

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Byron Truax)	State File No. L-15273; M-11495
)	
)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: Steve Janson
)	Commissioner
Pelletier Lumber)	
)	Opinion No. 21R-99WC

RULING ON THE PARTIES RESPECTIVE MOTIONS TO RECONSIDER

I. CLAIMANT’S MOTION TO RECONSIDER:

Claimant, by and through his attorney Scott Skinner, Esquire, moves the Commissioner to reconsider a portion of his April 29, 1999 Order. In response, defendant, by and through its attorney, John W. Valente, Esquire, opposes this Motion.

In seeking reconsideration, claimant challenges the temporary total disability compensation (“TTD”) aspect of the Commissioner’s decision. Specifically, although the claimant was awarded TTD for the periods of April 8, 1998 through September 16, 1998 and from February 19, 1999 and continuing, claimant contends that additional compensation should have been paid from September 17, 1998 through December 5, 1999. In support of this assertion, claimant maintains that since defendant did not provide the Rule 18 good faith job search written notice until December 4, 1998, claimant should be entitled to TTD benefits up until that date.

Defendant, in its reply memorandum, disputes the claimant’s argument, particularly his reliance on Rule 18. Since Rule 18 only applies to the termination of TTD compensation, defendant insists that it is inapplicable in this matter because the claimant was not receiving any workers’ compensation benefits. Furthermore, defendant contends that the Department already determined that the claimant failed to meet his burden of establishing entitlement to TTD during the period of September 17, 1998 through December 5, 1999 and, therefore, the Motion to Reconsider must be denied.

The defendant is correct in asserting that the claimant failed to meet his burden. In workers’ compensation cases, the claimant must establish all facts essential to support his claim. *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963). In this case, claimant failed to demonstrate the propriety for the continuation of his TTD benefits. As of September 16, 1998,

as a result of his own doctor's assessment, the claimant was reasonably aware that he was able to return to work in a limited capacity. Since claimant was released to return to work, his entitlement to TTD ceased. *See Roller v. Warren*, 98 Vt. 514 (1925). Therefore, as revealed by the evidence in this case, it is apparent that the claimant failed to satisfy his burden.

Accordingly, claimant's Motion to Reconsider is DENIED.

II. DEFENDANT'S MOTION TO RECONSIDER:

Following the release of the formal opinion of the Commissioner in this case, the defendant also moved for reconsideration of the April 29, 1999 Order, challenging the award of dependency benefits, as well as the sufficiency of the claimant's expert's opinion. Claimant did not file a response to this Motion.

Initially, defendant insists that claimant did not meet his burden of proving that he has three dependents since two of the children with whom he lives are not his biological or adopted children. However, being legally unsound, this argument must fail. Pursuant to 21 V.S.A. §642, an injured employee who is receiving temporary total disability is also entitled to \$10 per week for each dependent child who is unmarried and under 21 years of age. The term "child" is defined by the Workers' Compensation Act to include a stepchild, as well as an adopted child, posthumous child and an acknowledged illegitimate child. 21 V.S.A. §601(2). Since the claimant's testimony during the Hearing adequately established the nature of his relationship to both his biological child, as well as his two stepchildren, the award for dependency benefits is entirely proper.

Defendant also challenges the adequacy of the claimant's expert's causal opinion. Specifically, defendant asserts that Dr. Lapinsky did not proffer his opinion to a reasonable degree of medical certainty. Upon a careful review of the submitted evidence, including the medical records, as well as the deposition testimony, the Department accepted Dr. Lapinsky's opinion, finding ample evidence that the doctor's causal opinion complied with the requisite standard of probability, described by some as reasonable degree of medical certainty.

Therefore, defendant's Motion to Reconsider is DENIED.

Dated at Montpelier, Vermont, this 25th day of May 1999.

Steve Janson
Commissioner