D. P., Jr. v. GE Transportation (January 17, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

D. P. Jr.

v.

GE Transportation

Opinion No. 03-08WC

Phyllis Phillips, Esq.
Contract Hearing Officer

Patricia Moulton Powden
Commissioner

State File No. W-60106

OPINION AND ORDER

Claim submitted on stipulated facts and briefs without evidentiary hearing.

APPEARANCES:

Emily Joselson, Esq. for Claimant
John Valente, Esq. for Defendant

ISSUE PRESENTED:

Whether Claimant is entitled to temporary partial disability benefits after having been terminated from employment with Defendant for reasons unrelated to his work injury.

EXHIBITS:

Joint Exhibits:

Joint Exhibit A: Key Medical Records, as follows:

a. 4/13/05: Mark Messier, MD; office notes and work limitations form
b. 10/29/05: Mark Bucksbaum, MD; independent medical evaluation
c. 1/2/06: Mark Messier, MD; office notes (order MRI and referral to Dr. Boynton)
d. 1/4/06: Rutland Regional Health Services Radiology Report; MRI left shoulder
e. 1/25/06: Melbourne Boynton, MD; office notes and work injury tracking form
f. 3/24/06: Melbourne Boynton, MD; office notes and work injury tracking form
g. 3/27/06: Rutland Regional Medical Center, operative report
h. 4/4/06: Melbourne Boynton, MD; office notes and work injury tracking form
i. 4/13/06: Vermont Sports Medicine Physical Therapy initial evaluation form
j. 5/5/06: Melbourne Boynton, MD; office notes and work injury tracking form
k. 6/29/06: Melbourne Boynton, MD; third shoulder surgery post-op visit form and work injury tracking form
l. 9/26/06: Melbourne Boynton, MD; office notes and work injury tracking form
m. 3/13/07: Letter from Vermont Sports Medicine Physical Therapy, Tyler Smith, P.T. (advising discharge from physical therapy)
n. 3/26/07: Melbourne Boynton, MD; office notes (EMR, permanent impairment) and work injury tracking form
o. 7/27/07: Mark Bucksbaum, MD; independent medical evaluation (permanent impairment)
p. 10/18/07: Mark Bucksbaum, MD; letter advising continuing physical limitations

Joint Exhibit B: Complete Medical Records & Index

CLAIM:

Temporary partial disability benefits under 21 V.S.A. §646
Interest, attorney's fees and costs under 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

The parties jointly stipulated to the following findings of fact:

1. Claimant was an employee at all relevant times as defined by Vermont's workers' compensation statute and rules.

2. Defendant was an employer at all relevant times as defined by Vermont's workers' compensation statute and rules.

3. On April 13, 2005 Claimant suffered an injury to his left shoulder due to repetitive work while employed by Defendant, and promptly so notified his employer. The injury eventually was diagnosed as a rotator cuff tear.

4. As of April 13, 2005 Claimant had worked for Defendant for nearly twenty years. Also as of that date Claimant was working in a job that required lifting up to 37 pounds, including bulky items, and occasional reaching overhead and at shoulder level, as well as leaning over a broach machine.

5. On April 13, 2005 immediately following Claimant's report of injury, Defendant reassigned him to a less physical job assignment of bench de-burring. On April 14, 2005 Claimant reported that the new position was fine and caused no problems.

6. At the time of his injury Claimant was earning $940.81 per week, which yielded a compensation rate of $627.21 per week.

7. On April 13, 2005 Claimant saw Dr. Mark Messier and was issued a work restriction to avoid working with his arm at shoulder level. He was to follow up with Dr. Messier in four weeks.

8. Claimant continued working for Defendant at the bench de-burring position, which required less physical effort.

9. On May 4, 2005 Claimant's employment with Defendant was terminated. Defendant maintains that the termination was for cause unrelated to Claimant's workers' compensation claim. Claimant maintains that the reason for his termination is irrelevant to this matter.[1]

10. Following the termination of his employment with Defendant, Claimant had no health insurance.

11. Because Defendant's workers' compensation insurance carrier did not accept this claim until November 22, 2005 Claimant did not immediately obtain further medical care for his left shoulder.

12. Following his termination from Defendant's employment in May 2005 Claimant received unemployment compensation while he searched for new employment.

13. On October 24, 2005 Claimant obtained work at Timberwolf Manufacturing Corporation, earning $531.00 per week.

14. Claimant's job responsibilities at Timberwolf included pushing, pulling and lifting, but did not require any lifting to shoulder level or above.

15. In early November 2005 Timberwolf reassigned Claimant to operating a forklift, which involved even less pushing, pulling and lifting, due to Claimant's asserted physical limitations.

[1] I assume from this stipulated fact that Claimant disputes whether his termination was for cause, but agrees that it was in any event for reasons unrelated to the injury at issue in the current claim.

16. On November 22, 2005 the parties stipulated to Claimant's eligibility for workers' compensation benefits.

17. After Defendant's workers' compensation insurance carrier stipulated to compensability, Claimant returned to active medical care for his shoulder with Dr. Melbourne Boynton. Claimant's restrictions persisted, as documented by a Work Injury Tracking Form dated January 25, 2006, which states: "Able to work with limited use of left arm. Patient may work as tolerated. Surgery scheduled for left shoulder rotator cuff repair."

18. Claimant was scheduled for and underwent rotator cuff surgery, performed by Dr. Boynton, on March 27, 2006.

19. Following the surgery Claimant stayed out of work to recuperate. In his April 4, 2006 record Dr. Boynton restricted Claimant from work. In his May 5, 2006 record, Dr. Boynton's Work Injury Tracking Form states: "Claimant could return to work now with the restriction of no use of his left arm at all."

20. On June 29, 2006 Dr. Boynton's Work Injury Tracking Form states: "Claimant could return to work with limited use of left shoulder. He can do active motion but should not do repetitive activity with left arm and he cannot lift more than five pounds."

21. Because Claimant's employment involved pushing, pulling and lifting, he was not able to return to work at Timberwolf with these restrictions.

22. Claimant and Defendant entered into a Form 21 Agreement on July 26, 2006 which provided his compensation rate to be $627.21 per week. Claimant was paid temporary total disability (TTD) benefits from March 27, 2006 until September 7, 2006.

23. In August 2006 Timberwolf accommodated Claimant's physical restrictions by assigning him to a sales position with the company – a desk job that did not include any pushing, pulling or lifting.

24. On August 29, 2006 Claimant returned to work at Timberwolf, light duty status (and not yet at end medical result), earning $585 per week, and so notified Defendant's workers' compensation insurance carrier.

25. On September 7, 2006 Defendant's workers' compensation insurance carrier stopped payment on Claimant's last two TTD checks (8/29/06-9/4/06 and 9/5/06-9/11/06), totaling $1,254.42, asserting that Claimant had returned to work full-time and was no longer entitled to temporary disability benefits.

26. On September 26, 2006, upon learning that Claimant had taken a light duty position at Timberwolf without the same physical requirements as his prior position, Dr. Boynton's Work Injury Tracking Form released Claimant to work with no limitations, and stated: "Continue usual work."

27. As of February 19, 2007 Claimant was earning $607.20 per week at Timberwolf.

28. On March 26, 2007 Dr. Boynton found Claimant to be at end medical result and opined that he had a 3% permanent impairment to the whole person (5% upper extremity). Dr. Boynton's Work Injury Tracking Form of that date released Claimant to work with no limitations, and stated: "Continue normal work."

29. On July 27, 2007 Dr. Bucksbaum opined that Claimant had a 4% permanent impairment to the whole person (7% upper extremity).

30. The parties agree that Claimant's permanent impairment shall be 3.5% to the whole person.

31. On October 18, 2007 Dr. Bucksbaum opined that Claimant could work full time but should avoid reaching above his shoulder twelve times per hour with up to fifteen pounds of weight; reaching to shoulder up to fifteen times per hour with up to twenty pounds of weight; holding his arm in abduction or flexion up to twelve times per hour with up to fifteen pounds of weight; lifting and carrying up to twenty pounds fifteen times per hour; single upper extremity work using injured arm for light work only (full use of non-injured arm); no climbing ladders; and to avoid operation of tools or equipment that produce vibration to the left upper extremity.

32. The Commissioner may take judicial notice of any and all state forms, pleadings and correspondence to the Department filed by the parties.

33. In addition to the stipulated facts, in accordance with Paragraph 32 above I find the following facts as well:

    (a) Claimant has made no claim for temporary total disability benefits from May 5, 2005 (the date when his employment with Defendant terminated) until October 24, 2005 (the date when he began working at Timberwolf). Nor has Claimant made any claim for temporary partial disability benefits from October 24, 2005 until March 27, 2006 (the date of his surgery).

    (b) For reasons that are not entirely clear, Defendant's workers' compensation insurance carrier initially failed to accept Claimant's claim as compensable. On November 22, 2005 the Department issued an interim order in which it required Defendant to pay medical benefits causally related to Claimant's injury. The interim order noted that Claimant was not currently seeking temporary total disability benefits.

    (c) Defendant did not file a Notice of Intention to Discontinue Payments (Form 27) prior to discontinuing Claimant's temporary disability benefits on August 29, 2007.

    (d) Claimant has submitted evidence of costs totaling $67.20 and attorney's fees totaling $5,047.50.

CONCLUSIONS OF LAW:

1. In this claim Claimant seeks temporary partial disability benefits from the date following surgery when he returned to work for a subsequent employer, full-time but at a lower weekly wage than what he was receiving at the time of his original work-related injury while in Defendant's employ. Defendant argues that Claimant is disqualified from receiving temporary disability benefits because (a) he was terminated from Defendant's employment for reasons unrelated to his injury; and (b) he failed to show that the reduced wages he earned when he returned to work thereafter were occasioned by his injury-related work restrictions.

2. In *Andrew v. Johnson Controls*, Opinion No. 3-93WC (June 13, 1993), the Commissioner determined that a claimant who, during his or her recovery from a work-related injury, voluntarily quits a suitable job for unrelated reasons generally is not entitled to temporary total disability compensation. The rationale for the rule is that a claimant who voluntarily removes him- or herself from the work force can no longer point to the work-related injury as the cause for his or her loss of earnings. *Id.*

3. In order to avoid unnecessarily harsh consequences, however, the Commissioner recognized an exception to this rule, providing that temporary disability benefits might resume if a claimant can show that the work-related disability is once again the cause of his or her inability to find or hold new employment. *Id.* Thus, in order to fit within the exception, a claimant has the burden of demonstrating (a) a work injury; (b) a reasonably diligent attempt to return to the work force; and (c) that the inability to return to the work force, or a return at a reduced wage, is related to the work injury and not to other factors. *Id.*

4. In *Britton v. Laidlaw Transit*, Opinion No. 47-03WC (December 3, 2003), the Commissioner expanded the application of the rule enunciated in *Andrew* to situations where a claimant is fired for reasons unrelated to his or her work injury. As with the voluntary quit situation, a claimant who is fired cannot point to the work injury as the cause of his or her loss of earnings, and therefore is not entitled to temporary disability benefits until he or she can fit within the three-prong exception referred to above. *Id.*; *see also Ducharme v. DEW Construction*, Opinion No. 24-07WC (August 27, 2007) (holding that claimant who was laid off for lack of work is not entitled to resumption of temporary disability benefits unless three-prong test is met); *Pfalzer v. Pollution Solutions of Vermont*, Opinion No. 23-01WC (October 5, 2001) (same); *Gardner v. Nastech*, Opinion No. 5-98 (January 26, 1998) (holding that claimant who is incarcerated is not entitled to temporary disability benefits because causal link between work injury and lost wages is broken); *King v. CNF Construction*, Opinion No. 2-98 (January 3, 1998) (same).

5. In the current claim, the parties agree that Claimant's termination of employment from Defendant was unrelated to his work injury. That said, Claimant cannot point to his injury-related work restrictions as the cause of his initial loss of earnings in May 2005. According to the general rule established in *Andrew* and its progeny, therefore, Claimant is not entitled to temporary partial disability benefits unless and until he can demonstrate that he fits within the exception.

6. Claimant has satisfied the first prong of the *Andrew* exception – he suffered a work injury. Defendant does not dispute that Claimant underwent a reasonably diligent attempt to return to the work force thereafter, and thus the second prong of the exception presumably is met as well.

7. Claimant's proof is lacking as to the third prong, however. There simply is no evidence from which to conclude that *because of his injury-related disability* Claimant was unable to find suitable employment at a wage closer to what Defendant had paid him.

8. In his legal memoranda Claimant argues that the causal relationship between his injury and his reduced wages should be presumed, because (a) after twenty years of employment for Defendant, his wages were extraordinarily high; and (b) after a diligent search he took the best job offered to him that was consistent with his work restrictions, despite a wage rate considerably less than what he had been earning for Defendant. This is a reasonable argument, and the facts necessary to support it all may be true, but the evidence as submitted simply does not include them.

9. Neither the stipulated facts nor the records of which I can take judicial notice establish that Claimant took the Timberwolf job because his injury-related work restrictions precluded him from securing a higher-paying job. The record does not reflect what types of jobs Claimant applied for, how many he was offered (if any), how many he rejected (if any), and why. He may have received and rejected other job offers, at wages closer to those he received from Defendant, because he did not like the work environment, or because they did not offer career advancement opportunities, or because the fringe benefit package was unacceptable, or for any number of other personal reasons, all unrelated to his work restrictions. He may have accepted the Timberwolf job because on balance it offered a better employment opportunity than other jobs he investigated, albeit at a lower starting salary. From the facts presented, there simply is no way to know. Without such evidence, it would be impermissible speculation to point to the work injury as the cause of Claimant's loss of earnings, particularly where other equally plausible explanations exist for his decision to take a lower-paying job.

10. Having failed to satisfy the third prong of the *Andrew* exception, Claimant's claim for temporary partial disability benefits must be denied unless Defendant's conduct in adjusting the claim somehow overrides this result. Claimant argues that Defendant's failure to file a Notice of Intention to Discontinue Payments (Form 27) prior to terminating Claimant's temporary disability benefits is just such an overriding factor. Under the particular circumstances of this claim, however, I conclude that it is not.

11. Workers' Compensation Rule 18.1100 provides that "*[u]nless the claimant has successfully returned to work*, temporary disability compensation shall not be terminated until a Notice of Intention to Discontinue Payments (Form 27), adequately supported by evidence, is received by both the commissioner and the claimant." (Emphasis supplied). That rule must be read in conjunction with Rule 18.1410, which states, "A claimant shall be deemed to have returned to work successfully when he or she demonstrates the physical capacity and actual ability to perform the duties of *the job*, without disabling pain and/or imminent risk of re-injury." (Emphasis supplied).

12. Claimant argues that "the job" referred to in Rule 18.1410 means the pre-injury job. Claimant argues that because even following his March 2006 surgery he was unable to perform the duties of his pre-injury job for Defendant, his return to work for Timberwolf cannot be deemed to have been successful. Therefore, Claimant concludes, Defendant could not terminate benefits without first filing a Form 27.

13. Under the particular circumstances of this claim, however, I find that the more reasonable construction of Rule 18.1410 is that "the job" referred to means the job Claimant held at the time of his most recent disability, not the job he held at the time of the initial injury.

14. I find it significant that Claimant did not seek temporary partial disability benefits for the period of time after he first started working for Timberwolf in October 2005. Had he done so, Defendant would have been on notice that he did not consider his Timberwolf job to be suitable alternative employment and that consequently his work there did not constitute a "successful" return to work, either before or after the March 2006 surgery.

15. Thus, the result might be different if Claimant had been receiving (or at least had demanded) temporary partial disability benefits prior to the March 2006 surgery. In that case, it would have been clear that Claimant's injury-related restrictions were continuing to impact his ability to realize his maximum earning power, *see Orvis v. Hutchins*, 123 Vt. 18, 24 (1962), such that a "successful return to work" necessarily would have to refer back to his pre-injury job.[2]

16. I conclude, therefore, that under the very specific facts of this claim, Defendant was not required to file a Form 27 prior to discontinuing Claimant's temporary disability benefits on August 29, 2007.

[2] The result also might be different for a claimant who is undergoing vocational rehabilitation, as this too would be an acknowledgment that *because of injury-related work restrictions*, he or she had not yet achieved maximum restoration of his or her earning power. The ruling in the current claim should be interpreted as extremely fact-specific and should not be extrapolated readily to claims involving different factual circumstances.

ORDER:

Based on the foregoing findings of fact and conclusions of law,

1. Claimant's claim for temporary partial disability benefits is **DENIED**;

2. Because Claimant has not prevailed, he is not entitled to an award of attorney's fees or costs under 21 V.S.A. §678.

DATED at Montpelier, Vermont this 17th day of January 2008.

_____
Patricia Moulton Powden
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.