STATE OF VERMONT
DEPARTMENT OF LABOR

Elvia Konjuhovac

v.

University of Vermont

Opinion No. 06-21WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. KK-64597

OPINION AND ORDER

Hearing held via Microsoft Teams on November 17, 2020
Record closed on December 21, 2020

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
David Berman, Esq., for Defendant

ISSUES PRESENTED:

1. Were the spinal surgeries performed by David Lunardini, M.D. reasonable and necessary medical treatment for Claimant's accepted spinal condition?

2. Is Claimant at end medical result, and if so, as of what date?

EXHIBITS:

Joint Medical Exhibit ("JME")
Preservation Deposition of David Lunardini, M.D.

FINDINGS OF FACT:

1. I take judicial notice of all relevant forms in the Department's file for this claim.

2. Claimant is a 49-year-old woman originally from Bosnia. She has lived in the United States since approximately 1997. Since then, she has worked in multiple jobs requiring physical labor at various colleges and universities in Vermont, including Middlebury College, Saint Michael's College, and most recently, Defendant University of Vermont, which employed her as a custodian. In that capacity, she performed physically demanding work including cleaning, shoveling snow, and carrying trash. This work involved frequent lifting and bending. Between approximately 2016 and May 2018, she was able to perform these activities without significant difficulty.

3. Before May 2018, she was also physically active outside the workplace. She participated in Taekwondo, played basketball, actively gardened and raised chickens, performed household chores, bicycled, and took long walks nearly every day. While Claimant's medical records reflect some back-related complaints in 2008 (JME 1-3) and 2016 (JME 129-134), there is no evidence that she suffered from any chronic or seriously limiting back pain before May 2018.

4. On May 20, 2018, while working for Defendant, Claimant knelt down to remove three layers of duct tape from a baseboard in a university dormitory, but there were several items of furniture in the way. She moved a dresser toward her and felt pain in her lower back and into her legs. Defendant accepted her lower back injury as compensable and paid some workers' compensation benefits accordingly.

5. Following her May 2018 injury, Claimant's physical activity level decreased substantially. Although she could still perform some basic household chores, she could not walk like she used to and increasingly relied on her husband. It also became difficult for her to sleep at night, even after purchasing a new mattress and altering her sleeping position.

6. Claimant has received extensive conservative medical treatments including Lyrica, gabapentin, epidural steroid injections, physical therapy, massage therapy, and pool therapy. Although some of these treatments have provided some relief, she still experienced low back pain, shooting pain into her right leg, and numbness in her right foot.

7. In December 2019, Clarence Ivey, D.O., one of Claimant's treating physicians who provided her with multiple injections, suggested that surgery might help and referred her to consult with orthopedic surgeon David Lunardini, M.D. (*See* JME 812-831).

8. Dr. Lunardini first met with Claimant in February 2020. (JME 842). He asked her about her symptoms, conducted a physical examination, and reviewed diagnostic studies including x-rays, an MRI, a SPECT CT scan, and an EMG.

9. Dr. Lunardini advised Claimant that he believed that her pain was related to her L5 nerve root and discussed the possibility of spinal surgery, specifically an L5-S1 laminectomy and right L5 foraminotomy. He advised her that that surgery was intended to improve her leg pain, but that it may or may not improve her numbness or back pain. He expected this surgery to increase Claimant's functionality by eventually decreasing her pain, and Claimant confirmed that those were acceptable goals to her. (*See* Lunardini Deposition, pp. 14-15).

10. Dr. Lunardini ultimately performed two spinal surgeries on Claimant, the first as planned on September 29, 2020, and a revision surgery on October 2, 2020. (*See* JME 842-844; 913-919; *see also* Findings of Facts Nos. 14-20, *infra*). These surgeries substantially relieved Claimant's right leg pain, but she still has low back pain and has some increased right leg numbness.

11. Claimant was still recovering from her surgeries when she testified at the formal hearing. She was in visible discomfort and used a walker.

12. Defendant has denied the compensability of Dr. Lunardini's surgeries on the grounds that they were not medically reasonable or necessary. Defendant also seeks to discontinue temporary disability benefits on the ground that Claimant reached end medical result in September 2019, before Dr. Lunardini performed the surgeries described above.

Expert Medical Testimony

13. Both parties presented expert medical testimony in support of their respective contentions. Claimant presented Dr. Lunardini as her treating surgeon and Verne Backus, M.D., who performed an independent medical examination (IME) of Claimant on August 24, 2020. Defendant presented Nancy Binter, M.D., who performed an IME of Claimant on August 23, 2019 and supplemented her IME report on March 27, 2020.

Dr. Lunardini

14. Dr. Lunardini is a board-certified orthopedic surgeon who graduated from the University of Virginia Medical School in 2008, completed a residency at the University of Pittsburgh, and completed a one-year spine fellowship at Harvard Beth Israel Deaconess Hospital in Boston, Massachusetts. He has served as a spine surgeon at the University of Vermont since 2014.

15. Based on her description of her symptoms, he suspected that her complaints were related to her L5 nerve root. He found support for this etiology when he reviewed her SPECT CT scan and a 2018 MRI, which he testified showed a bone spur pushing on the right L5 nerve root stemming from a pars defect. He found that this correlated with her clinical symptoms as she was complaining of right leg pain in a "classic" L5 nerve root distribution, which is "down the back and outside of the thigh, calf, and then coursing into the top of the foot." (*See* Lunardini deposition, pp. 7-9). He also noted that Claimant had an antalgic gait and was unable to walk on her heel, which is a test of the L5 nerve root strength. In his opinion, the abnormalities he saw in Claimant's SPECT CT scan and 2018 MRI caused a narrowing in the area of her L5 nerve root to her right leg. (*Id.*, p. 10).

16. In determining that surgery was appropriate, Dr. Lunardini found it important that Claimant still had significant pain and limitations even after exhausting conservative treatments such as anti-inflammatory drugs, neuroleptic medications, and epidural steroid injections. He believed that there was an anatomic reason for her ongoing limitations that he sought to correct by surgically removing the bone spur that was pushing on the nerve. In his opinion, this surgery was "absolutely" reasonable and necessary medical treatment for her condition. (*Id.*, pp. 11-13).

17. He credibly acknowledged that some of Claimant's diagnostic studies did not reveal any specific anatomical defects. For instance, her May 2019 x-rays were unremarkable and showed no structural changes other than some age-related arthritis, her EMG studies did not show any active radiculopathy, and a 2020 MRI showed only a "subtle abnormality." (*Id.*, pp. 8-10, 20-22). He credibly testified that the SPECT CT "really drove it home" for him because that image is where he could "clearly see" the abnormality that he sought to correct through surgery. Additionally, he credibly explained that MRI scans show "cuts … spaced at certain areas, and … wouldn't have picked it up." (*Id.*, p. 22). He did not rely solely on the SPECT CT image in determining that surgery was appropriate. Instead, he relied upon "the distribution of her symptoms, the quality of her symptoms, the response to an injection, and the SPECT scan. It's a combination of everything." (*Id.*, p. 23).

18. After her initial surgery, Claimant's leg pain was partially but not completely improved, and her numbness actually increased. Post-surgical imaging showed that some bone matter remained in the area that Dr. Lunardini operated on. This prompted a second surgery to remove the rest of the bone. After the second surgery, Claimant experienced significant improvement in her leg pain. (*Id.*, pp. 15-17).

19. Dr. Lunardini credibly testified that the activity Claimant was engaged in at the time of her injury, namely moving a dresser while bent over to remove duct tape from a baseboard, could cause a previously asymptomatic pars defect to become symptomatic. He credibly explained that many people have narrowed areas for their nerves with no symptoms, but that an event can cause irritation and set off an inflammatory cycle that is difficult to break without removing the source of the narrowing. (*Id.*, pp. 17-18).

20. I find Dr. Lunardini's testimony credible and persuasive in all respects.

Dr. Backus

21. Dr. Backus is a board-certified occupational and environmental medicine physician. He attended Dartmouth Medical School, obtained a master's degree in public health from Harvard University, and completed an occupational medicine residency in Boston, Massachusetts. He has also completed a radiology residency. He has practiced medicine in Vermont, including work in occupational medicine and emergent care, for multiple decades and has extensive experience assessing and treating lower back injuries. He still performs some part-time clinical work at Champlain Urgent Care, but most of his work currently consists of conducting IMEs and rendering expert medical testimony.

22. Dr. Backus performed an IME of Claimant in August 2020 IME. (JME 876-907). In performing that IME, he reviewed her medical records, physically examined her, and had her complete multiple questionnaires. In his opinion, the decompression surgery that Dr. Lunardini recommended and performed was a reasonable medical treatment for Claimant's work-related injury. He based this opinion largely on the facts that after Claimant injured her back, she participated in conservative treatment without

significant relief and that her symptoms were consistent with an L5 dermatomal pattern. He also found it important that Claimant's imaging including her MRI and CT scan showed what Dr. Lunardini believed to be the problem generating Claimant's complaints, and that when Dr. Lunardini performed the surgery, he found what he expected.

23. Dr. Backus acknowledged that Claimant's medical records showed some degenerative changes and some history of low back pain before her May 2018 workplace injury, but he credibly testified that her injury aggravated her baseline condition.

24. He also acknowledged that his examination of Claimant yielded some nonorganic findings, including two "Waddell signs," specifically diffuse pain complaints and muscle weakness giveaway. He explained that Waddell signs are useful in assessing the appropriateness of surgery but not in determining whether a person is "faking." He testified that it is generally when a patient presents with three or four Waddell signs that he or she will "probably not [be] a great surgical candidate."

25. Dr. Backus also acknowledged that Claimant's pre-surgical EMG studies were normal, but he explained that EMG testing has a relatively low sensitivity, making it common for such studies to be normal but surgery to reveal a problem. In his opinion, EMGs can be very helpful when they find something but not particularly helpful when they do not.

26. With respect to the fact that Claimant was still in pain at the time of the formal hearing, Dr. Backus credibly explained that she was still recovering from her surgeries, which would take some time. However, he found it important that her leg pain had improved, as the primary objective of the surgery was to reduce leg pain. Additionally, he noted that all surgeries carry risks which require a balancing against the potential benefits.

27. I find Dr. Backus's testimony credible and persuasive in all regards.

Dr. Binter

28. Dr. Binter practiced as a neurosurgeon at the University of Vermont and currently devotes most of her professional efforts to the performance of IMEs, forensic medical records reviews, and permanent impairment ratings. She performed an IME of Claimant in August 2019. That evaluation included a comprehensive review of Claimant's medical records and a physical examination. (*See* JME 767-788).

29. Dr. Binter noted that Claimant reported lower back and right leg pain that extended down the back of her right thigh and rarely went below the knee, but that the top of her right foot was numb. She also noted tenderness in the central lower back around L4-5, where Claimant had muscle spasms, but she did not otherwise note any tenderness to the touch there or at the sacroiliac joint. She also found that Claimant was able to stand on her heels and toes.

30. Dr. Binter testified that based on her review of the medical file, Claimant's pain presentation was "all over the map" and involved multiple nerve root distributions, some of which did not correlate with any nerve roots at all. At the time of her IME, which was before the surgeries Dr. Lunardini performed, Dr. Binter assessed Claimant as having reached end medical result and assigned her a permanent impairment rating of 8 percent. (JME 788).

31. Dr. Binter based her finding of end medical result on the facts that more than one year had passed since Claimant's May 2018 injury and that Claimant had received extensive conservative treatment. She saw no anatomical issues that she would consider to be work-related and found no evidence that additional treatment would make any significant difference. She concluded that Claimant's recovery had plateaued.

32. After completing her IME, Dr. Binter also reviewed radiographic images upon which Dr. Lunardini relied in part for his opinion that Claimant's pain complaints related to the L5 nerve root; she supplemented her IME report accordingly. (JME 850-51). She disagreed with Dr. Lunardini's interpretations of those images and testified they did not show any L5 foraminal stenosis. Instead, she interpreted these images as showing a very open foramen and no evidence of any L5 nerve root compression. She also disagreed with Dr. Lunardini that Claimant's symptoms fit a "classic" L5 distribution.

33. Dr. Binter testified that throughout her career, she had regularly performed the type of procedure that Dr. Lunardini performed on Claimant. She did not believe that this procedure was indicated in this case and did not believe it would be effective because in her opinion, Claimant did not have a clear right L5 radiculopathy, had a normal EMG study, and did not have a right L5 nerve compression.

34. Dr. Binter also testified that Claimant's post-surgical status was unusual. In her experience, patients undergoing this type of surgery do not generally require revision surgery and are usually discharged within hours after the surgery. By contrast, Claimant remained hospitalized for approximately one week. Dr. Binter also would not expect a patient receiving this type of surgery to be using a walker seven weeks afterward, as Claimant was.

35. In Dr. Binter's opinion, the surgeries that Dr. Lunardini performed were not reasonable, necessary, or causally related to Claimant's workplace injury. She believes Claimant's workplace injury consisted of a lumbar sprain that should have resolved within a few months, and she does not know why Claimant's pain complaints continued so long after that time. She maintains her opinion that Claimant was at end medical result as of August 2019.

36. I find that Dr. Binter conducted a thorough examination of Claimant and her medical history. However, for the reasons below, I find the analyses of Drs. Lunardini and Backus more persuasive as they relate to disputed issues in this case.

CONCLUSIONS OF LAW:

1. Claimant has the burden of proof to establish all facts essential to the rights he 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).

The Surgeries Dr. Lunardini Performed Were Reasonable and Necessary Medical Treatment for Claimant's Accepted Lower Back Injury

2. Vermont's Workers' Compensation Act requires employers to "furnish to an injured employee reasonable surgical, medical, and nursing services and supplies, including prescription drugs and durable medical equipment." 21 V.S.A. § 640(a). The Department's Workers' Compensation Rules also define "[r]easonable medical treatment" as follows:

> … treatment that is both medically necessary and offered for a condition that is causally related to the compensable work injury. As to the medically necessary component, the determination whether a treatment is reasonable should be based primarily on evidence establishing the likelihood that it will improve the patient's condition, either by relieving symptoms and/or by maintaining or increasing functional abilities.

Workers' Compensation Rule 2.3800; *cf. also* 21 V.S.A. § 601(27) (defining "medically necessary" care).

3. Although the Act only requires employers to pay for "reasonable" medical treatment, there can be "more than one reasonable treatment option for any given condition." *Morrisseau v. Hannaford Brothers*, Opinion No. 21-12WC (August 8, 2012); *see also Cahill v. Benchmark Assisted Living*, Opinion No. 13-12WC (April 27, 2012). A claim for surgical services will not be defeated by "a purely academic disagreement with a treating physician[.]" *Lappas v. Stratton Mountain*, Opinion No. 55-03WC (December 22, 2003).

4. 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).

5. In this case, the first factor favors Dr. Lunardini over both Drs. Backus and Binter, as he was Claimant's treating surgeon and therefore more personally familiar with her condition. Conversely, the second factor slightly favors Drs. Binter and Backus over Dr. Lunardini due to their more comprehensive reviews of Claimant's extensive medical records. The fourth and fifth factors weigh substantially equally as to the three experts, as all are well-qualified in their respective fields and performed thorough evaluations.

6. As in many cases, I find the third factor most important here. This factor favors the opinions of Drs. Lunardini and Backus. They both credibly explained that Claimant's symptoms fit a pattern consistent with an L5 nerve root distribution and that certain radiographic images supported that nerve root as explaining her pain originating at that spinal level even though other diagnostic studies were normal. They both convincingly explained the limitations of diagnostic imaging in determining the existence of a nerve root compression like the one Claimant experienced. I also find that Dr. Backus persuasively explained that although Claimant's baseline condition reflected some degenerative back conditions, her May 2018 workplace injury aggravated her baseline.

7. Dr. Binter relied heavily on what she interpreted as normal diagnostic tests and images in support of her opinion that there was no L5 compression and therefore the surgery was not reasonable. From her testimony, I conclude that Claimant was not a clear and obvious surgical candidate. Two well-qualified surgeons, Drs. Lunardini and Binter, differed in their opinions about whether surgery was appropriate in a patient who presented a mixed medical picture with some normal diagnostic studies and some subject to conflicting interpretations. The existence of such an academic disagreement between experts does not render the surgery unreasonable. *Cf. Lappas*, *supra*.

8. Dr. Binter also emphasized Claimant's longer than usual postoperative recovery time and the unusualness of her need for a second surgery. However, as Dr. Backus credibly noted, surgeries have risks. Some of those risks materialized in this case. Although a procedure's risk profile certainly bears on its reasonableness, the fact of a complication does not render a procedure unreasonable.

9. Based on the totality of the evidence, I conclude the surgeries Dr. Lunardini performed were medically reasonable and necessary treatment for Claimant's accepted lower back injury.

Claimant Has Not Yet Reached End Medical Result

10. Under Vermont workers' compensation law, an injured worker is entitled to temporary disability compensation until reaching an end medical result or successfully returning to work. *See Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 532 (1996). The determination of end medical result is a question of fact for the Commissioner. *Id.*

11. "End medical result" is defined as "the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." Workers' Compensation Rule 2.2000. The Vermont Supreme Court has held that the "proper test" of whether a person has reached end medical result is "whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement." *Brace v. Vergennes Auto, Inc.*, 2009 VT 49 ¶ 11 (citing *Coburn, supra,* at 533).

12. At the time of the formal hearing in this case, Claimant was still recovering from the surgeries performed by Dr. Lunardini. Having concluded that those surgeries were reasonable and necessary, and having credited Dr. Lunardini's testimony that he expected that those surgeries would increase her function by alleviating her right leg pain, I conclude that Claimant has not yet reached end medical result under the standards set forth above. *See* Findings of Fact Nos. 9-11, 14-20, and 25-26; Conclusions of Law Nos. 2-9, *supra*.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to pay:

1) Medical benefits pursuant to 21 V.S.A. § 640(a) for the surgeries performed by Dr. Lunardini on September 29, 2020 and October 2, 2020;

2) Indemnity benefits consistent with Claimant not yet having reached end medical result, including interest thereon as provided by law; and

3) Attorneys' fees and costs pursuant to 21 V.S.A. § 678.

DATED at Montpelier, Vermont this 16th day of March 2021.

_____
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.