

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Mirela Pasic

Opinion No. 15-20WC

v.

By: Stephen W. Brown
Administrative Law Judge

University of Vermont
Medical Center

For: Michael A. Harrington
Commissioner

State File Nos. DD-60134 and FF-55020

OPINION AND ORDER

Hearing held in Montpelier on May 21, 2020
Record closed on June 24, 2020

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Jennifer K. Moore, Esq., for Defendant

ISSUE PRESENTED:

What, if any, permanent impairment rating is attributable to Claimant's accepted neck injury that she sustained on February 11, 2012?

EXHIBITS:

Joint Exhibit 1:	Joint Medical Exhibit ("JME")
Defendant's Exhibit A:	<i>Curriculum Vitae</i> of Nancy Binter, M.D.
Defendant's Exhibit B:	Correspondence from Claimant's attorney to Karen Huyck, M.D. dated April 22, 2016
Defendant's Exhibit C:	Independent Medical Examination Intake Form dated May 28, 2016
Defendant's Exhibit D:	Service Agreement between Claimant's attorney and Karen Huyck, M.D. dated November 10, 2016

FINDINGS OF FACT:

1. I take judicial notice of all relevant forms and correspondence in the Department's file for this claim, and of the AMA Guides to the Evaluation of Permanent Impairment, 5th ed. (the "AMA Guides").¹

¹ Defendant also proffered Exhibits E, F, and G, each consisting of an excerpt from the AMA Guides. Because I take judicial notice of the AMA Guides as a whole, it was not necessary to separately admit these exhibits.

2. Claimant is a 38-year-old woman residing in Milton, Vermont. As of February 2012, Defendant employed her as a licensed nursing assistant.
3. On February 11, 2012, while Claimant was working at Defendant's hospital, she helped a heavy patient move between her bed and the bathroom. The patient's feet moved out from under her, and Claimant tried to help her up with both arms but was unable to support her weight. Claimant sustained injuries to her lower back, left hip, and cervical spine. Defendant accepted this incident as compensable and paid some benefits accordingly. However, the parties presently dispute whether Claimant's cervical spinal injury resulted in any permanent impairment, and if so, then to what extent.
4. The day after her injury, Claimant presented to Defendant's emergency room with a primary complaint of back pain. (JME 1-3). The next month, she was evaluated at Concentra, where her provider assessed her back, shoulder, and neck pain as "nearly resolved," and released her to work half shifts with a 40-pound lifting restriction. (JME 25-26).
5. Claimant again reported trapezius and back pain during a follow-up visit at Concentra in September 2012, (JME 101), but there is no record of any neck, shoulder, or trapezius complaints during the next roughly seventeen months.
6. In March 2014, Claimant again reported neck stiffness to a physical therapist during a visit that was primarily for her left hip. (JME 230).² She credibly acknowledged at the formal hearing that it was "fair to assume" that she was not experiencing neck-related symptoms between September 2012 and March 2014.
7. Claimant's treatment records from the spring of 2014 also reflect stressful changes in her life, including the recent loss of her job with Defendant. (*E.g.*, JME 229). She credibly testified at the formal hearing that she tends to carry her stress in her neck and shoulders and that she has discussed this with multiple healthcare providers, who have recommended stretching and strengthening exercises and to improve her posture.
8. By March 2015, Claimant was taking college courses, cleaning houses part-time, and working as a substitute teacher. That month, she also began a Functional Restoration Program (FRP), a three-week intensive bootcamp-like exercise program. (JME 273).
9. Her FRP records identify the chief complaint requiring rehabilitation as "left groin, left buttock, low back, and left lower extremity pain with crepitus in the left hip, sensory loss affecting the left lateral hip and weakness in the left lower extremity." (JME 276). They also identify the relevant anatomic diagnoses as labral tear, degenerative disc, and arthritis. (*Id.*). While her FRP records contain multiple references to Claimant's back and hip complaints, they do not reflect any then-current

² Most of Claimant's extensive medical records relate to her hip and lower back injuries, which are not in dispute for the purpose of the issue presented in this decision.

complaints about her neck, shoulders, or trapezius muscles. (*See generally* JME 273-358).³

10. In April 2015, during a follow-up visit after completing the FRP, Claimant reported an onset of left shoulder pain during the prior week. On physical examination, however, her provider found her cervical range of motion to be “full and pain free.” (JME 370-374).
11. During the next nine months, Claimant experienced a flare of back and hip pain, which she attributed at least in part to increased hours cleaning houses. (*See* JME 389). In November 2015, after several conservative treatments had failed to resolve her persistent hip pain, she underwent left hip surgery to repair a labral tear. (JME 408-409).
12. Claimant began another physical therapy program after that hip surgery. In January 2016, she told her physical therapist that she was experiencing significant stress levels, and she reported neck pain and headaches at that time. (JME 428-430). She also reported neck pain radiating to the temporal areas during a physician visit later that month, which she attributed to psychosocial stressors, including her job loss, her workers’ compensation claim, and family issues. (JME 434). Her physician noted that her cervical range of motion was “full without complaints at any end range[.]” and referred her to additional physical therapy. (*Id.*).
13. Claimant continued to undergo physical therapy through much of 2016, primarily for her back and hip symptoms, but she occasionally complained of neck pain or tightness during this period. (*See generally* JME 459-612).
14. During three physical therapist visits in December 2016, she expressly reported that she had not had any recent neck pain. (JME 685) (“I haven’t had any neck pain or headaches for about a week also.”); (JME 687) (“Back still feeling pretty good and no headache/neck pain after last gym visit”); (JME 692) (“Doing well – no neck pain lately.”).
15. There is no mention of neck pain during any of Claimant’s medical treatment records from any time after December 2016 through the present. (*See generally* JME 696-805).
16. Claimant testified during a 2018 deposition, and again during the 2020 formal hearing, that she was not experiencing any problems with her neck at those times. I find this testimony credible.
17. However, she also testified that she sometimes continues to experience neck and shoulder tension, which she treats with massage therapy. Between approximately 2017 and the onset of the Covid-19 pandemic in early 2020, she received massage therapy

³ Claimant’s FRP records do reference a “history” of neck pain (*e.g.*, JME 289 and 350), but nothing in those records suggests that Claimant was complaining of any active neck-related symptoms during the program.

about once or twice per month. There are no medical records of her massage treatments, and Claimant knew only the first name of her masseuse. However, she credibly testified that the treatment provides her with some symptom relief and that if she goes too long without a massage, she again experiences tightness and tension in her neck.

18. There was no persuasive evidence that Claimant's current neck, shoulder, or trapezius tension presently limits her bodily functioning or activities of daily living in any way.

Independent Medical Examinations and Expert Opinion Testimony

19. Both parties presented expert opinion testimony. Claimant presented Karen Huyck, M.D., and Defendant presented Nancy Binter, M.D.

Dr. Huyck

20. Dr. Huyck is a board-certified occupational and environmental medicine physician on the faculty at Dartmouth-Hitchcock Medical Center. She has extensive experience performing permanency evaluations and is familiar with the AMA Guides.
21. Dr. Huyck performed two permanent impairment evaluations of Claimant. The first, in May 2016, primarily concerned her left hip and low back. There is no reference to any neck, shoulder, or trapezius complaints in Dr. Huyck's first evaluation report, and Dr. Huyck had no recollection of Claimant making any complaints of such symptoms at that time. Dr. Huyck did not issue a permanency rating at that time because she found that Claimant was not yet maximum medical improvement. (JME 532-536).
22. Dr. Huyck saw Claimant again in November 2016 and performed a comprehensive physical examination that included her neck and shoulders. At that time, she found that Claimant had bilateral trapezius tightness and spasm, more on the left than on the right, but she found no evidence of any primary shoulder joint pathology. (JME 673-680).
23. Based on her observations of Claimant during her examination, as well as Claimant's description of her symptoms over time and a review of the medical records available to her at the time, Dr. Huyck concluded that Claimant had suffered cervical spinal injuries as a result of her February 2012 workplace injury.
24. Dr. Huyck did not find it significant that Claimant's medical records contained several lengthy gaps during which there is little or no record of any neck, shoulder, or trapezius complaints. She testified that symptoms stemming from musculoskeletal injuries often wax and wane and that some of the gaps in Claimant's records correspond to times of intensive treatment for her lower back and hip injuries.
25. Dr. Huyck credibly acknowledged that there are many causes of trapezius pain, including postural changes, natural spinal degeneration, stretch injuries, material handling injuries, and stress. She did not convincingly refute defense counsel's

hypothesis on cross-examination that Claimant's cervical spinal injuries from February 2012 resolved in a matter of months and that the trapezius spasm observed in November 2016 resulted from either a new injury or from psychosocial stress. I find this causal hypothesis salient both because of the lengthy gaps in the medical records without any reference to neck complaints, and because of the references in those records to Claimant's attribution of her neck pain to psychosocial stressors. *See* Findings of Fact Nos. 7 and 12, *supra*.

26. Dr. Huyck's IME report contained no causation analysis, and she credibly testified that she was not asked to render a causation opinion. Although she testified that she had used the Bradford Hill causation criteria in concluding that Claimant's 2016 spasm was related to her February 2012 workplace injury, she did not provide a detailed analysis of how those criteria supported her causal conclusion in this case.
27. Based largely on Claimant's trapezius spasm, Dr. Huyck found that Claimant fit into the AMA Guides' Diagnosis Related Estimate Cervical Category II. *Cf.* AMA Guides, p. 392, Table 15-5. She found that a rating in the lower end of that range was appropriate because Claimant's symptoms were responsive to non-invasive treatment and because they were not significantly interfering with her daily functioning. Accordingly, Dr. Huyck rated Claimant with a five percent whole person impairment attributable to her cervical spine.
28. I find it credible that musculoskeletal symptoms often wax and wane over time, and that Claimant's hip and back injuries were more pressing concerns than her neck complaints during much of her treatment history. However, I find that these factors only render it *possible* that Claimant's November 2016 neck and trapezius symptoms related to her February 2012 workplace injury. These factors do not convince me that such a causal connection more likely than not exists, particularly given the length of the neck treatment gaps, Claimant's credible testimony that she was indeed not having neck symptoms during at least some of those gaps, the wide variety of possible causes of trapezius symptoms such as stress, and Claimant's own attribution of her tension to psychosocial stressors.
29. Additionally, Dr. Huyck rated Claimant's permanent impairment in November 2016, and she has not physically examined Claimant since that time. She also did not review any of Claimant's treatment records⁴ from any time after 2016 before testifying at the formal hearing in 2020. Nor had she reviewed the transcript of Claimant's 2018 deposition in which Claimant acknowledged that she was experiencing no neck-related symptoms at that time.
30. The lack of recorded neck, trapezius, or shoulder complaints in Claimants' post-2016 medical records, especially given her testimony in both 2018 and 2020 that she was not experiencing neck problems at those times, raises a serious question about whether any cervical spinal impairment that Claimant may have had in 2016 was truly

⁴ She had, however, received Dr. Binter's IME reports in advance of the hearing.

permanent. Dr. Huyck was not in a strong position resolve that question because she did not have all the relevant information about Claimant's medical progress after 2016. These factors hamper the persuasiveness of Dr. Huyck's opinion that Claimant has any permanent impairment attributable to her cervical spine stemming from her February 2012 workplace injury.

Dr. Binter

31. Dr. Binter is a board-certified neurosurgeon and independent medical examiner. She examined Claimant three times between 2013 and 2020, reviewed all of Claimant's medical records that were included in the Joint Medical Exhibit, and reviewed transcripts of Claimant's and Dr. Huyck's depositions.
32. Dr. Binter identified Claimant's relevant work injury as a cervical muscle strain, which she would generally expect to resolve within several months. In Dr. Binter's opinion, Claimant's strain resolved within that time.
33. In support of that opinion, Dr. Binter pointed to medical records showing that Claimant was able to lift twenty pounds above her head in December of 2012 (JME 125), her own IMEs of Claimant (JME 152-160, 627-648, and 801.1-801.32),⁵ an IME performed by George White, MD in May 2013 (JME 178),⁶ as well as Claimant's treatment records as a whole.
34. Unlike Dr. Huyck, Dr. Binter found the multiple gaps in Claimant's medical records with no reference to shoulder, neck, or trapezius pain very important in determining that Claimant had no lingering or chronic problems in those regions as a result of her February 2012 workplace injury.
35. Dr. Binter credibly testified that trapezius tenderness and spasms like the one Dr. Huyck noted in November 2016 are relatively common and can result from a wide range of causes such as poor posture, repeated forward bending, or even long and intense periods of concentration. She also credibly testified that such symptoms are often transient.

⁵ In February 2013, Dr. Binter rated Claimant's whole person impairment attributable to her lumbar and hip strains as five percent. (JME 160). There is no reference to neck pain or cervical spinal involvement in Dr. Binter's 2013 IME report. Dr. Binter again examined and rated Claimant's permanent impairment in October 2016 after her labral tear surgery. At that time, Dr. Binter found that Claimant's combined hip and lower back conditions supported an eight percent whole person impairment rating. (JME 627-648). There is again no rating for any neck complaints, and no indication that Claimant asserted any such complaints at that time. (*See generally id.*). Dr. Binter examined Claimant again in January 2020; she noted at that time that Claimant's cervical exam was "nontender" and that she had a "full cervical range of motion." (JME 801.31). She also noted that Claimant had a "full shoulder range of motion" and that her "upper extremity neurological exam [wa]s intact." (*Id.*). She concluded that there was no evidence of a work-related cervical injury.

⁶ Dr. White rated Claimant's whole person impairment as six percent in May 2013, attributable to her lower back, with no additional impairment attributable to her hip. (JME 178). There is no reference to neck pain or cervical spinal involvement in Dr. White's IME report.

36. Additionally, in Dr. Binter's opinion, trapezius tenderness or spasm, without more, is no basis to find an injury to be permanent, particularly where a patient, like Claimant, presents with a full range of motion and without evidence of functional impairment. For these reasons, Dr. Binter rated Claimant as having no permanent impairment attributable to her cervical spine.

CONCLUSIONS OF LAW:

1. Claimant has the burden of proof to establish all facts essential to the rights she presently asserts. *Goodwin v. Fairbanks Morse & Co.*, 123 Vt. 161, 166 (1962); *King v. Snide*, 144 Vt. 395, 399 (1984). She must establish by sufficient credible evidence the character and extent of the injury, see *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (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, supra*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. 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 (Sept. 17, 2003).
3. However, because Claimant bears the burden of proof, her expert's persuasiveness matters most; if the Claimant's expert cannot sustain the burden of proof as to the benefits she seeks, it is not necessary to assess each of the *Geiger* factors. See *Meau v. The Howard Center*, Opinion No. 01-14WC (January 24, 2014), Conclusions of Law Nos. 3-5; *Kibbie v. Killington, Ltd.*, Opinion No. 04-19WC (March 1, 2019), Conclusions of Law Nos. 10-12.
4. For two reasons, I do not find that Dr. Huyck's analysis can carry Claimant's burden of proof as to her claim for permanent impairment attributable to her cervical spine.
5. First, I do not find that Dr. Huyck convincingly established a causal relationship between Claimant's February 2012 workplace injury and her trapezius spasm that she observed more than four years later in November 2016, particularly given the lengthy treatment gaps, the multiple causes of trapezius injuries, and Claimant's own attributions of her neck issues to psychosocial stress. See Findings of Fact Nos. 7, 12, and 28-30, *supra*.
6. Second, and more importantly, the formal hearing took place more than three years after Dr. Huyck last saw Claimant, and there was no convincing evidence that

Claimant suffered from any ongoing neck, shoulder, or trapezius issues that interfered with her functionality or activities of daily living after Dr. Huyck last saw her.

7. Indeed, Claimant had not received any medical treatment for cervical-spinal complaints during that more-than-three-year period except in the form of elective massage treatments for which there are no records in evidence. *See* Findings of Fact Nos. 14-15, *supra*. Claimant's own testimony during her 2018 deposition and at the 2020 hearing made clear that she was not experiencing any neck pain at those times. *See* Finding of Fact No. 16, *supra*. Dr. Huyck was not aware of any of these facts. *See* Finding of Fact No. 28-30, *supra*. Therefore, she was not in a good position to assess whether any cervical spinal conditions that Claimant had in November 2016 resolved since that time, rendering them non-permanent.
8. Because I do not find that Dr. Huyck's testimony is capable of satisfying Claimant's burden of proof with respect to her claim for any permanent partial disability benefits attributable to her cervical spine, it is not necessary to compare her analysis with Dr. Binter's under each of the *Geiger* factors. That said, Dr. Binter's testimony was helpful in explaining the significance of the gaps in Claimant's treatment records, in highlighting the most relevant provisions in the AMA Guides that affect the analysis of this case, and in medically contextualizing Dr. Huyck's 2016 finding of a trapezius spasm.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for permanent partial disability benefits attributable to her cervical spine is **DENIED**.

DATED at Montpelier, Vermont this 15th day of September 2020.

Michael A. Harrington
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.