Harding v. B & T Black Creek Farms, LTD. (April 21, 1995)

Vermont Department of Labor and Industry

Robert Harding) File No. F-3237
)
v.) By: John H. Fitzhugh,
) Hearing Examiner
B & T Black Creek Farms, LTD.)
) For: Mary S. Hooper
) Commissioner
)
) Opinion No. 15-95WC

Heard in Montpelier, Vermont on February 27, 1995.
Record closed March 20, 1995.

APPEARANCES:

Robert Harding, Pro Se
Glen Yates, Esq. for Kemper Insurance Co. and B & T Black Creek Farms, Ltd.

ISSUE:

Whether claimant is entitled to additional temporary total disability compensation, medical or hospital benefits.

THE CLAIM:

1. Temporary total disability compensation under 21 V.S.A. §642 from 4/27/93 to present and continuing.

2. Medical and hospital benefits under 21 V.S.A. §640 in the amount to be determined.

STIPULATIONS:

1. On June 29, 1992

a. the claimant, Robert Harding, was employed by defendant, B & T Black Creek Farms, LTD.

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

c. the claimant suffered a personal injury when he was unloading hay and he slipped and fell off the hay wagon.

d. the injury arose out of and in the course of claimant's employment.

e. the Kemper Insurance Company was the defendant's workers' compensation carrier.

f. the claimant's average weekly wage for the 12 weeks preceding the 1992 accident was $327.25.

g. the claimant had no dependents.

h. the claimant was 47 years old. His current address is P.O. Box 617, West Farmington, Maine 04992.

2. On August 17, 1992, the employer filed a First Report of Injury (Form 1), along with an attached letter.

3. On April 27, 1993, the carrier filed a Form 27 terminating compensation.

4. On December 17, 1993, the claimant filed a Notice and Application for Hearing (Form 6).

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

Form 1 - Employer's First Report of Injury dated August 17, 1992 filed by the defendant
Form 27 - Notice of Intention to Discontinue Payments dated April 20, 1993, as claimant had been released to do part time or light work.
Form 6 - Notice and Application for Hearing dated December 17, 1993.

6. The following documents were admitted by Stipulation:

Exhibit 1 - Ciembromiewicz Records
Exhibit 3 - Dr. Boucher Report

Exhibit 5 - NW Medical Center Records
Exhibit 6 - Service Master Records
Exhibit 8 - Classified Ad
Exhibit 9 - Wefenling 4/4/94 Report
Exhibit 10 - Lowry 8/26/94 Report
Exhibit 11 - temporary total disability compensation Agreement (unapproved by Department)
Exhibit 12 - Esquerra Reports
Exhibit 13 - Paychecks to Robert Harding
Exhibit 14 - Tabulation of Kemper Payments and Summary of Checks

PRELIMINARY CONSIDERATIONS:

1. A hearing was held on this matter February 27, 1995. Present were the claimant and his wife, Joyce Murray Harding; Glen Yates, attorney for the defendant; and Thomas and Susan Howrigan.

2. At the hearing, over the claimant's objection, the hearing officer admitted Exhibit 15, various medical reports prepared by Dr. Martin Flanagan.

3. At the hearing, also offered by defendant, were Exhibits 2, 4, 7, 16, and 17, relating to the claimant's driving record in Maine and Vermont, past criminal history, and recent incarceration in the Maine State Prison. The claimant objected to these documents on the basis of relevancy, prejudice, and a constitutional right to counsel. The hearing officer took the proffer under advisement and by letter dated February 28, 1995, denied the admission of Exhibits 2, 4, 16, and 17, and limited admission to those portions of Exhibit 7 which related either to the claimant's medical or work history, or were evidence of a crime committed in the past 15 years which either evidenced falsification or untruthfulness, or were felonies under Vermont law or crimes in another jurisdiction which could warrant a sentence in excess of one year (V.R.E. 609).

4. The parties were then given until March 20, 1995 to submit proposed Findings of Fact and Conclusions of Law.

5. On March 4, 1995, defendant's Request to Find was received, including a request that the excluded documents be admitted under V.R.E. 409. On March 17, 1995, claimant submitted his proposed Findings of Fact and Conclusions of Law, including supplemental records. On March 22, 1995, defendant filed an

objection to claimant's proposed Findings.

6. On March 15, 1995, defendant submitted to the Department another temporary total disability compensation Agreement (Form 21) for approval, identical in terms to Exhibit 11. The average weekly wage figure was calculated at "rate of hire" according to the document signed by the claimant.

FINDINGS OF FACT:

1. I find that Stipulations 1 through 4 above are true, but note that no wage statement was filed by the defendant.

2. In June, 1992, the claimant was hired by the defendant as a farm laborer at the rate of $4.25 an hour. His work hours were 5:00 a.m. to 6:00 p.m. Monday through Friday, plus 12 hours over the weekend. Although claimant responded to a classified ad indicating that housing was included as a benefit of employment, it is unclear whether that was part of his compensation package; in any event, he never lived at the farm during the week he was employed there.

3. On June 29, 1992, the claimant slipped off a hay wagon and fell on the hay wagon pole hurting his back. Later that day his wife drove him to the Northwest Medical Center where he was x-rayed, and told to go home and rest. The x-rays did not show evidence of any recent bony injury.

4. On July 3, 1992, he saw Dr. Deogracias Esquerra, who diagnosed a muscle contusion with spasms in the back, prescribed Valium and Percodan, and told him to rest.

5. When the claimant first told Thomas Howrigan, the defendant's president, that he had been injured at work, Howrigan said he did not carry workers' compensation insurance. From July 8 to July 26, 1992, however, Howrigan gave the claimant four checks totalling $854.19 for reimbursement of various medical bills.

6. In late July, the claimant demanded $2500.00 cash to forego any workers' compensation claim. The defendant refused and on August 17, 1992, filed a

First Report of Injury with the Department and his workers' compensation carrier.

7. In October, 1992, the claimant and Kemper executed a Temporary Total Disability Agreement (Form 21) in which Kemper accepted the claim. (Exhibit 11) This agreement was never submitted to the Department for approval until March, 1995 (or if earlier agreements were submitted, they did not end up in the file).

8. On April 23, 1993, the defendant filed a Form 27, indicating that it was terminating the claimant's temporary total disability compensation benefits on April 27, 1993 on the basis that the claimant had been released for light or part-time work but had not made a reasonable effort to find such work. In support thereof, the defendant submitted the December 1992 and January 1993 reports of Dr. Ciembromiewicz.

9. The defendant has paid $2,222.19 in medical benefits, $9,381.72 in disability benefits, and $212.09 for prescriptions and transportation expenses in this matter.

10. The claimant saw Dr. Esquerra July 7, 23, and 27, 1993 in office visits. Dr. Esquerra said he could return to regular work July 28, 1993. The claimant, in August, returned to Maine, where he had family. In September, he was referred to the Work Injury Management Clinic at the Farmington Memorial Hospital. The clinic determined claimant could do light duty but refused to accept him until he had gone through a substance abuse program. He did not do so.

11.For much of his adult life, the claimant has suffered from alcoholism and other substance abuse. After the June, 1992 injury, he told doctors he drank to relieve the pain.

12. In December, 1992, the claimant saw Dr. Dayton Haigney, a neurologist in Skowhegan, Maine. Dr. Haigney diagnosed right lumbosacral pain but could find no evidence of acute radiculopathy from electrodiagnostic testing. Dr. Haigney felt the claimant had received poor medical management since the June, 1992 incident.

13. In December, 1992 and January, 1993, the claimant was examined by Dr. Ciembromiewicz. A CAT scan of the lumbosacral spine was unremarkable. The doctor noted that the claimant had fractured his rib in a work-related injury in 1984. He diagnosed a syndrome of S-1 nerve route irritation on the right side; did not recommend surgery and referred the claimant to aggressive physical therapy and to evaluation for possible alcohol addiction.

14. Dr. Ciembromiewicz felt the claimant tended to magnify his symptoms. He felt the claimant could be employed "in any form of light capacity with lifting restrictions to about 25 lbs. on an infrequent basis and maybe 10 to 15 lbs. with a frequency not exceeding about 10 to 15 per hour." The doctor prescribed Tylox for pain.

15. The claimant did not pursue physical therapy because of on-going alcohol abuse compounded by use of narcotic pain killers, initially Percodan and later Tylox. There is a question whether it was appropriate to prescribe such drugs to a patient with a known substance abuse history.

16. In April, 1993, after his temporary total disability compensation benefits were terminated, the claimant returned to Vermont and was seen by Dr. Esquerra. Dr. Esquerra saw the claimant on April 30, 1993, for low back pain. On May 25, 1993, Dr. Esquerra referred him to a neurosurgeon, Dr. Flanagan, and opined that he should not work for a month. On November 17, 1993, the claimant was again seen by Dr. Esquerra who said he should not work until further notice. Dr. Esquerra prescribed additional Percodan at all three office visits.

17. On October 20, 1993, the claimant saw Dr. Flanagan. He could discern no neurosurgical lesion as the cause of claimant's pain. He recommended an MRI. The MRI, taken October 20, 1993 was normal except for degenerative changes at L5/S1 and "small posterior central disc herniation or bulge" at the same level which "does not appear to be causing impression on the thecal sac."

18. On February 28, 1994, the claimant began serving a seven month sentence at Maine State Prison for driving while intoxicated and being an habitual offender (which conviction arose out of previous driving violations involving

alcohol). While in prison, based on medical examinations, he was eligible for light-duty (20 lbs. maximum lifting) employment opportunities. Since being discharged from prison, he has not been employed although he has pursued some unspecified opportunities.

19. On January 25, 1995, the claimant was examined by Dr. William Boucher at the OHX Center in Augusta, Maine on behalf of the defendant. Dr. Boucher reviewed the medical records and thoroughly examined the claimant.

20. Dr. Boucher concluded that the claimant's June, 1992 injury had completely resolved by the time he was examined by Dr. Ciembromiewicz; that the claimant showed significant signs of symptom magnification and a learned pattern of illness behavior; that he had at least a light-work capacity to work full-time and could lift up to 25 lbs. occasionally and 12 lbs. frequently; and that a conditioning program encouraging the claimant to decrease his alcohol abuse would be helpful. Finally, Dr. Boucher concluded that the claimant's current work restrictions were totally unrelated to the injury of June, 1992.

21. At the hearing, the claimant presented no testimony or evidence regarding his claim for additional medical, surgical, or hospital benefits. After the hearing, in his Requests to Find, he submitted the following unreimbursed bills for payment:

a. Dr. Flanagan visit, 10/20/93 - $180.00

b. MRI, 11/19/93 - $263.00

c. Jeffrey Poole, M.D. - $29.50

He also asked to be reimbursed for the following costs:

d. Travel expense to see Dr. Boucher - $23.50.

e. Unitemized drug reimbursement expenses - $70.92

f. Travel expense to Dr. Esquerra from Maine

10/20/93 - 440 miles at $.25 per mile = $110.00
04/30/93 - 440 miles at $.25 per mile = $110.00

g. Travel expense to Labor & Industry conference on 12/12/94 - $100.00.

Defendant objected to the post-hearing admission of these documents, as well as other documents apparently from the Maine State Prison.

22. Based on the credible medical evidence, the absence of any surgical recommendation, and the claimant's unwillingness or inability to undergo physical therapy, it is more probable than not that claimant had reached maximum medical improvement with respect to his June 1992 injury by April 1993.

23. There is insufficient medical evidence linking claimant's bladder and bowel difficulties to his work injury.

CONCLUSIONS OF LAW:

1. The principle question posed in this claim is whether temporary total disability compensation benefits were properly terminated in April of 1993, and secondarily whether the claimant is entitled to additional medical or hospital benefits.

2. Although in his post hearing pleadings the claimant seeks vocational rehabilitation benefits, those were not sought at or prior to the time of hearing and, in any event, no evidence was submitted in support of such benefits at the hearing. Likewise the claimant did not seek benefits for permanent partial disability, if any.

3. Temporary total disability compensation benefits were terminated on the basis that claimant had not made a reasonable effort to find light or part-time work which he was capable of doing (Finding of Fact, ¶ 8). Defendant did not seek termination on the basis that claimant had reached a medical end result, although in fact he had (See Finding of Fact, ¶ 22).

4. Rule 18(A)(3) of the Rules Governing Claims Under the Vermont Workers' Compensation and Occupational Disease Acts ("Rules"), in effect in April, 1993, state that in the case of termination on the basis of a claimant's failure or refusal to return to work, the Form 27 notice must be accompanied by written documentation establishing the following:

a. That the claimant has been medically released to return to work, either with or without restrictions;

b. That the claimant has been notified both of the fact of his release and of his obligation to conduct a good-faith

search for suitable work; and

c. That the claimant has either failed to conduct a good-faith search for suitable work and/or has refused an offer of suitable or available work once notified.

5. The burden of proof when disability benefits are terminated is on the employer to show that termination is justified. Merrill v. University of Vermont, 133 VT 101.

6. In this case it appears that Dr. Ciembromiewicz's January 29, 1993 letter and March 12, 1993 chart note accompanied the Form 27. Those documents informed the claimant that he could return to work with restrictions but did not inform him of his obligation to conduct a good-faith search for suitable work and that he had failed to conduct such a search or had refused suitable or available work once notified.

7. Contemporaneous with the Form 27, however, it does appear the claimant had begun a search for work. (See Dudley letter to Kemper March 25, 1993, Exhibit 12.)

8. Based on the language in Rule 18(A)(3), the defendant did not sustain its burden of proof in April of 1993 for termination of temporary total disability compensation benefits on the basis that the claimant had failed to make a good-faith search for work for which he was qualified.

9. The question then becomes whether a determination of temporary total disability compensation benefits in April, 1993, can be sustained on another basis. We find that it can.

10. Although not specified in the Form 27, the documentation which accompanied it, as well as the subsequent medical evidence introduced in this hearing, demonstrates that the claimant had reached maximum medical improvement by April, 1993. While physical therapy might have continued or enhanced the healing process, the claimant either would not or could not, due to his alcohol addiction, undergo such therapy. No surgery then, nor since, has been recommended.

11. Temporary disability benefits are provided for workers who suffer disability during the period between their injury and final recovery, and once the recovery process has ended, or the worker has achieved the maximum

possible restoration of earning power, he is no longer entitled to temporary disability benefits. Bishop v. Town of Barre, 140 Vt. 564 (1982).

12. While claimant's pre-existing and on-going alcoholism may have impeded his treatment and therapy for the June, 1992 injury, and may have impeded his ability to return to the work force, the responsibility for this lies not with the defendant but the claimant. "If the claimant's continued unemployment is the result, not of her employment-related impairment, but of personal ailments unrelated to her employment, there's no possible ground for continuing temporary benefits." 1C Larson, the Law of Workers' Compensation, Section 57.12(E). See also Mills v. Ultramotive Corporation, 35-94WC.

13. This case asks us to compare Wroten v. Lamphere, 147 VT 606, and Gee v. City of Burlington, 120 VT 472. In both cases claimant sought temporary total disability compensation benefits after a medical end result. In Wroten, they were denied, even though claimant was in a vocational rehabilitation program that kept him from working; his participation was voluntary, the court said. In Gee, temporary total disability compensation benefits were granted because claimant was "prevented from obtaining suitable employment by conditions beyond his control." Wroten, supra, at 610. In this case, based on the evidence presented, the claimant's failure to look for or find work after April 1993 was not based on "conditions beyond his control."

14. We next turn to claimant's request for additional hospital and medical benefits. The defendant is responsible for those which are reasonable and causally related to the work related accident. 21 V.S.A. 640.

15. Although defendant argues that bills submitted by the claimant after the closure of the hearing should not be admitted (See Finding, ¶ 21), it does not argue that these items are either unreasonable or unrelated to the work injury. Based on the credible medical evidence, the bills of Dr. Flanagan and for the MRI are causally related, and should be paid by the defendant, if they have not already been paid. Likewise, pursuant to Rule 12(b), the defendant should pay claimant travel expenses to see Dr. Boucher for the IME, but not to see Dr. Esquerra the treating physician. (I do not find that the claimant was "required" to travel from Maine to St. Albans to see Dr. Esquerra.)

16. With respect to Finding, ¶ 21(g), this relates to a trip to Montpelier for a pre-hearing conference at which no representative of defendant appeared. Although unfortunate, there is no right to reimbursement of travel
expenses or other costs permitted by law or the Rules.

ORDER

1. Claimant's claim for additional temporary total disability compensation is denied.

2. Defendant or its insurance carrier, Kemper Insurance Co., is ordered to pay claimant or the appropriate provider the sums listed in Finding ¶ 21(a), (b), (d) and (e).

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

_____
Mary S. Hooper
Commissioner