Paul Hill v. CV Oil Co, Inc. (August 7, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Paul Hill

v.

CV Oil Co., Inc.

Opinion No. 15A-09WC

By: Jane Dimotsis, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. S-03322

RULING ON DEFENDANT'S MOTION TO AMEND ORDER

Defendant moves to amend that portion of the Commissioner's May 26, 2009 Order relating to interest on the permanent partial disability benefits awarded. Defendant states two grounds for doing so. First, Defendant argues that it should not be assessed interest on the permanency awarded for Claimant's physical injuries because Claimant previously had refused its tendered payment of the amount ultimately awarded. Second, Defendant argues that interest on the permanency awarded for Claimant's psychological injury should be assessed only as of the date it was rated, not back to the date of end medical result.

As to the first issue, Claimant counters that he was justified in refusing Defendant's tender because (a) it was offered as a lump sum and in a way that would not have protected Claimant's entitlement to SSDI benefits adequately, *see* 21 V.S.A. §652(c); and (b) it did not account for the full extent of Claimant's permanency, both physical and psychological. As to the second issue, Claimant argues that the appropriate date for assessing interest is the date of end medical result.

Interest on Physical Permanency Award

The Commissioner's May 26, 2009 Order awarded permanent partial disability benefits referable to Claimant's physical injuries in accordance with Dr. White's 7% whole person impairment rating. Defendant first proposed a Form 22 Agreement for Permanent Partial Disability Compensation in accordance with that rating in August 2004. Claimant did not sign the form and Defendant's repeated attempts to follow up with his attorney went unanswered.[1] Finally, in November 2006 Defendant sent a check for the full amount owed. To this action Claimant's attorney finally responded, and returned the check uncashed.

[1] Appended to Defendant's Motion are nine letters addressed to Claimant's attorney, spanning a date range from August 31, 2004 through November 20, 2006. Each one referred to prior correspondence and requested a response as to Defendant's proposed Form 22. It would have been better had the interest issue been raised, and these letters introduced into evidence, at the formal hearing.

Claimant argues that because Defendant had not offered complete compensation for his injuries (both physical and psychological), he could not sign the proffered Form 22. According to Claimant, furthermore, to accept the tendered check without a signed Form 22 would have jeopardized his right to an offset against his monthly SSDI benefit. For those reasons, Claimant asserts that he was justified in not accepting Claimant's proffered payment and that therefore it is appropriate to award interest now.

Claimant's argument is not persuasive. I note, first of all, that had Claimant's attorney responded in a more timely fashion to Defendant's repeated attempts to resolve the physical permanency issue, the parties might have sought approval for a partial lump sum permanency payment in accordance with §652(c). Had they done so, the appropriate SSDI offset language could have been included and Claimant's interests adequately protected. Claimant's attorney having failed to respond, however, by the time Defendant tendered its check the payments were for *past due* benefits, and therefore §652(c) was no longer even applicable.

Defendant is not entirely blameless either, however. Had it acted in accordance with Workers' Compensation Rule 3.1200, it would have notified the Commissioner and begun advancing weekly benefits much sooner than it did.

In the end, although Defendant did not follow the letter of our rules, it at least complied with their spirit – it tendered the amount that it admitted was owed and about which no genuine dispute existed. With that in mind, I find it appropriate to award interest on the physical permanency award from the date payments should have commenced – September 10, 2004, the date on which temporary disability benefits terminated on the basis of end medical result – until the date they were tendered, November 20, 2006.

Interest on Psychological Permanency Award

The Commissioner's award of permanency benefits referable to Claimant's psychological injury was based on his expert witness' impairment rating, which was not issued until August 5, 2007. Defendant contends that interest should run from that date forward rather than from the date of end medical result, September 10, 2004. Defendant argues that it could not be expected to make permanency payments in accordance with an impairment rating that had not yet issued, and that therefore to impose interest from the earlier date forward would be unfair.

Prior formal hearing decisions are conflicting as to the appropriate date from which to compute interest in cases such as the present one. *Compare McCrillis v. Vermont Castings*, Opinion No. 62-98WC (November 7, 1998) (interest runs from date of end medical result) *with Merchant v. A&C Enercom*, Opinion No. 27-04WC (July 20, 2004) (interest runs from date of permanent impairment rating). The statute requires that interest be computed from "the date upon which the employer's obligation to pay compensation under this chapter began." 21 V.S.A. §664. According to §648(a), the obligation to pay permanent partial disability benefits begins "at the termination of total disability," which in this case was as of the date of end medical result. The plain language of the statute, therefore, dictates that interest begin to run as of that date.[2]

ORDER:

Defendant's Motion to Amend the May 26, 2009 Order is hereby **GRANTED IN PART**. Paragraph 2 of the Order is amended to read:

2. Interest on the 7% permanent partial impairment referable to Claimant's physical injuries calculated from September 10, 2004 until November 20, 2006, and on the remaining 16% permanent partial impairment referable to Claimant's psychological injuries calculated from September 10, 2004 forward, both in accordance with 21 V.S.A. §664.

Claimant's request for attorney fees incurred in responding to Defendant's Motion to Amend is hereby **DENIED**.

DATED at Montpelier, Vermont this 7th day of August 2009.

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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.

[2] Defendant was on notice as of the date of end medical result that Claimant might be entitled to permanency benefits relating to his psychological injury. A month earlier, in the context of his permanency evaluation Dr. White specifically noted that his impairment rating referred only to Claimant's physical impairment, and that "there may be permanent impairment related to psychiatric disorders, but that would be in the realm of a psychiatrist to determine." Defendant also could have mitigated the effect of an interest award by proffering payment in accordance with its own expert's psychological impairment rating, which was issued in July 2007, but chose not to.