Cehic v. Mack Molding Co., Inc. (July 8, 2004)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Ramiz Cehic	)	Opinion No. 16S-04WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Mack Molding Co., Inc.	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. M-25723

RULING ON DEFENSE MOTIONS FOR RECONSIDERATION AND STAY

The defense moves this Department to reconsider or, in the alternative, to stay the order of April 9, 2004 that it adjust this claim. The defense argues that the flare-up doctrine was erroneously applied and that claimant suffered an aggravation, thereby relieving it of liability. Such an argument, however, ignores the numerous medical experts, including the treating surgeon, whose opinions support the decision. The order will not be reversed now.

Nor will the order be stayed because the necessary criteria have not been met. To prevail on its request for a stay, Defendant must demonstrate: "(1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) a stay will not substantially harm the other party; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co*., 132 Vt. 554 (1974). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v. Webster Corporation*, Opinion No. 62S-96WC (1996).

With the supportive medical opinions in this case, it is not likely that Defendant will prevail on appeal. Claimant who is without income will be substantially harmed if a stay were granted. And the best interests of the public are best served with payment to this claimant, who without doubt suffered a work-related injury, while defendant pursues an appeal.

Finally, on the question of attorney fees, the hourly limit is $90.00 under WC Rule 10.1210.

In sum, the motion for reconsideration or stay is DENIED and attorney fees are subject to the hourly limit.

Dated at Montpelier, Vermont this 8th day of July 2004.

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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.

Cehic v. Mack Molding (04/09/04)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Ramiz Cehic	)	Opinion No. 16-04WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
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Mack Molding Co., Inc.	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. M-25723

Expedited hearing held in Montpelier on February 23, 2004
Record Closed on March 3, 2004

APPEARANCES:

Steven P. Robinson, Esq. for the Claimant
Nicole Reuschel-Vincent, Esq. for the Defendant

ISSUE:

Was a lifting incident at Pike Industries in 2001 or an injury at Mack Molding in 1998 responsible for claimant's current condition, his January 2002 surgery and lost time from work?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	New Hampshire Workers' Compensation Decision
Defendant's Exhibit A:	Curriculum Vitae of Victor Gennaro, D.O.

FINDINGS OF FACT:

1. English is a second language for this claimant, who is more comfortable in his native Bosnian tongue. Although at times he has had difficulty with communication, he was able to understand and answer questions at the hearing without a translator.

2. While lifting pallets at Mack Molding in Vermont on November 30, 1998, claimant herniated a disc in his spine at the L4-5 level, injured a facet joint at that level and strained lower lumbar muscles.

3. On August 26, 1999, Dr. Leonard Rudolph operated on the claimant's spine, removing part of the facet joint and large amounts of disc material. Claimant's postoperative course was difficult, lasting more than six months and requiring facet injections.

4. In November of 1999, Dr. Rudolph released claimant to work part-time on a light duty basis, with a lifting restriction and the length of the workday gradually increasing. By March of 2000 Dr. Rudolph noted that claimant continued to have back symptoms and could neither sit nor stand for longer than two hours without a break to move around.

5. In May of 2000, claimant accepted a job at Pike Industries in New Hampshire, with lifting restrictions.

6. On November 8, 2000, when claimant was working at Pike, the insurer for Mack Molding sent claimant to Dr. Thomas Kleeman, an orthopedic surgeon. Dr. Kleeman noted that claimant had persistent back and leg pain aggravated by most normal activities, including bending, standing, and lifting.

7. On the questions of medical end result and permanency, Dr. Kleeman determined that claimant had reached a medical end with a 10% whole person impairment.

8. On July 31, 2001, claimant was lifting a pipe while working at Pike when he felt a sudden increase in his back pain and, within a few hours, pain down his leg. Two days later he visited Dr. Kleeman who noted complaints of back pain with some leg numbness.

9. Claimant missed little time from work, participated in physical therapy, and by September or October was up to 8 hours workdays. He was laid off from work on January 4, 2002.

10. On January 24, 2002, Dr. Kleeman surgically fused the involved vertebrae. Claimant has not worked since.

New Hampshire Claim

11. After the Pike lifting incident, claimant filed a worker's compensation claim in New Hampshire, which was denied on the basis that Mack Molding was the responsible employer. A hearing on the aggravation vs. recurrence issue resulted in a holding that Pike was not liable.

Expert Medical Opinions

12. Dr. Kleeman, treating orthopedic surgeon, reviewed all relevant records and MRI scans and examined the claimant. The scans taken before and after the Pike incident revealed no changes in pathology seen. He determined that the need for the 2002 surgery was caused by claimant's 1998 work related injury at Mack Molding.

13. Dr. Kenneth Polivy, an orthopedic surgeon to whom Liberty Mutual (Mack Molding's Insurer) sent the claimant on November 14, 2001, determined that the July 2001 incident worsened the claimant's condition for a four to six week period, but that claimant had returned to baseline by September 20, 2001. In his report, Dr. Polivy predicted the need for a fusion.

14. Dr. Richard Sobel from the Southern New Hampshire Sports Medicine and Orthopaedic Clinic reviewed the claimant's medical records and issued reports. In the one dated February 22, 2002, he opined that claimant strained his back in July of 2001, then "returned to baseline in late September of 2001."

15. Dr. Victor Gennaro reviewed claimant's medical records for Liberty Mutual, concluding that the July 2001 incident at Pike Industries was an aggravation. He based that opinion on claimant's description of the lifting incident at Pike, his report of symptoms, physical findings on examination immediately after that incident, and his belief that claimant's condition had stabilized. Dr. Gennaro further opined that claimant's underlying condition had changed, although the changes could not be seen on MRI.

16. Claimant submitted evidence of his fee agreement with his attorney and statements reflecting that he incurred $1,557.30 in costs and that his attorney worked 83.5 hours on this case.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

2. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. When a worker sustains more than one injury, determining the liable party involves the familiar recurrence, aggravation, flare-up analysis. In this case, claimant will be entitled to benefits from Mack Molding, the original employer, if his injury is a recurrence and the 2001 incident was a flare-up. On the other hand, if this is an aggravation, his only recourse is against a New Hampshire company in a jurisdiction that has denied the claim.

4. A recurrence is "the return of symptoms following a temporary remission," a continuation of a problem which had not previously resolved or become stable. WC Rule 2.1312. Whereas, an aggravation is "an acceleration or exacerbation of a previous condition caused by some intervening event or events." WC Rule 2.110. If the "second incident aggravated, accelerated, or combined with a preexisting impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an "aggravation," and the second employer becomes solely responsible for the entire disability at that point." *Pacher v.Fairdale Farms* 166 Vt. 626, 629 (1997).

5. Facts this Department examines to determine if an aggravation occurred, with the greatest weight being given the final factor under *Pacher*, are whether: 1) a subsequent incident or work condition destabilized a previously stable condition; 2) the claimant had stopped treating medically; 3) claimant had successfully returned to work; 4) claimant had reached an end medical result; and 5) the subsequent work contributed independently to the final disability. *Trask v. Richburg Builders*, Opinion No. 51-98WC (1998).

6. As the court noted in *Pacher*, a third possibility also exists, neither an aggravation or recurrence, "but rather a new injury distinct from claimant's prior injuries. Where an employee suffers unrelated injuries during different employments, the employer at the time of each accident becomes responsible for the respective workers' compensation benefits." Id. at 628.

7. With this third possibility, a so-called flare-up, the second employer is liable only until the claimant reaches the pre-injury baseline, after which responsibility returns to the first employer. Id; *Smiel v. Okemo*, Opinion No. 10-93WC (1993).

8. The medical evidence convincingly proves that the injury this claimant incurred at Pike was a flare-up. It caused the claimant pain and prompted him to seek medical attention but did not alter the underlying condition. Had Pike been a Vermont employer, it would have been responsible for benefits associated with the lifting incident, but not after he returned to baseline.

9. Claimant's condition from the Mack Molding incident was not stable at the time he had the lifting incident at Pike. He still had pain, lifting restrictions and wore a back brace. He had not stopped treating medically, although he had reached medical end result and had returned to work. On the most important criterion, the last, the work at Pike temporarily increased symptoms, but did not contribute independently to the final disability, as proven by the MRI results and persuasive opinions from all but one physician.

10. Once claimant reached his pre-Pike-injury baseline, in late September or October of 2001, the condition remaining was a recurrence of the Mack Molding injury. Accordingly, Mack Molding is liable for the present claim.

11. As a prevailing claimant, Mr. Cehic is entitled to reasonable attorney fees as a matter of discretion and necessary costs. 21 V.S.A. § 678 (a); WC Rule 10.000. Before I make this determination, however, I must be satisfied that the request complies with the Workers' Compensation Fee Schedule and requirement that attorney time be recorded in increments no greater than one tenth of an hour, which is not clear from the materials submitted. See *Bertrand v. McKernon Group*, Opinion No. 20-03WC; WC Rule 40 (2003). Claimant has 30 days from the date this order is mailed to clarify and amend his request for fees and costs.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, Mack Molding/Liberty Mutual is ordered to adjust this claim.

Dated at Montpelier, Vermont this 9th 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.