairment as compared to what was rated and paid in 2005. Defendant agrees that her impairment has increased, but disputes both the legal and factual basis for any additional award of benefits.

3. Vermont statute allows for an award of workers' compensation benefits to be modified at any time within six years from the date of the original award "upon the ground of a change in the conditions." 21 V.S.A. §668; *see, e.g., Estate of Richardson v. Regular Veteran's Association Post #514*, Opinion No. 04-11WC (February 16, 2011). The statutory language does not exclude permanency awards from modification. However, the very nature of such awards demands that a request for modification be closely scrutinized. A permanency award is, after all, presumed in most cases to be permanent.

4. "[An] award for permanent incapacity looks to the future to compensate for the probable reduction in earning power that will attend [an injured worker] for the remainder of his working life." *Orvis v. Hutchins*, 123 Vt. 18, 22 (1962). Thus, while temporary disability benefits are payable during the healing process, permanency benefits do not become due until the injured worker "is as far restored as the permanent character of his injuries will permit." *Id.* at 24. At this point, the worker is deemed to have reached the "end result" of his or her physical recovery period. *Bishop v. Town of Barre*, 140 Vt. 564, 571 (1982).

5. Notably, by delineating the point at which the injured worker has recovered as much function as possible following a work-related injury, the concepts of end medical result and permanency focus on the extent to which a compensable injury or condition has *improved*, not the extent to which it might continue to *worsen*. *See* Workers' Compensation Rule 2.1200 (defining "end medical result").

6. Recognizing that every award of permanent partial disability benefits thus encompasses the possibility that a claimant's condition still might continue to deteriorate even after an end medical result is declared, the question becomes, under what circumstances should modification on the grounds of "a change in the conditions" be granted?

7. One obvious requirement is that any change in an injured worker's condition that results in an increased permanent impairment must be shown to have been caused by the work injury rather than non-work-related factors. Establishing this causal nexus is as necessary in the context of modification as it is in the context of an initial award. *Egbert, supra; see, e.g., Marshall v. State of Vermont, Vermont State Hospital*, Opinion No. 01-11WC (January 25, 2011).

8. The interrelationship between end medical result and permanent partial disability dictates a second requirement as well. For the same reason that a claimant cannot be awarded permanency benefits initially until curative treatment has concluded and the condition has stabilized, so too a prior award should not be modified unless additional curative treatment has been undertaken and an end medical result reached. Otherwise, the "permanent" aspect of the award will be lost, and piecemeal recoveries might result.

9. Considering the second requirement first, I conclude in this claim that the treatment Claimant has undergone since 2010, including evaluations and referrals related to the various injections referred to in Finding of Fact No. 10 *supra*, has been curative rather than palliative in nature. As the credible medical evidence established, the purpose of these treatments was both diagnostic and therapeutic. Prior decisions have routinely held likewise. *See, e.g., Luff v. Rent Way*, Opinion No. 07-10WC (February 16, 2010); *Abare v. Ben & Jerry's*, Opinion No. 44-08WC (November 5, 2008).

10. As to the first requirement – the causal relationship between Claimant's 2003 work injury and her worsened permanent impairment – the parties presented conflicting expert testimony. 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).

11. Neither of the medical experts here was a treating physician. However, Dr. Grace had the benefit of conducting numerous independent medical examinations in the years since Claimant's 2003 injury, whereas Dr. Harvie only examined her once, some nine years later. Given that the central issue in dispute involves the manner in which Claimant's condition has evolved over time, I conclude that this factor lends added credibility to Dr. Grace's opinion.

12. Beyond that, I conclude that Dr. Harvie's opinion suffers from a lack of objective support. He asserted that the 2003 work injury was still a factor contributing to the

ongoing degeneration in Claimant's lumbar spine, but acknowledged that there was no way to quantify to what extent this was so. He also admitted that she could control the rate at which her range of motion would continue to decline (and thus the extent to which her permanent impairment would continue to increase) through diet and exercise. The logical inference is that such non-work-related factors are more likely driving Claimant's current circumstance, not an injury that occurred more than nine years ago.

13. In contrast, considering all of the factors that have played a role as Claimant's condition has continued to worsen, Dr. Grace credibly concluded that the natural aging process was the most likely cause of her increased permanent impairment. In doing so, he recognized how speculative it would be to predict the extent to which the degeneration in Claimant's lumbar spine would have progressed had her work injury not occurred. I agree.

14. Claimant points to the language of the parties' previously approved permanency agreement, in which the compensable injury was described as "degenerative disc disease," as the basis for imposing liability on Defendant for her increased permanent impairment. I cannot accept this interpretation. That Claimant suffered from preexisting degeneration in her lumbar spine was never disputed. It would make no sense to ascribe its entire existence to her 2003 fall.

15. Though perhaps drafted inartfully, the injury Defendant accepted as compensable was not the degenerative condition in Claimant's lumbar spine itself, but rather the acceleration or aggravation of that condition. By virtue of the permanency benefits it paid in 2005, Defendant already has compensated Claimant for that compensable consequence. At some point, the causal relationship between her work injury and the continued progression of her disease becomes too attenuated, however. That point has now been reached.

16. I conclude that Claimant has failed to sustain her burden of proving the extent, if any, to which her 2003 work injury has caused her permanent impairment to increase since her 2005 permanency award.

Coverage for Dr. Harvie's February 2012 Evaluation

17. Having previously found that at least one-third of Dr. Harvie's February 2012 evaluation was directed at issues unrelated to Claimant's compensable injury, Finding of Fact No. 12 *supra*, I allocate one-third of the cost of that examination, or $1,695.00, to those issues. The remaining two-thirds, or $3,441.00, I conclude are properly allocated to reasonable medical services provided as treatment for Claimant's compensable injury, for which Defendant is responsible under 21 V.S.A. §640(a).

Costs and Attorney Fees

18. As Claimant has failed to substantially prevail on her claim for benefits, she is not entitled to an award of costs and attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for additional permanent partial disability benefits referable to her January 2003 compensable injury is hereby **DENIED**. Defendant is hereby **ORDERED** to pay:

1. Medical benefits totaling $3,441.00 in accordance with 21 V.S.A. §640(a).

DATED at Montpelier, Vermont this 9th day of May 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.