VERMONT DEPARTMENT OF LABOR AND INDUSTRY

Kelly Whalen	)	State File No. E-1547
	)	
v.	)	BY: DAVID J. BLYTHE Hearing Officer
	)	
Lake Champlain Transportation, Inc.	)	FOR: BARBARA G. RIPLEY Commissioner
	)	
	)	Opinion No. 21-93WC

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on for final hearing before David J. Blythe, Hearing Officer and designee of the Commissioner of Labor and Industry on June 29, 1993. Claimant Kelly Whalen was present and was represented by Attorney Keith J. Kasper. Defendant Lake Champlain Transportation, Inc. ("Defendant") and its workers compensation insurance carrier, CNA, were represented by Attorney Christopher McVeigh.

I. ISSUE PRESENTED

Three issues are presented for resolution in this action:

(a) Whether the injury for which compensation is sought is a recurrence or an aggravation;

(b) How temporary benefits should be established for the claimant, a full-time college student, who returned to the University of Vermont in August 1992; and

(c) Whether the claimant unreasonably refused reasonable medical treatment by ignoring her physician's recommendation that she not work as a waitress during the summer of 1992; and if she

did, what is the impact on her entitlement to workers' compensation benefits?

II. EVIDENTIARY EXHIBITS

The parties stipulated to the admissability of the following:

(a) Joint Exhibit No. 1 (compilation of medical records);

(b) Joint Exhibit No. 2 (various documents relating to expenses for which reimbursement is sought).

In addition, the Commissioner received into evidence the following:

(a) Claimant's Exhibit No. 1: "Quarter Wage Statement" from the Skipper Restaurant of Bass River, Inc.

(b) Defendant's Exhibit A: Letter from Keith J. Kasper to Dr. Cummings, dated September 11, 1992.

III. FINDINGS OF FACT

Based upon facts stipulated by the parties, evidence properly before the Commissioner and representations of counsel, the Commissioner makes the following Findings of Fact, Conclusions of Law and Order:

1. On July 18, 1991, the claimant, Kelly Whalen, was employed by Defendant as a marina attendant.

2. Defendant was an employer within the meaning of the Workers Compensation Act on July 18, 1991.

3. The claimant suffered personal injury on July 18, 1991 during the course of her employment when she was holding a

motorboat "guy" rope and was pulled off of a dock and into the water, striking her head as she fell.

4. The claimant's injury arose out of and in the course of her employment with Defendant.

5. CNA was the workers compensation carrier for Defendant on July 18, 1991.

6. The claimant's average weekly wage preceding the accident was $155.81 resulting in weekly compensation rate of $155.81.

7. The claimant had no dependents under the age of 21.

8. In July, 1991, the claimant was 22 years of age, and not married.

9. On July 24, 1991, Defendant filed a First Report of Injury.

10. On March 3, 1992, Defendant discontinued temporary total disability compensation on the basis that the claimant was released by her physician to return to work.

11. On September 23, 1992, the parties entered into an Agreement for Temporary Partial Disability Compensation (Form 24).

12. At the hearing on June 29, 1993, Defendant conceded responsibility for the claimant's April, 1993, shoulder surgery, and the compensation benefits resulting from it. That matter is not an issue before the Commissioner. Defendant also presented a last best offer to settle the matter which, in addition to acknowledging responsibility for the claimant's April 6, 1993, surgery and associated benefits, included an offer of $1,500.00

to settle the summer and 1992-1993 academic year indemnification benefits and $1,778.00 of the $3,502.00 medical expenses incurred during the summer of 1992.

13. Following the incident of July 18, 1991, claimant was temporarily totally disabled through and including March 2, 1992.

14. Following the injury on July 18, 1991, claimant initially treated with her family doctor, Dr. O'Brien. Dr. O'Brien referred claimant to Dr. Ciongoli in August of 1991. Dr. Ciongoli's treatment focused upon injury to claimant's lower cervical spine. See Joint Exhibit 1 at 73.

15. On August 22 and 29, 1991, x-rays and CAT scans were performed of claimant's cervical spine which revealed no gross abnormalities. See Joint Exhibit 1 at 83-84. No objective testing of claimant's shoulder was performed at this time.

16. Claimant attempted to return to school in the fall of 1991 but her pain and medications precluded her from continuing with a full course load in the Fall of 1991. See Joint Exhibit 1 at 77. Dr. Ciongoli's note specifically related claimant's problem to her shoulder pain. Id. Due to this continued pain, claimant carried only one course that semester.

17. Dr. Ciongoli treated claimant conservatively with limited improvement in claimant's condition. Claimant's treatment consisted primarily of physical therapy and medication to relieve her pain. Initially, this physical therapy focused upon her shoulder, but then became more concentrated upon her cervical spine by the beginning of 1992. See Joint Exhibit 1 at 44-62.

18. Due to the limited improvement in her condition, claimant was referred to Dr. Cummings on October 7, 1991. Dr. Cummings initiated a home exercise program for claimant, removed her from Soma medication and attempted a cortico-steroid injection. See Joint Exhibit 1 at 18-20.

19. Claimant returned to school in January of 1992. This return to school resulted in an increase in her symptomatology. See Joint Exhibit 1 at 62. Due to this increase in claimant's symptomatology, claimant again reduced her course load. This evidence was not rebutted by Defendant.

20. On January 15, 1992, Dr. Ciongoli released claimant from his care, and stated that claimant could return to work. See Joint Exhibit 1 at 75.

21. On or about July 31, 1991, the claimant started a physical therapy program with therapist, Pam Currier. In pursing physical therapy, the claimant testified that she would tell Ms. Currier about complaints of pain during the therapy sessions, and that she thought Ms. Currier's notes were accurate ones.

22. Although Ms. Currier notes complaints of pain concerning claimant's right shoulder during her visits of July 31, 1991, and August 2, 1991, the notes also reflect a marked improvement in the claimant's shoulder condition starting with her August 5, 1991, visit. See Joint Exhibit 1 at 46-48.

23. On August 14, 1991, Ms. Currier noted "shoulder much improved - no sign pain now." See Joint Exhibit 1 at 49).

24. From August 14, 1991, through December 20, 1991, Ms. Currier noted various complaints of neck pain, arm pain, and thoracic pain, but did not record any instances of shoulder pain. See Joint Exhibit 1 at 49-61.

25. On December 20, 1991, Ms. Currier noted that shoulder pain had recurred. Then from December 20, 1991, through February 19, 1992, the physical therapist notes mention cervical and thoracic pain and only on February 29, 1992, does Ms. Currier mention shoulder stating "shldr pain since yest./cause unknown gradual ¦ over day." See Joint Exhibit 1 at 71. Then on March 25, 1992, Pam Currier noted that the claimant went skiing, which exacerbated her cervical and thoracic pain. On March 27, 1992, Ms. Currier noted "neck unchanged, thoracic region was acutely painful but still worse than before vacation." See Joint Exhibit 1 at 71B.

26. Claimant spent the summer of 1992 on Cape Code, where she accepted employment as a waitress at the Skipper Restaurant. Prior to accepting this position, claimant testified that she sought other, less physically demanding employment.

27. Claimant began working at Skipper's Restaurant on May 29, 1992, at which time she attended a two-hour training session. She was not actually scheduled to begin working for approximately one week thereafter.

28. After this initial training session but before starting work, claimant contacted CNA (defendant's workers compensation carrier) and requested authorization for continued medical

treatment in Massachusetts. CNA advised claimant that she would need a referral from her treating physician, Dr. Cummings, in order to receive treatment at Defendant's expense.

29. On June 1, 1992, claimant was examined by Dr. Cummings. In his progress notes, Dr. Cummings noted that claimant had recently begun working as a waitress on Cape Cod. See Joint Exhibit 1 at 17. Dr. Cummings recommended continuing treatment. In a letter to the claimant's attorney (apparently misdated May 29, 1992), Dr. Cummings made reference to having made "some recommendations for her to try to be able to continue with her waitress job over the summer." See Joint Exhibit 1 at 16.

30. In a later letter dated September 14, 1992 to the claimant's attorney, Dr. Cummings stated that he advised the claimant that "it was quite likely that activities such as waitressing would worsen her symptoms." See Joint Exhibit 1 at 13.

31. In still another letter dated September 16, 1992, Dr. Cummings wrote to the claimant's attorney that he "thought [waitressing] was a bad idea, and that particular type of activity would worsen her symptoms." See Joint Exhibit at 11.

32. Dr. Cummings specifically stated in a September 14, 1992 letter to the claimant's attorney that, in his view, the claimant's symptoms "flared up" as a result of her waitressing activities in June, 1992, but that she did not experience a "new injury" at that time. See Joint Exhibit 1 at 13.

33. During the summer of 1992, the claimant treated regularly with John P. Fanara, Jr., D.C., a chiropractic physician.

34. In a report dated July 3, 1992, Dr. Fanara noted that claimant was partially disabled but was able to continue work. See Joint Exhibit 1 at 31 and 32.

35. On July 28, 1992, Dr. Fanara reported that he had restricted claimant from all types of work. See Joint Exhibit 1 at 29.

36. On September 15, 1992, Dr. Fanara described claimant as having experienced an exacerbation of a pre-existing condition due to her work as a waitress. However, Dr. Fanara opined that this type of exacerbation would have occurred eventually "from any other type of work . . ." See Joint Exhibit 1 at 25.

37. On August 6, 1992, the claimant underwent an independent medical examination by William Berkowitz, D.C., a chiropractic physician. Dr. Berkowitz opined that the claimant had reached her medical endpoint. He also stated that her work as a waitress may have aggravated her pre-existing symptoms and that she was unable to work as a waitress at that time. See Joint Exhibit 1 at 42.

38. In a letter dated September 16, 1992, Dr. Cummings specifically disagreed with Dr. Berkowitz's statement that the claimant had reached her medical endpoint at that time. He also stated, based upon his extended period of time treating the claimant, that the claimant's condition was chronic and would require on-going treatment. See Joint Exhibit 1 at 10-12.

39. The claimant was a full-time college student prior to her injury on July 18, 1991. Her employment history was as follows:

a) Freshman academic year (9/88-5/89)
Part-time sales clerk - 20 hrs/wk at $5.00/hr.

b) Summer 1989
Employed by Defendant full-time.

c) Sophomore academic year (9/89-5/90)
Worked only over Christmas vacation.

d) Summer 1990
Employed by Defendant full-time.

e) Junior academic year (9/90-5/91)
Not employed.

f) Summer 1991
Employed full-time by Defendant.
Injured 7/18/91.

40. Claimant testified that she had planned to work weekends during her senior academic year (9/91-5/92) for defendant, but that this employment had not been confirmed.

41. Claimant did not complete college in May of 1992, but continued for another academic year (9/92-5/93). She testified that due to her injury, she was not able to work during that academic year. This evidence was not rebutted by Defendant.

42. Claimant returned to full-time employment on June 1, 1993.

CONCLUSIONS OF LAW

1. The claimant has the burden of establishing all facts essential to the rights asserted, including the character and extent of the injury or disability. McKane v. Capital Hill Quarry Company, 100 Vt. 45 (1946); Goodwin v. Fairbanks, Morse & Company,

123 Vt. 161 (1962); Rothfarb v. Camp Awanee, Inc., 116 Vt. 172 (1950) (overruled on other grounds, Shaw v. Dutton Berry Farm, Opinion No. 92-267, Vermont Supreme Court dated June 11, 1993).

2. The claimant has the burden of establishing, by sufficient competent evidence, the character and extent of her injury as well as the causal connection between her injury and the medical treatment for her injury, and her employment. Rothfarb v. Awanee, Inc., supra., overruled on other grounds by Shaw v. Dutton Berry Farm, supra.

3. When the claimant's injury is an obscure one and a layman could have no well-grounded opinion as to its causation or duration, expert medical testimony is sole ground of laying a foundation for an award. Lapan v. Berno's Inc., 137 Vt. 193 (1979). Credible expert medical evidence must link the injury, and the medical treatment for the injury, to claimant's activities as an employee. There must be created in the mind of the trier of fact something more than a possibility, speculation, suspicion, or surmise that the employment caused the injury and the inference from the facts proved must be at least the more probable hypothesis. Burton v. Holden and Martin Lumber Company, 112 Vt. 17 (1941).

A. AGGRAVATION VS. RECURRENCE

4. The first issue presented is whether the increased symptoms the claimant suffered to her shoulder are more properly deemed an "aggravation" or a "recurrence". An aggravation has been defined as "a destabilization of a condition which has become

stable, although not necessarily fully symptom-free." A recurrence has been defined as "a continuation of a problem which has not previously resolved or become stable." Jaquish v. Bechtel Construction Company, Opinion No. 30-92-WC, dated December 29, 1992.

5. If a condition is characterized as an aggravation of a pre-existing but stabilized condition, it is deemed a new injury for which the employer/insurer on the risk at the time of the aggravation is responsible. If the condition is characterized as a recurrence, then the risk stays with the original employer/insurer. Jaquish v. Bechtel Construction Company, supra at 12.

6. To determine whether a condition is an aggravation or a recurrence, the Commissioner must consider factors such as successful return to work, whether the claimant was actively treating for the condition prior to the second injury, the extent of that treatment, and its temporal proximity to the second injury. Jaquish, supra.

7. The Commissioner has also defined a second work-accident or work-condition as an aggravation if that work accident or condition "aggravates a pre-existing condition which resulted from the prior accident, the second accident [or work condition] which aggravated the pre-existing condition is treated as a new injury if the second accident [or work condition] at least partly precipitated the claimant's disability." Doyle v. G.P.I. Construction Company, Opinion No. 19-89WC, dated May 22, 1991, at

8; Norse v. R.K. Mile, Inc., Opinion No. 23-91WC, dated December 3, 1991, at 5.

8. The claimant's shoulder injury for which compensation is sought is attributable to her July 1991 injury while in the employ of the defendant. Virtually all of the medical evidence presented serves to establish a clear causal relationship between that dockside injury and the subsequent medical problems. Claimant's condition had not stabilized, and she was still treating for that injury. There is no conclusive or persuasive evidence that her work as waitress caused or constituted an aggravation or new injury within the meaning of Vermont's workers compensation statutes or regulations. Therefore, as a matter of law, claimant suffered a recurrence of her previous injury in June, 1992 while employed as a waitress in Massachusetts.

B. SHOULD CLAIMANT'S CLAIM FOR ADDITIONAL BENEFITS BE DENIED IN THAT CLAIMANT FAILED TO REASONABLY FOLLOW MEDICAL ADVICE?

9. The next issue which must be addressed is whether, in view of the finding that the claimant's injury is a recurrence rather than an aggravation, her claim should be denied in that she failed to follow the reasonable advice of her physician and curtail her physical activities and specifically, whether she should not have accepted a job as a waitress in June, 1992.

10. Under the Workers' Compensation Act, a claimant may not refuse to follow reasonable medical treatment or medical advice.

Knight v. Ames Department, Opinion No. 1-93. 1 Larson, Workmen's Compensation Law, § 13.22 et seq.

11. A claimant who acts rashly and whose rash conduct exacerbates or aggravates her condition is not entitled to workers' compensation benefits for the aggravation or exacerbation. 1 Larson Workmen's Compensation Law, § 13.22.

12. A claimant who, with knowledge of limiting conditions, engages in unreasonable conduct or activity which exacerbates or aggravates a condition, may not claim compensation for the exacerbation or aggravation. See, e.g., Amey v. Friendly Ice Cream Shop, 555 A.2d 677, 680 (N.J. Super. 1989) (appeals court upheld the trial court's decision that the plaintiff's conduct in violation of his physician's prescribed recommendation severed the causal connection between the work injury and the subsequent re-injury so that the plaintiff was not entitled to workers' compensation benefits.)

13. The claimant's decision to accept employment as a waitress in June, 1992 may be characterized, with benefit of hindsight, as ill-advised. However, a determination of whether that decision and course of conduct was reasonable must be made from the perspective of the claimant at the time the decision was made. In this case, the claimant consulted her treating physician prior to actually beginning work as a waitress. See Joint Exhibit 1 at 11, 13, 17. While Dr. Cummings expressed reservations about the claimant working as a waitress, he did not specifically advise against it. Id.; also, testimony of the claimant. Further, when

the claimant was treated by Dr. Fanara in Massachusetts, he initially allowed her to return to work on a trial basis with limitations. See Joint Exhibit 1 at 26 and 31. In view of this evidence, it cannot be said that claimant acted unreasonably in accepting employment as a waitress in June of 1992.

C. CLAIMANT'S ENTITLEMENT TO BENEFITS IN ACADEMIC YEAR SEPTEMBER, 1992 TO MAY, 1993.

14. The claimant has the burden of proving her entitlement to benefits under the Act, including the extent of those benefits. See McKane, supra.

15. Protection against actual wage loss is one of the main purposes of Vermont Workers' Compensation Act. Bishop v. Town of Barre, 140 Vt. 564, 572 (1980).

16. Under Vermont law, temporary disability benefits are designed to compensate an employee for the "immediate or present loss of wages during the period of physical recovery." Orvis v. Hutchins, 123 Vt. 18, 22 (1962). See also, Wroten v. Lamphere, 147 Vt. 606, 609 (1987); Bishop v. Town of Barre, supra, at 571. Average weekly wages should be computed in the manner best calculated to provide replacement for average weekly earnings. 11 V.S.A. § 650(a).

17. In determining the proper basis for determining the average weekly wage, "the test is not the duration of the employment or the claimant's connection with it; it is their inherent quality as continuous or noncontinuous." 2 Larson, Workers' Compensation Law, § 60.21(a) at 10-690.

18. The purpose of wage calculation is "to make a realistic judgment on what the claimant's future loss is in light of all the factors that are known." Larson, supra, § 60.21(c) at 10-705. Furthermore, a "claimant's probable future loss is a full-time loss only if the line for which [she] is trained and qualified will normally continue to provide full-time employment." Larson, supra at § 60.22(a) at 10-713-714.

19. In the present case, the claimant seeks temporary disability benefits for academic year September, 1992 through May 31, 1993 (the day before her return to full-time employment). However, the claimant did not work during the previous two academic years (except for brief employment during the Christmas holidays during her sophomore year). She stated that she had plans to work part-time for the Defendant during her senior academic year. Claimant testified that she would be working for Defendant at least 14 hours bi-weekly for $7.00 per hour (resulting in anticipated wages of $98.00 per bi-weekly period). This testimony was not refuted by Defendant, and therefore, as a matter of law, claimant is entitled to be compensated for this lost income at the actual rate of loss. To provide the claimant with compensation benefits based upon full-time employment would be inequitable and would not fairly take into account the fact that the claimant was not precluded from full-time employment.

D. PREJUDGMENT INTEREST

22. At the hearing on June 29, 1993 and in her subsequent Proposed Findings, the claimant characterized CNA's conduct as

sufficiently inappropriate to justify an award of pre-judgment interest, which award is a matter of the Commissioner's discretion. See, e.g., Blaine v. St. Johnsbury Trucking, Opinion No. 19-91WC (October 10, 1991) (purpose of assessing interest against defendant is to enforce defendant's obligation to adjust a claim expediently and efficiently and to pay the benefits "it knows are due in a reasonably prompt fashion".)

23. In the present case, the claimant has not established that the defendant's (or CNA's) course of conduct was sufficiently egregious so as to warrant an award of pre-judgment interest, and none is made.

E. ATTORNEY'S FEES

24. The Commissioner has the statutory authority to award attorney's fees in contested workers compensation cases. 21 V.S.A. § 678; Rule 10 of the Processes and Procedures for Claims Under the Vermont Workers Compensation and Occupational Disease Acts (hereinafter, referred to as Workers' Compensation Rule 10).

25. Rule 10 establishes the maximum amount which may be awarded as attorney's fees at

a) itemized charges at a rate of not more than $35.00 per hour; or

b) a 20% contingency fee to cover all legal services, or $3,000.00, whichever is less.

Workers' Compensation Rule 10.

26. The Rules require that "evidence establishing the amount or reasonableness of the attorney's fees claimed shall be offered no later than that date upon which the final documents in the case

are filed . . ." Workers' Compensation Rule 10. (emphasis added). For the purposes of this Rule, Proposed Findings are within the meaning of the term "final documents".

26. The claimant having substantially prevailed, and not being responsible for any delay in this matter, is entitled to an award of attorney's fees in the amount of 20% of her benefits, see Downs v. Weyerhauser (II), Opinion No. 6-93WC (June 23, 1993), not to exceed $3,000.00, plus costs in the amount of $389.33.

ORDER

Defendant (or its workers compensation carrier) shall pay or reimburse the claimant the following compensable benefits, with credit for any such payment as has already been made:

A. Temporary Total Disability Benefits for the period July 12, 1992 through and including August 30, 1992 based upon a compensation rate of $155.81 per week;

B. Temporary Partial Disability Benefits for the period August 31, 1992 through and including May 31, 1993 (corresponding to claimant's final academic year) at the actual rate of $32.68 per week, computed as follows:

14 hours per bi-weekly period X $7.00/hour X 2/3 = $32.68

C. Any outstanding medical bills reasonably related to this injury/condition.

D. Claimant's costs, in the amount of $389.33.

E. Claimant's attorney's fees in the amount of 20% of claimant's recovery of benefits, not to exceed $3,000.00.

DATED in Montpelier, Vermont this 24th day of November, 1993

Barbara G. Ripley
Commissioner