Gilbeau v. CEPCO, Inc. (May 23, 1995)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRIES

Lisa Gilbeau	*)*	*File #: F-6379*
	)	
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	
	)	*For: Mary S. Hooper*
CEPCO, Inc.	*)*	*Commissioner*
	)	
	)	*Opinion #: 24-95WC*

Hearing held at Montpelier, Vermont, on April 28, 1995.
Record Closed on May 10, 1995.

APPEARANCES

Joseph C. Galanes, Esq., for the claimant
Christopher J. McVeigh, Esq., for the employer

ISSUE

Whether the claimant is entitled to on-going temporary total disability and medical benefits, and any permanency, after an unrelated injury suffered at a grocery store.

THE CLAIM

1. Temporary total disability compensation pursuant to 21 V.S.A. §642 from June 30, 1994, until the present.

2. Medical and hospital benefits pursuant to 21 V.S.A. §640.

3. Attorneys' fees and costs pursuant to 21 V.S.A. §678(a).

STIPULATIONS

1. On April 19, 1993:

a. The claimant, Lisa Gilbeau, was employed by the defendant, CEPCO, Inc.

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

c. The claimant suffered a personal injury when she was adjusting the tension on the belt of a grinder lathe, during which she had to push a section of the lathe straight up above her head.

d. The claimant's April 19, 1993, injury arose out of and in the course of employment with the defendant.

e. The claimant had a non-work accident at the Brattleboro Price Chopper Supermarket on July 20, 1993, in which she slipped and fell, landing on her back and the back of her head.

f. The claimant underwent cervical spine surgery, a disc excision and fusion, on May 23, 1994. CEPCO, Inc., refused to pay medical expenses relating to the surgery and post-surgical care. Bills from North Adams Regional Hospital total $4,487.07. Unpaid bills from Dr. Wieneke total $7,376.00. Dr. Wieneke's bill for performing a permanency evaluation totalled $350.00. Defendant stipulates to the amount of the bills, but not to the reasonableness or necessity.

g. The claimant had three dependents under the age of 21, identified as: Heather, Adam and William.

2. On April 20, 1993, the defendant filed a First Report of Injury.

3. On September 24, 1994, the defendant filed a Report of Benefits and related Expenses Paid, showing that the claimant had been paid Temporary Total Disability Compensation in the amount of $16,001.64, from April 21, 1993, through May 10, 1994, with an ending weekly amount of $298.62 (amount from April 21, 1993, through June 30, 1993, was $284.86).

4. Judicial notice may be taken of the following documents in the Department's file:

Form 1: Employer's First Report of Injury
Form 5: Notice of Injury and Claim for Compensation
Form 6: Notice and Application for Hearing
Form 10: Certificate of Dependency
Form 13: Report of Benefits and Related Expenses
Form 21: Agreement for Temporary Total Benefits
Form 25: Wage Statement
Form 27: Notice of Intent to Discontinue Benefits
Form 28:
Form VR 1:

5. Judicial notice may be taken of the Complaint and Interrogatory Answers prepared in connection with a court action filed by the claimant and her spouse against The Golub Corporation d/b/a Price Chopper Supermarkets, Windham Superior Court Docket No. S509-11-94 WmC.

EXHIBITS

Joint Exhibit 1: Medical records and bills

Joint Exhibit 2: Two MRI reports dated 7/13/93 and 10/26/93

Joint Exhibit 3: Mary Moller's rehabilitation reports dated 7/13/93, 8/19/93, 10/15/93, 12/21/93, 2/3/94, 3/10/94, 4/4/94, 5/2/94, 5/31/94, 6/23/94, 7/8/94 and 8/28/94

Joint Exhibit 4: Deposition transcript of Kuhrt Wieneke, M.D., dated April 12, 1995

Joint Exhibit 5: Interrogatory Answers of Lisa Gilbeau dated March 8, 1995, Windham Superior Court, Docket No. S509-11-94 WmC, Lisa and Danny Gilbeau v. The Golub Corporation d/b/a Price Chopper Supermarkets

Defendant's Exhibit A: Craig Chartrand's report regarding vocational rehabilitation dated June 27,1994.

FINDINGS OF FACT

1. The stipulations are true and adopted as evidence, and the exhibits listed above are admitted into evidence without objection.

2. The claimant was injured in the course of her work at CEPCO, Inc., on April 19, 1993. She treated conservatively for her injury up to the time of her accident at Price Chopper on July 20, 1993. She made one attempt to return to work in May, with the advice of her doctor, and was unsuccessful because of increased pain.

3. Mary S. Moller was in June of 1993 a senior rehabilitation nurse for CNA. She became involved in cases over 60 days old to evaluate on-going medical care. She was referred to Lisa Gilbeau by Peg Phelps, the claims representative on this case. Ms. Moller met with the claimant for the first time on June 9, 1993.

4. At the time of Ms. Moller's assignment to this case, the claimant was treating with Dr. Elizabeth Woodcock, a chiropractor. The claimant's report to Dr. Woodcock indicated pain in her left shoulder and arm, low back pain and headache at the base of the skull. When Ms. Moller met the claimant for the first time, Dr. Kuhrt Wieneke had begun to treat the claimant. The claimant's complaints to Dr. Wieneke included neck and shoulder girdle pain, a stiff neck, posterior occipital headache and interscapular pain.

5. While participating in conservative care with Dr. Wieneke, the claimant fell in the Price Chopper, striking her head forcefully on the ground. She was knocked unconscious for some time, and then was transported to Brattleboro Memorial Hospital. In the emergency room, she apparently reported that "she slipped on some water and fell, injuring her head, neck and lower back."

6. Prior to the fall at the Price Chopper, Dr. Wieneke had determined that the claimant had a "smallish disc rupture which does not appear surgical to me. She continues with frontal headaches and has had little, if any relief." There was an effort on-going at that time to return the claimant to light duty work again. Ms. Moller testified that it was not unreasonable for the claimant to make the effort to return to work at that time.

7. Dr. Wieneke's note of July 21, 1993, indicates that the claimant reported that she had fallen backwards and that she had numbness in both her upper and lower extremities. He referred her to a neurologist. On his next visit with her, he noted that she was worse, with a Philadelphia collar, described as a stiff collar, unlike the traditional off-white soft collar which is commonly seen.

8. Ms. Moller visited the claimant at her home on July 30, 1993. She had had a call from the claimant's husband on July 21, 1993, reporting the fall in the store, and that the claimant had returned to the hospital because of dizziness. She observed the claimant to be "wearing a hard cervical neck brace and appeared to be in pain." Ms. Moller's testimony that she was unaware that the Price Chopper injury involved the same areas of injury as the work-related claim is not credible. She knew that the claimant was claiming neck pain and cervical strain prior to the Price Chopper incident, and then observed the claimant in a hard cervical collar after the injury. The material change in the claimant's condition, from light duty capacity to near complete incapacitation, could not have failed to make an impression on the person charged with evaluating the medical care received by the claimant.

9. After conservative care for several months, the claimant underwent surgery on her spine, involving a disc excision and cervical fusion with bone graft. Dr. Wieneke opined that neither injury in and of itself would have warranted surgery, but that the combination of the two injuries led to the necessity for the operation. He further stated that the permanency should be allocated evenly between the two injuries.

10. The claimant was seen by Dr. Raymond D. Pierson for an independent medical evaluation prior to the surgery. He determined that 75% of the permanency was attributable to the second, Price Chopper injury, while 25% was caused by the original insult to her back. He further indicated skepticism about the efficacy of surgery because of what he described as "a significant component of symptom enhancement on her part."

11. Since the surgery on May 23, 1994, the claimant has been unable to return to work. She continues to suffer headaches, and holds her left arm in a guarded position. On November 8, 1994, Dr. Wieneke released her to light to medium duty work, with lifting restrictions, although he determined that she was not at an end result yet.

12. Ms. Moller testified that she was unaware of the connection between the ongoing disability and the second injury. She spoke with Dr. Wieneke on more than one occasion but she never saw his notes. All medical reports went to the claims adjuster, and Ms. Moller was given the substance of the reports over the phone. It strains credulity to understand how one can effectively evaluate ongoing medical care, as Ms. Muller testified was her job, if one never sees the medical notes of the treating physician. Moreover, the notes of Dr. Wieneke indicate that he had referred the claimant to a neurologist for further treatment. There is no indication of any attempt to get the records of the neurologist to evaluate his treatment and to make an independent determination of the relationship between his treatment and the original or second accident.

13. Ms. Moller testified that she requested an independent evaluation in the spring of 1994 because she was unsure as to which injuries were work related and which were not. On April 19, 1994, the claimant was seen by Dr. Raymond D. Pierson in Northampton, Massachusetts, for an insurance medical examination. Based on his report, on May 10, 1994, the insurer through Peg Phelps filed a Form 27 with the Department, with notice of discontinuance of payments due to the intervening accident of July 20, 1993. Dr. Pierson's report was attached to the Form 27 as the basis for the discontinuance.

14. Ms. Gilbeau testified that she had received a bonus in February that was

not included in her wage statement. According to the employer, the amount of the bonus was $1,076.50, which was not included in the wage statement filed with the Department. The employer asserts that there was an overpayment of benefits after the discontinuance of May 10, 1994, of $1,481.27.

15. The claimant, through her attorney, filed an affidavit with a motion for attorney's fees and costs indicating that the attorney has spent in excess of 44 hours in preparation of the case and the paralegal has spent in excess of 42 hours on this case. Costs are reported to be $251.95 for mileage and Federal Express charges. Based on these numbers, the claim is for 20% of the benefits awarded in this case, not to exceed $3,000.00, as required by Rule 10 of Processes and Procedure for Claims under the Vermont Workers' Compensation and Occupational Disease Acts.

FINDINGS OF LAW AND 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. An injury arises out of and in the course of the employment when it occurs in the course of it and is the proximate result of the employment. Rae v. Green Mountain Boys Camp, 122 Vt. 437 (1961). The fact that an intervening incident has occurred that impacts on the injury creates in the claimant the burden of proving that the intervening incident was either caused by the original incident or was irrelevant to any further period of disability in order to continue compensation. "[O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause." Larson, Workmen's Compensation Law, §13.11(a). Because there is no evidence that the progression of the claimant's work-related injury was accelerated or aggravated by the nonindustrial accident, the logical conclusion is that the original injury is no longer compensable.

3. 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. Berno's Inc., 137 Vt. 393 (1979). Moreover, the burden is on the claimant to prove the extent and character of her entitlement and disability. See, e.g., Lapan, supra.

4. 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).

5. The claimant fails in her claim here because "but for" the fall at the Price Chopper, she would not have needed surgery and further therapy, and she would have returned at least on a trial basis to light duty work. Her permanency, if any, from the work-related injury is not susceptible of discovery or ascertaining. Notwithstanding the efforts of both of the doctors

who did permanency ratings, there is nothing in the record from which one could say to a reasonable degree of medical certainty what the consequences of the work-related injury would be absent the intervening nonindustrial accident. See, e.g., Morgan v. C&S Wholesale Grocer, Opinion # 24-93WC. In Morgan, the claimant suffered injuries in a car accident that terminated her rights to further benefits under the Workers' Compensation Act. She, like the claimant here, was near the end of her treatment and had reached a point where permanency would in all likelihood have been addressed shortly. Nonetheless, she was denied benefits because of the substantial intervening accident.

6. The employer seeks a return of payments made between the date of the intervening accident and the filing of the Form 27 on the ground that the claimant's treating physician never indicated that her on-going medical problems were the result of the intervening accident and not the work-related accident. It is alleged that the claimant reaped a benefit from the failure of Dr. Wieneke to disclose the full extent of the claimant's injury from the fall at Price Chopper. First, this strains credulity since the insurer's own expert had the opportunity to view the claimant before and shortly after the intervening accident and could make the determination on her own of the aggravating nature of the second accident. Moreover, the claims adjuster had Dr. Wieneke's records which reflect that the claimant was worse after the accident and that she, for the first time, needed the services of a neurologist. Secondly, there is no evidence of fraud from which I can find that the regular rules regarding Form 27s should be placed in abeyance. Pursuant to Rule 18 of Processes and Procedure for Claims under the Vermont Workers' Compensation and Occupational Disease Acts, which was the operative rule at the time of the adjusting of this claim, "[u]nless the claimant has successfully returned to work, temporary disability compensation shall not be terminated until a Notice of Intention to Discontinue Payments (Form 27), adequately supported by evidence, is received by both the Commissioner and the claimant." (emphasis added.) This is mandatory language, and the insurer cannot prevail if it is in noncompliance.

7. The claimant argues that the insurer's signing of a Form 21, Agreement for Temporary Total Disability Compensation, on April 29, 1994, bars the insurer from claiming that its liability terminated some eight months earlier when the claimant fell in Price Chopper. This misreads the substance of the Form 21, which merely establishes the claimant's entitlement to compensation during the period of total disability. As a matter of law given the above findings, the claimant's total disability from the accident at CEPCO ended on July 20, 1993, when she fell in Price Chopper. The fact that the Department of Labor and Industry requires the filing of a Form 21 prior to allowing for a discontinuance of benefits as a matter of form cannot change the substantive rule, and cannot be held against an employer.

8. I find that the insurer overpaid by the sum of $1,481.27 after the date of discontinuance. However, the claimant was also underpaid during the period in which she was entitled to compensation because of the insurer's failure to include the bonus she received in calculating her benefit amount. If, after recalculation, it is determined that the claimant should have received less than $1,481.27 more in the period from the date of injury to the intervening accident on July 20, 1993, then no additional payments will be due from the insurer. If, however, the underpayment from April 19, 1993, to July 20, 1993, exceeds $1,481.27, then the insurer will be responsible for that difference.

ORDER

Based on the above findings of fact and conclusions of law, it is ordered:

1. That the employer, or its insurer, recalculate the benefits payable to the claimant for the period from April 19, 1993, until July 20, 1993, and pay to the claimant any amount above $1,481.27 that may be owing to her; and

2. That the balance of the claimant's claim be and hereby is denied.

DATED at Montpelier, Vermont, this ____ day of May , 1995.

_____
Mary S. Hooper
Commissioner