

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

NANCY LUTHER) File # B-27022
)
) By: Frank E. Talbott
) Contract Hearing Officer
)
) For: Barbara G. Ripley
GENERAL ELECTRIC) Commissioner
)
) Opinion #9-93WC

Hearing Held at Montpelier, Vermont on May 27, 1993.

APPEARANCES

Richard A. Pearson for the claimant
Craig Weatherly for the defendant

ISSUES

1. Whether the claimant is 100% disabled because of depression that is causally related to her work injury;
2. Whether there is a substantial likelihood that drug therapy would improve the claimant's condition and reduce her percentage of disability;
3. Whether the defendant is excused from liability for that percentage of disability that would be reduced by drug therapy if the claimant refuses to undergo the therapy because of a drug phobia that pre-dates the industrial accident and injury in this case;
4. Whether the claimant suffers a functional impairment and if so, to what degree.

THE CLAIM

1. Permanent total disability compensation under 21 V.S.A. § 644 beginning July 31, 1992.
2. Medical and hospital benefits under 21 V.S.A. § 640.

3. Attorney fees and costs under 21 V.S.A. § 678(a).

STIPULATIONS

1. On May 15, 1989:

a. The claimant's physician, Victor J. Pisanelli, Sr., M.D., diagnosed the claimant as having carpal tunnel syndrome caused by the work the claimant had been doing at General Electric, and the claimant's physician, Dr. Forst Brown diagnosed the claimant as having bilateral carpal tunnel syndrome, Raynaud's disease, and repetitive use trauma, all of which were work-related.

b. The claimant, Nancy Luther, was employed by the defendant, General Electric, of Rutland, Vermont, doing "benching."

c. The defendant was an employer within the meaning of the Workers' Compensation Act.

d. The claimant suffered a personal injury when doing "benching" at General Electric.

e. The claimant's injury arose out of and in the course of employment with the defendant.

f. The Electric Mutual Insurance Company was the workers' compensation carrier for the defendant on May 15, 1989.

g. The claimant's average weekly wage for the twelve weeks preceding the accident was \$478.06, resulting in a weekly compensation rate of \$335.53 (plus \$10.00 for each dependent).

h. The claimant had one dependent under the age of 21, identified as: Heather Luther, born 8/11/69.

2. On August 10, 1989, the claimant and the defendant entered into an Agreement for Temporary Total Disability Compensation (Form 21) in which the defendant agreed to

pay the claimant \$345.54 a week, including dependency benefits of \$10.00, beginning on May 15, 1989.

3. On July 1, 1989, the claimant's compensation was increased under 21 V.S.A. § 650(d) to \$365.10.
4. On July 31, 1992, the defendant discontinued temporary total disability compensation being paid the claimant on the basis that the medical records showed "without anti-depressant medication, proposed program could make no further contribution to her management." A Form 27, Notice of Intention to Discontinue Payments, was mailed to the claimant on July 16, 1992.
5. The claimant reached medical end result as to her physical injuries as of July 31, 1992.
6. When compensation ceased on July 31, 1992, the defendant or its insurer had paid a total of \$58,357.64 in temporary total compensation benefits. Since then, the defendant has advanced a total of \$15,699.30, which it claims is permanent partial disability compensation.
7. On November 24, 1992, the claimant filed a Notice and Application for Hearing.
8. There are no objections to the qualification of the following expert witnesses who will be appearing through deposition, by telephone or simply by written report:
 - a. Dr. Timothy Ahles.
 - b. Dr. Forst Brown.
 - c. Dr. Coleman Levin.
9. Judicial notice may be taken of the following documents in the Department's file:

Form 25:	Wage Statement
Form 10:	Certificate of Dependency
Form 21:	Agreement for Temporary Total Disability Compensation
Form 28:	Notice of Change in Compensation Rate dated April 5, 1990.

Form 27: Notice of Intention to Discontinue Payments dated July 16, 1992, together with medical report of Dr. Ahles.
Form 6: Notice and Application for Hearing.

FINDINGS

1. Stipulations 1 through 9 are true.
2. During the hearing the following exhibits were received in evidence without objection:

Claimant's Exhibit A : 129 pages of medical records

Claimant's Exhibit B : Transcript of the Deposition of Forst Brown, M.D.

Claimant's Exhibit C : Transcript of the Deposition of Timothy Ahles, M.D.

Claimant's Exhibit D : 96 pages of medical reports and evaluations

Defendant's Exhibit 1 : Report of Edward S. Leib, M.D. dated April 5, 1991 to Craig Weatherly

Defendant's Exhibit 2 : Records of May 8 and 15, 1989 from Pisanelli Surgical Associates

Defendant's Exhibit 3 : 8 pages of copies of return to work and excuse from work certificates

Defendant's Exhibit 4 : Transcript of the Deposition of Forst Brown, M.D. taken December 15, 1990

Defendant's Exhibit 5 : Medical History - Pre Placement dated March 10, 1987

Defendant's Exhibit 6 : Positive Discipline, Form 1, Supervisor's Employee Discussion Worksheet

3. The claimant's physician, Dr. Brown, has diagnosed the claimant as having a 25% permanent impairment of function of her upper extremities. 13% of this impairment is related to muscle weakness. 12% is related to pain. Both the muscle weakness and the pain are caused in part by spasms which, Dr. Brown believes, are psychosomatic.
4. The claimant has a history of depression before this injury. However, the level of the claimant's depression before the injury did not disable her from gainful employment.
5. The claimant currently suffers severe depression and anxiety. She has been treating with Timothy Ahles, M.D. Ph.D. Dr. Ahles has linked claimant's depression to her pain, inability to work and decreased activity resulting from the injury in this case.
6. According to Dr. Brown, and Dr. Ahles, there is a medical probability that the claimant's functional impairment to her arms and hands is related to the claimant's depression.
7. Dr. Ahles has treated the claimant with all possible methods except a course of drug therapy. Dr. Brown believes that if the claimant were to receive treatment successful in alleviating her depression, she would see an improvement in her functional capability in her arms and hands. However, he cannot predict with any reliability the quantum of improvement that might be realized. The improvement could be 50%, more or less. Dr. Brown is clear that a degree of the claimant's permanent impairment is related to actual permanent effects on the claimant's muscle tissues caused by the injury and resulting muscle spasms. Successful psychotherapy followed by physical therapy may not entirely resolve the permanent limitations on the muscles due to scarring and spasms of the muscles. However, Dr. Brown cannot at this time differentiate the degree of psychosomatic involvement from the actual physical impairment.
8. The medical risk (meaning the risk of physical side effects) to the claimant in the course of drug therapy that Dr. Ahles has in mind is minimal. Furthermore, Dr. Ahles does not feel that there would be any risk of

psychological or psychiatric injury to the claimant in undergoing a course of drug treatment for her depression. The course of treatment would be on an in-patient basis so that the claimant's physicians could closely monitor her so as to avoid any possible side effects to the drugs.

9. Dr. Ahles believes that the claimant understands the likelihood of success in a course of drug treatment to her rehabilitation. However, the claimant has a phobic fear of drugs because her father was a drug addict. According to Dr. Ahles, the claimant is convinced that she will become a drug addict or be turned into a "zombie" by being on medications. Dr. Ahles considers this fear to be irrational. Further, he believes that the claimant understands that the fear is irrational. However, to her the fear is real. Therefore, Dr. Ahles believes that the claimant does not have the capability of making the decision to attempt drugs as a therapy.
10. This phobia is preexisting. It is not causally related to the accident or injury, nor has the phobia been aggravated by the accident or injury.
11. Dr. Ahles believes that the claimant is 100% disabled because she cannot return to any sort of work due to her depression and anxiety.

CONCLUSIONS

1. The claimant has the burden of proof in establishing her injury and disability. King v. Snide, 144 Vt. 395, 399, 479 A.2d 752 (1984). If the injury and the resultant disability are not in dispute, the burden of proof is on the employer to establish the facts justifying termination of compensation. Merrill v. University of Vermont, 133 Vt. 101, 105, 329 A.2d 65 (1974).
2. If expert medical evidence establishes a causal connection between an aggravated or accelerated medical condition and a work-related injury, the aggravated or accelerated condition is compensable. Jackson v. True Temper Corp., 151 Vt. 592, 595, 563 A.2d 621 (1990); Campbell v. Savelberg, Inc., 139 Vt. 31, 35-36, 421 A.2d 1291 (1980);

Marsigliis Estate v. Granite City Auto, 124 Vt. 95, 103, 197 A.2d 799 (1964).

3. If a disability caused by a compensable physical injury is increased because of a preexisting mental condition, it is uniformly held that the full disability is compensable. Larson, Workmen's Compensation, §42.22(a). A pre-existing neurotic tendency does not lessen the compensability. Id. at §42.22(b). However, there must be a substantial causal connection between the work-related physical injury and the resulting aggravation of the mental condition. Id. at §42.22(c).
4. The claimant's current disability is due in large measure by her depression and anxiety. Although her depression was pre-existing, it clearly has been aggravated by her injury and pain.
5. Permanent disability benefits are calculated solely on the basis of impairment. Bishop v. Town of Barre, 140 Vt. 564, 571, 442 A.2d 50 (1982). "The permanent disability statute has arbitrarily fixed the amount of compensation to be paid for scheduled specific injuries regardless of loss of present earning power." Id. (quoting Beane v. Vermont Marble Co., 115 Vt. 142, 145, 52 A.2d 784, 786 (1947)).
6. The distinction between total disability and partial disability does not take into account a claimant's wage loss. Bishop v. Town of Barre, 140 Vt. 564, 573, 442 A.2d 50 (1982). The language in the Workers' Compensation Act precludes consideration of an individual's ability to earn wages when determining permanent disability. Id. at 574.
7. The claimant's current impairment of function is 25% of her upper extremities. This percentage of impairment takes into account the effects of the claimant's depression and anxiety. Although the claimant may be 100% disabled from working, this is not taken into account in determining the degree of permanent impairment.
8. The Commissioner has the power and authority to bar or reduce benefits payable under the Workers' Compensation Act where the claimant refuses treatment which will alleviate the injury. Larson, Workmen's Compensation Law,

§13.22 (1990). While the Vermont Workers' Compensation Statute does not explicitly provide for temporarily barring or reducing benefits due to unreasonable refusal to undergo treatment, the objectives of the Workers' Compensation Laws would not be served unless the Commissioner were imbued with that inherent power. See, e.g., Clemons v. Roseburg Lumber Co., 578 P.2d 429, 431 (Or. App. 1978).

9. Whether refusal of treatment should be a bar to recovery depends upon the reasonableness of the refusal. Reasonableness of refusal requires a weighing of the probability of the treatment's successfully reducing the disability by a significant degree against the risk of the treatment to the claimant. Id. at §13.22(b).
10. The Commissioner must weigh the possibility of pain to the claimant in the treatment proposed against the probability of benefit from the treatment. Id. at §13.22(d).
11. The claimant argues that in determining whether refusal to undergo treatment is reasonable, the Commissioner should consider the subjective intent of the claimant. Such a test would be unworkable, especially in the present case. The claimant in this case firmly believes that her depression is caused wholly by her physical condition and her treatment by the employer. Whereas, the claimant's physicians are clear that while the claimant's physical ailments have contributed to the claimant's depression and anxiety, her preexisting depressive disorder is the primary factor of her disability. It is not the claimant's drug phobia alone that causes her to refuse the treatment. It is clear that the claimant does not fully understand the benefits of the proposed therapy. This, combined with the claimant's experiences with her father's drug addiction, has resulted in an "irrational" choice by the claimant to refuse the therapy.
12. While the Vermont Supreme Court has not considered this issue, the majority of other jurisdictions which have considered it do not base "reasonableness" of refusal on the subjective intent of the claimant. See Larson, Workmen's Compensation Law, § 31.22 (1990) and cases cited.

13. It is true that in judging the reasonableness of a claimant's refusal to undergo treatments, the claimant's perspective must be taken into account. Clemons v. Roseburg Lumber Co., 578 P.2d 429, 431 (Or. App. 1978). In this case, the claimant herself understands the irrationality of her refusal to undergo therapy. Even from her perspective, refusal is unreasonable. Indeed, her psychiatrist opined that if she were faced with the situation of her worker's compensation benefits ending and her social security/disability benefits ending, she might very well choose to undergo the therapy.
14. As the probability of reducing the claimant's current impairment is substantial, and the risk of the treatment is minimal, it is unreasonable for the claimant to refuse treatment. While the claimant does have a degree of permanent impairment which will not be alleviated by the drug therapy treatment, that degree will not be measurable until the drug therapy and physical therapy to follow is completed.
15. The claimant has not, therefore, reached a medical end result because of the psychological involvement in her current disability. However, because she has unreasonably refused to undergo treatment, she is barred from recovering further temporary or permanent disability benefits until she undergoes the treatment recommended by her physicians. If the claimant chooses to undergo the treatment, she will be entitled to receive temporary total disability compensation during the treatment until such time as she reaches medical end result or returns to work, and entitled to permanent partial disability compensation thereafter.

ORDER

It is therefore **ORDERED**, that the claimant is barred from recovering further temporary or permanent disability benefits until she undergoes the treatment recommended by her physicians. If the claimant chooses to undergo the treatment, she will be entitled to receive temporary total disability compensation until such time as she reaches medical end result or returns to work, and entitled to permanent partial disability compensation thereafter.

The Defendant is ordered to pay all other benefits that the claimant would be entitled to under the Workers' Compensation Statute consistent with this opinion.

The claimant's request for attorney's fees is DENIED.

DATED at Montpelier, Vermont this 29th day of July, 1993.



Barbara G. Ripley
Commissioner