Catani v. A.J. Eckert Co. (May 17, 1995)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRIES

David Catani	*)*	*File #: D-17928*
	)	
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	
	)	*For: Mary S. Hooper*
A.J. Eckert Co.	*)*	*Commissioner*
	)	
	)	*Opinion # 28-95WC*

Decision on Claimant's Motion for Summary Judgment

APPEARANCES

Geoffrey W. Crawford, Esq., for the claimant
Christopher J. McVeigh, Esq., for the defendant

ISSUE

Whether there are substantial facts in dispute, and, if not, whether the claimant is entitled to recover as a matter of law.

PROCEDURAL MATTERS

The claimant was receiving total temporary disability compensation pursuant to an agreement with the insurance carrier for the employer without any difficulty until November 15, 1993, at which time the carrier filed a Form 27, Notice to Commissioner and Employee of Intention to Discontinue Payments, supported by a medical report dated December 8, 1992, that estimated that claimant would be at a medical end result several months hence. Thereafter, the claimant's attorney wrote to the adjuster on the case, and apparently had a telephone conversation with her also. In the meantime, the Department did not act on the Form 27. The adjuster, Peg Phelps, wrote a letter to the claimant's attorney, representing that she would contact Dr. Rudolph, upon whose opinion she had relied in filing the Form 27, to see if he would "state that Mr. Catani was at end result on February 8, 1992 . . ." Failing such a statement, she intended to have the claimant seen for a new exam for a permanency rating. Nothing more was done by either party until June 29, 1994, when Ms. Phelps sent the claimant a letter indicating that his permanency benefit was about to end. This triggered a request for review from the claimant to the Department, which then rejected the Form 27 filed in November of 1993 because it was not adequately supported. The Department on September 8, 1994, issued an interim order that the carrier reinstate temporary total benefits as of November 15, 1993, and to continue those payments until Mr. Catani reached a medical end result or returned to work, whichever occurred first.

DISPUTED AND UNDISPUTED FACTS

A. The parties agree to the following facts:

1. David Catani was injured on February 10, 1991, while employed by A.J. Eckert as a skilled welder and pipefitter. He suffered an injury to his left arm which has required surgery and other treatment.

2. A.J. Eckert's workers' compensation carrier, CNA, accepted Mr. Catani's claim as compensable and commenced paying him temporary total disability compensation on or about February 10, 1991. He has also received medical benefits without any dispute.

3. On April 16, 1992, the Department of Labor and Industry approved an IWRP agreed to by CNA and Mr. Catani. The IWRP provided for a two year vocational rehabilitation program at Keene State College. Mr. Catani would attend Keene State on a full-time basis and graduate with an associate's degree in mechanical drafting. Mr. Catani commenced his studies in the spring of 1992 with some remedial work in Math and English. He commenced his full-time studies in the fall of 1992 and graduated on schedule in the spring of 1994.

4. On December 8, 1992, at CNA's request, Mr. Catani attended an IME exam with Leonard Rudolph, M.D. With regard to medical end result, Dr. Rudolph wrote,

> *We feel that the patient has still some time for continued improvement as far as his strength is concerned, and we would encourage him to continue with muscle strengthening program. We also suggested he continue with a vocational rehabilitation training. Overall, we feel that the patient has restored full ROM to his wrists and arm. He does have some weakness due in part to anticipation of symptoms from the RSD as well as from disuse muscle loss. If the patient wished to be considered at medical end point, certainly 2 years from onset and surgery would be sufficient time to allow for a determination of permanent impairment.*
>
> *If the patient wished to continue with treatments for another 4-6 months, then that should be respected, given the gradual persisting improvement.*

Dr. Rudolph assessed a ten percent permanent impairment to the left upper extremity.

5. No action was taken regarding the Rudolph report until November 15, 1993, when CNA filed a Form 27 seeking to discontinue payment of temporary total disability compensation on the basis of the report. The claimant's attorney objected by letter dated November 17, 1993, on the ground that the Rudolph report was insufficient to support the termination of temporary total disability compensation. A copy of this letter was sent to the Department of Labor and Industry.

6. By letter dated November 29, 1993, to the claimant's attorney, CNA's adjuster Peg Phelps advised that she would seek further information from Dr. Rudolph regarding the issue of medical end result. Ms. Phelps wrote,

> *Thank you for speaking with me recently concerning permanent partial disability benefits to Mr. Catani. This is to confirm that I have agreed*

that if Dr. Rudolph does not state that Mr. Catani was at end result on February 8, 1992, I will revert all permanency payments made since November 15, 1993, to temporary total benefits.

I will also set up a new exam for a permanency rating if the doctor does not agree that he was at end result in December of 1992.

No further statement or information was ever supplied by CNA from Dr. Rudolph.

7. On June 29, 1994, CNA wrote to the claimant's attorney and stated,

Shortly you will receive your final check for permanency. Your benefits run out on July 4, 1994.

8. After an exchange of correspondence and a conference, the Department of Labor and Industry ordered the reinstatement of temporary total disability compensation as of November 15, 1993.

9. On November 29, 1994, Mr. Catani was seen for an IME by Raymond Pierson, M.D. Dr. Pierson found him to be at a medical end result and assessed a 17% permanent partial disability to the left upper extremity. The claimant does not contest Dr. Pierson's finding of medical end result or his assessment of permanent partial disability.

10. On December 15, 1994, CNA issued a Form 27, Notice of Intention to Discontinue, on the basis of the Pierson report. This was followed by a Form 22 providing for 17% permanent partial disability compensation which was prepared and signed by CNA's adjuster on December 22, 1994, and by the claimant on December 30, 1994. The Department of Labor and Industry approved the Form 22 on January 31, 1995. This form states that temporary total disability compensation ended on 12/15/94 and that permanent partial disability compensation shall be paid for 36.5 weeks thereafter.

11. The claimant returned to employment as a mechanical engineer on January 10, 1995.

B. The employer, through its attorney, indicates that the following facts are in dispute:

12. There is a dispute as to whether the medical evidence conclusively supports the claimant's assertion that he suffers from reflex sympathy dystrophy.

13. The IWRP to which CNA and Mr. Catani agreed and which the Department approved, provided that Mr. Catani agreed "to use his Permanent Partial Disability and Temporary Total Disability Monies toward maintenance of his home and family during his schooling."

14. After Dr. Rudolph's December 8, 1992, report, Mr. Catani did not continue medical treatments for another four to six months as that evaluation suggested but only treated with his treating physician on January 16, 1993. If there was any further treatment, CNA does not have any documentation thereof, until July of 1993.

15. According to Peg Phelps of CNA, she was contacted by the claimant's

attorney after he received Dr. Rudolph's report, and he requested that treatment continue until April 10, 1993; he did not "challenge" Dr. Rudolph's conclusions regarding end medical results.

16. The Department of Labor and Industry took no action on the Form 27 filed by CNA until August 26, 1994, when the Form 27 was rejected as unsupported.

FINDINGS AND RULINGS

1. In reaching a decision on a Motion for Summary Judgment, the trier of fact must accept the facts in the light most favorable to the non-moving party. See, e.g., Pierce v. Riggs, 149 Vt. 136 (1987).

2. The only significant fact in this case is the signing and acceptance of the Form 22, Agreement for Permanent Partial Disability. There is no dispute about the document in question, as to its terms or its signing. It is dispositive of all issues contained in it by its very terms. Neither party preserved any issues by communication with the Department of Labor and Industry concurrent with the execution of the agreement, and hence any claim of irregularity prior to the signing of the Form 22 is waived. "Once executed by the parties and approved by the Division, these forms shall become binding agreements and absent evidence of fraud or material mistake of fact the parties shall be deemed to have waived their right to contest the material portions thereof." Rule 17, Processes and Procedure for Claims under the Vermont Workers' Compensation and Occupational Disease Acts.

3. When the parties to a claim have begun the process of resolving the claim and then file a Form 22 settlement agreement, this Department will accept that filing as a full and final determination of the dispute between the parties, absent compelling evidence of error. To rule otherwise would open the floodgates of litigation and result in a chaotic loss of certainty in the procedures of this Department. There is no question that the insurer could have preserved its right to contest this case fully by the simple expediency of asking the Department to accept the Form 22 provisionally, subject to the outcome of the formal hearing process.

4. The defendant's argument that CNA filed the Form 22 only because the workers' compensation rules require that a Form 22 be filed whenever a claimant is deemed to have suffered a permanent partial impairment is without merit. A Form 22 must be filed when the parties are in agreement concerning the substance of the Form 22. Workers's Compensation and Occupational Disease Rules 3(f) and 3(h) make clear that an appropriate form is to be filed when there is agreement; absent agreement, the employer/insurer is to promptly commence payment of the amount(s) it believes to be correct, pending a determination by the commissioner. No form need be filed. Workers's Compensation and Occupational Disease Rule 17 does not assist defendant either. First, that rule is primarily a description of the various forms and the appropriate times for their use. Second, the rule specifically makes plain that the forms fulfill the requirement for a memorandum of the agreement between the parties as required by 21 V.S.A. §662(a); no filing is required in the absence of such an agreement, see 21 V.S.A. §662(b).

Defendant's argument is also disingenuous. If it truly believed that a Form 22 was required to be filed by the rule, even where no agreement existed, why did it not attempt to file one when it filed the first Form 27? Either it

did not believe filing was required, or recognized that the first Form 27 was unsubstantiated, or an acknowledged that the letter of Attorney Crawford objecting to the original Form 27 along with the response by Ms. Phelps operated as a withdrawal of that Form 27.

5. I find that the November 29, 1993, letter from CNA's adjuster to attorney Crawford operated as a withdrawal of the first Form 27 notice of discontinuance. It specifically informed claimant's attorney that all payments would be classified as temporary total disability compensation.

6. Even if the insurer did not intend to withdraw the original Form 27, as a matter of law the Form 27 filed on November 15, 1993, was not adequately supported by evidence. The sole evidence in support of the Form 27 was the report of Dr. Rudolph, dated some eleven months earlier, which did not even say that the claimant was at an end medical result. The language used by Dr. Rudolph was prospective and speculative, depending on what the claimant was going to do and what he then wanted. "If the patient wished to be considered at medical end point, certainly 2 years from onset and surgery would be sufficient time to allow for a determination of permanent impairment. If the patient wished to continue with treatments for another 4-6 months, then that should be respected, given the gradual persisting improvement." It is clear that the patient did not wish to be considered at "medical end point" nor that he was willing to forego further medical treatment.

7. Moreover, the use of a stale medical report to support a termination of benefits is strongly disapproved. I can see no circumstance under which an eleven month old speculative medical report, alone would support a Form 27.

8. This case is not assisted by the failure of the CNA to send copies of its correspondence to the Department. Until the pretrial conference of this matter, the Department was unaware of the letter sent by Peg Phelps to Attorney Crawford on November 29, 1993, in response to his letter of November 15, 1993, which had been sent to the Department. Only with the defendant's opposition to the instant motion did the Department receive confirmation that CNA had requested additional information from Dr. Rudolph. There is nothing in the Department's file nor attached to either filing on this motion that indicates that Dr. Rudolph responded to the request for information from Ms. Phelps. Even taking all of this correspondence in the light most favorable to the insurer, I cannot find that the insurer is entitled to ignore the representations admittedly made by its agent upon which the claimant clearly relied. There is, however, no need to reach the issue of waiver or estoppel because of the failure of the Form 27 on independent grounds.

9. Defendant's insistence on pursuing this matter to a hearing after the filing of the Form 22, in light of the clear failure of the original Form 27, caused unnecessary delay to the claimant in receiving his just compensation, and required the needless use of the attorney's time to resolve this matter. The claimant is therefore entitled to an award of attorney's fees, as he has prevailed in this matter. By letters to this department dated December 15, 1994, and March 27, 1995, the claimant through his attorney presented evidence of a fee agreement in which the claimant was to pay 20% of his recovery for permanent partial disability as well as expenses. The permanency in this case is 17% of 215 weeks, or $21,710.70. Mr. Crawford also supplied a statement of hours spent prior to the filing of the Form 22, totalling 53.55 hours. Since that time he has undoubtedly spent an additional 10 hours, at a minimum, because of the dispute arising after the signing of the

Form 22. In either case, I find that he is entitled to maximum attorney's fees in the amount of $3,000.00. There is an itemization of expenses totalling $246.11 which I find to be reasonable and proper.

ORDER

Based on the above findings and rulings, it is ordered:

1. That the claimant's Motion for Summary Judgment is hereby granted; and

2. That the parties comply with the terms of the Form 22 approved by this Department on January 31, 1995; and

3. That the employer or its insurer pay to the attorney for the claimant the sum of $3,000.00 for fees in this case and $246.11 for expenses.

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

_____
Mary S. Hooper
Commissioner