Smith v. Killington Ltd. (April 21, 1995)

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

Alan K. Smith	*)*	*File Nos. E-17523 and E-14680*
	)	
	)	*By: Sheldon A. Keitel*
	)	*Hearing Officer*
v.	*)*	
	)	*For: Mary S. Hooper*
	)	*Commissioner*
	)	
Killington Ltd.	*)*	*Opinion No. 16-95WC*

Heard in Montpelier, Vermont on September 16, 1994
Record closed November 30, 1994

APPEARANCES

Cortland T. Corsones, Esq. for the claimant
William A. O'Rourke, III, Esq. for the defendant

ISSUES

1. Is the employer/insurer liable for additional disability and medical benefits pursuant to the Workers' Compensation Act relating to claimant's back injuries sustained in January and March of 1992 while in defendant's employ?

2. If so, is claimant also entitled to medical benefits pursuant to 21 V.S.A. §640 for psychological counselling through December 10, 1992?

3. If not, is the defendant entitled to reimbursement for benefits previously paid under protest?

THE CLAIM

1. Temporary total disability compensation under 21 V.S.A. §642 from May 3, 1993 to the present and continuing.

2. Medical and hospital benefits (past and future) under 21 V.S.A. §640.

STIPULATIONS

1. The claimant, Alan K. Smith, was on all relevant dates employed by the defendant, Killington Ltd., of Killington, Vermont as a rescue skier.

2. The defendant was on the dates in question an employer within the meaning of the Workers' Compensation Act.

3. On the dates in question, Legion Insurance Company was the workers' compensation insurer for the defendant and Scott Wetzel Services, Inc. was the third-party claims administrator.

4. On January 25, 1992, the claimant suffered a personal injury to his back and neck while working on the ski slope when another skier collided with him from the rear. The claimant was 33 years old at the time of this injury.

5. On February 25, 1992, the employer filed an Employer's First Report of Injury (Form 1).

6. Claimant received temporary total disability payments pursuant to the Agreement for Temporary Total Disability Compensation (Form 21) approved by the Department on 4/16/92, after which he returned to work for his employer at the same job.

7. On March 14, 1992, while working for defendant as a rescue skier, claimant was escorting an injured skier to the base of the mountain; in the course of supporting and assisting the injured skier, claimant again injured his back. The claimant was 34 years of age at the time of this injury. [The claimant's date of birth was February 12,1958.]

8. On March 28, 1992, the claimant and the defendant entered into an Agreement for Temporary Total Disability Compensation (Form 21) in which the defendant agreed to pay the claimant $198.00 per week beginning on March 18, 1992.

9. On May 3, 1993, the defendant discontinued temporary total disability compensation payments to the claimant on the basis of medical reports which

defendant interpreted as disproving the continuing causal connection between
the claimant's condition at the time and the injury of March 14, 1992. A Form 27, Notice of Intention to Discontinue Payments, was mailed to the claimant on April 28, 1993.

10. On July 16, 1993, the claimant's attorney filed a Notice and Application for Hearing (Form 6).

11. Judicial notice may be taken of the following documents in the Department's claim files relating to this matter:

Forms 1: Employer's First Reports of Injury
Form 6: Notice and Application for Hearing
Form 25: Wage Statements
Forms 27: Notices of Intention to Discontinue Payments

12. The following documents were offered into evidence without objection:

Defendant's Exhibit A: IME 6-5-92, Dorothy Ford, M.D. (2 pgs)

Defendant's Exhibit B: IME 8-17-92 Valley Orthopaedic (2 pgs)

Defendant's Exhibit C: MRI report 8/25/92 (Dr. Tata)

Defendant's Exhibit D: Letter dated Oct. 2, 1992 (Kenneth D. Polivy, M.D. - Scott Wetzel)

Defendant's Exhibit E: Letter Polivy-Scott Wetzel 10/29/92

Defendant's Exhibit F: Letter Polivy-Scott Wetzel 2/19/93

Defendant's Exhibit G: Letter dated April 12, 1993 (James G. Wepsic, M.D. - Scott Wetzel)

Defendant's Exhibit H: Letter Polivy-Scott Wetzel 5/26/93

FINDINGS

1. Stipulations 1 through 4 are true. Stipulation 5 is modified to conform to the following: "On February 11, 1992, the employer filed an Employer's First Report of Injury (Form 1) dated Feb. 5, 1992 (State File No. E-14680)." Stipulations 6 through 10 are true. Judicial notice was taken of the documents listed in Stipulation 11. The documents listed in Stipulation 12 were admitted into evidence.

2. The following documents were received into evidence at the hearing (hereafter abbreviated "CE-_" and "DE-_"):

Claimant's Exhibit 1: Claimant's statement dated 1-27-92

Claimant's Exhibit 2: Convenient Medical Care x-ray report and treatment notes 1-26-92

Claimant's Exhibit 3: Records, Robert C. Larson, D.C., 1/13/89 to 7/31/92 (20 pages)

Claimant's Exhibit 4: Surgeon's Report dated 4/1/92 with 3-page attachment (Larson)

Claimant's Exhibit 5: Billing statements (Larson) 1/28/92 - 8/3/92 (4 pages)

Claimant's Exhibit 6: Records, Killington Mtn. Medical Clinic (3 pages)

Claimant's Exhibit 7: Records, Vermont Sports Medicine Center 3/14/92 to 6-10-92 including FCE (9 pages)

Claimant's Exhibit 8: IME 6-5-92, Dorothy Ford, M.D. [same as Defendant's Exhibit A]

Claimant's Exhibit 9: Treatment notes 8/13/92 - 9/9/92, Dr. Vargas (2 pages)

Claimant's Exhibit 10: MRI report 8/25/92 [same as DE-B]

Claimant's Exhibit 11: 8-17-92 Valley Orthopaedic [same as Defendant's Exhibit C]

Claimant's Exhibit 12: 11/2/92 report of Dr. Krag (2 pages)

Claimant's Exhibit 13: 2-page letter (Krag-Larson) 1/18/93

Claimant's Exhibit 14: Letter (Krag-Larson) March 19, 1993

Claimant's Exhibit 15: 7-6-93 report, Dr. Krag (2 pages)

Claimant's Exhibit 16: Letter dated June 22, 1994 (Dr. Krag - claimant)

Claimant's Exhibit 17: Office notes 4/15 and 5/12/93 (Dr. Hazard) and 7-6-93 (Dr. Krag)

Claimant's Exhibit 18: Operative report 4/19/94

Claimant's Exhibit 19: MCHV Operative Report (6/24/94), Radiology Report (6/27/94) and Discharge Summary (7/7/94)

Claimant's Exhibit 20: Letter dated August 30, 1994 (Larson - claimant's attorney)

Claimant's Exhibit 21: Letter dated Dec. 11, 1992; Treatment Plan of Roger C. Pierce, M.S

Claimant's Exhibit 22: Psychiatric evaluation and letter to Scott Wetzel from Richard Kast, M.D. dated January 28, 1993 (5 pages)

Claimant's Exhibit 23: Claimant's statement re: 3-14-92 injury

Defendant's Exhibit I: Newspaper advertisement

Defendant's Exhibit J: Statement of Henry B. Lunde dated 11-2-92

3. On Sunday, Jan. 25, 1992, the claimant was skiing backwards and looking to the side and to his rear as he maneuvered himself into position to service a piece of snow making equipment; he was run into by a recreational skier at a time when the slopes were very crowded. The collision was sufficiently forceful that claimant was "lifted up and sent flying." The claimant felt pain in his lower back and a shooting pain into his left leg; although shaken, he was able to return to the base lodge where he reported the accident, was released from further work that day, and was told to seek medical treatment. (Testimony of claimant; CE-1.)

4. Claimant was seen at the Convenient Medical Care Center on Monday, Jan. 26 with complaints of neck, shoulder and back pain with pain radiating down his left leg; claimant's prior history of spondylolisthesis was also noted. (CE-2.) Claimant was not satisfied with the degree of attention paid by personnel at Convenient Medical Care Center to his lower back complaints, and he therefore recontacted the Larson Chiropractic Center (where he had treated previously) on Jan. 28, 1992. (CE-3).

5. The chiropractic treatment records noted intermittent lower back pain of about a year's duration when claimant began treatment in 1989. Claimant treated on five occasions in Jan. - Feb. '89; absence of radiating pain was specifically noted. Claimant treated twice in July 1989 for a right sided neck problem in connection with his brush-hogging business; he was seen six times in March 1990 for a right-sided shoulder problem. Claimant was seen twice later that year, at which time it was noted for the first time that pain was radiating into the legs. Claimant did not treat at all, however, between October 1990 and the work-related injury of January 25, 1992. (CE-3).

6. Claimant was deemed to have suffered sprains or strains to both the back

and neck as the result of the Jan. '92 skiing injury (CE-5; CE-6). Claimant was released for return to work in a reduced capacity in late February/early March, 1992 (CE-4; CE-6).

7. On March 14, 1992, claimant had resumed duties as a rescue skier and he re-injured his back on that date. (Form 1 dated 3/28/92, State File No. E-17523.) The injury was again diagnosed and treated as a soft-tissue injury; claimant began a supervised therapy/exercise regimen at Vermont Sports Medicine Center and was scheduled for work hardening in mid-May. (CE-7.) As the result of an IME by Dr. Ford, however, claimant was determined still to be temporarily totally disabled and referred to Dr. Vargas. (CE-8.)

8. Claimant was unable to see Dr. Vargas until 8/13/92; he returned to Larson Chiropractic on 7/8/92 in acute distress (a note indicates that Dr. Vargas would not schedule claimant until the carrier approved). X-rays and examination revealed increased slippage and instability of the lumbar vertebrae when compared with the January 1992 x-rays. This was eventually confirmed by Dr. Vargas, who ordered an MRI which disclosed discopathy at L4-5 and L5-S1 (CE-9; CE-10).

9. A second IME with Valley Orthopaedic Surgeons noted "apparent increased bone density at the upper border of L5 suggesting that this spondylolisthesis with stress may have been present for some time." The final conclusion, however, was that claimant "has this underlying problem with aggravation by two injuries, one in January and one in March 1992. I feel at this time he is unable to work because of the rather severe pain and instability . . . . Recreational skiing for short periods of time might be possible at this point if it were winter but certainly he is not in a position to be doing any other major work activities." (CE-11.)

10. Upon referral by his chiropractor to the Spine Institute of New England in November 1992, claimant continued to explore non-surgical options, in part because of his preference to avoid surgery but also in large part because of still further independent consults which counselled against surgical intervention. (Defendant's Exhibits D, E, F and G.) On the strength of these reports, which defendant considered to prove that "back problems do not relate to the alleged 3/14/92 incident" and to be the "most credible," the carrier discontinued TTD benefits as of May 3, 1993. (Form 27 dated April 28, 1993.) The Form 27 further noted "Even claimant's doctor, Dr. Krag, is not sure as to the cause of his present symptoms."

11. Claimant had begun psychological counselling in December 1991 for "extreme psychosocial stressors in his life" (prior to either of the claimed dates of injury). By December 1992, however, his therapist advised the carrier that claimant's physical disability had become sufficiently central to his overall condition to warrant therapy in its own right (CE-21); defendant had an independent psychiatric exam which essentially confirmed the treating therapist's recommendations. (CE-22.) (Claimant's therapist asked for payment of 13 weekly sessions, deemed for purposes of this decision to be the equivalent of the three months of therapy recommended by defendant's consultant.)

12. Claimant placed an advertisement for his brush-hogging business in a local flyer in June 1992. (DE-I.) Defendant also produced a handwritten statement from another employee which alleges that claimant was overheard to say in November 1992 "I'll be back at Killington soon and then they can pay to fix it," or words to that effect, referring to his continuing back problems; claimant also allegedly stated that he had re-injured himself in the course of self-employment while brush-hogging. (DE-J.) Claimant testified that he attempted to work at brushhogging during the 1992 season but was not physically able to do so. Claimant denied any injury, as well as having made any statement about an injury in 1992 in connection with self-employment. (Testimony of claimant.)

13. Claimant eventually underwent diagnostic surgery in April 1994 (placement of external fixator to determine potential for success of permanent fusion). (CE-18.) Claimant underwent an L4-5 fusion in June 1994. (CE-19.)

CONCLUSIONS OF LAW

1. To recover under the Workers' Compensation Act, it is essential that a worker receive a personal injury by accident arising out of and in the course of his employment. Norman v. American Woolen Co., 117 Vt. 28 (1951). The claimant must establish by sufficient competent evidence the nature and extent of the injury and has the burden of showing the causal connection between the accident causing the injury and his employment. Lapan v. Berno's, Inc., 137 Vt. 393 (1979). An aggravation or acceleration of a pre-existing condition can constitute a personal injury under the Vermont Workers' Compensation Act; if the claimant meets the burden of proof that he

suffered an injury as a result of work, or proves that work accelerated a previously existing condition, the injury is compensable. Campbell v. Heinrich Savelberg, Inc., 139 Vt. 31 (1980). When a claimant sustains a second accident as a result of a specific job-related incident which aggravates a preexisting condition, the second accident is treated as a new injury if it at least partly precipitated the claimant's disability. Fitzgerald v. Concord General Mutual Insurance Co., Opinion #56-94WC (Nov. 28, 1994; Jaquish v. Bechtel Const. Co., Opinion #30-92WC (Dec. 29, 1992); Gardner v. Vermont Tap & Die, Opinion #10-90WC (Nov. 8, 1991).

2. Claimant has established by competent evidence (including second opinions of physicians selected by defendant--Findings 9 and 11) that specific job-related incidents on Jan. 25 and Mar. 12, 1992 caused injuries to soft-tissue supporting structures of the spine which resulted in, precipitated, or accelerated further degeneration of a pre-existing condition and gave rise to an eventual reasonable need for surgery and psychological supports.

3. When the original injury and resulting disability are unquestioned, the burden is on the employer to justify the termination of temporary total disability compensation. Merrill v. University of Vermont, 133 Vt. 101 (1974). The employer has not sustained its burden of justifying the termination of TTD in May of 1993.

(a) The medical opinions on which defendant relied to terminate TTD benefits in May 1993 (Finding 10) were based on record reviews only and were contradicted by the three earlier opinions obtained by defendant which did not question causal relationship (Findings 7 thru 9). Two of those opinions (CE-9 and CE-10) clearly support a causal link by aggravation.

(b) The conclusion in May 1993 that claimant's condition "certainly does not appear to be secondary to any work-related injury occurring at the ski slope" (DE-H) is undercut by the same doctor's opinion (DE-E) that there were still "some mild residual problems from the injury of March 1992" as late as October '92 which were expected to last several months longer (and discopathy had been confirmed the previous August; CE-10).

(c) For the same reasons that Dr. Krag properly deferred to the opinions of earlier treating physicians (Finding 10, CE-16), defendant's experts were not the best situated to pass judgment on the issue of causation.

(d) Defendant's Massachusetts experts were at that time addressing

primarily the issue of the advisability of surgical intervention (not causation); their recommendations are essentially in accord with those of the treating physicians except for trying to pound the round peg of medical terminology into the square hole of Vermont's legal standard regarding the legal definition of the term "aggravation".

4. The probative value of the evidence referenced in Finding 12 is too limited to be determinative.

(a) DE-J is tainted by hearsay, hearsay within hearsay, and a logical contradiction with the overwhelming weight of the evidence. The alleged statements against interest would have been far more damaging if made in November of 1991 rather than 1992, i.e., prior to the alleged injuries; the medical evidence in this case indicates that claimant was totally disabled in November 1992 with little or no prospect of returning to employment with defendant at that time, which argues against such a statement being made at all. The alleged substance and content of the statement heard in passing (as well as its tone) could have been easily misconstrued.

(b) DE-I is evidence only of claimant's presumed intent to be an active participant in his brush-hogging business in the Spring of 1992, not that he actually was; such an intent was entirely consistent with the stated goals of his therapy. (CE-7.) The functional capacity evaluation which found him physically capable of doing so was in any event superseded by Dr. Ford's subsequent IME (CE-8); even though he did attempt some physical labor required by the brush-hogging business (Finding 12), he probably shouldn't have. This Department has long recognized the pragmatic limitation on too strict an application of the rule on aggravations to cover the situation of an injured worker trying to return to work too soon; see, for example, Whalen v. Lake Champlain Transportation Co., Commissioner's Opinion #21-93WC (Nov. 24, 1993). It must be emphasized that there is no evidence to substantiate defendant's theory of reinjury in the course of self-employment (as was noted in DE-F, even though claimant had been subjected to undercover investigation); the situation might be different had claimant presented in acute pain before, rather than after, Dr. Ford's IME.

5. The questions raised by Issues 1 and 2 having been answered in the affirmative, Issue 3 need not be addressed. The facts and conclusions herein recall the similar case of Metzler v. Mount Mansfield Company, Opinion

#29-94WC (August 19, 1994); the present decision merely incorporates the Vermont rule on aggravation of pre-existing conditions to the factual elements of Metzler.

ORDER

Based on the foregoing Findings and Conclusions, the defendant Killington Ltd. is ORDERED to pay the claimant temporary total disability compensation for the period beginning May 4, 1993 through September 16, 1994,
the date of the hearing, in the amount of $204.00 per week, adjusted as of 7/1/93 and 7/1/94 in accordance with Rule 16, Processes and Procedure for Claims under the Vermont Workers' Compensation and Occupational Disease Acts,
and such additional compensation as subsequent medical evidence may warrant.

Defendant Killington Ltd. is further ORDERED pursuant to 21 V.S.A. §640 to pay all reasonable and necessary medical expenses arising out of this claim, including thirteen (13) weeks for psychological counselling and any additional reasonable and necessary expenses for counselling as may be subsequently documented.

As claimant has substantially prevailed in his claims for compensation, then, pursuant to 21 V.S.A. §678(a), defendant Killington Ltd. is ORDERED to
pay claimant's attorney fees in the amount of 20% of amounts to be paid pursuant to the above or $3,000.00, whichever is less.

DATED at Montpelier, Vermont this _____ day of April, 1995.

_____
Mary S. Hooper
Commissioner