VERMONT DEPARTMENT OF LABOR & INDUSTRY

Lyn E. Perkins	)	File No.: C - 7838
	)	
	)	By: J. Stephen Monahan
v.	)	General Counsel
	)	
Bruno Associates	)	For: Barbara G. Ripley
Inc., P.C.	)	Commissioner
	)	
	)	Opinion No.: 19-93WC

Oral testimony taken June 28, 1993
Record closed on July 28, 1993

APPEARANCES

Dennis O. Shillen, Esq., for the claimant
Thomas M. Higgins, Esq., for the defendant

ISSUES

1. Does the decision in Bousquet v. Howe Scale Co., 96 Vt. 364 (1923), prohibit the Department of Labor and Industry from ordering a workers' compensation insurance carrier to pay a claimant for additional periods of temporary total disability, temporary partial disability, and medical benefits, after the claimant has signed a Form 22 settlement agreement for the payment of permanent partial disability compensation?

2. Has the claimant received an overpayment, and if so to what extent?

3. If the claimant has received an overpayment, may the carrier recoup the amount of that overpayment by refusing to pay reasonable and necessary medical bills incurred by the claimant for treatment, without obtaining the Department's approval?

4. Did the workers' compensation carrier properly calculate claimant's weekly compensation amount's when it paid the claimant temporary total disability and permanent partial disability compensation?

5. Was the claimant improperly induced to sign the Form 22 agreement by representations made by agents of the insurer?

6. Is the claimant entitled to reimbursement for out-of pocket medical expenses and mileage for travel to her physicians?

7. Is the claimant entitled to compensation for the time periods she missed work in order to keep physician appointments for the treatment of her work related injury?

THE CLAIM

1. The defendant seeks:

   a) A determination that the department lacks jurisdiction to order additional payments in this matter;

   b) A determination that claimant has been overpaid; and

   c) Department approval to offset the amount of the overpayment against any additional medical expenses incurred by the claimant.

2. The claimant seeks:

   a) Additional periods of temporary total and temporary partial disability compensation based on the deterioration of her work-related back condition;

   b) Reimbursement for out-of-pocket medical expenses, and mileage. In addition, they request that third party health insurers who have paid portions of claimant's treatment be reimbursed;

   c) Reimbursement for the hours of work missed to attend physicians' appointments for treatment of her work-injury; and,

   d) Payment of attorney fees and costs.

FINDINGS

1. On January 18, 1993, claimant was injured when moving a filing cabinet in the course of her employment as a secretary with the defendant, Bruno Associates. The injury was reported but not filed as a workers' compensation claim at that time.

2. Claimant continued to experience back pain and 3 weeks later went to Rutland Medical Center where her problem was diagnosed as a herniated disc. She subsequently had surgery. Blue Cross/Blue Shield paid for this even though it was a work related because no workers' compensation claim had been filed.

3. After a month claimant's condition deteriorated further and Dr. Vargas proposed a second surgery. At that time a workers' compensation claim was filed.

4. Claimant missed 3.2 weeks of work following the first surgery but was not paid any temporary total disability compensation. Instead she had to use accrued vacation and sick leave for this period.

5. In October of 1989, the claimant underwent a second surgery on her back to remove additional disc fragments and scar tissue.

She missed work for six weeks (from 10/18 to 11/24) and received temporary total disability compensation.

6. Claimant's average weekly wage at the time of the injury was $573.80. She had three dependents under age 21. She was entitled to temporary total disability compensation at a rate of her average weekly wage (or $382.53) plus $10.00 for each dependent ($30.00) for a total of $412.53 for each week of work missed because of her injury, between January 18, 1989 and June 30, 1989. On July 1, 1989, the compensation rate was statutorily increased by 1.0583 resulting in an increase in Claimant's compensation rate to $404.83 plus $30.00 dependency benefits or $434.83 per week for each week of work missed between July 1, 1989 and June 30, 1990.

7. Claimant reached a medical end result following the second surgery on November 27, 1989. The following September, she and defendant's insurer, Amerisure submitted a Form 21 agreement concerning temporary total disability compensation, and a Form 22 agreement concerning permanent partial disability compensation for the Department's approval. Both agreements were approved.

8. Under the terms of the Form 21 agreement, Amerisure should have paid claimant temporary total disability compensation for 3.2 weeks at a compensation rate of $412.53 for work missed following the first surgery, and temporary total disability compensation for 6 weeks at compensation rate of $434.83 for work missed following the second surgery, for a total of $3,929 in temporary total disability compensation.

9. Under the terms of the Form 22 agreement, Amerisure should have paid claimant 96.98 weeks permanent partial disability compensation based on a 24% impairment to her spine and a 7.5% impairment to her left lower extremity. From November 27, 1989 to June 30, 1990 (31 weeks) compensation was owed at a rate of $404.83 per week (dependency benefits are not added to permanent partial disability compensation) for a total of $12,549.73 and for the remaining 65.98 weeks at a rate of $415.96 per week for a total of $27,445.04. In other words, the agreement called for a total of $39,994.77 in permanent partial disability compensation to be paid the claimant.

10. According to the payment history submitted by Amerisure, it paid claimant $2,660 between 11/7/89 and 12/4/89. These payments are not labeled on the payment history, and none of them reflect the actual weekly compensation rate but this evidently was for temporary total disability compensation during that period. Amerisure next paid the claimant between September 20, 1990 and September 26, 1990. These amounts totaled $39,474.24 and evidently were for her permanent partial impairment although they are not labeled as such. Thus the documentation provided by Amerisure indicates that during the periods specifically covered by the Form 21 agreement and the Form 22 agreement it underpaid claimant $1,269.00 in temporary total disability compensation and underpaid her $520.53 in permanent partial disability compensation.

11. Amerisure did not honor its obligations under the agreements it entered into with the claimant. Based on the information provided by Amerisure, it owed claimant $1,789.53 for the period of time specifically covered by the agreements.

12. Defendant argues that claimant agreed to a lesser amount and points to the Affidavit As To Payment Of Compensation (Form 13) filed by Defendant's employee with the Department on 12/11/90 as evidence of this. This argument is specious. The Form 13 was filed without the knowledge or agreement of the claimant, conflicts with the actual agreements filed earlier, and does not even accurately reflect the payment history produced by the defendant Amerisure.

13. Because of her back pain, claimant left her employment with defendant Bruno Associates on 5/10/91. She entered a pain management clinic at Dartmouth-Hitchcock and did not obtain other employment for 6.6 weeks. After reviewing the medical evidence the department issued an interim order directing that temporary total disability compensation recommence at a rate of $445.96 per week ($415.96 + $30.00 dependency benefits = $445.96).

14. Claimant obtained part time employment with the Kedron Valley Inn on 6/26/91. She is claiming an entitlement to temporary partial disability compensation for the entire period she worked there (6/26/91 to 1/20/93). She has not submitted sufficient medical evidence to support a finding that she was in fact temporarily partially disabled during this period. Although she clearly worked fewer hours at a lower hourly wage, this could just as easily been due to the economics of the lodging industry and not any temporary partial disability.

15. Amerisure paid the claimant $7,425.54 between 7/25/91 and 8/29/91. Once again, none of the payment amounts corresponds to the actual weekly compensation rate owed the claimant. Nonetheless, since claimant was only owed 6.6 weeks of temporary total disability compensation ($2,943.34) it overpaid the claimant $4482.20 during this period.

16. Claimant began experiencing increased back pain in October of 1992, although she continued working until 1/20/93. At that point, because of the pain, and on the advice of Dr. Vargas, she stopped work at the Kedron Inn. Both the claimant's treating physician and the defendant's reviewing physician, Dr. Ford, were of the opinion that her pain was a recurrence of her original work injury. Dr. Ford also concurred in Dr. Vargas's recommendation that claimant not work for 3 months.

17. The claimant did not work for 13 weeks. She obtained part time employment with William Wood Real Estate Appraisers for the period 4/9/93 to 6/25/93. For those 13 weeks she was entitled to a reinstatement of temporary total disability at a rate of $453.72 (reflecting the annual statutory adjustments) plus $30.00 for her

dependents or $483.72 per week, for a total of $6288.36 in temporary total disability compensation.

18. Claimant again asserts an entitlement for an additional period of temporary partial disability compensation, but has not offered sufficient evidence to support that determination.

19. Claimant is owed $6,288.36 minus the overpayment of $4482.20, plus the initial underpayment of $1,789.53. This equals a total of $3595.69 in temporary total and permanent partial disability compensation to which the claimant is entitled.

20. Claimant is entitled to reimbursement for those work injury medical expenses which she paid out of her own pocket. She is also entitled to mileage for travel to and from her physicians in the amount of $398.10.

21. Blue Cross/Blue Shield is entitled to reimbursement for all medical payments it made for treatment of this work related injury.

22. Claimant has also asserted that defendant Amerisure improperly withheld information concerning a permanency evaluation provided to it by Dr. Carr. Although the recently enacted rules make it quite clear that such evaluations must be shared with the claimant and the Department, the rules in effect at the time were silent on this issue. Furthermore, in this instance, Dr. Carr's report clearly indicated that a copy had been sent to the claimant so defendant did not know she had not received it. Finally, Dr. Carr's evaluation was similar to that of Dr. Vargas in most respects except that it also suggested that claimant had some degree of permanent mental injury. The record is lacking in sufficient evidence to support a finding of such an impairment and none is awarded.

23. Defendant Amerisure's employee, Laurie Newton was specifically asked by the claimant if the Form 22 agreement would foreclose her applying for additional periods of temporary total disability if the need arose, before claimant signed the agreement. Ms. Newton informed her that the agreement would not foreclose such claims.

24. The Form 22 agreement, by its express terms, allows an injured worker to continue to be entitled to the payment of reasonable and necessary medical expenses related to treatment of the work injury.

25. At no point during the pendency of this claim has the claimant signed a final settlement receipt, or any other document which expressly waived her right to additional compensation under the Act.

26. For much of the period covered by this claim, the claimant was not represented by an attorney. She dealt directly with employees of Amerisure, concerning her entitlement to compensation

and the meaning and purpose of the Form 21 and Form 22 agreements which she entered into with them. Presumably, those Amerisure representatives were Vermont licensed adjusters with a working knowledge of the Vermont workers' compensation law and process. It is difficult to understand how this insurance company consistently failed to accurately calculate the compensation rate, and failed to accurately describe what it had paid out on more than one occasion. Indeed, it took the company several months to even produce a payment history, despite several requests to do so.

27. Claimant's exhibits 3 - 12 and 15 were admitted into evidence. Claimant's exhibits marked 1, 2, 13, and 14 were consider as argument rather than evidence. Defendant's Exhibits A, B, and C were admitted into evidence at the hearing. In addition the "exhibits" defendant attached to his memorandum and received by the Department on July, 28, 1993 were also considered.

28. The hearing officer took judicial notice of the following information in the Department's file:

Form 1	Employer's First Report of Injury dated 8/30/90, 10/5/89 and 10/5/89;
Form 10	Certificate of Dependency indicating claimant has three dependents;
Form 21	Agreement For Temporary Total Disability Compensation approved 9/6/90;
Form 22	Agreement For Permanent Partial Disability Compensation approved 9/17/90 with letter approving a lump sum;
Form 25	two Wage Statements filed with the Department on 10/5/89;
Form 28	two Notice of Change in Compensation Rate forms approved by the Department on 9/17/90;
Form 13	Affidavit As To Payment Of Compensation filed with the Department on 12/11/90;
Letter	letter from Jeanine Wood to Dr. Vargas dated 6/28/91 and response from Dr. Vargas dated 7/19/91;
Form 27	Notice To Commissioner And Employee Of Intent To Discontinue Payments filed with the Department 8/27/91;
Letter	letter from workers' compensation specialist Janet Laperle dated 3/12/93, setting out an Interim Order that Amerisure commence payment of temporary total disability compensation;
Form 6	Notice and Application For Hearing filed by defendant Amerisure with the department on march 22, 1993; and
Letter	letter from Blue Cross/Blue Shield dated 6/3/93 asserting a claim for reimbursement.

CONCLUSIONS

1. The claimant has the burden of establishing all of the facts essential to the rights asserted. Claimant must establish both the initial compensability of the alleged work related injury as well as substantiate the degree of permanent impairment. Goodwin v. Fairbanks, Morse & Co., 123 Vt. 161 (1962); McKane v. Capital

Hill Quarry Co., 100 Vt. 45 (1926). A workers' compensation claimant has the burden of showing that an injury comes within the scope of this chapter and of showing the causal connection between the accident causing the injury and his or her employment. Lapan v. Berno's Inc., 137 Vt. 393 (1979). When the original injury and resulting disability are unquestioned, the burden is on the employer to justify the termination of temporary total disability compensation. Merrill v. University of Vermont, 133 Vt. 101, 105 (1974).

2. In this case the compensability of the original injury is unquestioned. Defendant did not pay claimant for the initial 3.2 weeks of temporary total disability and the claimant had to use her vacation and sick leave time. This was not proper and claimant is entitled to temporary total disability compensation for that period.

3. The right to workers' compensation is fully statutory, nonexisting except under circumstances provided in the statute. LaBombard v. Peck Lumber Co., 141 Vt. 619 (1982). Workers' compensation statute, having benevolent objectives, is remedial in nature and must be given a liberal construction. Montgomery v. Brinver Corp., 142 Vt. 461 (1983). No injured employee should be excluded from coverage under the Workers' compensation act unless the law clearly intends such exclusion or termination of benefits. Montgomery v. Brinver Corp., 142 Vt. 461 (1983). The provisions of Vermont's workers' compensation act shall be interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it. 21 V.S.A. § 709.

4. The claimant is entitled to temporary total disability compensation until he either reaches a medical end result or successfully returns to work. Orvis v. Hutchins, 123 Vt. 18, 24 (1962). Under Vermont law periods of temporary total disability need not occur continuously but may be broken up into continuing intervals. 21 V.S.A. § 650(c); Orvis v. Hutchins, 123 Vt. 18 (1962). Indeed a period of temporary total disability may arise even after a determination of medical end result has been reached if the claimant's condition deteriorates at some later date due to the injury. See e.g., Smitty's Coffee Shop v. Florida Industrial Commission, 86 So. 2d 268 (Fla. 1956); Colbert v. Consolidated Laundry, 107 A.2d 521 (N.J. 1954). A claimant is not required to continue to work if it will cause him serious discomfort and pain while so engaged. Sivret v. Knight, 118 Vt. 343 (1954).

5. 21 V.S.A. § 650(c) provides in pertinent part:

> When temporary disability, either total or partial, does not occur in a continuous period but occurs in separate intervals each resulting from the original injury, compensation shall be adjusted for each recurrence of disability to reflect any increases in wages or benefits prevailing at that time. . . .

This provision was added to the Workers' Compensation Act in 1973. Case law had recognized that temporary total disability could occur at separate intervals prior to the statutory amendment. See, Orvis v. Hutchins, 123 Vt. 18 (1962).

6. In this case the evidence is abundantly clear that claimant had a work injury, and that on two separate occasions recurrences of temporary total disability occurred each resulting from that original injury. Defendant offered no credible evidence which tended to show that claimant's additional periods of temporary total disability were not recurrences but instead the result of some other event. Instead defendant argues that it does not owe any additional amounts because claimant signed an agreement for permanent partial disability compensation and this action deprived the Commissioner of further jurisdiction and terminated any claim to additional compensation which claimant might have.

7. Defendant's argument fails on several grounds. Defendant claims that the case of Bosquet v. Howe Scale Co., 96 Vt. 364 (1923) supports its position. A review of the facts of that case demonstrate its inapplicability here. In Bosquet, the claimant entered into a settlement agreement with the defendant, was paid in full accord with that agreement, and then signed a settlement receipt which expressly stated that the settlement was a final settlement of the compensation and medical benefits owed the claimant. Three and a half years later the claimant sought to reopen the claim for additional compensation. The Supreme Court determined that because the had accepted the final settlement and been paid in full, the commissioner was without jurisdiction to reopen the case on the grounds of a change in conditions.

8. In this case, although the claimant signed a settlement agreement with the defendant, that agreement did not expressly waive any further claim for temporary compensation and specifically left open the ability to claim additional medical benefits. The claimant did not ever sign a final settlement receipt after receiving full payment, and requested additional temporary total compensation within a matter of months of signing the agreement, before final payment was made. Indeed the claimant was never paid the full amount required by the agreement by the defendant. Thus this case is factually different than Bosquet. Final disposition of any entitlement to temporary total or temporary partial disability compensation can only be effected with a Form 14 or Form 15 settlement agreement which explicitly terminate any future entitlement to such compensation. See, Lajoie v. Lajoie, Commissioner's Opinion No. 13-84WC, dated April 1, 1986.

9. Defendant's assertion that the Commissioner lacks continuing jurisdiction in this matter also fails because in many respects this claim is not a reopening but a new claim for temporary total disability based on the recurrence of the disabling symptoms caused by the original injury. Claimant had the burden of establishing that she was temporarily totally disabled from work,

and that disability was caused by a recurrence of the original work injury rather than a new injury or an aggravation. Claimant met her burden in this regard both for the period May 10, 1991 to June 26, 1991 and for the period January 20 1993 to April 8, 1993.

10. Furthermore the evidence is that claimant, who was unrepresented and not knowledgeable concerning her rights under the workers' compensation act, specifically asked the defendant if by signing the Form 22 agreement she was waiving any right to future compensation and was told by the defendant's employee that signing the Form 22 agreement would not waive her right to make further claims for temporary total disability. Based at least in part on this inducement, claimant signed the Form 22 agreement. (Defendant's employee correctly stated the Department's interpretation of the law since the Lajoie decision cited above.) Having induced the claimant to sign the agreement with this representation, the defendant is estopped from now asserting that claimant waived her rights.

11. Defendant's argument also fails because the express terms of the Form 22 agreement limit it to permanent partial disability. It explicitly leaves open the obligation of the defendant to continue to pay for reasonable and necessary medical treatment related to the work injury, and is silent with regard to temporary total disability compensation. The agreement also explicitly sets out the Commissioner's ability to review and reopen any award based on changed conditions. Nothing on the agreement indicates that signing the agreement results in a full and final settlement of all aspects of the claim.

12. Claimant had the burden of establishing an entitlement to temporary partial disability. She did not meet that burden.

13. Vermont's Workers' Compensation Act prohibit an insurer from attempting to recoup a possible overpayment by not paying claimant's reasonable and necessary medical bills absent express authorization to do so from the department. 21 V.S.A. § 651. Defendant Amerisure improperly attempted to recoup an overpayment by refusing to pay medical bills.

14. The record in this matter closed on July 28, 1993; the parties had been directed to file all papers prior to that date. Claimant submitted a memorandum and two exhibits, including documentation of attorney hours and fees after that date. Because they were not submitted on or before July 28, 1993, these documents were not considered. Claimant's request for attorneys fees is denied because it was not submitted prior to July 28, 1993.

ORDER

Therefore, based on the Foregoing findings and conclusions Defendant's request that the department determine that it lacks jurisdiction over this matter is DENIED. Defendant's request that

it be found that claimant was overpaid is DENIED, as is its request to offset any overpayment against medical benefits owed.

The Defendant through its insurer, Amerisure, or in the event of its default, Bruno Associates, is ORDERED:

1. To pay the claimant $3595.69 in temporary total and permanent partial disability compensation;

2. To pay the claimant $398.10 for mileage and expenses incurred in traveling to and from physician appointments;

3. To pay all of claimant's reasonable and necessary medical treatment related to her work injury;

4. To reimburse the claimant for any documented out of pocket medical expenses paid by her for treatment of her injuries;

5. To reimburse Blue Cross/ Blue Shield for medical expenses it paid for treatment of claimant's work injury.

Claimant's request for temporary partial disability compensation is DENIED. Claimant's request for reimbursement of hours of work missed for physician appointments is DENIED because the statute authorizing such payments was enacted after the original injury. Finally, claimant's request for attorney fees is DENIED.

Dated in Montpelier, Vermont this 13th day of October, 1993.

Barbara G. Ripley
Commissioner