

M. D. v. DEW Construction

(August 28, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

M. D.

Opinion No. 24-07WC

v.

By: Jane Dimotsis, Hearing Officer
Renee Mobbs, Law Clerk

DEW Construction

For: Patricia Moulton Powden
Commissioner

State File No. X-06341

AMENDED OPINION AND ORDER

Corrected Date on last page, paragraph 9, to May 9, 2007.

Hearing held in Montpelier on June 25, 2007.

Record closed on July 13, 2007.

APPEARANCES:

Claimant, *pro se*

William Blake, Esq., for Defendant

ISSUES:

1. Whether Defendant must pay Claimant temporary total disability benefits from the time Claimant was laid off by a subsequent employer to the time Claimant resumed employment with a third employer.
2. Whether Claimant is entitled to Vocational Rehabilitation.

EXHIBITS:

Claimant's Exhibits

Claimant's Exhibit 1: 4/26/07– 5/16/07 Medical records from Dr. Macy and Lee Morse, PT

Claimant's Exhibit 2: 2/19/07 Functional Capacity Evaluation by Joe Barry, OT

Claimant's Exhibit 3: 5/18/07 IME Letter and Evaluation Questionnaire from Dr. Davignon

Defendant's Exhibits

Defendant's Exhibit 1: 7/06 DEW Newsletter

Defendant's Exhibit 2: 1/11/07 Email from Claimant to Specialist Biron

Defendant's Exhibit 3: 9/12/06 Transcription of phone call between Claimant and Peter Wells

- Defendant's Exhibit 4: 9/12/06 Transcription of phone call between Claimant and Peter Wells
- Defendant's Exhibit 5: 4/20/07 Letter to Claimant from John May, VR Counselor

FINDINGS OF FACT:

1. From April 2005 to September 12, 2006, Claimant was an employee of Defendant within the meaning of the Vermont Workers' Compensation Act (the "Act").
2. From April 2005 to September 12, 2006, Defendant was Claimant's employer within the meaning of the Act.
3. On May 31, 2006, Claimant suffered a work-related injury while tearing down a concrete block wall. Claimant was using a cart to remove concrete from the site of the wall; he injured his left shoulder when he pulled on the concrete-filled cart while it was still chocked.
4. Defendant filed a Form 1 on June 1, 2006.
5. A physical therapist assessed Claimant with a light duty work capacity on June 1, 2006. Claimant returned to work June 2, 2006.
6. Defendant provided Claimant with light duty work from June 2, 2006 to June 19, 2006, when Dr. Winokur diagnosed Claimant with a left rotator cuff tear. Dr. Winokur scheduled Claimant for an MRI on June 28, 2006. She also referred Claimant to physical therapy and extended his light duty work capacity for 4 more weeks.
7. Claimant continued to perform light duty work until the week of July 10, 2006, when he was out of work for the birth of his son.
8. On July 17, 2006, Dr. Macy performed arthroscopic surgery on Claimant to repair his left rotator cuff tear. On July 24, 2006, Claimant was referred back to physical therapy.
9. Defendant paid Claimant temporary total disability benefits from July 17, 2006 to August 22, 2006. On August 22, 2006, at Claimant's bidding, Dr. Macy returned Claimant to work on a light duty basis until further follow-up. Claimant returned to work on August 23, 2006.
10. On September 5, 2006, Dr. Macy extended Claimant's light duty work capacity for 8 more weeks.
11. Defendant provided Claimant with light duty work from August 23, 2006 to September 12, 2006.

12. On September 12, 2006, Claimant contacted Peter Wells, Defendant's General Superintendent, regarding the characterization of his out of work time for the week of July 10, 2006. During this conversation, Claimant informed Mr. Wells that Walker Construction had offered him a job. Claimant explained that Walker Construction would pay him \$6 more per hour and provide him with a company truck. When Claimant asked Mr. Wells if he would make a counter offer to match or raise Walker Construction's offer, Mr. Wells stated that the Defendant was not in a position to make a counter offer. Claimant then gave Mr. Wells his two weeks notice. Later on that day, Mr. Wells called Claimant to verify what Claimant's last day would be. Claimant confirmed that since he would be starting with Walker Construction on September 25, 2006, his last day with Defendant would be September 22, 2006. Nevertheless, after the latter phone call Defendant decided to reject Claimant's two weeks notice and Claimant was let go that afternoon.
13. Defendant voluntarily paid Claimant temporary total disability benefits for the week of September 18, 2006 to September 22, 2006.
14. Claimant began working for Walker Construction September 25, 2006; however, Claimant was laid off for lack of work on approximately October 14, 2006. Although Claimant testified that his work at Walker Construction was within his light duty restrictions, Claimant also testified that he never told Walker Construction about his left shoulder injury and subsequent surgery.
15. On November 7, 2006, Dr. Macy indicated that Claimant could return to medium duty work or get a Functional Capacity Evaluation to better determine his work restrictions. Dr. Macy stated that Claimant was not at medical end result.
16. On November 13, 2006, Claimant sought reinstatement of his temporary total disability benefits.
17. Defendant filed a Form 2 on November 29, 2006. Defendant denied Claimant's request for temporary total disability benefits because Claimant had voluntarily terminated his employment with Defendant in order to work for Walker Construction. Defendant further argued that Claimant's layoff from Walker Construction was for reasons unrelated to his original work injury.
18. On December 7, 2006, Specialist Luanne Biron denied reinstatement of temporary total disability benefits for lack of evidence. She requested that Claimant submit documentation showing that he had performed a reasonably diligent job search but that he was unable to secure work because of his work restrictions. Specialist Biron also noted that Claimant was receiving unemployment benefits, and that if he were found entitled to reinstatement of temporary total disability benefits he would need to pay back any unemployment benefits he had received.

19. On December 7, 2006, Claimant faxed to the Department a number of job inquiries he had emailed to potential employers after being laid off by Walker Construction. Claimant testified that he did not inform the potential employers of his work injury. These job inquiries were not entered into evidence at the formal hearing.
20. Despite Claimant's job inquiries, Defendant continued to oppose reinstatement of temporary total disability benefits because Claimant had been able to obtain employment with Walker Construction while under more limiting work restrictions (light duty) than he was under at the time he made the post-layoff inquiries (medium duty). Further, Defendant noted that the potential employers' responses to Claimant's inquiries pointed not to Claimant's work injury but to his lack of qualifications as the reason for their refusal.
21. On January 7, 2007, Specialist Biron responded to the parties and indicated that the available evidence was not reasonably sufficient to reinstate temporary total disability benefits.
22. A Functional Capacity Evaluation ("FCE") was performed February 19, 2007. Occupational Therapist Joe Barry found Claimant to have a medium work capacity, except for work at shoulder level and above. Mr. Barry also recommended that Claimant continue physical therapy.
23. On April 20, 2007, Claimant was found not entitled to Vocational Rehabilitation ("VR"). VR Counselor John May noted that, although Claimant had not returned to work since he was laid off by Walker Construction, he was employed as a supervisor in a physically suitable job after his injury and surgery. In addition, Mr. May noted that Claimant had experience in surveying, drafting, and quality control, all jobs that were consistent with his physical abilities (medium duty). Therefore, Mr. May found that, based on Claimant's ability to perform suitable employment for which he had previous training and experience, he was not entitled to VR.
24. On April 26, 2007, a physical therapy note indicated that although Claimant's left shoulder did not feel 100% better, he was able to play baseball. A May 7, 2007 physical therapy note again indicated that Claimant could play baseball, but that he could not yet play golf.
25. On May 7, 2007, Dr. Macy indicated that Claimant could return to work May 16, 2007, with restrictions as outlined in the FCE. On May 9, 2007, Dr. Macy stated that while Claimant was still experiencing pain, he was able to play softball. Further, Dr. Macy placed Claimant at medical end result and recommended an Independent Medical Evaluation ("IME"). Finally, Dr. Macy indicated that Claimant could return to work as soon as the next day so long as the FCE were complied with.
26. A May 15, 2007 physical therapy note stated that Claimant woke up that morning with severe pain in his left shoulder. Claimant denied that any trauma caused the pain; he suspected that he re-injured his shoulder in his sleep.

27. Claimant saw Dr. Macy on May 16, 2007. Dr. Macy's note indicated that Claimant re-injured himself lifting something. Although Dr. Macy had stated in his last note that Claimant could return to work, he placed Claimant back out of work until June 1, 2007 due to the re-injury. Dr. Macy also recommended more physical therapy.
28. On May 19, 2007, Dr. Davignon sent Claimant a letter scheduling an IME on permanency pursuant to Dr. Macy's determination of medical end result. However, Claimant did not attend the IME scheduled for June 5, 2007 due to the re-injury of his shoulder.
29. On May 27, 2007, Claimant ruptured his Achilles tendon while playing softball.
30. Claimant was unemployed from October 2006, when he was laid off by Walker Construction, to May 29, 2007, when he began working for the State of Vermont.
31. Claimant collected 26 weeks of unemployment benefits from the time he was laid off by Walker Construction to the time he was hired by the State of Vermont.
32. Defendant has paid and continues to pay all medicals related to Claimant's original work injury.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the Claimant has the burden of establishing all facts essential to supporting the claim. *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963). The Claimant must establish with 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). The Claimant must create 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 injury, and the inference from the facts proven must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
2. Claimant seeks temporary total disability benefits from the time he was laid off by Walker Construction to the time he was hired by the State of Vermont. He argues that he was unable to get a job at the wage he deserves because of his injury. Claimant also contests Dr. Macy's opinion that he reached medical end result on May 9, 2007. Further, Claimant disagrees with Dr. Macy's May 16, 2007 note, which states that Claimant re-injured his left shoulder "lifting something." Finally, Claimant opposes the VR Counselor's determination that he is not entitled to VR.

3. Defendant argues that Claimant is not entitled to further temporary total disability benefits because he voluntarily terminated his employment with Defendant. In the alternative, Defendant argues that Claimant is not entitled to temporary total disability benefits after May 9, 2007, when Claimant reached medical end result, May 16, 2007, when Claimant re-injured his left shoulder, May 27, 2007, when Claimant injured his Achilles tendon, or May 29, 2007, when Claimant returned to work with the State of Vermont. Defendant also avers that Claimant cannot be found entitled to VR because he has not offered an expert opinion in opposition to the VR Counselor's findings.

Temporary Total Disability Benefits; Voluntary Quit

4. In *Andrew v. Johnson Controls*, Opinion No. 3-93WC, Conclusions of Law at ¶ 4, the Department adopted the rule that “a claimant who voluntarily quits [his or her] job for reasons having nothing to do with the injury is **not** entitled to temporary total disability compensation.” However, the Department noted an exception to the general rule where the employee “begins a diligent search for employment” but “the employee’s work-related disability is the cause of the employee’s inability to find or hold new employment.” *Id.* at ¶ 5. Therefore, the Department has held that a claimant who voluntarily removes him or herself from the work force for reasons unrelated to the work injury has the burden of demonstrating: (i) that he or she suffered a work injury; (ii) that he or she made a reasonably diligent attempt to return to the work force; and (iii) that he or she was unable to return to the work force, or returned at a reduced wage, because of the work injury. *See id.* at ¶ 6. However, an employee’s voluntary quit does not relieve the defendant from its obligation to pay for all reasonably necessary medical treatment. *Id.* at ¶¶ 2, 9.
5. In *Andrew*, the Claimant was denied temporary total disability benefits because after voluntarily leaving her position with her employer, she did not make a reasonably diligent effort to return to the work force. *Id.* at ¶ 7. The Department found that “[a]pplying for only one position is not sufficient.” *Id.*

6. In *Pfalzer v. Pollution Solutions of Vermont*, Opinion No. 23-01WC, Conclusions of Law at ¶¶ 5 and 6, the Department restated the *Andrew* rule and exception. As in *Andrew*, the Claimant in *Pfalzer* was denied temporary total disability benefits for two of his out of work periods. However, unlike the *Andrew* Claimant, who failed to satisfy the second prong of the exception, the *Pfalzer* Claimant was denied temporary total disability benefits because he failed to satisfy the third prong of the exception. That is, the Claimant in *Pfalzer* could not show that he was unable to find work because of his original work injury. *Id.* at ¶¶ 8, 11. The Department noted that the “[C]laimant was able to eventually find a better paying job within a year while suffering no recorded (or claimed) change in his... condition.” *Id.* at ¶ 8. Further:

[D]efendant’s argument against awarding [C]laimant’s temporary total disability benefits after his lay-off... is persuasive. Claimant became unemployed... because of an economic downturn... .Thus his unemployment is the result of an economically related lay-off and has nothing to do with his [condition]. Furthermore, [C]laimant has not established that he was unable to find work after [his lay-off] because of his... condition.

7. It is clear that Claimant voluntarily terminated his employment with Defendant because Walker Construction was going to pay him a higher wage and provide him with a company truck. Thus, under the *Andrew* rule, Claimant is not entitled to temporary total disability compensation.
8. Nonetheless, Claimant did suffer a work injury on May 31, 2006 while working for Defendant. Therefore, the first prong of the *Andrew* exception is satisfied. Moreover, although Claimant did not enter his job inquiries into the formal record, the Department has considered them and finds them to be evidence of a reasonably diligent attempt to return to the work force in satisfaction of the second prong of the *Andrew* exception. In fact, unlike the *Andrew* Claimant, who only applied for one position, Claimant inquired into and applied for a number of positions. However, Claimant has failed to show that he was unable to return to the work force because of his work injury. Like the *Pfalzer* Claimant, the Claimant in this case successfully returned to work after voluntarily terminating his employment with Defendant. Indeed, Claimant’s post-injury employment at Walker Construction was more favorable to Claimant than his employment with Defendant. Also, Claimant never reported his prior work injury and surgery to Walker Construction; thus, Claimant’s layoff could not have been related to his left shoulder condition. Finally, Claimant did not tell the potential employers he contacted after being laid off by Walker Construction about his work injury. Therefore, their reasons for not hiring Claimant could not have had anything to do with his shoulder condition. Thus, Claimant has failed to satisfy the third prong of the *Andrew* exception and is not entitled to temporary total disability benefits after his layoff from Walker Construction. However, Defendant is not relieved of its obligation to pay for all reasonably necessary medical treatment related to Claimant’s left shoulder injury.

9. The Department also finds that Claimant reached medical end result for his original work injury on May 9, 2007. Indeed, although Claimant disputes Dr. Macy's determination, the Claimant has failed to introduce a medical opinion counter to Dr. Macy's.

Vocational Rehabilitation

10. The Department finds that Claimant is not entitled to Vocational Rehabilitation because the Claimant was employed as a supervisor in a physically suitable job after his injury and surgery and is able to perform suitable employment for which he has previous training and experience. Indeed, although the Claimant disputes VR Counselor John May's April 20, 2007 determination that he is not entitled to VR, the Claimant has failed to introduce a VR opinion counter to Mr. May's.

ORDER:

Based on the foregoing finds and conclusions:

1. Claimant's claim for temporary total disability benefits from the time he was laid off by Walker Construction to the time he resumed employment with the State of Vermont is DENIED. However, Defendant shall continue to pay for all reasonably necessary medical treatment related to Claimant's work-related left shoulder injury.
2. Claimant's claim for Vocational Rehabilitation is DENIED.

DATED at Montpelier, Vermont this 28th day of August 2007.

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.