

J. F. v. Fraternal Order of Eagles

(April 12, 2006)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

J. F.

Opinion No. 17-06WC

v.

By: Margaret A. Mangan  
Hearing Officer

Fraternal Order of Eagles

For: Patricia A. McDonald  
Commissioner

State File No. X-17040

Hearing held in Montpelier on October 19, 2005  
Record closed on November 28, 2005

**APPEARANCES:**

David A. Gibson, Esq., for the Claimant  
William A. O'Rourke, Esq., for the Defendant

**ISSUES:**

1. Whether Claimant is entitled to temporary total disability (TTD) benefits between February 6, 1991 and November 19, 1991 and between December 18, 1992 and January 23, 1993 when Claimant awaited shoulder surgery that was performed on January 26, 1993?
2. Whether Claimant is entitled to TTD benefits from April 1994 and August 1996 while he was awaiting the second shoulder surgery, performed on August 20, 1996.
3. Whether Claimant is entitled to an award of costs, expenses and attorney fees when Defendant's insurer made a settlement offer without prejudice, an offer rejected by Claimant prior to hearing.

**EXHIBITS:**

Joint:

- I. Medical Records and transcript of 12/13/95
- II. Transcript of deposition of Robert Leffert, M.D.

Claimant:

1. Letter to Workers' Compensation Specialist J. LaPerle and copies of correspondence referenced
2. Notices to Commissioner and Miscellaneous correspondence.

## **FINDINGS OF FACT:**

1. Claimant was an employee and the Fraternal Order of Eagles his employer when he was injured at work on February 19, 1986. While leaving work. Claimant slipped on ice and put his arm out to catch himself, hurting his shoulder.
2. As a result of the injury, Claimant suffered disabling shoulder problems that needed to be surgically corrected. He had a surgical exploration and acromioplasty of the right shoulder at Massachusetts General Hospital on March 23, 1987 for impingement syndrome.
3. In 1988 Claimant expressed the desire to return to work, but his physician advised him against bartender or painting work he had done before.
4. In January 1991 shoulder surgery was recommended, but the surgeon first required that certain dental infections be cleared up with extractions.
5. Because of complications particular to the Claimant, but unrelated to this action, the dental work was not done until June 11, 1992 and shoulder surgery not performed until January 26, 1993. Claimant seeks TTD for the period while he waited for the surgery and was unable to work.
6. After Claimant was placed at medical end result for the shoulder surgery in December 1993, this Department approved the carrier's Form 27 to discontinue TTD benefits. It then paid permanent partial disability benefits (PPD) based on an impairment rating. Claimant argues that he was not yet at medical end result and, therefore, was entitled to continued TTD benefits after December 1993.
7. Because Claimant's shoulder problems persisted, he was given the option of elective shoulder replacement surgery. He had that surgery on August 20, 1996.
8. In the years before the second surgery, Claimant had treatment for other, unrelated, health issues.

## **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 (1962).
2. A disabled injured worker is entitled to temporary disability benefits when the injury causes disability from work 21 V.S.A. § 642. However, "the lack of opportunity to work must not be due to the servant's fault or to general business depression." *Sivret v. Knight*, 118 Vt. 344, 346 (1954).

3. In this case, Claimant seeks TTD payments for the delay in scheduling the first surgery because of preexisting dental problems. I agree with Defendant that the scheduling of the dental work was within the control of the Claimant, not the carrier. Requiring a carrier to pay for TTD benefits during that period could encourage unreasonable delay in the scheduling of such procedures. Therefore, the carrier is not responsible for the time Claimant was out of work before the dental work was performed. However, once the dental work was completed in June 1992 and Claimant was awaiting surgery, he was entitled to TTD because Claimant had removed the only delaying factor over which he had control. At that time the chain of causation from the work related injury to the disability was unbroken.
4. The record shows that Claimant was paid for part of that compensable period, from June 1992 until December 1992, but not between December and the date of shoulder surgery in January. Therefore, he is entitled to TTD during the disputed time from December 18, 1992 to January 23, 1993.
5. Vermont law further provides that workers' compensation disability benefits are to continue until the Claimant has successfully returned to work or has reached medical end result. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 532 (1996). However, temporary disability benefits need not be continuance, but payments may be made in intervals if appropriate. 21 V.S.A. § 650(c). In instances such as this when elective surgery is proposed, Claimant may reach medical end result if a plateau in his condition has been reached, even though he may elect to have additional surgery years later. See, WC Rule 2.1200; *Bertrand v. McKernon Group*, Opinion No. 20-03WC (2003).
6. In this case, the carrier properly stopped the TTD payments and properly paid PPD benefits after Claimant reached medical end result in December 1993. Claimant was not entitled to further TTD benefits until he had a separate period of disability following the shoulder replacement surgery in 1996.
7. In sum, Claimant is entitled to additional TTD only for the period from December 18, 1992 and January 23, 1993.
8. Finally, Claimant seeks attorney fees and costs in association with this action. However, since the Claimant rejected an offer (not unsealed until the decision had been written) that exceeded what he is now awarded, Claimant has not "prevailed" under 21 V.S.A. § 678(a). Attorney fees and costs are, therefore, denied.

**ORDER:**

Claimant is AWARDED temporary total disability benefits from December 18, 1992 to January 23, 1993.

All other claims are DENIED.

Dated at Montpelier, Vermont this \_\_\_\_ day of April 2006.

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Patricia A. McDonald  
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.