

Eighmey v. Grand Union (April 26, 1995)

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

LOUISE EIGHMEY) File No. G-12881
)
) By: Frank E. Talbott
v.) Contract Hearing Officer
)
) For: Mary S. Hooper
) Commissioner
)
GRAND UNION) Opinion #: 21-95WC

Hearing held in Montpelier, Vermont on January 26, 1995.

APPEARANCES

*Edward L. Winpenny for the claimant
William A. O'Rourke for the defendant.*

ISSUES

1. Whether the claimant suffered an injury as a result of and in the course of employment with the defendant.

THE CLAIM

- 1. Temporary total disability compensation under 21 V.S.A. §642 from October 11, 1993, to date.*
- 2. Medical and hospital benefits.*
- 3. Attorney fees and expenses.*

FINDINGS

1. During the hearing, the following exhibits were received in evidence:

Claimant's Exhibit A : Binder containing medical records

Claimant's Exhibit B : Binder containing medical bills

Claimant's Exhibit C : Job description

Claimant's Exhibit D : Transcript of deposition of Dr. Joseph H. Vargas

Defendant's Exhibit 1 : Disability claim payment record

Defendant's Exhibit 2 : Collection of medical records

Defendant's Exhibit 3 : Grand Union form titled "Doctor's Statement" and "Claimant's Statement" for purposes of sick time claim.

Defendant's Exhibit 4 : Grand Union Information Center (documents placed on the bulletin board at the Poultney store)

Defendant's Exhibit 5 : Records from Casleton Health Associates

2. The claimant was a full time deli manager at Grand Union in Poultney, Vermont, since April, 1988.

3. When the claimant was working at the Deli, part of her duties required that on a daily basis she serve customers by reaching into a refrigerated deli case to retrieve trays of food and pieces of meat. This required her to bend forward at her waist, with her arms extended, and lift produce weighing between three and fourteen pounds with her arms fully extended.

4. The claimant's duties also required that she unload trucks, by removing items of produce from a pallet and placing them on a U-shaped dolly to take into a freezer. The items she would remove weighed from 2 lbs to 100 lbs.

5. For several months prior to October, 1993, the claimant transported 5 gallon buckets of water from the meat department to the deli because the hot water heater was broken. The claimant described her back and leg pain as becoming more severe during the time she was performing these duties for the defendant.

6. The claimant has had a long history of back and leg pain. She received an excision of a herniated disc at L5-S1 in 1990. Then, in October, 1993, she

was admitted to Rutland Regional Medical Center because she had extreme chest pain. After admission, she began to complain of back, left hip and left leg pain. A CAT scan taken during her admission showed a defect at L5-S1, and a later MRI showed that the pain in her back, left hip and leg was the result of a recurrent disc problem, not from scar tissue from the 1990 surgery.

7. The symptomology the claimant began experiencing in August of 1993, a couple of months before she went into the hospital, included aching in her back, sometimes a shock down her leg from her buttocks, aching across the small of her back. The symptoms were not something she felt she needed to immediately treat. She took nonprescription pain medication. Her doctor had told her after her first surgery in 1990 that she would need to take care of her back and live with the pain.

8. On October 11, 1993, the claimant was experiencing serious pain at work. She was not able to leave work because there was no replacement for her. At the end of the day she reported to her supervisor saying, "if I am not dead or dying I'll see you tomorrow." The claimant's back was in serious pain, and her chest had a deep aching that would not go away. She also had pain in her legs and across the small of her back; she felt that she was walking strange; and she felt that the pain was considerably more intense than it had been over the previous 3 to 4 weeks. That evening when her husband came home, he found the claimant lying on the couch complaining of intense chest and back pain. After calling a friend who was an emergency medical technician, the claimant's husband decided to admit her to the hospital.

9. Prior to the claimant's admission into the Rutland Regional Medical Center in October, 1993, the claimant did not miss any time from work; she did not treat with any medical doctor for back problems; and she did not take any prescribed medication for back problems from the time that she recovered from her surgery in 1990.

10. The claimant's treating physician, Dr. Vargas, concluded that the claimant had a recurrent herniated disc at L5-S1. Dr. Vargas also concluded that the herniation was not caused by the scar tissue or "left behind" from

the earlier surgery, but was a new problem. Dr. Vargas reviewed the claimant's work history, as described by the claimant, and concluded that the source of this new problem was most likely the work that the claimant had been performing while in the employ of the defendant.

11. The claimant's husband is the one who took the claimant to the hospital on October 12, 1993. Mr. Eighmey called the claimant's employer from the hospital, and spoke to Bill Roberts, her supervisor, telling him that the claimant was in the hospital because of chest pains. When the claimant began complaining in the hospital of back, hip and leg pain, it was decided to keep her in the hospital overnight to do tests. Mr. Eighmey called the employer and reported this to Mr. Roberts, describing the claimant's symptoms to him. He is not sure if he described the claimant's back, hip and leg pain as well as the claimant's chest complaints.

12. However, Mr. Eighmey continued to report to the defendant the condition of the claimant while she was in the hospital, and the defendant was made aware of the claimant's back pain and her inability to work due to the back pain shortly after the claimant's admission to the Rutland Regional Medical Center.

13. Following the claimant's release from the Rutland Regional Medical Center, Dr. Vargas tried conservative treatment, including epidural steroid injections. These injections failed to bring relief. Therefore, Dr. Vargas recommended surgery. On December 10, 1993, Dr. Vargas performed an excision of a recurrent herniated nucleus pulposus at L5-S1. At the time of the surgery, Dr. Vargas concluded that the material excised was "new material" which had extruded from the disc at the site of the previous operation.

14. Dr. Vargas wrote a letter to the personnel department for defendant on January 15, 1994, explaining the claimant's back condition. Although Dr. Vargas does not say in that letter that the claimant's herniated disk was a direct result of the claimant's work, he did indicate that the claimant's work was very vigorous and required a fair amount of lifting. Dr. Vargas further informed the defendant that the claimant would be able to return to work over the "long term" but would return with weight limitations.

15. Although the claimant had not reached maximum medical improvement, sometime between January 15 and February 3, 1994, Dr. Vargas did give the claimant permission to return to work, with a weight limitation of 25 pounds. However, when the claimant returned to work with her weight limitation, she

was told that there was no work for her to do with that limitation.

16. Following surgery, Dr. Vargas referred the claimant to Vermont Sports Medicine. Dr. Vargas later referred the claimant to The Spine Institute.

17. The claimant completed her treatment at the Spine Institute in November, and on December 14, 1994, the claimant was released to return to work at the defendant with a maximum weight limitation of 50 pounds.

18. Dr. Vargas has reviewed the claimant's treatment and the medical bills incurred for her treatment, and concluded that the following bills for medical services or supplies were reasonable and necessary:

<i>Dr. Bonazinga</i>	<i>\$ 30.00</i>
<i>Mid-Vt. Orthopaedists (Dr. Vargas)</i>	<i>\$4,028.00</i>
<i>Rutland Radiologists</i>	<i>\$ 538.50</i>
<i>Rutland Regional Medical Center</i>	<i>\$7,005.30</i>
<i>University Health Center</i>	<i>\$7,107.38</i>
<i>Vermont Sports Medicine</i>	<i>\$3,782.00</i>

TOTAL: \$15,419.18

19. The claimant received sick pay and then disability benefits from October 16, 1993 to February 15, 1994. After her disability benefits ended, she filed a Notice of Injury and Claim for Compensation on February 25, 1994.

20. The claimant's average weekly wage for the twelve weeks preceding October 13, 1993 was \$651.70, which equals a weekly compensation rate of \$434.46.

CONCLUSIONS

1. The claimant has the burden of establishing all facts essential to the rights asserted. King v. Snide, 144 Vt. 395 (1984). The claimant must establish by sufficient competent evidence the character and extent of the injury and disability, as well as a causal connection between the injury and the employment. Rothfarb v. Camp Awanee, Inc., 115 Vt. 172 (1949).

2. A Notice of injury and claim for compensation is to be made within six months after an injury. 21 V.S.A. §656. The claimant filed her notice of injury and claim for compensation within the six month period.

3. Where the causal connection between an accident and injury is obscure,

and a lay-person would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979). The only expert testimony presented was the testimony of Dr. Vargas, which was that the claimant's work duties most likely were the cause of the claimant's disk herniation in October, 1993.

4. When a disability develops gradually, the insurance carrier covering the risk at the time of the most recent exposure bearing a causal relation to the disability is liable for the compensation. 1 *Larson, Workmens' Compensation Law* § 95.00. If specific job-related functions have aggravated a pre-existing condition, the aggravation is treated as a new injury if the trauma by the job-related functions at least partly precipitates the claimant's disability. See *Aetna Casualty Ins. Co. v. McKenzie*, 152 G. App. 445 (1979); *Providence Wash. Ins. Co. v. Bonner*, 680 P.2d 96 (Ala. 1984).

5. The claimant is entitled to temporary disability benefits from the date of the injury until she is restored to her maximum earning capacity or reaches the end of her healing process. *Wroten v. Lamphere*, 147 Vt. 606 (1987); *Moody v. Humphrey*, 127 Vt. 52 (1968). The claimant was not restored to her full earning capacity until December 14, 1994, when she reached her maximum medical improvement and was released to return to work for the defendant. Therefore, the claimant is entitled to temporary total disability compensation from October 12, 1993 to December 15, 1994.

6. The claimant is entitled to reasonable and necessary medical expenses which are related to the care and treatment of her injury. 21 V.S.A. § 640. The statute places no other limitation on the receipt of benefits.

7. The claimant has requested attorney's fees and costs pursuant to 21 V.S.A. §687(a). Under this section the award of reasonable costs is mandatory and the award of attorney's fees is discretionary. *Morrisseau v. Legac*, 123 Vt. 170 (1962). The purpose of 21 V.S.A. §687(a) is to discourage any unnecessary expense and unreasonable delay in the resolution of the workers' compensation claims. *Morrisseau v. Legac*, 123 Vt. 70 (1962).

ORDER

It is therefore ordered that the defendant or its workers compensation insurer immediately pay to the claimant:

1. Temporary total disability compensation under 21 V.S.A. §642 from

October 11, 1993, to December 15, 1994, beginning at the rate of \$434.46 per week, adjusted pursuant to 21 V.S.A. §650(d).

2. The following medical and hospital benefits:

<i>Dr. Bonazinga</i>	<i>\$ 30.00</i>
<i>Mid-Vt. Orthopaedists (Dr. Vargas)</i>	<i>\$4,028.00</i>
<i>Rutland Radiologists</i>	<i>\$ 538.50</i>
<i>Rutland Regional Medical Center</i>	<i>\$7,005.30</i>
<i>University Health Center</i>	<i>\$7,107.38</i>
<i>Vermont Sports Medicine</i>	<i>\$3,782.00</i>

3. Attorney fees in the amount of \$2,371.25 and expenses in the amount of \$1,254.60.

4. All other benefits which may be due under the Workers Compensation Act consistent with this opinion.

Dated this _____ day of April, 1995.

Mary S. Hooper, Commissioner