Grover v. Crescent Manor Nursing Home (August2, 1995)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRIES

Margaret Grover *File #: E-23313*
By: Barbara H. Alsop
v. *Hearing Officer*
For: Mary S. Hooper
Crescent Manor Nursing Home *Commissioner*
Opinion #:32-95WC

Hearing held at Montpelier, Vermont, on May 9, 1995.

APPEARANCES

Sam W. Mason, Esq., for the claimant
Keith J. Kasper, Esq., for the employer

ISSUES

1. Whether the claimant is entitled to temporary total disability benefits for the period from March 17, 1993, to April 26, 1993.

2. What is the appropriate measure for permanency in this case?

THE CLAIM

1. Temporary total disability compensation pursuant to 21 V.S.A. §642 from March 27, 1993 to April 26, 1993 and temporary partial disability from October 31, 1993, to February 22, 1994.

2. Permanent partial disability compensation pursuant to 21 V.S.A. §648 for 30 % of the spine.

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

STIPULATIONS

1. On June 18, 1992, the claimant suffered a work-related injury

arising out of and in the course of her employment.

2. At that date, she was an employee within the meaning of the Workers' Compensation Act.

3. Crescent Manor Nursing Home was an employer within the meaning of the Workers' Compensation Act on that date.

4. On the date of the injury, Liberty Mutual was the worker's compensation insurance carrier for the employer.

5. Her average weekly wage at the time of the injury was $243.67 resulting in temporary total disability payment of $204.00.

6. Claimant seeks temporary total disability compensation from March 27, 1993, through April 27, 1993, and temporary partial disability compensation from October 31, 1993, until February 27, 1994. The degree of permanent partial impairment is also disputed.

EXHIBITS

Joint Exhibit 1 Medical records, 69 pages
Defendant's Exhibit A Letter from Kuhrt Wieneke, M.D., to Attorney Keith Kasper, and Physical Therapy note dated 3/4/93
Defendant's Exhibit B Curriculum Vitae of Kuhrt Wieneke, M.D.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations are true and the exhibits are admitted into evidence.

2. After the claimant's injury, she began to treat with Dr. Edwards, after an initial evaluation by Dr. Scattergood in Bennington. Dr. Edwards continues to treat the claimant to the present time.

3. The claimant is a poor historian, which is not, in and of itself, fatal to her claim. See, e.g., Donald Clark v. U.S. Quarried Slate Products, Opinion #8-95WC. Significantly, the claimant recognized her memory difficulties and kept a notebook to allow her the ability of refreshing her memory.

4. The nub of this case arises from the dispute over the appropriate measure of permanent partial disability compensation. However, there is an issue raised by her failure to obtain light duty work from March 27 through April 27, 1993.

5. On or about March 22, 1993, the insurer indicated by means of a Form 27 an intent to discontinue payments to the claimant because she had been found to be capable of light duty work, but had made no effort to return to her employer, who had light duty work available to her. Attached to the Form 22 was a copy of a letter also dated March 22, 1993, from the adjuster to the claimant. Judicial notice is taken of this letter.

6. In the letter, the adjuster wrote as follows:

It is the opinion of Dr. Weineke that you have the physical capacity to assume a light duty position, including folding laundry. Crescent Manor has such a position beginning the week of March 22, 1993. Because of your reluctance to accept this position your lost wage benefits will be terminated. You have indicated to me that Dr. Edwards does not feel that you are even capable of light duty. However, there is no medical documentation substantiating your allegation. Thus, unless there is medical evidence disputing Dr. Wieneke's opinion with respect to light duty, or you make a reasonable effort to assume this light duty position, the discontinuance will remain in effect.

....I have written a letter to Dr. Edwards requesting specific working restrictions for light duty.

It would have been better practice to await Dr. Edwards' response prior to issuing the Form 27, particularly where, as here, the letter seems to indicate that such deference will be given to Dr. Edwards' opinion.

7. The claimant testified that she was not allowed by the employer to return to work without a written release from her doctor, and that she had to wait until April 19, 1993, when she saw Dr. Edwards, who indeed gave her a release to work. Thereafter, she attempted to return to work in the light duty capacity the employer had made available to her. However, she was unable to do the work that was set aside for her. The employer worked with her to find work that she could do, and she did not lose any time after her return to work in April of 1993 until further deterioration caused her to start losing time on October 31, 1993.

8. I find that the claimant had a light duty work capacity as of March 22, 1993, and that she wrongfully failed to return to work at that time in spite of the fact that her employer had light duty work available to her.

9. The issue of permanency is complicated by the failure of Dr. Wieneke to prepare his original letters regarding permanency with care. Dr. Wieneke has substantial experience in workers' compensation claims in Vermont and is well aware that, prior to April 1, 1995, all claims of injury to a specific body part had to be assessed based on the loss of function of that specific part, not as a whole person measurement. Notwithstanding this requirement, Dr. Wieneke wrote his letters as if he had assessed the specific body part, but in fact he had assessed them on the whole person scale, without conversion. This error on his part compounded the disagreement between the parties and was, in large measure, responsible for the prolonging of this claim.

10. At the time of the original informal conference in this case, the parties' disagreement was based on a permanency evaluation by Dr. Edwards of 15%, while Dr. Wieneke's rating was 7%. However, the 7% rating by Dr. Wieneke was a whole person rating, as he testified at hearing. That rating, when converted, resulted in a rating of 11% to 12%. This variation would have been minimal, and it is likely that an agreement could have been reached. When Dr. Wieneke later evaluated the claimant, his whole person figure increased to 9%, which translates into a converted figure of 14% to 16%, and which appears to confirm the original rating by Dr. Edwards. However, by the time Dr. Wieneke reached this conclusion, Dr. Edwards had reevaluated the claimant and reached an opinion of 30% permanency. And so the battle was joined again.

11. The claimant has treated almost exclusively with Dr. Edwards, except for surgical consultations with Dr. Block. Departmental regulations in effect at the time of the claimant's injury and treatment list as one of the factors to be considered in evaluating conflicting medical opinions is "[w]hether the care provider has gained special knowledge or insight into the claimant's condition and capacities as a result of his or her treatment of the claimant." Rule 14, Processes and Procedure for Claims under the Vermont Workers' Compensation and Occupational Disease Acts. Dr. Edward's

notes of his treatment with the claimant give some insight into the nature of her problem and the difficulties in bringing her to an end medical result.

12. Dr. Edwards' initial estimate was that the claimant's condition would normalize within three months of the original date of injury, on June 18, 1992. It appears that his estimate was optimistic. The claimant did not reach a light duty capacity until the spring of 1993, when the events referred to above in Findings #5 through 8 occurred. Treatment during this time included medication, physical therapy and home exercise programs. The claimant was seen by Dr. Wieneke in February of 1993, when he confirmed that she needed further treatment but anticipated that she would be at an end medical result after 90 days at work.

13. The claimant returned to work on April 26, 1993, so that 90 days would have taken her to late July by Dr. Wieneke's estimation. On July 19, the claimant was seen by Dr. Edwards, who reported that she was tolerating light duty work with only a slight increase in symptoms, and suggested work hardening with a 30 day date for unrestricted release.

14. When Dr. Edwards saw the claimant in August, her condition had worsened, until by the last week of August, she was again returned to light duty work, with a recommendation for retraining for permanent light duty work. In late September, Dr. Edwards indicated that she was at an end medical result with a 15% permanent partial disability and a long term goal of light duty work. I find this evidence to be credible.

15. Dr. Wieneke saw the claimant again in October, and reached his conclusion that translates to 11% to 12% rating for the spine and lower extremity. One of the bases for his conclusion was that there was minimal degenerative change in the claimant's back.

16. The claimant returned to Dr. Edwards in December with increased pain and reduced working hours, which had commenced on or about October 31. Dr. Edwards at that time stated that "[i]t was premature to call the patient at a medical end point on September 28, 1993. Due to increased symptomology and need for repeat work up and consideration of surgery, will defer on medical end point at this time." Dr. Wieneke saw the claimant and wrote his findings in a letter dated March 15, 1994. Although he stated

that the claimant's recent lumbar myelogram and augmented CT scan "provide[] no additional useful information beyond what we knew last fall," he also found moderate rather than minimal degenerative change in the claimant's back, and an additional 2% permanent partial impairment.

17. Finally, there are indications in the record that the claimant needs permanent light duty work and that she has received some benefits for retraining. I find that such retraining is appropriate, and that the claimant is entitled to vocational rehabilitation to allow her to find alternative employment of a light duty nature.

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. Berno's Inc., 137 Vt. 393 (1979).

3. Both of the doctors evaluating the claimant had the opportunity to perform two separate ratings of her condition. Both found that she had deteriorated between the first pair of evaluations and the second, although Dr. Wieneke attempted to argue that there was really no change, or at most a minimal one. None of the reports is particularly persuasive, and the only one to which I can give significant credence is Dr. Edwards' first report. However, I find that the claimant has deteriorated since the time of that report, and some measure must be found for that further deterioration.

4. The reasons for the failure of the other three reports are as follows: Dr. Wieneke's reports, in spite of his substantial exposure to Vermont rules, are deceptive in that they indicate that the permanency evaluations were made with regard to specific body parts when in fact they were made based on whole person calculations. This has led to unnecessary litigation, since early proper evaluation would have led to early

resolution of this claim. Moreover, Dr. Wieneke is disingenuous when he writes his second report as if there was no actual change in the claimant's condition, when there patently was. He sloughs over his 2% increase in her spinal impairment, which translates into a 3% to 5% increase after conversion. This is not a trivial matter. On the other hand, the increase does appear to be a valid measure of the change in the claimant's condition.

5. Dr. Edward's second evaluation is not accepted because he simply does not give any objective clinical basis for the new number. This is a case that suffers because of the claimant's failure to call the treating physician as a witness. In person or by telephone, the doctor could have been questioned closely about the basis of his decision, and the lack in his reports could possibly have been supplied by his testimony. Failing that, there is no way that I can find that his report reflects the more probable hypothesis. See, e.g., Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).

6. I find that the claimant suffered, as of September of 1993, a 15% impairment of her spine and lower extremity. Thereafter, her condition deteriorated, and she suffered a further 4% impairment of her spine and lower extremity, for a total of 19%.

7. I further find that as of October 31, 1993, the claimant was unable to work full-time because of the further deterioration in her condition. Normally, this finding would allow the claimant to receive temporary partial disability compensation for the period of her partial disability. However, there was no evidence presented as to the extent of her partial disability, nor was there evidence as to the reason for her disability. There is some evidence in the record that suggests that she worked reduced hours while attending school. Under all of these circumstances, I cannot say that the claimant has met her burden of proof either as to the nature of her partial disability nor of its extent, and her claim for temporary partial disability is denied.

8. The claimant has moved for attorney's fees, and has provided the Department with a copy of her fee agreement with her attorney, as well as an itemization of his hours spent on this case. The claimant is not responsible for any delay in the proceedings, and has prevailed at least to some extent. I find that the defendant is responsible for delay in failing to present its permanency rating in the manner prescribed by this Department, and that any time spent by the claimant's attorney after October 15, 1993, is to be paid by the defendant at the rate of $35.00 an hour. The claimant's filing does not include the time spent at the hearing

of this matter nor on the preparation of proposed findings and rulings, and therefore, fees cannot be awarded for those times. The attorney has spent 35.25 hours that are payable, for an award of $1233.75.

ORDER

Based on the above findings and rulings, it is hereby ordered that Liberty Mutual Insurance Company, or in its default the Crescent Manor Nursing Home, pay:

1. To the claimant permanent partial disability compensation in the amount of 19% of her spine and lower extremity;

2. To the claimant's attorney, the amount of $1233.75 in fees; and

3. To the claimant, such other medical benefits and vocational rehabilitation benefits to which she is entitled under the terms of the Workers' Compensation Act.

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

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Mary S. Hooper
Commissioner