Abbott v. Bombardier, Inc. (March 13, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Yolanda Abbott	*)*	*File #: G-22233*
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	*For: Mary S. Hooper*
Bombardier, Inc.	*)*	*Commissioner*
	)	
	)	*Opinion #: 10-96WC*

Record closed on February 6, 1996.

APPEARANCES

Keith J. Kasper, Esq., for Liberty Mutual Insurance Company
John W. Valente, Esq., for CIGNA Corporation

ISSUE

Whether CIGNA is entitled to reimbursement from Liberty Mutual for benefits paid to the claimant after May 2, 1994.

THE CLAIM

1. Reimbursement of $39,582.66 from Liberty Mutual to CIGNA.

STIPULATIONS

1. The parties seek the Department of Labor and Industry s determination as to whether Claimant s disability and corresponding indemnity and medical benefits subsequent to May 2, 1994, constituted an aggravation or a recurrence of her preexisting compensable injury of January 20, 1990.

2. Yolanda Abbott was an employee within the meaning of the Vermont Workers Compensation Act at all relevant times.

3. Bombardier Corporation was an employer within the meaning of the Act at all relevant times.

4. Liberty Mutual was the workers compensation insurance carrier for Bombardier Corporation on the date of the initial injury on January 20, 1990.

5. CIGNA was the workers compensation insurance carrier for Bombardier Corporation in May of 1994.

6. Claimant has received all appropriate workers compensation benefits and CIGNA seeks reimbursement from Liberty Mutual for all benefits paid to Claimant subsequent to May 2, 1994, in the amount of $39,582.66.

7. The parties agree that this matter can be resolved based upon the Joint Medical Exhibits, attached as Joint Exhibit Number 1; Claimant s Deposition, attached as Joint Exhibit Number 2; all applicable forms on file with the Department of Labor and Industry of which the Department may take judicial notice; and the proposed Findings of Fact and Conclusions of Law of the respective parties.

EXHIBITS

1.	*Joint Exhibit 1*	*Medical records exhibit*
2.	*Joint Exhibit 2*	*Deposition of Yolanda Abbott*

FINDINGS OF FACT

1. The above stipulations are accepted as true and the exhibits referenced therein are admitted into evidence. Notice is taken of all forms filed with the Department with regard to this claim.

2. The claimant was first injured in January of 1989, when she hurt her back pulling wire cable from a large reel. She had experienced pain during the day and had reported it to her supervisor, but continued to work until she felt a sudden and acute onset of pain accompanied by a snapping noise in her back. She fell to her knees from the pain, and was later transported to a hospital for x-rays and emergency care.

3. She began to treat with Dr. John Peterson, an osteopath, who attempted to help her with non-invasive techniques and physical therapy. When conservative care proved unavailing over a period of about a year, the employer filed a first report of injury in January of 1990, and the claimant underwent further testing.

4. A CT scan showed degenerative changes in her spine, as well as a possible stenosis. As a result, the claimant was referred to Dr. Nancy Binter, who, on May 4, 1990, performed an L4-5 laminectomy and discectomy and a left L5-S1 foramenotomy. She again went to physical therapy, and ultimately returned to work.

The claimant was found to be at a medical end result in April of 1991, with a 15% permanent impairment to her spine.

5. The claimant s job at Bombardier was changed to a lighter duty job, but she continued to feel some discomfort from her back. The pain progressed, and she returned for further treatment in November of 1991. She underwent another course of physical therapy, and then was referred to the Spine Institute for further evaluation.

6. In June of 1992, the claimant underwent a post-myelogram lumbar CT scan, which showed a vacuum phenomenon at L4-5 with a large central disc herniation, with displacement of both the L5 and S1 nerve roots bilaterally. As a result of these findings, the claimant again underwent surgery on September 18, 1992. She had a bilateral laminectomy at L4-5 with discectomy, and a right L5/S1 foramenotomy.

7. After the second surgery, the claimant again underwent physical therapy. She had a functional capacity evaluation and work hardening program as a result, and returned to work in a position appropriate to her limitations. She was determined to be at an end medical result after the second surgery on May 20, 1993, when Dr. Peterson determined her then permanency of the spine to be 46.5%.

8. The claimant returned to work with Bombardier in May of 1993. She reported that she felt stiff with occasional pain, with which she dealt by taking Tylenol intermittently. She was working in subassembly where she did a number of tasks, like the wiring of switch panels. Whenever any heavy lifting was required, she had one of her coworkers assist her. She never lifted more than 20 pounds, and always had assistance available for her.

9. In March of 1994, after working for about nine months, the claimant noticed that the pain in her back became more frequent, rising to the level of a daily dull ache. She began to have to take more Tylenol throughout the day. She thought that the pain was a little higher than it had been before, but that otherwise it was similar to the pain she had experienced prior to her other surgeries, if less intense.

10. The new pain progressed to the point that the claimant could no longer tolerate work, and she went out again on May 2, 1994. The change in the pain had been a gradual progression until it became intolerable. After a number of medical conferences and

tests, the claimant again underwent surgery on her back on September 21, 1994.

11. The surgeon, Dr. Cordell Gross who had also performed the 1992 surgery, reported that he found no evidence of a recurrent disc at the L4-5 or L5-S1 levels, although he found significant scarring around the nerve root at the operative site. After the surgery, the claimant has reported that she has returned to the same level of functioning that she had when she returned to work after the second surgery, and that she feels pretty good.

12. On November 8, 1994, CIGNA filed with the Department a Form 6, Notice and Application for Hearing, raising the issue of which carrier was responsible for the claimant s benefits arising out of her leaving work on May 2, 1994. Liberty Mutual was put on notice of the claim, and CIGNA continued to adjust the claim while the application for hearing was pending.

13. On February 22, 1995, the claimant was again evaluated by Dr. Peterson, who found that she was at an end medical result from the third surgery with an additional 10% permanency to her spine. Based on that report, CIGNA and the claimant entered into a Form 22, Agreement for Permanent Partial Disability Compensation, which was approved by the Commissioner s designee on March 16, 1995.

CONCLUSIONS OF LAW

1. According to both statute, 21 V.S.A. § 662(c), and case law, Smiel v. Okemo, Opinion No. 10-93WC, the burden of proof in this case is on CIGNA, as the carrier at the time of the most recent report of injury.

2. If the injury of 1994 was an aggravation of the claimant s preexisting condition, then CIGNA is responsible, whereas if it were merely a recurrence, it would be the responsibility of Liberty Mutual.

3. As defined by the Workers Compensation and Occupational Disease Rules, an aggravation means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events while a recurrence means the return of symptoms following a temporary remission. Rules 2(I) and (j). While there has been a plethora of decisions involving these terms, it is still one of the most heavily disputed areas in workers compensation in Vermont.

4. Among the factors that will be considered in evaluating a dispute are the following: 1) whether the claimant has successfully returned to work; 2) whether the claimant had actively treated prior to the second injury and the extent of that treatment; 3) the proximity in time of the two injuries; 4) whether the claimant had been declared at an end medical result; and 5) whether there was a specific new incident as opposed to a gradual worsening of the condition. Jaquish v. Bechtel Construction Company, Opinion No. 30-92WC.

5. An additional factor is whether the later work contributed independently to the final injury, or at least partially precipitated the most recent disability. See, e.g., Griffin v. Blue Seal Feeds, Inc.,Opinion No. 14-94WC.

6. Applying these factors to the instant case, I find that the claimant had a successful return to work after reaching a medical end result and that the claimant sought treatment prior to the most recent departure from work and less than ten months after the finding of end medical result. I find that the time between the two injuries should be measured from the time of the last treatment of the prior injury, and hence there is only a ten month period of time when the claimant was stable, and not symptom free. Finally, I find that there is no evidence that the later work in any way contributed to the need for the third surgery, where the surgical findings are consistent with scarring attributable to the prior two surgeries and not with a new injury to the previously injured area. Accordingly, I find that the claimant suffered a recurrence of her original injury, and Liberty Mutual should properly be charged with the claim.

7. Liberty Mutual also argues that CIGNA is bound by the terms of the Form 22 which it executed and which was accepted by the Department. A Form 22 is binding between the parties to the agreement upon approval by the Commissioner. Catani v. A.J. Eckert, Co., Opinion No. 28-95WC. Liberty Mutual was not a party to the agreement, and hence cannot interpose itself into that commitment. Moreover, as it is the policy of this Department to expedite the handling of claims and to require prompt adjustment of issues outstanding between the claimant and the insurer, in disputes arising under 662© it would be inappropriate to allow form to prevail over substance, when form is mandated by policy. The substance in this case is that the dispute between the carriers required a proceeding separate and apart from resolving the claimant s rights under the Act, and the carrier ordered to adjust the claim did so properly in all material respects.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Liberty Mutual reimburse CIGNA for all benefits paid by CIGNA in the adjustment of this claim.

DATED at Montpelier, Vermont, this 13th day of March 1996.

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Mary S. Hooper
Commissioner