

P. S. v. Ethan Allen, Inc.

(May 1, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

P. S.

Opinion No. 21-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Ethan Allen, Inc.

For: Patricia A. McDonald
Commissioner

State File No. S-04913

Hearing held in Montpelier on April 4, 2006
Record closed on April 14, 2006

APPEARANCES:

Patricia Turley, Esq., for the Claimant
Jennifer K. Moore, Esq., for the Defendant

ISSUES:

Do actions of the Claimant warrant termination of workers' compensation benefits and other administrative penalties pursuant to 21 V.S.A. § 708(a) and Workers' Compensation Rule 45?

EXHIBITS:

Claimant's 1: Investigative Report January 10, 2003
Claimant's 2: Investigative Report April 8, 2005
Claimant's 3: Barton Agency
Claimant's 4: Mileage

Defendant A: Medical Mileage Report
Defendant B: Calendar
Defendant C: Investigative Report March 15, 2005
Defendant D: Investigative Report January 26, 2005

FINDINGS OF FACT:

1. Claimant was hit in the head by a door while in the employ of Ethan Allen in August 2001. Since that time, the carrier has paid her temporary total disability benefits; medical benefits, including several operations; and permanent partial disability benefits. She was placed at medical end result in February 2004.
2. In August of 2005, Claimant prevailed on a contested claim for surgery after a full evidentiary hearing. Op. No. 50-05WC. Dr. Phillips performed that surgery. The

carrier did not pay the Claimant temporary total disability benefits after that surgery, for reasons that are unclear.

Mileage Claims

3. Since she began treatment for her work related injury, pursuant to Workers' Compensation Rule 12.2100, Claimant submitted to the carrier requests for mileage reimbursement for travel to and from doctor's appointments.
4. Claimant's mileage reimbursement requests exceeded actual miles driven to appointments. At times the requests simply asked for more miles than needed to be driven for a particular appointment. Other requests were for trips to a doctor on days when Claimant was on vacation out of state. Payment given to the Claimant for miles not driven, or for mileage never verified, totaled \$12,792.24.
5. Claimant was aware of actual miles driven. She willfully inflated those figures to increase the amount of reimbursement checks.

Physical Abilities

6. Claimant suffers from a pain syndrome that even the Department ordered surgery performed last summer has not relieved. She has represented to all health care providers that she is unable to work and unable to do more than essential activities such as minor chores, errands and driving to doctor's appointments.
7. Videotape surveillance on a few days depicted Claimant engaged in more activities than what one would expect from the medical records. However, I cannot find that Claimant lied to health care workers to obtain workers' compensation benefits. She merely conveyed to them what she believes about her limitations, although that belief does not always conform to reality.

Attorney Fees and Costs

8. Claimant submitted a claim for attorney fees based on 81.1 attorney hours at \$90.00 per hour and 7.8 paralegal hours at \$60 per hour. She also claims necessary costs of \$487.03.

CONCLUSIONS OF LAW:

1. The defense seeks an order that Claimant has forfeited all workers' compensation benefits and other penalties for fraud pursuant to 21 V.S.A. § 708(a), which provides:

A person who willfully makes a false statement or representation, for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for her or himself or for any other person, after notice and opportunity for hearing may be assessed an administrative penalty of not more than \$1,000.00 and shall forfeit all or a portion of any right to compensation under the provisions of this chapter, as determined to be appropriate by the commissioner after a determination by the commissioner that the person has willfully made a false statement or representation of a material fact.

2. The Commissioner has discretion to order the forfeiture of all benefits, although such an order must have some relationship or be proportional to the fraud proven. *Butler v. Huttig Bldg. Products*, 175 Vt. 323 (2003).
3. In this case, the forfeiture must be related to the false representations made, that is the mileage. Therefore, Claimant must repay the excess mileage claimed totaling \$12,792.24 or the carrier may deduct that amount from permanency owed. In addition, she forfeits all future mileage reimbursement requests.
4. However, Claimant did not make false representations to health care providers in order to obtain worker's compensation benefits. She continues to be entitled to temporary total disability and medical benefits necessitated by her work related injury, and in no way affected by her false mileage representations.
5. Next is the question of attorney fees and costs. A prevailing workers' compensation claimant is entitled to a discretionary award of attorney fees and mandatory award of necessary costs. 21 V.S.A. § 678(a); WC Rule 10.0000. When a claimant partially prevails, this Department has often exercised discretion by awarding part of the fees requested. See *Estate of Lyons v. American Flatbread*, Op. No. 36A-03 (2003); *Brown v. Whiting*, Op. No. 07-97WC (1997). When any degree of fraud has been proven, even a partial award of fees would unreasonably reward one who violated § 708 and undermine the benevolence inherent in the Workers' Compensation Act. Therefore, Claimant's request for attorney fees in this case is denied. Costs of \$487.03 necessary to defend this claim, however, are awarded as mandated by § 678(a).
6. Finally, Defendant asks the Department to order administrative penalties against the Claimant for fraud. Because such an action is within the prosecutorial function of this Department, the issue is referred to the staff attorney for her consideration.

ORDER

Claimant is hereby ordered to repay the carrier \$12,792.24 for excess mileage claimed. In addition, she forfeits all future claims for mileage reimbursement. She may recover necessary costs.

Dated at Montpelier, Vermont this 1st day of May 2006.

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.

P. S. v. Ethan Allen

(June 16, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

P. S.

Opinion No. 21A-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Ethan Allen, Inc.

For: Thomas W. Douse
Acting Commissioner

State File No. S-04913

**RULINGS ON
DEFENDANT'S MOTION TO RECONSIDER AND CLAIMANT'S MOTION TO
ALTER OR AMEND**

In an order of May 1, 2006, the Commissioner held that Defendant proved fraud in Claimant's mileage claims, but not in her representations to her physicians. The forfeiture order was limited to the amount of excess mileage claimed. Claimant's request for attorney's fees was denied, but she was awarded costs.

Defendant now asks for reconsideration or clarification on two issues: 1) temporary total and medical benefits due; and 2) whether Claimant fraudulently deceived her physicians. Claimant asks that: 1) the mileage finding be amended; 2) temporary total disability benefits be reinstated; and 3) attorney's fees be awarded.

Mileage Fraud

Claimant argues that the mileage decision is not supported by specific findings and seeks an explanation for the \$12,792.24 figure. She asks that honest mistakes be deducted from the total. Defendant alleged and proved 128 fraudulent mileage requests totaling \$11,333.14 and 48 trips with overstated mileage totaling \$1,459.10. The defense allegations are amply supported and stand. However, Claimant argues further that the carrier should be equitably estopped from claiming fraud. *Greenmoss Builders v. King*, 155 Vt. 1 (1990). "The doctrine of equitable estoppel is based upon concerns of public policy and an interest in encouraging fair dealing, good faith and justice." *Id.* at 6. The party invoking the doctrine, in this case Claimant, must establish four elements: 1) the carrier must know the true facts; 2) the carrier must have intended that its actions would be relied upon; 3) Claimant must be ignorant of the true facts; and 4) Claimant must rely on the estoppel to her detriment. *See id.* at 7. In this case, the carrier could have known the true facts; it could have verified the mileage, but cannot be faulted for its reliance on the good faith of a claimant. Further, because Claimant could not have been ignorant of true facts and did not rely on those payments to her detriment, she cannot prove equitable estoppel.

Extent of Forfeiture

Defendant asks the Commissioner to reconsider and order forfeiture of temporary total and medical benefits and not limit the forfeiture future to mileage claimed and a credit against permanency. It argues that the fraud in this case pales in comparison to that found in *Butler v. Huttig Bldg. Prods.*, 2003 VT 48, where the court held that forfeiture should be proportional to the dishonest acts. The same hearing officer heard both *Butler* and this case. Willfulness in that case was blatant and far-reaching. Here, it was limited to the claims of mileage. On the record before me, I do not find that the fraud extended to health care providers, despite the videotape. The forfeiture order stands.

Temporary total disability benefits

In February 2004, Claimant's TTD benefits were discontinued based on a finding of medical end result. Claimant now seeks TTD from March 2005, when Dr. Phillips proposed surgery to treat her, surgery that was delayed until August 2005 because of a carrier denial. That surgery was performed only after the Commissioner's order in Opinion No. 50-05WC. In September 2005, the carrier filed a Form 27 for the discontinuance of medical and temporary total disability benefits based on mileage fraud, a basis that is not valid because of the conclusion in Op. No. 21-06 that the mileage fraud could not be used to discontinue temporary total or medical benefits. Defendant now argues that Claimant is not entitled to resumption of TTD because she did not have wages in the 12 weeks preceding the surgery. Defendant knows how to terminate benefits through a properly filed Form 27, which it has done twice in this case. Because the basis for the last Form 27 is no longer valid, the carrier must reinstate TTD retroactive to March 2005. Those benefits may be terminated only with a supported Form 27.

Attorney's Fees

Claimant argues that the denial of fees in this case undermines the critical purpose of 21 V.S.A. § 678(a), to ensure adequate counsel for injured workers. Had no fraud been shown, I would agree with Claimant. However, on public policy grounds, fees will not be awarded when fraud has been proven.

Therefore, Claimant's request for reinstatement of temporary total disability benefits is GRANTED.

All other motions to reconsider are DENIED.

Dated at Montpelier, Vermont this 16th day of June 2006.

Thomas W. Douse
Acting Commissioner