Bennett v. Ponderosa Restaurant (April 5, 1995)

Vermont Department of Labor and Industry

Henry Bennett	)	*File No. D-17740*
	)	
v.	)	*By: John H. Fitzhugh*
	)	*Hearing Officer*
Ponderosa Restaurant	)	
	)	*For: Mary S. Hooper*
	)	*Commissioner*
	)	
	)	*Opinion No. 1-95WC*

APPEARANCES

Henry Bennett, pro se.
Stephen Ellis, Esq., for Ponderosa Restaurant

ISSUE

1. Did the claimant's knee injury arise out of and in the course of employment?

2. The Travelers Insurance seeks to have any and all claims brought by Mr. Bennett dismissed for failure to prosecute this claim as well as the resulting prejudice.

THE CLAIM

1. Temporary total disability compensation under 21 V.S.A. § 642 from 3/17/91 to present.

2. Permanent partial disability under 21 V.S.A. § 648 for 102 weeks.

3. Temporary partial disability under 21 V.S.A. § 646 from 2/2/91 to 3/17/91.

4. Permanent total disability compensation under 21 V.S.A. § 644 beginning
3/17/91.

5. Medical and hospital benefits under 21 V.S.A. § 640 in the amount of $2900.00.

6. Attorney's fees in the amount of $5,044.36.

STIPULATIONS

1. On February 2, 1991.

a. the claimant, Henry Bennett, was employed by defendant, Ponderosa Restaurant as a maintenance worker/cleaner.

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

c. the Travelers Insurance Company was the defendant's workers' compensation carrier.

d. the claimant's average weekly wage for the twelve weeks preceding February 2, 1991 was $172.50 a week.

e. the claimant had no dependents.

f. the claimant was 29 years old. His current mailing address is P.O. Box 352, Shelburne, Vermont 05482.

2. In March of 1991, the claimant filed a First Report of Injury. On April 9, 1991 and again on September 15, 1992, the defendant denied the claim.

3. On September 28, 1992 the claimant filed a Notice and Application for Hearing.

4. On June 7, 1993, the claimant's attorney, Kevin E. Brown, filed a Notice and Application for Hearing.

5. On November 29, 1993, The Travelers Insurance Company filed a Notice and
Application for Hearing.

6. The following documents were admitted without objections:

Exhibit 1: Medical Records of Henry Bennett
Exhibit 2: Statement of Dan Michaud dated May 5, 1991

7. The Commissioner may take judicial notice of the following documents:

Form 1: Employer's First Report of Injury received by Department of Labor and Industry, March 13, 1991, filed by the claimant.

Form 6: Notice and Application for Hearing dated September 28, 1992, filed by claimant.

Form 6: Notice and Application for Hearing dated June 7, 1993 filed by claimant's attorney, Kevin Brown.

Form 6: Notice and Application for Hearing dated November 29, 1993 filed by the Traveler's Insurance Co.

8. On March 7, 1991, the claimant stopped working at the Ponderosa Restaurant.

9. In October, 1992, F. Kendall Barlow, Esq. entered an appearance on the claimant's behalf. On September 1, 1994, his motion to withdraw, unopposed by the claimant and the defendant's attorney was granted.

10. On February 2, 1991, Mike Ginnette, an employee of the defendant, was on duty.

PRELIMINARY CONSIDERATIONS

1. A hearing on this matter was held on October 18, 1994. Present were the claimant and Mr. Ellis, attorney for the defendant.

2. At that hearing, the claimant sought to introduce seven exhibits. Those exhibits are marked and identified as follows:

Claimant's Exhibit A: Statement of Mike Ginnette, allegedly taken by telephone by claimant's former attorney's investigator.

Claimant's Exhibit B: Statement of Sam Handy, allegedly taken by telephone by claimant's former attorney's investigator.

Claimant's Exhibit C: Seven pages of various medical records and a Combined Insurance Company of America claim form.

Claimant's Exhibit D: Ten pages of miscellaneous medical records.

Claimant's Exhibit E: Nine pages of miscellaneous medical records.

Claimant's Exhibit F: A letter purportedly by Dr. Charles McLean regarding permanent disability.

Claimant's Exhibit G: A photocopy of three pages in a medical dictionary.

3. The defendant objected to the admission of all documents, on the basis that they were either hearsay, not relevant, or on the basis of surprise. Exhibits C, D, E, and F were not included in a joint medical exhibit, and were first made available to the defendant ten minutes before the hearing.

4. At the hearing, the hearing examiner did not admit claimant's Exhibit A, B and F. Exhibits A and B were not admitted on the basis of hearsay and unreliability; Exhibit F was not admitted because it was unsigned and because it related to permanent disability. (The hearing examiner had informed the claimant that evidence of permanent disability and the extent thereof would not be considered unless proof of the disability were provided to the defendant at least by September 10, 1994 (See Fitzhugh letter of September 1, 1994). That was not done.)) Exhibit G was admitted.

5. The hearing examiner stated that he would take under advisement the defendant's objections to the admissions of Exhibits C, D and E. Rule 7(d) of the Processes and Procedures for Claims under the Vermont Worker's Compensation and Occupational Disease Acts permits the Commissioner to admit into evidence relevant medical records produced after the pre-trial conference if they are legible and their admission causes no unfair surprise to the other party.

6. On September 9, 1994, defendant's attorney had submitted a joint medical exhibit and asked the claimant to let him know immediately if any medical records were missing from the exhibit. The claimant admitted that he did not bring Exhibits C, D and E to the defendant's attention until minutes before the hearing. He said the reason for this was that he had just discovered them in his file which he had recently received from his former attorney. It is

also clear from the correspondence in the state's file in this matter that the defendant has made numerous attempts over the past three years to obtain all of the defendant's medical records pertaining to the alleged claim and been frustrated in that regard. Claimant testified that he had given a medical authorization to his former attorneys permitting access to all medical records.

7. Pending a continuation of the hearing (see below) the admission of Exhibits C, D and E were denied.

8. Also at the hearing on October 18, 1994, the claimant expressed surprise that neither Dan Michaud or Sam Handy were present. An offer of proof was made that should such persons have been present, they would have testified as to their presence at the defendant's work place on February 2, 1991 and generally as to their knowledge that the claimant intended to make a worker's compensation claim for an injury he alleges to have suffered on February 2, 1991.

9. At the pre-trial conference on September 1, 1994, the defendant, pursuant to Rule 7(b), indicated that it intended to call Dan Michaud and Mr. (Peter) Handy as witnesses. The claimant said he intended to subpoena Gilbert Gravelle and Michael Ginnette. (The claimant did submit proposed subpoenas for Ginnette and Gravelle; they were not in the proper form and were not pursued.)

10. Following the pre-trial conference, defendant's counsel wrote letters to the hearing examiner and the claimant regarding various evidentiary issues on September 9, September 26, October 4, and October 5, 1994. Counsel did not indicate that he no longer intended to call either Handy or Michaud. The claimant, pro se, did not reaffirm with defense counsel by telephone regarding the voluntary attendance of Michaud and Handy at the hearing.

11. At the hearing, the examiner deferred ruling on whether the failure to voluntarily produce Michaud and/or Peter Handy entitled the claimant to a continuation of the hearing. Following the hearing, and after a review of the record (above), the hearing examiner determined that the claimant should have that continuation right, but if so, needed to exercise it within one week of the hearing or it would be waived. A letter to that effect was mailed to the parties. If the hearing was continued, Exhibits C, D and E

were to be admitted, except for those portions relating to permanent impairment.

12. Pursuant to a letter dated October 25, 1994, the parties were notified that a continuation of the October 18, 1994 hearing would be held. Defendant's counsel related that Michaud was outside the State and could not be subpoenaed to a hearing. Notice of the hearing was sent by the Department on October 31, 1994. A second notice rescheduling the date and time of the hearing was sent November 1, 1994. Pursuant to that second notice, the continued hearing was held November 11, 1994. Mr. Bennett was not present. Exhibits D, E, and E were admitted, except for information relating to permanent impairment. A witness, Peter Handy, was sworn and testimony taken. Two additional exhibits, defendant's X and Y, (statements by Peter Handy), were admitted. Parties were informed by letter of November 14, 1994 to submit Findings of Fact and Conclusions of Law by December 10, 1994. On November 23, 1994, an uncertified transcript of Peter Handy's November 11 testimony was mailed to the claimant. On December 10, 1994, proposed Findings of Fact and Conclusions of Law were submitted by the defendant. In addition, the hearing officer received miscellaneous letters from the claimant, copies of which were sent to defendant.

FINDINGS OF FACT

1. The Stipulations 1 through 7, 9 and 10 above are found to be true.

2. The claimant began working for the defendant in 1987 as a maintenance worker/cleaner at its Shelburne Road restaurant. He was in his late twenties. Prior to working for the defendant he had suffered a couple of concussions, been discharged medically from the service, and suffered from periodic headaches. Although there is no psychiatric evidence in the record, several of the claimant's physicians who have examined him during the past six years believe he may suffer from some mental disturbance, perhaps schizophrenia.

3. In August, 1990, the claimant hurt his left foot when he slipped on a greasy floor at work. He saw Dr. D.F. Henderson, M.D., who had been treating him since 1983. Beginning somewhat prior to this time he was also experiencing parathesia and achiness in his lower extremities.

4. As a result of the foot injury, the claimant received temporary total disability compensation (TTD) for approximately a month and a half. He returned to work in mid-October.

5. Sometime in January or early February, 1991, the claimant was cleaning a bathroom mirror during his shift (10:00 p.m. to 3:00 a.m.) when another worker shut the lights off in the bathroom. The claimant slipped in the darkness and banged his left knee against the wall in the bathroom. At the time of the injury, the claimant was working 40 hours a week.

6. Although company policy requires employees to promptly report work injuries, the claimant made no immediate mention of the knee incident to his supervisors or fellow workers until mid-February, 1991. Nor did he emphasize it to Dr. Henderson whom he saw February 26, 1991, with respect to left foot pain. He did, however, begin to work half-time, pursuant to a note from Dr. Henderson.

7. On March 7, 1991, on a referral by Dr. Henderson, the claimant was seen by Dr. Campbell with the problem of left foot pain and parathesia in the left leg. In Dr. Campbell's notes, he recites the claimant's recollection of the bathroom incident. Several times, during the course of that examination the claimant asked the doctor if he would cut off his left leg above the knee. The doctor thought this comment was bizarre. Dr. Campbell concluded that the claimant had suffered a knee strain at work, and possibly internal derangement or a contusion. He prescribed a neoprene knee brace and suggested three more weeks of part-time work.

8. On March 13, 1991, the claimant filed a first report of injury with the Department.

9. The claimant saw Dr. Campbell several more times in 1991 and early 1992. At the April 9, 1991 session, the claimant referred to slipping on pavement earlier that day. The doctor diagnosed knee pain syndrome, chondromalacia of patella and parathesias of left foot and leg. By January 14, 1992, he said the claimant had reached a medical end point with respect to his knee. The doctor strongly recommended vocational rehabilitation counselling.

10. According to Dr. Henderson, who saw the claimant periodically throughout

1991, as of August 10, 1991, he could have performed on a full-time basis the cleaning work that he had been doing at the Ponderosa the previous winter.

11. After 1991, the claimant has periodically experienced his left knee giving out in various times and places. Some knee episodes having been prompted by other incidents. There is some indication the claimant's lumbar problems may be associated with his left knee difficulties.

12. In June of 1992, David Keller, M.D., diagnosed the claimant as having a patella femoral compression syndrome. X-rays of his knee were normal.

13. In March, 1993, the claimant again saw Dr. Henderson. The claimant's principle complaint related to mid-lumbar pain. The doctor concluded that full psychiatric evaluation would likely determine grounds for disability and orthopaedic evaluation probably would not.

14. Later that month, the claimant was seen on a self-referral by Dr. John Lawlis. Dr. Lawlis diagnosed probable patella femoral arthrosis with dramatic supratentorial overlay and recommended an arthrogram or MRI. However, he noted that the claimant's lack of cooperation made proper examination of his knee impossible.

15. In November and December, 1993, the claimant was seen by Dr. Johnson at University Health Center, for giving out of his left knee. Dr. Johnson diagnosed possible medial meniscal tear, but noted difficulty in reaching definite diagnosis because of the patience's inability to relax or cooperate during the exam. The claimant refused surgical management and indicated he was on herbal medications.

16. After the incident in January or February, 1991, the claimant at first resisted seeing a physician and continued to work part-time until some time between March 7 and March 17, 1991, when he was terminated from his employment. His wages during this time are not in evidence, although it appears he was working half-time. At the time of his termination, the defendant knew of the claimant's allegation that the knee injury arose at work. The basis given for this discharge was a slackening of the claimant's efforts and excuses relating to his injury. It's unclear whether the claimant's First Report of Injury was filed just before or just after his termination.

17. Between the time that the claimant began working at Ponderosa and when he was discharged in 1991, his physical appearance and behavior changed,

becoming more disheveled in appearance and conspiratorial in attitude.

18. Since working for the defendant, the claimant has never returned to regular full-time employment, although he may have worked on a part-time basis as a private investigator or a drug surveillance operative or doing yard work. Beginning in October, 1991, he received 26 weeks of unemployment benefits.

19. Since March, 1991, the claimant has consistently stated, in written statements and to various physicians, the manner in which he hurt his knee at work.

20. The claimant retained counsel with Langrock, Sperry & Wool to represent him in October, 1992. That counsel withdrew September 1, 1994 (see stipulation 9 above). At the hearing the claimant represented himself. Following the hearing, the claimant submitted on October 5, 1994 a bill from his previous lawyers showing a balance now due of $2,544.36. Only services in September, 1994, were itemized. The claimant wrote on the bill, please note that $2,500.00 paid already, etc. Based on the claimant's post hearing letters, his total bill by his former lawyers on this matter was $5,044.36, which the claimant has paid in full. The bill does not indicate the hourly rate or the number of hours.

21. Of the medical bills in evidence, I find the following relate to the claimant's left knee or left foot ailments:

Dr. Campbell	*3/07/91*	*$110.00*
Dr. Campbell	*4/09/91*	*30.00*
Dr. Campbell	*3/20/92*	*60.00*

There are other records indicating claimant was treated for his knee or left foot, but no indication of the cost for the same.

22. Based on the claimant's average weekly wage of $175.00 in 1991, which is below the minimum compensation rate, his compensation rate at that time would have been $175.00.

CONCLUSIONS OF LAW:

1. In worker's compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodman v. Fairbanks Morse Company, 123 Vt 161 (1963). The claimant must establish by sufficient credible evidence, the character and extent of the injury and disability as well as the causal connection between the injury and the employment. There must be created in the mind of the trier of facts something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. Burton v. Holden Lumber Company, 112 Vt 393 (1941).

2. Reviewing the evidence submitted, the credibility of the witnesses, and particularly Dr. Campbell's office notes of March 7, 1991, I find that the claimant did suffer an injury to his knee while cleaning the bathroom at the defendant's restaurant sometime in late January or early February, 1991. This injury arose out of and in the course of his employment with defendant.

TEMPORARY DISABILITY:

3. Following the injury at work and from the time he saw Dr. Henderson on 2/26/91, the claimant worked half-time until early to mid-March, 1991, when he was discharged. Dr. Henderson concluded that the claimant could work on a full-time basis as a cleaner after August 10, 1991.

4. A claimant is totally disabled for work under 21 V.S.A. § 642 while he or she is either (1) in the healing period and not yet at maximum medical improvement, Orvis v. Hutchins, 123 Vt 18 (1962), or (2) unable as a result of his injury either to resume his former occupation or to procure remunerative employment at a different occupation suited to his impaired capacity. Roller v. Warren, 98 Vt 514 (1925). Temporary partial disability is due when the claimant can work, but for less money than he was earning when injured. §646, Roller, supra.

5. Based on these standards and the proof, claimant was temporarily partially disabled from February 26, 1991 to March 17, 1991 (The date the defendant alleges he was discharged), and temporarily totally disabled from March 17, 1991 until August 10, 1991.

6. While the claimant may have been temporarily totally disabled for some

periods of time after August 10, 1991, the evidence submitted was inadequate to determine dates.

PERMANENT DISABILITY:

7. The claimant also sought benefits for permanent disability. Evidence of some permanent disability was proffered, but not accepted (see Preliminary Finding 4). The claimant's claim for permanent disability is denied, without prejudice to his rights to seek such benefits in the future.

MEDICAL BENEFITS:

8. The claimant seeks reimbursement for $2900.00 in medical bills. Proof was submitted, however, only supporting reimbursement of $200.00 for services performed by Dr. Campbell. Without additional evidence, the Commissioner has no basis to award additional benefits.

ATTORNEY FEES:

9. The Commissioner may award reasonable attorneys fees to a claimant who prevails, at a rate not to exceed (a) $35.00 an hour supported by an itemized statement, or (b) 20% of the amount recovered, or $3,000.00, whichever is less. Rule 10, Processes and Procedures for Claims under Vermont's Workers Compensation and Occupational Disease Acts. The decision as to whether to award fees is discretionary.

10. Although claimant paid $5,044.36 to his former attorneys, there is no indication of the amount of hours worked and thus no award can be made on that basis. It does not appear claimant's former attorneys, who did not represent him at the hearing, significantly contributed to his recovery. Representation of a workers' compensation claimant (particularly one considered schizophrenic or mentally disturbed by some of his treating physicians) on a cash-for-services basis is unusual. We do not know the precise terms of the attorney's retainer, nor the reasons for the termination of services. On such a record an award of fees is inappropriate.

ORDER:

Therefore, based on the foregoing, the Travelers Insurance Co., or in the event of its default, the employer, the Ponderosa Restaurant, is HEREBY ORDERED to pay the claimant:

1. Temporary partial disability compensation for the period from February 26, 1991 until March 17, 1991.

2. Temporary total disability compensation for the period from March 17, 1991 to August 10, 1991.

3. Medical benefits totalling $200.00.

The claimant's request for permanent partial disability compensation is DENIED, without prejudice.

DATED in Montpelier, Vermont this ____ day of April, 1995.

_____

Mary S. Hooper
Commissioner