Degraff v. Pizzagalli (04/30/04)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Randy Degraff	)	Opinion No. 14S-04WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Pizzagalli Construction	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. P-00784

APPEARANCES:

William C. Kittel, Esq., for the Claimant
John W. Valente, Esq., for the Defendant

SUPPLEMENTAL RULINGS

Omitted from the March 9, 2004 opinion in this case was a ruling on the claimant's request for attorney fees and costs. Also, in that ruling an erroneous date appeared in the order. This opinion corrects the omission and error.

Date of medical end result

Because I accepted Dr. Mahoney's medical end result determination, the operative date for the discontinuance of temporary total disability on that basis was one year after the May 17, 2000 surgery, therefore May 17, 2001, not 2002 as stated in the order. Therefore, the amended order should read: "Because claimant reached medical end result one year after his surgery, he is entitled to temporary total disability benefits from the time of discontinuance until May 2001 pursuant to 21 V.S.A. § 642. Defendant's obligation to pay these benefits began on the date of discontinuance. Interest, therefore, is due from that date. 21 V.S.A. § 664."

Attorney fees and costs

Under 21 V.S.A. § 678 (a) and Workers' Compensation Rule 10.000, a claimant who prevails is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. Often the right to recover fees for a workers' compensation claimant is an access to justice. See *Fleury v. Kessel/Duff Constr. Co.*, 149 Vt. 360, 364 (1988). In support of this claim, counsel submitted his fee agreement for an hourly rate and evidence of 123.2 hours worked on this case as well

as an accounting for $2291.00 in expenses, of which $1,075.00 is for services of Dr. Davignon.

Claimant succeeded in his claim for additional temporary benefits from the time of discontinuance in the fall of 2000 until May of 2001, plus interest from the date of discontinuance. However, he did not succeed in obtaining a permanency award based on a 20% whole person rating because the rating accepted was the one based on the defense expert's opinion, 7%.

It is due to the efforts of his attorney that this claimant partially prevailed, which justifies a discretionary award of fees in proportion to the success. See *Lyons v. American Flatbread*, Opinion No. 36A-03WC (2003).

One third of the requested fee amount, a fee based on 41 hours at $90.00, is awarded as a fair reflection of overall success. Furthermore, claimant is awarded the costs necessary for the successful aspect of this claim, subject to WC Rule 40. Dr. Davignon's charges are not included in that award because his permanency rating was not accepted.

In sum, claimant reached medical end result on May 17, 2001. He is awarded attorney fees of $3, 690 and costs subject to the restrictions specified above.

Dated at Montpelier, Vermont this 30th day of April 2004.

_____

Michael S. Bertrand
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.

DeGraff v. Pizzagalli Construction (03/09/04)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Randy DeGraff	)	Opinion No. 14-04WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Pizzagalli Construction	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. P-00784

Hearing Held in Montpelier on October 28, 2003
Record Closed on December 3, 2003

APPEARANCES:

William C. Kittell, Esq., for the Claimant
John W. Valente, Esq., for the Defendant

ISSUES:

1. When did claimant reach a medical end result for his work-related injury?

2. To what permanent partial disability benefits is claimant entitled?

EXHIBITS ADMITTED BY STIPULATION:

Joint I: Medical Records

Claimant's 1: Transcript of deposition of Patrick Mahoney, M.D.
Claimant's 2: Transcript of deposition of claimant

FINDINGS OF FACT:

1. Claimant Randy DeGraff was an employee and Pizzagalli Construction his employer within the Workers' Compensation Act.

2. Claimant worked for Pizzagalli from November of 1988 until his injury in 1999.

3. In June of 1999, claimant sustained an injury to his left elbow that arose out of and in the course of his employment with Pizzagalli.

4. As a result of that injury, claimant received temporary total disability benefits until January 19, 2000. At that time, claimant received a payment for permanent partial disability benefits based on a 1% rating.

5. Claimant's elbow did not heal as expected. On May 17, 2000 Dr. Mahoney treated it surgically with a surgical excision of the right radial head.

6. Later claimant received a lump sum payment for TTD for the period January 18, 2000 until September 15, 2000.

7. On January 10, 2001, claimant had a "punch-jab" incident with the forcible hyperextension of his elbow and fracture of an osteophyte.

8. On September 25, 2001, claimant fell on a cement surface, resulting in swelling to his injured elbow.

9. On November 14, 2001, claimant had a valgus angulation of the elbow which means it was angled away from the body.

Expert Medical Opinions

10. On October 25, 2000, Dr. John Johansson placed claimant at medical end result for his work-related injury with a 7% permanent partial impairment. He reached the final rating by measuring the loss of motion at 5% whole person and ulnar nerve dysesthesia at 2% whole person.

11. Dr. Mahoney, a board certified orthopedic surgeon, who performed the surgery on the claimant, opined that he would not have reached medical end result for a year after the surgery. The opinion is based on the severity of this claimant's injury and the doctor's years of experience showing that it takes at least one year for one to reach that point after the type of surgery claimant had. His experience has shown the one-year marker to be a good and practical one. In his opinion, the fairly severe work-related fracture dislocated the claimant's elbow and tore ligaments. The eventual excision of the radial head then lead to instability in that joint. The instability combined with deficits in range of motion account for his permanent impairment. He opined that the angulation was present because of the instability and that the pain is there because of intermittent involvement of the ulnar nerve.

12. On February 12, 2003, Philip Davignon, M.D., who is board certified as an Independent Medical Examiner, examined the claimant. He determined that claimant had a 20% whole person impairment, based on the 5th edition of the AMA Guides to the Evaluation of Permanent Impairment and its companion book, Master the AMA Guides, 5th edition. Dr. Davignon defined medical end result as that point at which a condition is well established and not likely to change. Dr. Davignon concurred with Dr. Mahoney's determination that claimant reached medical end result in 2001 and disagreed with Dr. Johansson's opinion that a medical end had been reached in October of 2000, a mere 4 months after the surgery.

13. Michael Kenosh, M.D. evaluated the claimant for the defendant in this case. He is a physiatrist board certified in Physical Medicine and Rehabilitation and in Independent Medical Examination. He reviewed the claimant's records and examined him. In Dr. Kenosh's opinion, claimant had reached medical end result with a 7% whole person impairment. Although the examination was less than adequate because of the claimant's pain, he considered his rating reasonable based on the *Guides* ratings for the upper extremity and described Dr. Davignon's as excessive. He explained that the total whole person rating for the upper extremity is 60% (90% of that is the hand). Because claimant has no neurological problem with his hand, he does not believe that his problem in the elbow could be 20%. He also noted that Dr. Johansson's October 25, 2000 examination resulted in the same 7% rating although their methodologies differed.

DISCUSSION:

1. "Under Vermont workers' compensation law, a claimant is entitled to temporary disability compensation upon reaching medical end result or successfully returning to work." *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 532 (1996); *Orvis v. Hutchins*, 123 Vt. 18, 24, 179 A.2d 470, 474 (1962) (temporary disability ends when maximum earning power has been restored or recovery process has ended).

2. Medical End result means the point at which one has "reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." WC Rule 2.1200.

3. Dr. Mahoney opined that claimant did not reach medical end result until one year after the surgery he performed. Dr. Johansson placed claimant at medical end four months after the elbow surgery. With such a difference in the opinion of these experts, it necessary to choose between them by considering the following factors: 1) the treating physician relationship with the claimant; 2) the professional education and experience of the expert; 3) the evaluation performed, including whether the expert had all medical records in making the assessment; and 4) the objective bases underlying the opinion. *Yee v. IBM*, Opinion No. 38-00 (2000); *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (1997).

4. On the issue of medical end result, these factors devolve in favor of Dr. Mahoney who had treated the claimant, knew the pre-operative severity of the injury, intervened surgically and monitored him post-operatively. He is the only physician who rendered an opinion in this case who has expertise in orthopedic surgery. He reviewed the relevant medical records. And he based his opinion on the severity of this claimant's condition and years of experience. That claimant's condition did not change after October 2000, a few months after the operation, does not nullify his surgeon's more conservative approach of testing claimant's condition against more time and waiting until the one-year mark before proclaiming medical end.

5. Next is the question of permanency. Dr. Davignon rated claimant's permanent partial impairment at 20% whole person; Dr. Kenosh rated it at 7%. Neither physician treated the claimant. Both are well qualified to determine permanent impairment ratings. Dr. Kenosh reviewed more medical records and provided a sounder basis. Dr. Davignon's rating is based in part on a subjective history of the claimant, which lacks reliability, and on an incomplete set of medical records. It was done after the claimant had injured his elbow in more than one non-work related incident. Dr. Kenosh had all the records, but was unable to complete his examination due to the claimant's pain behaviors. However, he convincingly cited the *Guides* chapter on the upper extremity, Chapter 16, when he explained that a 20% rating for this claimant's injury is excessive when one considers that the entire upper extremity, meaning amputation of the arm, would be 60%, and that 90% of the upper extremity is for the hand. *Guides* at 441. Indeed, it is illogical to accept the claimant's proposition that his impairment, which does not involve the hand at all, is the equivalent of one third of the upper extremity. Despite Dr. Kenosh's inability to complete his examination, his 7% rating is consistent with Dr. Johansson's October 2000 rating. Although the surgeon was justified in waiting until after that date for a medical end result determination, because claimant's condition could have changed, there is nothing in the record demonstrating that his condition actually had changed since Dr. Johansson's rating. On balance, therefore, the most logical rating is 7%.

CONCLUSIONS OF LAW

1. Because claimant reached medical end result one year after his surgery, he is entitled to temporary total disability benefits from the time of discontinuance until May 2002 pursuant to 21 V.S.A. § 642. Defendant's obligation to pay these benefits began on the date of discontinuance. Interest, therefore, is due from that date. 21 V.S.A. § 664.

2. Permanent partial disability payments due the claimant are those based on a 7% whole person rating. The defense obligation to pay those benefits began on the date of Dr. Kenosh's rating, the operative date for the calculation of interest if not yet paid.

SO ORDERED

Dated at Montpelier, Vermont this 9th day of March 2004.

_____

Michael S. Bertrand
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.