D. D. v. W. T. Solutions, Inc. (February 23, 2007)

STATE OF VERMONT
DEPARTMENT OF LABOR

D. D.

v.

W.T. Solutions, Inc.

Opinion No. 07-07WC

By: George K. Belcher
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. W-60786

Hearing held in Montpelier on December 28, 2006.
Record closed on January 12, 2007.

APPEARANCES:

Steven P. Robinson, Esq. for the Claimant
Richard R. Hennessey, Esq. for the Defendant

ISSUES:

1. Should the Form 27, Employer's Notice of Intention to Discontinue Payments, be accepted as a valid termination of temporary Workers' Compensation benefits for the Claimant?

2. Has the Claimant established that her injuries are work related?

EXHIBITS:

1. Stipulated Medical Index with 40 medical records of the Claimant.
2. Legal bill of Diamond and Robinson, P.C., dated January 9, 2007 and filed on January 12, 2007.

FINDINGS OF FACT:

1. The Claimant worked for the Defendant from 2003 until May 9, 2005 as a supervisor and an industrial seamstress. Her general work was industrial sewing with repetitive use of her left arm and shoulder. The Claimant was an employee within the meaning of the Vermont Workers' Compensation Act (Act) for all relevant periods. The Defendant was an employer within the meaning of the Act for all relevant time periods.

2. In October of 2003, the Claimant was having left shoulder pain. In February of 2004 she underwent a left shoulder arthroscopic acromioplasty with Dr. Douglas Macarthur. This injury was rated at 7% whole person impairment on April 6, 2005 and was accepted as a compensable injury.

3. On May 9, 2005, the Claimant was at work, taping a cardboard box for her finished products, when she felt intense and debilitating pain in her left shoulder. She went to the emergency room at the hospital and reported that her pain flared up when she was taping the box. Joint Medical Exhibit, Tab. 2. Her visit to the emergency room was the start of many medical examinations and assessments which have not positively identified a structural cause for her pain. Her pain has continued from the onset on May 9, 2005 until the date of the hearing. She has been consistent in identifying the box incident as the start of her most recent shoulder problem. Joint Medical Exhibit.

4. The May 9, 2005 injury was accepted by the Defendant and benefits were paid until March 2006. A Form 27, Employer's Notice of Intention to Discontinue Payments, was accepted by the Department on April 4, 2006. The Form 27 covered both medical benefits and temporary total disability benefits. Thereafter, no benefits have been paid.

5. Between May 9, 2005 and January 2006, the Claimant was treated by a variety of doctors and medical professionals who assessed her shoulder injury and pain. She was diagnosed with: (1) possible shoulder dislocation, (2) exaggerated protective response related to low grade muscularskeletal injury, (3) myofacial pain syndrome, and (4) "shoulder injury." Joint Medical Exhibit.

6. In a report generated by Dr. Philip Davignon in September of 2005 at the request of the Defendant, Dr. Davignon essentially ruled out fibromyalgia as the likely cause of the Claimant's pain. That same opinion was confirmed by Dr. Bruce Samuels in his report of October 5, 2005. Despite these two opinions, in February of 2006, Dr. Charles Carr gave a report which indicated that chronic myofacial pain syndrome/ fibromyalgia was her diagnosis and that she had no source of discomfort emanating from her shoulder. See Joint Medical Exhibit, Tab 28.

7. Thereafter, her nurse practitioner, Lili Cargill, listed her primary diagnosis as fibromyalgia on February 16, 2006. Joint Medical Exhibit, Tab 29.

8. The records which supported the diagnosis of fibromyalgia were submitted to the Department with the Form 27. See Department filing of March 27, 2006 which included medical records from Dr. Shafritz, Dr. Carr, Physician's Assistant Ryan Card and Nurse Practitioner, Lili Cargill. The Defendant's insurance adjuster wrote to the Department indicating that the Claimant had "failed to provide medical evidence of a compensable related disability; current symptoms are not work related as Claimant has been diagnosed with fibromyalgia which is not compensable under the current circumstances." See Letter of Nneka Oliphant to Department dated March 20, 2006.

9. What the Defendant did not submit to the Commissioner was the opinion of their own expert, Dr. Philip Davignon, of September of 2005. He had already determined that the Claimant did not meet the criteria for fibromyalgia. The insurer also did not include the report of Dr. Samuels of October 5, 2005 which had ruled out fibromyalgia. While the Claimant's diagnosis may have been a complex determination, the insurer presented only the material which would make it appear as a simple diagnosis of fibromyalgia, despite its possession of records which showed that this diagnosis was questionable and disputed.

10. The other reason stated by the Defendant for the Form 27 was that the Claimant had not supplied evidence that her pain problem was work related. The Claimant was able to provide such an opinion shortly after the termination of her benefits. Dr. Graubert on February 27, 2006 gave a diagnosis of myofacial pain in the left shoulder, possibly a complex regional pain syndrome. In July of 2006, Dr. Jenkyn diagnosed that the Claimant had chronic pain syndrome as a direct consequence of the work injury on May 9, 2005. Dr. Davignon, in his impression section of his report, listed the first impression to be "History of left shoulder injury." It was his testimony that the May 9, 2005 incident was a contributing factor to the overall problem with the left shoulder.

11. The attorney for the Claimant has submitted a bill for legal fees for a total of 77.00 hours of attorney and paralegal time for a total fee of $6,861.00 and reimbursable costs of $781.55.

CONCLUSIONS OF LAW:

1. In Worker's Compensation cases the Claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). The Claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

2. 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 inference from the facts proven must be the more probable hypothesis. *Burton v. Holden and Martin Lumber Co.* 112 Vt. 17 (1941).

3. While the Claimant has the burden of proof in the first instance, once the claim is accepted and benefits are paid, the employer must show that the Claimant has either returned to work or that the discontinuance of the benefits is warranted. 21 VSA Sec. 643a. The burden of proof to terminate a claim which has been accepted is upon the employer. *Merrill v. University of Vermont*, 133 Vt. 101 (1974). Under Workers' Compensation Rule 18.1100 the termination of benefits must be "adequately supported by evidence" as presented in the Form 27.

4. In this case, the Defendant chose to submit only the evidence which it had which supported a diagnosis of fibromyalgia, despite the fact that it had, in hand, the medical report of Dr. Davignon which said that the Claimant's condition did not fit within the clinical criteria for a diagnosis of fibromyalgia. It is also probable that the Defendant had in its possession a second report from Dr. Samuels concluding that the Claimant did not have fibromyalgia.

5. The Form 27 clearly gives the employee a right to challenge the action taken on a Form 27 discontinuance of benefits. *Thiverge v Groleau*, Opinion No. 67-94 WC (April 20, 1995). Clearly, the Commissioner relies upon the evidence presented by the employers in support of terminations. If the employer submits only a slice of those medical records which support one conclusion, the employer runs the risk that benefits will be reinstated with attorneys fees and interest. *Wilson v. Webster Corporation*, Opinion No. 33S-00 WC (October 5, 2000). The Defendant has failed to sustain its burden of proof when all the relevant medical evidence is considered.

6. It is also clear at this time that, even if the burden of proof were on the Claimant (which it was not) the Claimant could have, and did, present adequate evidence of causation between her pain condition and the injury of May 9, 2005. The Claimant presented opinions from Dr. Davignon, Dr. Graubert and Dr. Jenkyn, which, taken together with her own testimony, provide adequate, and persuasive evidence that the Claimant's pain condition is related to her injury at work. This conclusion is also supported by the facts that the Claimant was working and would continue to be working but for the incident, her immediate onset of pain which the incident triggered, and her immediate and consistent complaint of pain from the time of the incident forward. (This common sense interpretation of the facts is what Dr. Davignon identified as his "impression" of a "history of left shoulder injury.") Likewise, the Claimant has been consistent in her report of the onset of the problem and she immediately reported to medical providers that the work incident was the cause of her problem. Also, the injury of May 9, 2005 occurred with the backdrop of a prior work-related injury to the same shoulder which had been rated for a 7 % whole person impairment just two months before the May 9, 2005 injury. (The issue of aggravation/recurrence was not presented by the Defendant in this case.)

7. Under Vermont Workers' Compensation Rule 10.0000, the Commissioner may, in her discretion, award reasonable attorneys fees to the prevailing party. Attorneys' fees in the amount of $6,861.00 and costs of $781.55 are awarded to the Claimant. In addition, where payments are due, but unpaid, interest may be awarded. 21 VSA Sec. 664. In this case, the payments (both medical and temporary total disability benefits) were due by reason of the acceptance of the claim by the insurer. Given the earlier determination that the Form 27 was filed with selective medical reports, interest should be due on the retroactive temporary total benefits and medical benefits as they were due. See *Hendry v. City of Burlington*, Opinion No. 40-05WC (2005).

ORDER:

Therefore, based upon the foregoing findings of fact and conclusions of law, the Commissioner determines that the Claimant is entitled to the following:

1. Medical benefits regarding the Claimant's left shoulder injury and related pain condition;

2. Past TTD from the date of the last payment in March or April of 2006 to the present and ongoing until a medical end result is reached;

3. Attorneys' fees of $6,861.00, costs of $781.55 and interest on the medical and disability benefits which would have been paid but for the Form 27 which was filed.

Dated at Montpelier, Vermont this 23rd day of February 2007.

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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. Sec. 670, 672.