

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

Roger Clark)	State File No. F-14600
)	
v.)	By: Mark L. Stephen
)	Contract Hearing Officer
First Quality)	
Maintenance Services)	For: Barbara G. Ripley
)	Commissioner
)	
)	Opinion No. 17-93WC

Hearing held on July 6, July 14 and July 21, 1993
Record closed on August 6, 1993

APPEARANCES

John Barrera, Esq. for the Claimant
John Davis Buckley, Esq. for the Defendant

ISSUE

Whether certain injuries from which the Claimant suffers arose out of and in the course of his work duties for the Defendant?

THE CLAIM

1. Temporary Total Disability Compensation (TTD) under 21 V.S.A. §642 from February 8, 1993 to March 16, 1993.
2. Temporary Partial Disability Compensation (TPD) under 21 V.S.A. §646 from March 17, 1993 through April 12, 1993.
3. Medical and hospital benefits under 21 V.S.A. §640.
4. Attorney's fees and costs under 21 V.S.A. §678(a).

STIPULATIONS

1. The Claimant, Roger Clark, who resides at 7 Court Street, Apartment 16, Middlebury, Vermont 05753, and whose date of birth is June 30, 1962, was employed on January 18, 1993 by the Defendant, First Quality Maintenance Services, P.O. Box 845, 3 Greenhills Drive, Shelburne, Vermont 05482, as a cleaner.
2. The Defendant was an employer within the meaning of the

Workers' Compensation Act (21 V.S.A. §§601 et seq.).

3. The National Grange Mutual Insurance Company was the workers' compensation insurance carrier for the Defendant on January 18, 1993.

4. The Defendant filed a Form 25 (Wage Statement) with the Department on March 16, 1993.

5. The Claimant had no dependents under the age of 21 on January 18, 1993.

6. Judicial notice is taken of the following documents filed with the Department:

- a. First Report of Injury (Form 1)
- b. Notice of Injury and Claim for Compensation (Form 5)
- c. Carrier's Denial, dated March 12, 1993
- d. Notice and Application for Hearing (Form 6)
- e. Wage Statement (Form 25)
- f. Certificate of Dependency (Form 10)

7. There are no objections to the qualification of the following expert witnesses, appearing through report:

- a. Philip E. Gates, MD
- b. Fred Kniffin, MD
- c. Stanley E. Gryzb, MD

FINDINGS

1. Stipulations 1 through 7 are true.

2. During the hearing, the following documents were received in evidence without objection:

Claimant's Exhibit 1	Wages earned by Claimant since released to part-time work
Claimant's Exhibit 2	List of medical care sought since initial treatment
Claimant's Exhibit 3	List of certain medical bills
Claimant's Exhibit 4	6 pages of notes from Dr. Gates
Claimant's Exhibit 5	5 pages of office notes of Dr. Gates
Claimant's Exhibit 6	4 pages of records from Porter Medical Center

Claimant's Exhibit 7	4 pages of Porter Medical Center bills and a 1 page bill from Brooks Drug in Middlebury
Claimant's Exhibit 8	6/11/93 Therapy Referral Form from Dr. Gryzb
Claimant's Exhibit 9	6/11/93 report from Dr. Gryzb
Claimant's Exhibit 12	4 pages of Porter Medical Center bills, dated 6/28/93
Defendant's Exhibit 1	6 pages from Payroll Register of Defendant, covering the period 12/30/92 through 2/9/93.
Defendant's Exhibit 2	8 page recorded statement taken by Janice Laperriere from Claimant

3. Subsequent to the hearing, Claimant's attorney filed what he had denominated as Claimant's Exhibit 10, which is his 2-page statement of hours and disbursements in connection with his representation of Claimant in this matter.

4. On January 18, 1993, the Claimant, while within the course of his employment with the Defendant, fell on two occasions after slipping on ice. The first of these falls occurred in Milton, Vermont at the home of a customer of the Defendant; the second while at the offices of the Defendant. While Ron Cole, Defendant's self-described general manager, denied having seen these falls, it is acknowledged that the Claimant advised both Mr. Cole and Alan Trombly, Defendant's President, of them the same day that they occurred.

5. Roger Clark took January 19, 1993 to celebrate his wedding anniversary, which day off had been previously scheduled. He also took January 20 off, which had not been scheduled. The Claimant spent these two days essentially bed-ridden, as a result of his falls. Mr. Clark returned to work on January 21 in some discomfort and with right shoulder and arm weakness. This testimony was corroborated by Mr. Cole, who noted that Mr. Clark worked fewer hours than had been his custom and at a slower pace over the ensuing 2 1/2 weeks until the Claimant ceased working altogether and sought medical care. Payroll records also corroborate the reduced hours, as Claimant worked 50 or more hours per week on average prior to the accident and about 35 thereafter.

6. Mr. Clark testified that on February 4, after having gotten into his car, his pain substantially worsened and he had trouble

exhaling. He further testified that there was no event of which he was aware which caused this increased pain. Both Mr. Cole and Martin Trombly, son of the Defendant's president, testified that the Claimant had told them that he had twisted his back helping a friend of his wife get into or out of a car and that that was what caused the change in condition.

7. Mr. Clark testified that his condition worsened over the next couple of days until, after having to leave work after only 20 minutes on February 7, on the morning of February 8 he went to the emergency room at Porter Medical Center in Middlebury. He received treatment for a presumed upper back strain there followed up by seeing orthopaedist Philip Gates, MD on February 12, who began a course of treatment for presumed thoracic strain and myofascial pain syndrome. Dr. Gates prescribed physical therapy which, according to the Claimant, he could not afford and did not undertake. Claimant noted that he had no health insurance and testified that Alan Trombly had told him he (Trombly) had never lost a workers' compensation case.

8. Dr. Gates continued treating the Claimant until mid-April, having released him for part-time, light duty work on March 16, 1993 and for full-time yard work as of April 19, 1993. Subsequently, as he has continued to complain of pain and be in need of physical therapy, Mr. Clark has sought treatment from Stanley Gryzb, MD through University Orthopaedics in Burlington.

9. Commencing as of the time of his light duty release, the Claimant earned \$122.50 during that first week and also earned \$35 during the week leading up to Dr. Gates' release for full-time yard work. Certain other wages, not relevant to the issues in this hearing, have also been earned by the Claimant since the yard work release.

10. This case turns principally upon credibility. I have found the Claimant to be, on the whole, credible, if a bit inflexible with regard to aggressively seeking care recommended by his doctor. Betty Smith, Claimant's mother-in-law, who resides with him, was likewise credible in her testimony that discussions took place in her presence between Mssrs. Cole and Clark concerning Mr. Cole having actually witnessed the falls which the Claimant testified he took. Critical components of the Claimant's case are generally corroborated by medical records, payroll records or statements given.

11. The Defendant's case, on the other hand, is fraught with problems. Both Mr. Cole and Martin Trombly, each of whom resides with the Defendant, are found to have been generally not credible in their testimony. Particularly noteworthy is Mr. Cole's failed

memory, leading to Defendant's inability to rebut Claimant's testimony. Further, even if Mr. Clark did worsen his back condition helping a friend into or out of a car, as testified to by Mssrs. Cole and Trombly, and I find he did not, such an event, while he was already suffering from pain that was limiting his speed and hours worked as a result of the work-related fall, would likely not have broken a chain of causation and acted to defeat an otherwise valid claim.

12. Overshadowing the entire defense is the inexplicable and unexcused absence and failure to testify of a critical witness--the Defendant's president Alan Trombly. This hearing was convened three times, the latter two solely to hear from Alan Trombly. Indeed, despite earlier agreements between counsel that he would appear voluntarily and without subpoena, for the last convening of the hearing, Mr. Trombly was under subpoena issued by the hearing officer. For the initial hearing, Defendant claimed he had himself suffered a back injury which precluded his appearance. While never corroborated, this excuse was taken at face value. For the second hearing, no communication was ever received. Defendant merely did not appear. Being under subpoena, Alan Trombly did appear in the parking lot of the Department's offices for the third hearing. He refused to leave his van, claiming a psychological condition causing him to be unable to enter the building. Despite the willingness of the hearing officer to accommodate the Defendant's claims by taking his testimony in his van, Mr. Trombly left the premises while arrangements were being made.

CONCLUSIONS OF LAW

1. In a workers' compensation case, the claimant has the burden of establishing all facts essential to the rights asserted, including the character and the extent of the injury and disability. Goodwin v. Fairbanks, Morse & Co., 123 VT 161 (1962); McKane v. Hill Quarry Co., 100 VT 54 (1946).

2. The claimant must establish by sufficient competent evidence the character and the extent of the injury and disability, as well as the causal connection between the injury and the employment. Rothfarb v. Camp Awanee, Inc., 116 VT 172, 71 A.2d 569 (1950).

3. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incident complained of was the cause of the injury and the inference from the facts proven must be at least the more probable hypothesis. Jackson v. True Temper Corp., 151 VT 592, 596 (1989); Egbert v. The Book Press, 144 VT 367 (1984).

4. The Claimant herein has established by competent evidence that his falls on January 18, 1993 were both within the course of his employment and the cause(s) of his resulting disability. Claimant has also established that he was temporarily totally disabled under 21 V.S.A. §642 from February 8, 1993 until March 15, 1993, when he was released for and procured part-time work within his work capacity, earning \$122.50 for that week (through March 21, 1993).

5. A claimant is entitled to temporary partial disability compensation under 21 V.S.A. §646 when he is released for part-time and/or light duty work paying a lower average weekly wage than he had prior to the injury. Orvis v. Hutchins, 123 VT 18 (1962). From March 16, 1993 until April 19, 1993, Claimant was under a part-time (20 hours per week), restricted duty medical release from Dr. Gates. Effective April 19, 1993, Dr. Gates released the Claimant to full-time (40 hours per week) yard work. Claimant clearly established his entitlement to temporary partial disability compensation for the week of March 15 and the week of April 13. It is reasonable to infer that he was making a good faith effort to procure work within his physical limitations during that period. See Coleman v. United Parcel Service, 155 VT 646 (1990). Therefore claimant is entitled to temporary partial disability compensation for the weeks of March 16, 1993 and April 13, 1993 and temporary total disability compensation for the three weeks in between.

6. There has been no dispute as to the reasonableness of Claimant's medical care, delivered under 21 V.S.A. §640.

7. It is noted that the Claimant asserts he has not reached end medical result and is, in fact, in need of continuing medical care. That claim, along with any related claim for compensation, is outside the scope of this hearing and can be handled through the Department's claims process.

8. Claimant has prevailed in this matter and he has not been the cause of any delay. He is entitled to costs and to attorneys' fees in accordance with Rule 10 of the Processes and Procedure for Claims Under the Vermont Workers' Compensation and Occupational Disease Acts. Morrisseau v. Legac, 123 VT 70 (1962).

ORDER

It is therefore ORDERED that the Defendant pay to the Claimant, through its workers' compensation insurance carrier, National Grange Mutual, or in the event of its default, directly:

1. Temporary total disability compensation under 21 V.S.A. §642

in the appropriate weekly amount for the time period February 8, 1993 through March 14, 1993, and for the time period March 22, 1993 through April 9, 1993;

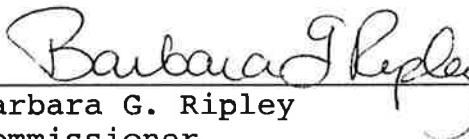
2. Temporary partial disability compensation under 21 V.S.A. §646 in the appropriate weekly amounts for the weeks March 15, 1993 and April 13, 1993. The Claimant's earnings for the purpose of determining the amount of his TPD entitlement appear on Claimant's Exhibit 1;

3. Medical bills as submitted and allowable under 21 V.S.A. §640; and

4. Attorneys' fees in the amount of \$598.50 and costs as submitted in the amount of \$55. Additionally, attorneys' fees are ordered paid in the amount of \$540 (6 hours @ \$90/hour), as stipulated by the Defendant, for counsel's time in twice traveling to Montpelier for hearings scheduled solely to receive testimony from Defendant's president, who then failed to appear.

5. The claim for temporary partial disability compensation for the period March 22, 1993 and April 12, 1993 is **DENIED**.

DATED at Montpelier, Vermont this 13th day of October, 1993.



Barbara G. Ripley
Commissioner