Donald Patch v. Jan Co., Inc. (April 15, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Donald Patch

v.

Jan Co., Inc.

Opinion No. 12-09WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. AA-52776

OPINION AND ORDER

Hearing held in Montpelier on March 2, 2009
Record closed on March 13, 2009

APPEARANCES:

Frank Talbott, Esq., for Claimant
Craig Matanle, Esq., for Defendant

ISSUE PRESENTED:

1. Did Claimant suffer a compensable work-related injury on September 6, 2008?

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

EXHIBITS:

Claimant's Exhibit A: Medical records
Claimant's Exhibit B: Deposition of Daniel Robbins, M.D. taken on February 11, 2009
Claimant's Exhibit C: *Curriculum Vitae*, Daniel Robbins, M.D.

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640
Interest pursuant to 21 V.S.A. §664
Attorney's fees and costs 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. Defendant is the parent corporation for a local Burger King restaurant. Claimant has worked there as an assistant manager since 1999. As a "hands-on" manager, Claimant's duties include not only running the shift and supervising employees, but also taking, filling and bagging customer orders.

4. On September 6, 2008 Claimant was working the drive-through window. This assignment involves a significant amount of bending, lifting, twisting and moving in awkward positions in order to pass items to waiting customers. It was a busy Saturday afternoon. Within a few hours of starting his shift, Claimant began to feel low back and groin pain. Later the pain intensified and began radiating down the inside of his right leg and into his calf. Ultimately the pain became so unbearable that Claimant called his supervisor to report that he was leaving early to go to the hospital emergency room.

5. Claimant has a prior medical history of occasional low back pain and lumbar stiffness, for which he has treated on a fairly regular basis with Dr. Marco, a chiropractor. Claimant testified credibly that his previous episodes of low back pain were not nearly as intense as what he experienced on September 6, 2008, that they did not involve radicular pain and that they resolved fairly quickly. Claimant characterized his ongoing treatment with Dr. Marco as a type of "fitness care." Dr. Marco's treatment notes corroborate this testimony.

6. Claimant treated conservatively for his September 6, 2008 injury. When his symptoms lingered, in December 2008 he sought a consultation with Dr. Robbins, an orthopedic surgeon. Based both on Claimant's description of the mechanism of injury and the symptoms that followed and on his review of an MRI scan taken shortly after the incident, Dr. Robbins concluded that Claimant had suffered an annular tear at L5-S1. To a reasonable degree of medical certainty Dr. Robbins testified that the tear most likely had been caused by Claimant's work activities on September 6, 2008. Dr. Robbins felt "strongly" that Claimant's symptoms did not represent a continuation of any underlying chronic problem. To the contrary, he stated that Claimant's presentation was "absolutely textbook" for an acute annular tear.

7. As treatment Dr. Robbins prescribed aggressive physical therapy, a core stabilization and stretching regimen and non-steroidal anti-inflammatories. Claimant has progressed well with this program. At this point, although Dr. Robbins has not yet declared him at end medical result, he does not anticipate any substantial long-term impairment.

8. Defendant's medical expert, Dr. Davignon, performed an independent medical evaluation in November 2008. In Dr. Davignon's opinion, assuming that the prior medical history Claimant gave was accurate – and the evidence reveals no reasonable basis for concluding that it was not – the September 6, 2008 incident most likely resulted in an aggravation of the pre-existing chronic low back pain for which he had received chiropractic treatment in the past. On those grounds, Dr. Davignon concluded that Claimant's current symptoms were causally related to his work for Defendant.

9. As a result of his September 6, 2008 injury Claimant was totally disabled from September 7, 2008 until mid-December 2008. Defendant delayed putting Claimant back on the work schedule, however, until January 24, 2009 at which point Claimant returned to work full-time and full-duty.

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. Claimant alleges that his work activities on September 6, 2008 resulted in an annular tear at L5-S1, causing disabling symptoms that required medical treatment and precluded him from working for some time thereafter. Claimant presented Dr. Robbins' expert opinion in support of his position. Defendant countered with Dr. Davignon's expert opinion.

3. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).

4. Applying this test to the current claim, Claimant clearly prevails. Dr. Robbins credibly synchronized the mechanism of the injury with the MRI findings to conclude that Claimant's symptoms were in fact related to his work activities on September 6, 2008. His opinion was persuasive in every respect.

5. Indeed, Dr. Davignon reached essentially the same conclusion, albeit by way of a somewhat different medical path. The only disclaimer he appended to his opinion was his assumption that Claimant had reported his medical history accurately, which in fact he had. With that fact established, Dr. Davignon concluded that Claimant's ongoing symptoms amounted to a work-related aggravation of his pre-existing condition and thus were causally related to his employment for Defendant.

6. I conclude, therefore, that Claimant has sustained his burden of proving that his low back pain and radicular symptoms after September 6, 2008 were causally related to his work activities on that date. Defendant is responsible to pay for all associated workers' compensation benefits to which Claimant proves his entitlement. These include payment for all reasonably necessary medical services and supplies as well as indemnity benefits. As to the latter, Claimant has proven his entitlement to temporary total disability benefits from September 7, 2008 until January 24, 2009. Whether Claimant will be entitled to permanent partial disability benefits as well remains to be seen.

7. Claimant's attorney has submitted a request under 21 V.S.A. §678 for costs totaling $1,740.75 and attorney's fees totaling $5,904.00. An award of costs to a prevailing claimant is mandatory under the statute and therefore these are awarded. As for attorney's fees, these lie within the Commissioner's discretion. I find they are more than appropriate here, and therefore these are awarded as well.

ORDER:

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

1. Temporary total disability benefits from September 7, 2008 through January 24, 2009;

2. Medical benefits covering all reasonably necessary medical services and supplies causally related to treatment of Claimant's September 6, 2008 injury;

3. Additional workers' compensation benefits, including permanent partial disability benefits, proven to be causally related to Claimant's September 6, 2008 injury;

4. Interest on the above amounts in accordance with 21 V.S.A. §664; and

5. Costs of $1,740.75 and attorney's fees of $5,904.00 in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 15th day of April 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.