

Terranova v. IBM Corp. (June 15, 1995)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRIES

Robert Terranova) File #: F-15708
) By: Barbara H. Alsop
v.) Hearing Officer
) For: Mary S. Hooper
IBM Corporation) Commissioner
)
) Opinion #: 23-95WC

Hearing held at Montpelier, Vermont, on April 12, 1995.

APPEARANCES

*George E. Taft, Esq., for the claimant
Keith J. Kasper, Esq., for the employer*

ISSUES

- 1. Has the claimant reached an end medical result, and, if so, when?*
- 2. If the claimant is at an end medical result, what is the correct measure of permanency for his work injury?*

THE CLAIM

- 1. Temporary total disability compensation pursuant to 21 V.S.A. §642 until the date of end medical result.*
- 2. Permanent total disability compensation pursuant to 21 V.S.A. §648.*
- 3. Medical and hospital benefits pursuant to 21 V.S.A. §640.*
- 4. Attorneys' fees and costs pursuant to 21 V.S.A. §678(a).*

STIPULATIONS

At hearing, the parties stipulated orally to the following:

benefits from IBM

WITNESSES

For the claimant:

For the employer:

Robert Terranova

Carol McKenna, PhD.

William Windels, MSN, RN, CS

Joel Lowy, C.R.C.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations are adopted as true and the exhibits above-referenced are admitted into evidence. The documents marked for identification are not admitted into evidence.

2. Robert Terranova was employed at IBM in its Essex Junction plant, working as a production specialist, in March of 1992, when the compensable injury to his left stump occurred.

3. Mr. Terranova was in a car accident in 1973, at which time he lost his left leg by amputation to an area immediately above his knee. At the time of the accident, he was an alcoholic, and his accident had been alcohol related.

4. Mr. Terranova was in many respects a "model" amputee, as he excelled at sports and became actively involved in AA, to help others to avoid the pitfalls that had engulfed him. His major failing was that he did not address the loss that he had suffered in any meaningful way, so that when later problems arose, he was unequipped emotionally to deal with them. However, he showed for a number of years his strength in dealing with issues of pain and his effectiveness in managing his pain.

5. The injury at IBM occurred when Mr. Terranova was engaged in work that entailed a larger amount of walking than that to which he was accustomed. He had been told that his position would require about an equal amount of time sitting and standing/walking. In practice, he was spending as much as 70% to 80% of his time standing or walking. This was very difficult with his stump, and he began to feel discomfort rising to the level of pain in his leg and back.

6. Mr. Terranova was operated upon on March 20, 1992, for bursitis of left above the knee amputation (also known as "AKA") stump. This did

not resolve the problems he was having, and in March of 1993, he had further surgery to remove more of his leg. This decision was made only after exploring other avenues of treatment, including a new prosthesis. All of the evidence suggests that this surgery was appropriate.

7. The surgery of March 7, 1993, was only partially successful. Mr. Terranova suffered an infection and a hematoma, which prolonged his hospital stay and contributed to his deconditioning. When he finally left the hospital, he was unable to wear his prosthesis, which no longer fit, and was required to use crutches.

8. Mr. Terranova then entered in August the Liberty Mutual Medical Service Center, a rehabilitation center operated by the employer's workers' compensation insurance carrier. In his intake interview, the claimant reported the problems that he was having with his back, as well as the complex of symptoms directly related to the new amputation.

9. Mr. Terranova had had a history of low back pain throughout his adult life. He had always been able to manage the pain, prior to the second amputation. However, the pain he was experiencing after the second amputation was much greater, and was not amenable to the pain management techniques that he had been using for over 15 years.

10. While at the Liberty Mutual Medical Service Center, the claimant met several times with two counselors for psychological problems he was having. It does not appear that he was offered treatment for the problems that arose, with the exception of certain performance problems he was having.

11. Similarly, it does not appear that Mr. Terranova was offered any treatment of a meaningful nature for the back problems he was suffering. Although he was enrolled in various programs at Liberty Mutual for rehabilitation, it does not appear that any of them was sufficiently tailored to his needs as to allow him to avail himself of the services offered. In fact, it appears that he was somewhat neglected by the staff when he could not perform the tasks assigned to him. When he left, he felt no appreciable improvement in his condition.

12. Dr. David B. Pilcher, the claimant's treating physician, saw Mr. Terranova in January, 1994, approximately one month after the claimant had left the Liberty Mutual center in Boston. As a result of his meeting with the claimant, Dr. Pilcher wrote the following:

Mr. Terranova had an extensive rehabilitation stay in Boston at the Liberty Mutual Medical Services Center, under the medical supervision of Dr. Melvin Glimcher, M.D.

I am in receipt of numerous records form [sic] there in his UHC record, which suggest that he had been successfully rehabilitated sufficiently to return to work, and that he had been urged to return to work.

I had a long meeting with Mr. Terranova on January 25, 1994, and clearly he is not able to stand nor to put weight on his prosthesis, nor to walk on his prosthesis. The difficulty with uncomfortable feeling in his prosthesis as described in Dr. Glimcher's record on 12/6/92 persists and totally prohibits him from walking with his prosthesis. Attempting to walk with the prosthesis and favoring his leg, he feels, has aggravated his back pain to the point where he cannot even be comfortable because of his back pain. He cannot participate in the Spine Center therapy because of the difficulties with his prosthesis and his stump.

In my opinion, Liberty Mutual Medical Services Center, whose goal was to rehabilitate Mr. Terranova, seems to have decided that he has been rehabilitated because that was their goal and because they have "reached their goal". Clearly, Mr. Terranova has not been rehabilitated, and is not able to return to work. This is due to a combination of his prolonged illness and his interpretation of his disability, his back pain, and his stump pain prohibiting walking. I believe he is still totally disabled.

This is credible and is adopted as a finding.

13. Mr. Terranova's physicians indicate that there is a medical procedure that holds out hope for improvement in his condition. The employer's examining physician, Dr. Dorothy Ford, confirms that there are fruitful avenues to be explored for further treatment. She reaches her conclusion that Mr. Terranova is at an end medical result only at his request, because her belief in the possibility of further diagnostic work and "imaginative" physical therapy, something he certainly never got at the Liberty Mutual Medical Service Center, would rule against a finding of end medical result.

14. The psychiatric component of the claim is difficult to resolve. Dr. McKenna tested the claimant very thoroughly, and reached the conclusion that he has treatable problems, although he "believed he had no vocational ability" and would be unwilling to follow through with treatment. Mr. Windels, a psychiatric nurse practitioner, also has doubts about Mr. Terranova's possible improvements, although he is exploring medicinal

treatments for the claimant's severe depression. In any event, it is clear that the claimant's depression and previous psychiatric conditions prevent him from making intelligent and reasoned choices about medical care that could improve his physical functioning.

15. Mr. Terranova now lives a very sedentary life, with minimal medical intervention. His doctors have indicated that further medical treatment, i.e., surgery, is appropriate, but they recognize his reluctance to undergo surgical procedures again, particularly in light of the difficulties in the 1993 surgery. The claimant expresses an unwillingness to partake in any further treatment or rehabilitation, although he is actively engaged in psychiatric care with a psychiatric nurse practitioner. His current lifestyle is in marked contrast to the period before the second amputation when he engaged in a number of physical endeavors and social ventures. There is no question from his history that he is capable of overcoming tremendous odds, and able to cope with pain and loss with strength and courage. The fact that he is currently suffering from a major depression, as attested to by both Dr. McKenna and Mr. Windels, prevents him from rising to his earlier levels of accomplishments.

16. Unfortunately, neither of the psychiatric witnesses has addressed an issue upon which much revolves, that is, whether the claimant's current unwillingness to accept treatment is a result of his diagnosed avoidant personality trait, and whether that avoidance trait can be removed from the equation with appropriate psychiatric care. Moreover, neither has addressed the issue of whether intensive treatment of the major depressive disorder would enable the claimant to undergo the surgery necessary to resolve both his stump and back problems. Obviously, such treatment would have the salutary effect of returning the claimant to the workforce, whether at IBM or elsewhere.

17. Dr. McKenna's report contains the following, which is adopted as true:

With regards to a psychological intervention for this man, clearly one is indicated but he likely would be resistant to participating in an intervention specific for pain management and work re-entry.

Dr. McKenna questions whether the claimant would follow through on such a program, but until it is tried, he cannot be said to be at an end medical result.

18. Dr. McKenna also made the following recommendation: "...that consideration be given to a referral to the psychopharmacology clinic in

the department of psychiatry at the University Health Center. It is unclear that Mr. Terranova's current medications have afforded him the best relief possible. It could be helpful to obtain and [sic] objective assessment of this." This is adopted as a finding.

19. The claimant has indicated an unwillingness to seek further treatment of any sort or to return to work in any of the positions offered by his employer. I find that the claimant's unwillingness is a product of the mental illness he is suffering as a result of his work injury, and that, were he healthy, he would recognize the necessity for the treatment recommended by Dr. McKenna.

20. I find that Mr. Windels' claim that the claimant had reached an end medical result for his psychiatric problem in July of 1994 is unsupported by the evidence, given that even the defendant's examining expert suggests that further treatment is warranted. It is, however, an indication that a change in treatment modalities for the psychiatric problem is now warranted.

21. Therefore, I find that the claimant is in need of intensive psychiatric intervention as a result of his work injury, that such intervention would be compensable and that the claimant would still be entitled to temporary total disability benefits during the period of the intervention and for such time thereafter as he is seeking the recommended treatment for his stump and back pain.

22. The claimant has presented no evidence in support of his claim for attorney's fees other than his fee agreement with his attorney. The claimant has not been responsible for any delay in the proceeding. Since there is no basis in the record for the awarding of fees based on the terms of the agreement, the claimant will be awarded fees based on 20% of the amount awarded. The claimant has presented evidence of costs in the amount of \$925.31.

CONCLUSIONS

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse Co., 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. Egbert v.

The Book Press, 144 Vt. 367 (1984).

2. *Where the causal connection between an accident and an injury is obscure, and a lay-person would have no well grounded opinion as to causation, expert medical testimony is necessary. Lapan v. Berne's Inc., 137 Vt. 393 (1979). Such expert testimony may include that rendered by nurse practitioners as well as by physicians and psychologists.*

3. *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 were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).*

4. *The probable hypothesis in this case is that while the claimant appeared to have reached an end medical result in July, 1994, for his psychiatric illnesses, he has subsequently declined, and that he has never reached an end medical result for his physical disability. A treatment plan encompassing all of his problems is the only way to return the claimant to a reasonable work capacity. The parties agree that the claimant is not malingering and that his failure to undergo the corrective surgery is a function of his mental illness. See, e.g., Gimbert v. United Parcel Service, Opinion #22-88WC.*

5. *I find that the claimant would benefit from further treatment, that such treatment may require that he seek other caregivers than he has used in the past, that he has the capacity to become a productive member of society again, and that he can get well with such treatment, at which time it would be appropriate to make a determination about permanency in this case.*

6. *However, recognizing that the proposed psychiatric intervention may not be effective and that the claimant may therefore not undergo the required surgery, this Department will review carefully any proposal by the insurer to terminate benefits pursuant to a Form 27 after a period of six months.*

7. *The claimant has prevailed to some degree and hence is entitled as a matter of law to his costs of \$925.31 and to attorney's fees as a matter of discretion.*

8. *The Commissioner's husband is an employee of IBM. This fact has played no role in deciding this matter. Nonetheless if any party believes that this creates a basis for review or reconsideration of this opinion, that party shall notify this Department within ten days of the issuance of*

this decision. Otherwise, any objection will be deemed to have been waived.

ORDER

Based on the foregoing findings and conclusions, it is hereby ordered that:

1. The insurer, or in the event of its default the employer, pay temporary total disability compensation to the claimant from the date of discontinuance until the claimant reaches an end medical result;

2. The insurer, or in the event of its default the employer, pay or reimburse relevant medical and related expenses incurred by the claimant in seeking evaluation and treatment for his disease; and

3. The insurer, or in the event of its default the employer, pay attorneys' fees at the rate of 20% of the amount of this award and costs incurred in the amount of \$925.31.

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

*Mary S. Hooper
Commissioner*