STATE OF VERMONT
DEPARTMENT OF LABOR

Jasmina Omerovic

v.

University of Vermont Medical Center

Opinion No. 02-22WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. HH-54558

OPINION AND ORDER

Hearing held September 13, 2021
Record closed October 25, 2021

APPEARANCES:

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

ISSUES PRESENTED:

1. Did any of Claimant's work activities after July 8, 2019 aggravate her preexisting degenerative spinal condition and contribute to her need for the surgery that Martin Krag, M.D. performed on February 28, 2020?

2. If so, to what benefits is Claimant entitled?

EXHIBITS:

Joint Medical Exhibit (JME)

Defendant's Exhibit A: *Curriculum Vitae* of Nancy B. Binter, M.D.
Defendant's Exhibit B: Job Description for "Unit Secretary/LNA"

FINDINGS OF FACT

Overview

1. Claimant suffered a workplace assault on October 14, 2015, while working for Defendant as a licensed nursing assistant ("LNA"). Although she has a long history of chronic neck pain, it is undisputed that her 2015 workplace injury caused, for at least some time, a worsening of that pain. After significant time away from work, she returned to work for Defendant, at first part-time and with significant limitations. She began working for Defendant full-time in December 2018 as a unit secretary on the same floor where she had worked as an LNA before the workplace assault. She

asserts, and Defendant denies, that her duties as unit secretary beginning in December 2018 aggravated her baseline degenerative cervical spinal condition and contributed to her need for spinal surgery that Martin Krag, M.D. performed in February 2020.

Procedural History

2. This is the Department's fourth published decision in this case, and it presumes familiarity with the factual background outlined in the Department's prior decisions.

3. The first decision, Opinion No. 15-18WC (November 13, 2018) ("*Omerovic I*"), concerned a disputed witness subpoena. The second, Opinion No. 18-19WC (October 15, 2019) ("*Omerovic II*"), followed a two-day formal hearing that occurred on March 25 and 26, 2019. The record for that hearing closed on July 8, 2019. *See id*. *Omerovic II* resolved the following three issues:

   (1) Did Claimant suffer post-traumatic stress disorder (PTSD) or other psychological injury as a result of her accepted October 14, 2015 workplace injury?

   (2) Are cervical spinal injections reasonable and necessary medical treatment related to Claimant's accepted workplace injury?

   (3) Is physical therapy reasonable and necessary medical treatment related to Claimant's accepted workplace injury?

4. The Department resolved the first issue in Claimant's favor but decided the other two issues in Defendant's favor. *See generally Omerovic II.* In resolving the second and third issues in Defendant's favor, the Department held that Claimant's neck condition had returned to its pre-injury baseline. Neither party appealed that decision. By the time of the formal hearing and decision in *Omerovic II*, Claimant had returned to full time work for Defendant as a unit secretary.

5. Subsequently, Claimant began complaining of new neck and right upper extremity pain, for which orthopedic surgeon Martin Krag, M.D., evaluated her in December 2019. Dr. Krag assessed her with a right C5-C6 disc herniation and C6 radiculopathy, for which he recommended several treatments, including a discectomy, nerve root decompression, and disc replacement at the C5-C6 level. Defendant denied Dr. Krag's preauthorization request, citing the Department's finding in *Omerovic II* that Claimant had returned to her pre-injury baseline for her chronic neck and right upper extremity complaints. Claimant challenged Defendant's denial, and in response, Defendant filed a Motion for Summary Judgment arguing that *Omerovic II* collaterally estopped Claimant from establishing a causal relationship between her 2015 workplace injury and the medical complaints giving rise to Dr. Krag's proposed treatments.

6. The Department granted in part and denied in part Defendant's Motion in *Omerovic v. University of Vermont Medical Center*, Opinion No. 13-20WC (August 4, 2020) ("*Omerovic III*"), holding that while collateral estoppel applied, its proper application was narrower than the relief Defendant sought, and that while Claimant was bound by

the factual findings underlying the determination in *Omerovic II*, those findings would not preclude her from establishing a causal relationship between her October 2015 workplace injury and Dr. Krag's proposed surgery. *See id.*, Conclusion of Law No. 26. More specifically, *Omerovic III* concluded that

> … the doctrine of collateral estoppel precludes Claimant from denying the following factual matters which were litigated and determined in *Omerovic II*:
>
> (a) Claimant had a longstanding medical history of neck, back, and shoulder pain that significantly predated the October 2015 workplace injury; her baseline pre-injury condition was marked by chronic neck pain;
>
> (b) Claimant's October 2015 workplace injury caused a soft tissue neck injury;
>
> (c) Claimant's soft tissue neck injury resolved after several months; and
>
> (d) Claimant's neck condition returned to its baseline state by 2018 and remained there until at least July 8, 2019.
>
> Nothing in either [*Omerovic II* or *Omerovic* III] precludes Claimant from establishing that Dr. Krag's proposed treatment is for a flare-up or recurrence of symptoms that occurred after July 8, 2019, or that such flare-up or recurrence was causally related to Claimant's 2015 workplace injury.

Id.

7. Claimant subsequently changed her theory of causation as it relates to Dr. Krag's February 2020 surgery: instead of asserting that her need for that surgery stemmed directly from her October 2015 injury, she now argues that it arose from her new duties as unit secretary beginning in December 2018. (*See* Notice and Application for a Hearing (Form 6), dated March 17, 2021).

Claimant's Return to Work for Defendant in Unit Secretary Position in December 2018

8. Claimant first returned to work for Defendant as a unit secretary on a part-time basis sometime before December 2018, but she does not recall the precise date. Initially, her schedule was based on Defendant's needs, usually approximately four hours per day. She began performing that job on a full-time basis in late December 2018, with a mix of eight- and twelve-hour shifts.

9. Claimant credibly described her unit secretary role as the "base" of her unit with wide-ranging and variable job duties, including answering the telephone, sorting mail, filing papers, operating computers and fax machines, stocking medical supplies, and using a pneumatic tube system to send and receive medications from the pharmacy.

10. When she first began working in this role, she did not have headphones or a headset to perform her telephone duties, but Defendant supplied her a pair of headphones after

she requested them. Those headphones made it easier to multitask with the fax machine and pneumatic tube system while on the telephone. However, she experienced difficulties with the connectivity and battery life of those headphones and eventually stopped using them.

11. Claimant acknowledged that she had been experiencing some occasional upper right arm pain before she returned to full-time work in December 2018, but she testified that her pain worsened after she returned to full-time work and that her pain was worse and more persistent on days when she was particularly busy or active. Her medical records support her acknowledgement that she was experiencing symptoms before returning to full-time work,[1] but they paint a more mixed picture of ebbing and flowing symptoms thereafter.[2]

Diagnostic Imaging, Surgery, and Recovery

12. Following complaints of increasing pain, Claimant underwent a magnetic resonance imaging (MRI) scan in November 2019, which showed multi-level cervical spine degenerative and facet disease, more advanced at C5-6 compared to an earlier MRI performed in 2017. (JME 71-75).

13. Following her primary care provider's recommendation after that MRI, Claimant consulted with Dr. Krag in December 2019 about the possibility of surgery. Dr. Krag assessed her with a traumatic disc herniation at C5-6 with a C6 radiculopathy and recommended a nerve root decompression and disc replacement surgery. He performed that surgery on February 28, 2020. (JME 88-90, 113-117).

14. Claimant's post-surgical recovery has been positive. During post-surgical physical therapy in March 2020, she reported that her right arm numbness and tingling had resolved after surgery, though she also reported some new left-sided neck and scapular pain. (JME 124). During a telephone consultation with Dr. Krag in April 2020, Claimant reported a 50 percent decrease in both neck and right arm symptoms, but

[1] For instance, during the summer of 2018, Claimant saw pain management specialist Michael Borrello, M.D. for multiple rounds of cervical medial branch blocks and eventual radiofrequency ablation; although she obtained some short-term relief from some of these treatments, they were ultimately ineffective in providing lasting relief. (JME 1-4, 9, 25-28). That fall, she reported to multiple providers with severe neck pain and stiffness with radiation into her right upper arm and right hand, as well was right-hand twitching particularly when grasping objects; her records reflect increasing dosages of pain management drugs including Gabapentin, Tramadol, and ibuprofen. (JME 7, 11, 19-24). In early December 2018, after confirming that Claimant's response to radiofrequency ablation was modest, Dr. Borrello concluded that her persistent neck pain was not likely to benefit from further interventional treatment. (JME 27-28).

[2] In February 2019, Claimant saw her primary care provider with ongoing neck and right shoulder pain, although at that time, she had stopped taking Gabapentin and was doing well without it; she had also reduced her reliance on Tramadol. (JME 30-33). Approximately two months later, however, she reported worsening symptoms, requested a refill of Tramadol, and asked about repeating the last injection she received from Dr. Borrello. (JME 37-39). In June 2019, she told Dr. Borrello that her pain had increased, and he scheduled additional radiofrequency ablations, which he administered in August 2019. (JME 42-47). One week later, she reported a very stiff neck, reduced range of motion, and pain which she rated as 10 out of 10. (JME 48-53). The following month, however, she reported significant improvement with the use of a muscle relaxant (JME 56).

with gradual onset of left upper limb symptoms. Dr. Krag released her to work full time without restrictions on April 6, 2020. (JME 143).

15. Claimant has since returned to work full time for Defendant, working approximately one third of her hours as Unit Secretary and two thirds of her time as an LNA. She has also been able to partake in more household tasks and become less reliant on pain medication compared to before her surgery.

16. The parties agree that the surgery Dr. Krag performed was reasonable to perform and that it largely accomplished its goal, but they dispute whether Claimant's need for that surgery was causally related to her employment with Defendant.

Expert Medical Testimony

Verne Backus, MD

17. Claimant presented Verne Backus, MD, a board-certified occupational and environmental physician and a certified independent medical examiner, as an expert witness. Dr. Backus performed two IMEs of Claimant, the first in August 2020 and the second in November 2020. He reviewed her medical records, had her complete approximately fourteen pages of questionnaires, interviewed her, and physically examined her.

18. Dr. Backus credibly noted that before Claimant returned to full-time work for Defendant, her neck condition was "fragile" though stable, and that her condition appeared to worsen after her return to full-time work for Defendant. He was unable to pinpoint an exact time when this worsening occurred, but he noted that sometime between the time of her return to full-time work and the date of her MRI study, her symptoms went from being intermittent to constant. He believes that her mechanical work as unit secretary contributed to this change.

19. Dr. Backus acknowledged that the condition for which Claimant underwent surgery was a degenerative spinal condition and that everyone has some level of disc degeneration, which can happen regardless of activity level. He also credibly acknowledged that smoking is a significant risk factor for cervical radiculopathy.[3] However, he testified that when someone has a degenerative disc condition, an increase in activity can contribute to its worsening; he believes that that is what happened to Claimant.

20. In his written report, Dr. Backus noted that Claimant's job as unit secretary involved "much documentation but often getting up and getting supplies or other tasks, all light and not involving assisting patients in their rooms." (JME 217). He noted that she initially tolerated this work well but by September or October 2019 she reached out to her primary care provider with complaints of worsening symptoms. In his opinion,

[3] Claimant has been a smoker since approximately the age of fifteen and currently smokes about ten cigarettes per day. (JME 9, 212).

"[s]ome combination of her workstation ergonomic[s] and increased activities working more hours was more than her condition could tolerate and she worsened." (*Id.*).

21. During the formal hearing, Dr. Backus credibly acknowledged that during his two IMEs, there was no discussion about the specific setup of her workstation.

22. The primary purpose of his second IME was to pinpoint the timeline of Claimant's worsening, but he was not able to identify the precise time when her condition worsened, other than noting that it appeared to worsen after her return to full-time work.

23. Dr. Backus's central opinion is that Claimant's work activities "more likely than not, contributed to the worsening instead of improving to the functional level she was at prior to 2015, and the worsening necessitated the 2/28/2020 successful neck surgery by Dr. Krag." (JME 217). Although his analysis convinces me that this causal connection is a possibility, I am not convinced that it is more likely than not.

24. In particular, I do not find that Dr. Backus adequately ruled out the alternative hypothesis that Claimant's degenerative neck condition naturally progressed during the summer and fall of 2019 independent of her return to full-time work. The facts that this was a degenerative condition, that her unit secretary work was not physically strenuous, and that Dr. Backus offered an opinion that the ergonomics of her workstation contributed in part to her need for surgery but did not demonstrate any particularized familiarity with her workstation's actual layout all weaken the persuasiveness of his causal conclusions. For these reasons, I do not find that Dr. Backus's opinion sustains Claimant's burden of proof on medical causation.[4]

Nancy Binter, MD

25. Defendant presented Nancy Binter, MD, a board-certified neurosurgeon, as an expert witness. Dr. Binter worked for approximately thirty years on the same floor of Defendant's hospital where Claimant worked as both an LNA and as unit secretary. As such, she is personally familiar with the role of the unit secretary on that floor. She credibly testified that the unit secretary position on the floor where Claimant worked is primarily a clerical position, though it can be busy and that its workload fluctuates.

26. Dr. Binter also performed a comprehensive review of Claimant's medical records in this case, though she did not physically examine Claimant in connection with her current cervical spinal complaints.[5]

[4] In addition to his causation analysis, Dr. Backus also opined that Claimant is at end medical result with respect to her cervical spinal condition, and he rated her whole person impairment as 25 percent with respect to that condition. (JME 218).

[5] Dr. Binter did, however, examine Claimant previously in connection with this case. *See Omerovic II*, Findings of Fact Nos. 70-76.

27. Dr. Binter does not believe that there is any causal connection between Claimant's work duties as unit secretary and her need for the surgery that Dr. Krag performed in February 2020. She testified that there is no recognized relationship between administrative work and the age-related progression of degenerative disc disease, but that there is support in the medical literature supporting other risk factors, such as Caucasian race, age over forty years, and smoking as risk factors for this condition. All three of those known risk factors apply to Claimant.

28. Dr. Binter does not believe that anything about Claimant's work activities in her role as unit secretary could have caused significant stress on her cervical spine. She also found no evidence in Claimant's medical records of a worsened condition that temporally correlated with an increase in her hours; she noted records that documented worsening before her return to full-time work and improving following her return to full-time work. I find this observation well-supported and consistent with the record before me.

29. Dr. Binter also saw no evidence in Claimant's medical records of cervical radiculopathy until the fall of 2019, well after Claimant returned to full-time work. In her view, this timeline weakens the plausibility of a causal connection between this condition and Claimant's return to full-time work.

30. Dr. Binter testified that degenerative disc disease can progress to the point of radiculopathy with age, irrespective of activity or occupation, and that she saw no evidence to connect its progression in this case to Claimant's return to full-time work. This is consistent with portions of Dr. Backus's testimony, and I find this credible and persuasive.

31. I find it credible that Claimant's age, race, and smoking are all risk factors for degenerative disease while clerical work generally is not. While I find these risk factors relevant, they do not prove or disprove any causal theory of why Claimant's degenerative spinal conditions progressed.

CONCLUSIONS OF LAW

1. Claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). She must establish by sufficient credible evidence the character and extent of the injury, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between her injury and her 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. The Workers' Compensation Act requires an employer to provide injured workers with all "reasonable" medical treatment for compensable conditions. *See* 21 V.S.A. §

640(a). A treatment is reasonable when it is "both medically necessary and offered for a condition that is causally related to the compensable work injury." Workers' Compensation Rule 2.3800. Thus, a treatment may be unreasonable "either because it is not medically necessary or because it is not causally related to the compensable injury." *Lahaye v. Kathy's Caregivers*, Opinion No. 05-18WC (March 26, 2018).

3. 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).

4. 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.

5. In this case, I do not find that Dr. Backus's expert testimony convincingly established a causal connection between Claimant's return to full-time work and her cervical spinal complaints that ultimately gave rise to the need for the surgery that Dr. Krag performed in February 2020. Claimant had preexisting degenerative changes in that region as well as known risk factors for developing radiculopathy. The evidence shows that degenerative conditions like Claimant's can progress irrespective of activity level. While I find Dr. Backus's opinion that Claimant's spinal condition was fragile before she returned to full-time work to be well-supported, I am unconvinced that her activity level after returning to full-time work accelerated her condition's progression. Dr. Backus has convinced me that that scenario is a possibility, but not that it is any more likely than Claimant having experienced a natural progression of a preexisting degenerative condition that happened to coincide with her return to full time work. A mere possibility of causation is insufficient to sustain Claimant's burden of proof. *Burton, supra,* 112 Vt. at 20; *Morse*, *supra*, Opinion No. 40-92WC.[6]

6. Because I do not find Dr. Backus's opinion sufficient to sustain Claimant's burden of proof in this case on the issue of causation, I need not compare his analysis with Dr. Binter's with respect to each of the *Geiger* factors. That said, Dr. Binter's testimony

[6] The reasons described in this paragraph are sufficient for me to conclude that Dr. Backus's analysis does not sustain Claimant's burden of proof as to causation. Additionally, I concluded in *Omerovic III* that Claimant was collaterally estopped from denying that her neck condition returned to its baseline state by 2018 and remained there until at least July 8, 2019, when the record closed in Omerovic *II*. *See id.* Her return to full-time work began in December 2018 and continued after July 8, 2019. Dr. Backus was unable to determine precisely when Claimant's worsening occurred except to say that it appeared to happen after her return to full-time work. I find no basis to conclude that any putative worsening following Claimant's return to full-time work related to events or activities that occurred after July 8, 2019. As such, I see no way for Claimant to sustain her burden of proof given the Department's prior holdings even if all of Dr. Backus's opinions were credited.

was helpful in explaining Claimant's pertinent risk factors and interpreting Claimant's medical timeline.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Claimant has failed to demonstrate that her work activities aggravated her preexisting degenerative spinal condition or causally contributed to her need for the surgery that Dr. Krag performed in February 2020. Her claim for benefits relating to such injury and surgery are therefore **DISMISSED**.

DATED at Montpelier, Vermont this 20th day of January 2022.

_____
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.