

Folsom v. Rock of Ages Corp. (April 20, 1995)

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

Steven Folsom) File No. G-20847
)
 v.) By: David J. Blythe
) Hearing Officer
Rock of Ages Corp.)
) For: Mary S. Hooper
) Commissioner
)
) Opinion No. 14-95WC

*Hearing held at Montpelier, Vermont on January 23, 1995.
Record closed at conclusion of hearing.*

APPEARANCES

*Joseph P. McEntyre, Esq. for the Claimant
Stephen D. Ellis, Esq. for the Defendant*

ISSUES

- 1. Whether there is a causal relationship between Claimant's back pain and his employment with Defendant.*
- 2. Whether the claim was timely brought.*

THE CLAIM

Claimant did not file a Form 6 (Notice of Claim and Application for Hearing) specifying the exact nature of his claim and the specific benefits sought. Based upon representations of counsel at the pre-hearing conference held on November 14, 1994, and upon evidence presented at the final hearing, the claim was determined to include the following:

Medical and hospital benefits under 21 V.S.A. § 640

Attorney's fees and costs under 21 V.S.A. § 678(a)

STIPULATIONS

Based upon representation of counsel at the pre-hearing conference and immediately prior to the final hearing, and upon documents filed with the Commissioner of which Judicial notice may be properly taken, it is stipulated and agreed that:

- 1. Between February 1988 and January 1994, Claimant was employed (with some interruption due to lay-offs which were not specific to Claimant) by Defendant.*
- 2. During that time, Defendant was Claimant's employer within the meaning of the Workers' Compensation Act, 21 V.S.A. § 601 et seq. ("Act").*
- 3. Claimant's date of birth is March 9, 1962.*
- 4. On June 20, 1994, Defendant filed a Form 1 (First Report of Injury), although the Form 1 did not specify either the date or nature of the injury or condition for which compensation is sought.*
- 5. Claimant is not seeking income-replacement benefits, so no evidence of his average weekly wage was offered.*
- 6. On April 20, 1994, Claimant filed a Form 5 (Notice of Injury and Claim for compensation).*
- 7. Judicial notice may be taken of the Form 1 and Form 5 referenced above and of the Contingency Fee Agreement between Claimant and his attorney.*

EXHIBITS

JOINT EXHIBITS

- A. Medical Records*

B. Letters dated August 10, 1994 and September 19, 1994 from Dr. Robert

D. Monsey to Claimant's attorney.

C. Materials relating to Claimant's employment.

DEFENSE EXHIBITS

A. Log and Summary of Occupational Injuries and Illnesses.

CLAIMANT'S EXHIBITS

A. Transcript of Interview of Claimant by Defendant's workers compensation insurance carrier.

WITNESSES

Lisa Jarvis of Plainfield, Vermont

Lucy Hutterman of Plainfield, Vermont

Paul Hutchins of Barre, Vermont

Roland Tousignant of Williamstown, Vermont

John Venner of Berlin, Vermont

Claimant was not present at the final hearing

RULING ON CLAIMANT'S MOTION FOR CONTINUANCE

At the onset of the hearing, Claimant's counsel moved to continue the hearing on two bases:

(1) Claimant believed that the parties were going to settle the claim and had therefore not made arrangements to be available for the hearing.

(2) Claimant had not had an adequate opportunity to secure employment records from Defendant.

For the reasons set forth in the CONCLUSIONS OF LAW and in the ORDER,

Claimant's Motion for Continuance was DENIED, and the parties proceeded to the presentation of evidence.

FINDINGS OF FACT

- 1. Claimant originally was hired by Defendant on or about February 15, 1988. He was laid off due to lack of work on or about October 4, 1992. Claimant was then re-hired on or about April 7, 1993, and was laid off again due to lack of work on or about January 28, 1994.*
- 2. Defendant generally found Claimant to be a satisfactory employee who was capable of doing the strenuous physical work which his employment required.*
- 3. Claimant never reported any work-related injury or condition to Defendant and he never lost time from work due to a work-related injury or condition, with the single exception of a work-related hand injury in July 1990 which did not require medical attention nor cause Claimant to lose any time at work.*
- 4. Claimant often described to his co-workers his activities outside of work, which included golfing, hunting, fishing and skiing. The testimony of Defendant's witnesses was found to be credible in this regard.*
- 5. Between June 1990 and April 1994, Claimant sought treatment for back pain from several physicians, although the first evidence that Claimant related his back condition to his employment does not appear until a record dated March 30, 1994. (Joint Exhibit 1C).*
- 6. An unidentified medical record dated "June 90" states, "Low Back Pain - stiffest in the AM, not related to working but hurts with rotation. 2 mos grad onset without new injury." The note also refers to a 1980 injury to the left side of Claimant's back. (Joint Exhibit 1E).*
- 7. A Central Vermont Hospital Radiology Report dated 6/13/90 shows that Claimant was examined by Robert D. Johnson, M.D., upon a referral by Legrand C. Burns, M.D. Dr. Johnson ordered x-rays of Claimant's back. The x-ray report states that "AP and lateral views of the lumbar spine were obtained. The disc spaces appear normal. No compression fracture or other significant bony abnormality is seen." The record identifies Blue Cross as the insurance carrier, and refers to a previous examination of the lumbar spine on 10/23/84. (Joint Exhibit 1B).*

8. An intake form from the office of John M. Peterson, D.O., dated 7/5/90, states that Claimant was complaining of a "pinched nerve lower back" with an onset 2-3 months prior to the visit. Claimant saw Dr. Peterson again on 7/11/90, failed to show up for an appointment on 7/18/90, saw Dr. Peterson again on 7/27/90, and again failed to show up for an appointment on 8/17/90. Dr. Peterson's next note is dated 7/5/94, when he sent "copies to atty McEntyre." Dr. Peterson's notes of 7/11 and 7/27/90 identify Claimant's problem as "sciatica." (Joint Exhibit 1D).

9. On September 25, 1990, Claimant underwent a CT scan. Dr. Johnson examined the results and noted: "The L3-4 disc appears normal. There is a right-sided herniation of disc material noted at the L4-5 level which impinges upon the thecal sac and possibly the emerging right L5 nerve root. There is a generalized bulging of disc material noted at the L5-S1 level, but this does not appear to infringe significantly on either the thecal sac or emerging nerve roots. No significant bony abnormalities are seen." (Joint Exhibit 1A).

10. On October 9, 1990, Claimant was seen by James R. Burczak, D.O., with "chief complaint of 'dull' right sided low lumbar back pain with radiation down the posterior aspect of the right thigh and calf to the right foot causing his foot to 'go to sleep.' . The onset of his symptoms was May of 1990 with no trauma, overuse or other known precipitating incident. He does have a history of a 'spinous process fracture' of his lumbar spine in 1979." (Joint Exhibit 1A).

11. An unidentified medical note dated 9/30/91 states, "backs been better but he's living with it." (Joint Exhibit 1E).

12. Except for a medical consultation in March 1992 apparently unrelated to his back, Claimant did not seek or receive medical treatment between September 30, 1991 and February 14, 1994. (Joint Exhibit 1 generally).

13. On March 30, 1994, Claimant was examined by Stanley E. Grzyb, M.D., of the University Health Center. Dr. Grzyb's report of the consultation states: "He indicates that he has experience intermittent left lower extremity pain for four years. He states that he can initially remember experiencing the discomfort after a work related incident. He states that he was working on a crane hauling granite when he had to push the granite and felt a popping sensation on the low back. He developed left lower extremity discomfort at

that time. . . . He states that he has been having increasing discomfort into the left lower extremity. . . . It is all on the left side." Dr. Grzyb went on to note that "The CAT scan done in 1990 failed to reveal any pathology at L5-S1 and no left sided pathology was identified." (Joint Exhibit 1C). Dr. Grzyb's notes of 4/6/94 state that "since I have seen him last, he has undergone MRI evaluation. This has indeed shown a posterolateral disc herniation at L5-S1 which would appear to me consistent with his objective findings and his symptoms." (Joint Exhibit 1C).

14. On April 14, 1994, Claimant underwent a L5-S1 disc excision, and obtained almost immediate relief. Claimant has recovered well from the surgery. (Joint Exhibit 1C) Dr. Monsey, who wrote to Claimant's counsel on August 10 and September 19, 1994 (Joint Exhibit 2) did not offer any opinion as to the cause of Claimant's 1994 back condition. *Id.*

CONCLUSIONS OF LAW

1. In workers compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *McKane v. Capital Hill Quarry Co.*, 100 Vt. 45 (1926); *Goodwin v. Fairbanks, Morse & Co.*, 123 Vt. 161 (1963). 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 the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984). An injury arises out of the employment when it occurs in the course of it and is the proximate result of it. *Rae v. Green Mountain Boys Camp*, 122 Vt. 437 (1961).

2. For a claimant to sustain his or her burden of proof, there must be created in the mind of the trier of fact something more than a possibility, suspicion, or surmise that the incidents complained of occurred were the cause of the claimed injury, and the inference from the facts must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 437 (1961).

3. The trier of fact may not speculate as to an obscure injury which is beyond the ken of lay persons, *Laird v. State Highway Dept*, 110 Vt. 195, 199 (1938). Where the claimant's injury is obscure, and the lay person could have no well grounded opinion as to its causation, expert testimony is the sole means of laying a foundation for an award. *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979).

A) CLAIMANT'S MOTION FOR CONTINUANCE

4. Claimant did not appear at the final hearing. Through counsel, Claimant moved to continue the final hearing for the reasons set forth in the RULING ON CLAIMANT'S MOTION FOR CONTINUANCE above. Continuances of final hearings under the Act are governed by Rule 7 of the Processes and Procedures for Claims Under the Vermont Workers' Compensation and Occupational Disease Acts (hereinafter, "Rules"), which provides, in pertinent part, as follows:

(c) Continuances will be granted by the Commissioner or hearing officer only for extraordinary circumstances, or where all parties stipulate in writing to a continuance and the stipulation is approved by the Commissioner or hearing officer.

In the present case, the parties did not stipulate to a continuance. Therefore, the issue rests upon whether Claimant's failure or inability to attend the final hearing is due to "extraordinary circumstances" within the meaning of the Rule. As a matter of law, the Commissioner concludes that the bases for a continuance offered by Claimant fall far short of the standard required by the Rules. Claimant represented, through counsel, only that he believed the case would settle and therefore did not make arrangements to be excused from his current employment. There was no evidence that he was unable to get time off from work, only that he didn't try to do so. Consequently, Claimant's non-attendance at the final hearing is not justified and is not a basis for a continuance. Accordingly, Claimant's Motion for Continuance was denied.

B) TIMELINESS OF CLAIMANT'S CLAIM

5. The Act recognizes that an injury condition need not arise from a specific event which would enable a claimant to state with specificity when and under what exact circumstances an injury or condition arose. *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 447 (1985) (date of injury for purposes of giving notice and filing a claim is the point in time when an injury becomes reasonably discoverable and apparent to the claimant).

6. 21 V.S.A. § 656 governs the claimant's obligation to give timely notice to his or her employer of any injury for which compensation is sought. That statutory section provides, in pertinent part, as follows:

A proceeding under the provisions of this chapter for compensation shall not be maintained unless a notice of the injury has been given to the employer as soon as practicable after the happening thereof, and unless a claim for compensation has been made within six months after the date of the injury;

7. The purpose of this type of notice requirement is to "enable the employer to provide immediate medical diagnosis and treatment with a view toward minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury." Larson, Workers' Compensation Law, § 78.10, at 121-123.

8. The requirements of § 656 notwithstanding, the Commissioner cannot conclude from the record that Claimant was sufficiently negligent in terms of providing the required notice so as to completely preclude Claimant from presenting his claim, and while there are problems which attend a claim filed as late and with as little specific information as this one, the liberal application of the Act required by the statute does not compel a preclusion of this claim.

C) CASUAL RELATIONSHIP BETWEEN CLAIMANT'S BACK INJURY/CONDITION AND HIS EMPLOYMENT

9. Claimant's decision not to participate in the evidentiary hearing and not to present any live or telephonic expert medical testimony severely limited his ability to sustain his burden of establishing a casual relationship between his back injury/condition and his employment with Defendant. The evidentiary exhibits do not approach the level of proof required. Further, Defendant's witnesses established that Claimant was able to work at a physically demanding job without complaint or lost time, and to maintain a vigorous lifestyle outside of the work place.

10. Based upon the above, the Commissioner concludes that Claimant has failed to establish the required casual relationship between his back injury/condition and his employment with Defendant, and that therefore his claim must fail.

ORDER:

*Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW,
Claimant's claim for workers compensation benefits under the Act is DENIED.*

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

*Mary S. Hooper
Commissioner*