G. D. v. Censor Security (May 29, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

G. D.

v.

Censor Security, Inc.

Opinion No. 16-09WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. AA-51771

OPINION AND ORDER

Hearing held in Montpelier on February 18, 2009
Record closed on March 12, 2009

APPEARANCES:

Heidi Groff, Esq., for Claimant
David Berman, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant suffer a work-related injury on or about July 19, 2008?

2. If yes, to what workers' compensation benefits is he entitled?

EXHIBITS:

Joint Exhibit I: Medical records
Joint Exhibit II: Dr. Ayer progress note, 1/23/2009

Claimant's Exhibit 1: Deposition of Nathan Ayer, M.D., M.P.H., January 23, 2009
Claimant's Exhibit 2: Deposition of Anthony Rock, January 29, 2009
Claimant's Exhibit 3: Incident report, 8/3/08

Defendant's Exhibit A: Security Officer exam, 11/15/07
Defendant's Exhibit B: Incident report, 6/17/08
Defendant's Exhibit C: Statement of David Cahee, August 5, 2008
Defendant's Exhibit D: *Curriculum vitae*, George White, Jr., M.D.

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640
Temporary total disability benefits pursuant to 21 V.S.A. §642
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Interest pursuant to 21 V.S.A. §664
Costs and attorney's fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.

3. Claimant began working for Defendant, a private security services firm, in October 2007. He was assigned to work as a security guard at the Sheraton Hotel in South Burlington. Claimant's shift ran from 10:00 PM to 6:00 AM. His duties included making periodic tours of both the interior and the exterior of the hotel, which encompassed six buildings of four floors each. Nightly beginning at about 3:00 AM, Claimant also was responsible for placing each guest's bill, or folio, completely under his or her door. This task required a significant amount of repetitive bending and squatting.

4. On Saturday, July 19, 2008 Claimant was working his scheduled shift. The hotel was full that night, many guests had attended a local beer festival and he had been very busy. Midway through his shift, Claimant was delivering guest folios. As he bent down to place a folio under a guestroom door, he felt a pop in his low back and pain down his left leg.

5. Because the pain in his back and leg was so severe, Claimant had to return to the office and rest before delivering the rest of his folios. Anthony Rock, the night auditor, recalled that Claimant could barely sit down, and was hunched over and limping when he left. Mr. Rock testified that he had never seen Claimant in so much pain before.

6. Claimant had experienced a similar episode of back pain in December 2007, again while delivering folios during a very busy shift at the hotel. Claimant did not seek medical treatment and did not lose any time from work as a consequence of that incident. He worked in pain for about one week afterwards, and then his symptoms resolved. Claimant never reported this episode of work-related back pain to his employer.

7. As he had following the December 2007 episode, Claimant did not initially seek medical treatment after July 19th, as he hoped his pain would resolve on its own. He continued to work for two weeks, though in pain and with difficulty.

8. There is some dispute as to when Claimant first informed his employer of the July 19th episode and whether he requested time off due to his back and leg pain. Claimant recalled that he telephoned his supervisor, David Cahee, on July 21st and requested that another employee be assigned to work his shift. When Mr. Cahee advised him that no one else was available locally to work, Claimant agreed to report as scheduled, but asked that he not be assigned to work weekends, as those shifts tended to be busier.

9. Claimant testified that he could not recall whether he had specified to Mr. Cahee during the July 21st telephone conversation that the reason he was seeking time off and altered shift assignments was because of his back and leg pain. For his part, Mr. Cahee testified that Claimant made no mention of any back injury during that conversation. To the contrary, Mr. Cahee recalled that the discussion centered on Claimant's need to reduce his stress so as to better manage an unrelated health condition from which he had suffered previously. In fact, earlier in the summer Claimant had asked not to be scheduled for weekend shifts for just that reason, and Mr. Cahee had been doing his best to accommodate him.

10. Claimant's symptoms failed to resolve on their own, so on August 3, 2008 he sought medical treatment, first at the hospital emergency room and then with his primary care provider, Dr. Ayer. Dr. Ayer diagnosed severe low back pain with left-sided radiculopathy, and MRI findings confirmed a severe left-sided lateral recess and disc herniation at L4-5. Dr. Ayer determined that Claimant was temporarily totally disabled, and that his condition had been caused by his work activities on July 19, 2008. Ultimately, after a brief course of physical therapy failed to alleviate Claimant's symptoms completely, Dr. Ayer recommended a surgical consult.

11. With the exception of a single brief notation in one of the emergency room records referencing that Claimant's July 19, 2008 episode of back pain was related to a fall, all of the medical records consistently report the history of Claimant's current symptoms as having occurred while delivering guest folios at work on that night. Claimant testified credibly that the reference to a fall was erroneous.

12. At Defendant's request, Claimant underwent an independent medical evaluation with Dr. White on December 12, 2008. Dr. White did not give an opinion as to whether Claimant's work activities on July 19, 2008 caused his injury, but acknowledged that his physical findings and MRI results were consistent with the history as Claimant had reported it.

13. As to further treatment, Dr. White acknowledged that it would be reasonable for Claimant to undergo a surgical consult, though he voiced some concern as to whether surgery would completely alleviate Claimant's symptoms. Depending on the type of surgery undertaken, Claimant's leg pain might be relieved but his back pain might continue. As an alternative, Dr. White suggested that Claimant consider a course of spinal injections and/or a multidisciplinary rehabilitation program before embarking on a surgical treatment plan.

14. Dr. White also encouraged Claimant to remain as active as possible, and in that context suggested that he could return to modified-duty work activities. He recommended that Claimant walk as much as possible, that he change positions as needed and that he avoid repetitive bending, twisting, reaching or lifting.

15. In accordance with Dr. White's suggestion, in January 2008 Defendant, through its attorney, offered Claimant a modified-duty job as a security officer at a local mall. Claimant testified that he drove to the mall one day with an eye towards speaking with Defendant's on-site staff about the position, but was unable even to walk the short distance from his car to the mall security office without experiencing excruciating pain. On those grounds, Claimant determined that he would be unable to manage the proposed job and through his attorney indicated that he would not return to work in that position.

16. Claimant acknowledged that he never spoke personally with Mr. Cahee about the proposed modified-duty job at University Mall, either before or after he attempted to visit the site. He admitted that he never inquired as to what his specific job duties would be or whether additional accommodations might be available to allow him to perform them.

17. Dr. Ayer testified that he agreed with Dr. White's proposed modified-duty work restrictions and that it would be reasonable for Claimant to attempt to work in that capacity. He also agreed with Dr. White's suggestion that Claimant might benefit from the increased mobility involved with working light-duty, but noted that it was equally possible that such activities would worsen Claimant's pain. Dr. Ayer concluded that if Claimant had experienced excruciating pain just in walking from the parking lot to the mall entrance then it was unlikely that he would be able to tolerate the light-duty job that Defendant had proffered. Dr. Ayer did not offer any opinion as to whether Claimant's pain, though severe at first, gradually might abate with continued activity.

18. Although it had denied Claimant's claim from the beginning, Defendant filed a "precautionary" Notice of Intention to Discontinue Benefits (Form 27), effective January 19, 2009, on the grounds that Claimant had refused an offer of suitable modified-duty work.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. Defendant here questions the compensability of Claimant's injury because it was both unwitnessed and late reported. It is true that a claimant may have difficulty sustaining his or her burden of proof when he or she delays filing a workers' compensation claim for a significant period of time after an alleged injury. In such instances, the trier of fact must evaluate the factual evidence carefully so as to explore any inconsistencies, investigate possible intervening causes and evaluate "hidden or not-so-hidden motivations." *Jurden v. Northern Power Systems, Inc.*, Opinion No. 39-08WC (October 6, 2008); *Russell v. Omega Electric*, Opinion No. 42-03WC (November 10, 2003), citing *Fanger v. Village Inn*, Opinion No. 5-95WC (April 20, 1995).

3. The Commissioner has enumerated four questions to assist in this process. First, are there medical records contemporaneous with the claimed injury and/or a credible history of continuing complaints? Second, does the claimant lack knowledge of the workers' compensation reporting process? Third, is the work performed consistent with the claimant's complaints? And fourth, is there persuasive medical evidence supporting causation? *Jurden, supra; Larrabee v. Heavensent Farm*, Opinion No. 13-05WC (February 4, 2005), citing *Seguin v. Ethan Allen*, Opinion No. 28S-02WC (July 25, 2002).

4. I see nothing so suspicious about the circumstances of the current claim to justify disqualifying it. True, Claimant's injury was unwitnessed at the exact moment that it happened, but Mr. Rock, the night auditor, credibly testified as to the symptoms Claimant exhibited shortly thereafter. Given an employee whose job requires that he be working alone in the wee hours of the morning, certainly that is corroboration enough of Claimant's version of events.

5. Equally true, Claimant failed either to report the injury or to seek medical treatment until two weeks later. This was in keeping, however, with his experience after suffering similar symptoms at work, under almost exactly the same circumstances, in December 2007. On that earlier occasion, Claimant's symptoms resolved quickly and with no medical attention. It is reasonable to assume that he expected the same uneventful recovery to occur following the July 2008 incident. In that context, his decision not to file an injury report until he realized he would need to seek treatment is understandable.

6. As to medical causation, both Dr. Ayer and Dr. White testified that the mechanism of injury Claimant reported was consistent with the injury with which he presented. And while Dr. White did not comment directly on causation, Dr. Ayer testified with certainty that Claimant's current condition was caused by his work activities on July 19, 2008.

7. I conclude, therefore, that Claimant has sustained his burden of proving that he suffered a compensable work-related injury while delivering guest folios on July 19, 2008. What remains to be decided are the workers' compensation benefits to which he is entitled.

8. According to Dr. Ayer, Claimant was totally disabled from working as of the date he first examined him, August 5, 2008. Claimant is entitled to temporary total disability benefits beginning on that date.

9. I find that Claimant's entitlement to temporary disability benefits ended as of the effective date of Defendant's precautionary Form 27, January 19, 2009. I cannot accept as valid Claimant's conclusion that he was incapable of returning to work in the modified-duty position Defendant had offered when he took no steps to investigate either the parameters of the job or what additional accommodations might be available in order for him to perform it.

10. As for further medical treatment, both Dr. White and Dr. Ayer agree that a surgical consult is a reasonable next step. Having found Claimant's injury to be compensable, it follows that Defendant is obligated to pay for such a consult. Whether Defendant also will bear responsibility for any surgical treatment plan will depend on medical evidence that is yet to be developed, and therefore remains to be seen. Similarly, it also remains to be seen whether Claimant will be entitled either to additional temporary disability benefits and/or to permanency benefits. These determinations as well will depend on the course of his future medical treatment and recovery.

11. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $1,171.67 and contingent attorney's fees in accordance with Workers' Compensation Rule 10.1220. An award of costs to a prevailing claimant is mandatory under the statute. I find that Claimant has substantially prevailed here and therefore his costs are awarded.

12. As for attorney's fees, these lie within the Commissioner's discretion. Again, I find that Claimant has substantially prevailed, and therefore award him the contingent attorney's fees he has requested.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Temporary disability benefits from August 5, 2008 through January 19, 2009;

2. Interest on the above amounts pursuant to 21 V.S.A. §664;

3. Medical benefits covering all reasonably necessary medical services and supplies causally related to the July 19, 2008 injury, including but not limited to the cost of a surgical consult as referenced in Conclusion of Law 10 above;

4. Costs and attorney's fees in accordance with Conclusion of Law 11 above.

DATED at Montpelier, Vermont this 29th day of May 2009.

_____
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.