

STATE OF VERMONT

DEPARTMENT OF LABOR AND INDUSTRY

Gordon Benware)	State File No. D-1527
)	
v.)	By: David J. Blythe
)	Hearing Officer
Vermont Asbestos Group)	
)	
)	For: Barbara Ripley
)	Commissioner
)	
)	Opinion No. 27-93WC

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER OF COMMISSIONER

This matter came on for a final hearing on Claimant's claim for workers' compensation benefits on August 19, 1993. David J. Blythe, hearing officer, presided as designee of the Commissioner of Labor and Industry (hereinafter, "Commissioner"). The claimant, Gordon Benware (hereinafter, "claimant") was present and was represented by Attorney Vincent Illuzzi. Claimant has subsequently retained Attorney David F. Kelley, who has replaced Attorney Illuzzi as claimant's attorney of record. The defendant/employer, Vermont Asbestos Group (hereinafter, "employer") and its workers' compensation carrier, Travelers Insurance Co. (hereinafter, "carrier") were not present but were represented by Attorney Edward R. Kiel.

Based upon evidence presented and matters of judicial notice, the Commissioner makes the following FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER:

I. ISSUE PRESENTED

This claim for compensation presents for determination by the Commissioner the question of whether the injury to claimant's back is causally related to a workplace incident of July 18, 1990 in which claimant injured his knee.

II. THE CLAIM

Claimant seeks:

1. Total temporary disability benefits from May 21, 1992 to the present and continuing until he reaches a medical end point for an injury/condition to his back.

2. Permanent partial disability benefits for a workplace injury to claimant's back.

3. Medical benefits, including expenses of mental health counseling.

4. Attorneys fees and costs.

III. FINDINGS OF FACT

1. On July 18, 1990, claimant was employed by employer.

2. On that date, claimant suffered a work-related injury while in the employment of employer.

3. Claimant described his injury in a Workers' Compensation Employee Questionnaire he completed two weeks later as follows:

"I was getting out of a Mack truck and lost my balance, came in contact with the ground with all my weight on my left leg causing damage to my knee. The fall was probable (sic) two to three feet."

(Defendant's Exhibit A).

4. There is no dispute that the injury to claimant's knee was related to his employment and the employer was liable for that injury as provided for in Vermont's Workers Compensation Act, 21 V.S.A. Chapter 9 (hereinafter, "Act").

5. Claimant was 35 years old at the time of the injury. He testified that prior to July 18, 1990, he never had any trouble with his knee or his back. Claimant's testimony in this regard is credible.

6. Since 1973, claimant generally worked at employment which involved moderate to heavy physical labor. Since his injury, he has been unable to work at this level of physical activity.

7. Claimant had surgery performed on his left knee in August 1990 and on September 24, 1991. At the time of the August 1990 surgery, he had a spinal anesthesia procedure, which claimant believes may be related to, or may have exacerbated, his lower back problems.

8. Claimant's treating physicians, Craig D. Dreisbach, MD (in report) and Leonard Jennings, MD, (in his deposition of August 25, 1993) stated that in their opinions, claimant's back pain is not related to nor was it caused by the spinal anesthesia procedure.

9. Claimant reached a medical endpoint for his knee injury on April 30, 1992. Reports of Dr. Dreisbach, dated April 24, 1992 and September 1, 1992.

10. Claimant suffered a 25% permanent impairment of his lower left extremity due to the July 18, 1990 injury, for which employer paid temporary total disability benefits, permanent disability benefits and medical benefits as provided for by the Act.

11. Following settlement of claimant's PPD claim for permanent impairment to his lower left extremity, claimant advanced an additional claim for disability benefits due to the injury to his back.

12. On September 22, 1992, claimant was examined, at the request of employer, by Philip Gates, MD, an orthopedic surgeon. In a report dated September 25, 1992, Dr. Gates stated that it was his opinion, to a reasonable degree of medical certainty, that claimant had an 8.5% impairment of the spine, calculated by reference to the AMA impairment rating guidelines.

13. Dr. Gates further stated in his September 25, 1992 report that in his opinion, there was not sufficient evidence to establish a causal relationship between the July 18, 1990 injury and the impairment to claimant's back.

14. Dr. Gates further stated that at least 80% of the time, "in situations where there has been longstanding back pain, it is not possible to give a specific diagnosis".

15. Dr. Gates recommended certain further diagnostic tests in order to determine conclusively whether the back impairment was related to the workplace injury. In particular, Dr. Gates stated:

The only other possible test that might possibly indicate that this was a related problem would be doing electrophysiologic test (such as nerve conduction velocities, EMG's and/or somatosensory evoked potentials) that might show some connection between the two problems. I think this is very unlikely but would be the only other consideration.

16. In his September 25, 1992 letter, Dr. Gates stated that claimant had reached his medical end point relative to his knee. He also found a permanent impairment to he spine (see Finding of Fact No. 12) and recommended a rehabilitation program of education and exercise.

17. In a report dated November 27, 1992, Dr. Jennings, who

is claimant's principal treating physician, stated that claimant had sustained a permanent impairment to his lumbar spine of 16%. Although he did not specify his methodology, Dr. Jennings specifically referred to Dr. Gates' determination, and it is apparent that Dr. Jennings utilized the same method (AMA guidelines) as did Dr. Gates.

18. Dr. Jennings, by virtue of his established and on-going professional relationship with claimant, has gained special knowledge and/or insight into claimant's condition and capacities as a result of his treatment of claimant. As such, Dr. Jennings' opinion is accorded additional weight. To the extent it conflicts with Dr. Gates' opinion, Dr. Jennings' opinion will control. Defendant has failed to offer any evidence by which the Commissioner could similarly accord additional weight to Dr. Gates' opinion.

19. Based upon the evidence from Dr. Gates and Dr. Jennings, claimant has a 16% impairment of his spine.

20. Although Dr. Jennings' opined in a letter dated March 16, 1993 that claimant had not reached a medical end point at that time, that opinion is not consistent with Dr. Jennings November 27, 1992 permanent impairment rating.

21. Claimant reached a medical end point relative to his back as of September 22, 1992, the date of his examination by Dr. Gates.

22. On May 23, 1993, Timothy Fries, MD, a neurologist, conducted an EMG test and a nerve conduction test on claimant.

23. Dr. Jennings testified that it was his opinion with a reasonable degree of medical certainty that claimant's back injury was causally related to the July 18, 1990 workplace injury. *Dr. Jennings, August 25, 1993 at page 22, line 21-24 and page 23, line 1; pages 36-40; Deposition Exhibit 2.*

24. Dr. Jennings testified that on the basis of the EMG performed on May 23, 1993, together with the history as related to him claimant, that objective test confirmed and corroborated Dr. Jennings' earlier opinion that the knee and back injuries are both related to the fall that claimant sustained on July 18, 1990. This objective test was performed after the date of Dr. Gates' examination of claimant and is substantially the testing that Dr. Gates suggested in his report. (*See Finding of Fact No. 15.*) This corroborates and supports Dr. Jennings' conclusion that claimant's back injury is causally related to the workplace injury of July 18, 1990, and is so found.

25. Claimant has unpaid medical bills in connection with his back and/or knee injury as follows:

Copley Hospital	\$373.15	(Joint Exhibit 1)
Neurological Assoc.	\$201.00	(Joint Exhibit 1)
University Health Center	\$1165.00	(Joint Exhibit 1)
Medical Records Copies	\$26.01	(Joint Exhibit 1)
Medication	\$34.00	(Joint Exhibit 3)
Mileage		
(2346 miles x 1.5/mile)	\$351.90	(Exhibit 2)

Total Medical Expense	\$2151.06	

26. Claimant's compensation rate as of May 1, 1992 was \$272.55 per week. It was adjusted as of July 1, 1992 to \$239.61, apparently by the deletion of the dependent supplemental benefit.

27. Prior to the date of the hearing each of the parties was ordered by the Commissioner to provide to the other party copies of medical evidence which they reasonably anticipated submitting at the hearing. Claimant sent certain copies to employer at 5:00 p.m. on the evening before the hearing. In so doing, claimant did not act reasonably.

28. Claimant was granted permission to depose Dr. Jennings after the final hearing and to submit his deposition as evidence thereafter. Claimant's untimely deposition of Dr. Jennings was due entirely to strategic and procedural considerations and decisions within claimant's control. It would not be reasonable to require employer to incur additional expense in preparing for, participating in or responding to Dr. Jennings deposition, at least to the extent this effort and expense is in addition to employer's other preparation for the hearing. Therefore, claimant has unreasonably caused employer to incur expenses, including attorney's fees, incurred in connection with Dr. Jennings' deposition.

29. Claimant offered documentary evidence of his utilization of mental health counseling services. He did not offer competent expert testimony, either at the hearing or by deposition, by which the Commissioner could find that the counseling services were casually required by the workplace injury and were therefore compensable.

CONCLUSIONS OF LAW

1. In worker's compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks Morse and Co., 123 Vt. 161 (1963); McKane v. Capital Hill Quarry Co., 100 Vt. 45 (1926). The claimant must establish, by sufficient competent evidence, the character and extent of the injury and disability as well as the casual connection between the injury and employment.

Rothfarb v. Camp Awanee, 116 Vt. 172 (1949). (overruled on other grounds)

2. When the claimant's injury is an obscure one so that a layperson could have no well-grounded opinion as to its causation or duration, expert medical testimony is the sole means of laying the foundation for an award. Jackson v. True Temper Corporation, 151 Vt. 592, 596 (1989); Egbert v. The Book Press, 144 Vt. 367 (1984).

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, supra; Burton v. Holman and Martin Lumber Co., 112 Vt. 17, 19 (1941).

4. Based upon the evidence presented and the applicable law, claimant has sustained a compensable injury to his spine and has a permanent impairment to the spine of 16%, and he is entitled to permanent partial disability compensation, said benefits being in addition to the permanency benefits previously paid in connection with claimant's lower left extremity impairment.

5. Claimant, having established that his back injury is a work-related and therefore compensable injury, is entitled to medical benefits under 21 V.S.A. § 640 for those reasonable expenses incurred in connection with the diagnosis and treatment of the compensable injury.

6. Claimant has not met his burden of proof on the issue of mental health counseling benefits and has not established an entitlement to payment of mental health counseling expenses.

7. A claimant is entitled to temporary total disability compensation until he either reaches a medical end result or returns to work. Wroten v. Lamphere, 147 Vt. 606 (1987). In the present case, claimant has established his entitlement to temporary total disability compensation from May 1, 1992 through and including September 22, 1992, a period of 20.6 weeks.

8. Although claimant has prevailed on some aspects of his claim, he or his attorney were responsible for delay and caused the employer to incur additional expenses. See *Findings of Fact No. 27 and 28*. Furthermore proof as to the reasonableness of claimant's attorneys fees was not submitted in accordance with Rule 10. Therefore no attorney fees are awarded. See Morrisseau v. Legac, 123 Vt. 70 (1962).

ORDER

Employer or its workers' compensation carrier is ordered to pay to claimant the following benefits:

1. Temporary total disability benefits for a period of 20.6 weeks.
2. Permanent partial disability benefits for a period of 52.8 weeks.
3. Medical benefits in the amount of \$2,151.06.
4. Claimant's request for an award of attorney's fees is DENIED.

Dated at Montpelier, Vermont this 30th day of December, 1993.



Barbara Ripley
Commissioner