STATE OF VERMONT
DEPARTMENT OF LABOR

Refik Jandric

v.

Danforth Pewterers

Opinion No. 25-09WC

By: Phyllis Phillips
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. W-00993

RULING ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

ATTORNEYS:

Chris McVeigh, Esq., for Claimant
Eric Johnson, Esq., for Defendant

ISSUES:

Claimant moves for partial summary judgment as to his entitlement to temporary disability benefits from October 24, 2006 through November 7, 2007. Based on the Windsor Superior Court's ruling in *Harrness v. Therrien Foundations*, Docket No. 557-11-05 Wrcv, Claimant argues that as a matter of law the fact that he earned no wages during the twelve weeks preceding this period of disability cannot disqualify him from receiving temporary disability benefits.

Defendant opposes the motion on the grounds that *Harrness* is not binding precedent in this claim. In addition, Defendant cross-moves for summary judgment on the grounds that (1) Claimant's failure to accept proffered vocational rehabilitation services disqualifies him from receiving temporary disability benefits; (2) Claimant has failed to sustain his burden of proving that his injury was causally related to his work; and (3) Claimant's claim for benefits was not timely made and is therefore barred.

FINDINGS OF FACT:

Only a brief recitation of the facts is necessary. In July 2004 Claimant made a claim for workers' compensation benefits for a right elbow injury that he alleged was causally related to his work for Defendant. Defendant executed a Form 21 Agreement for Temporary Total Disability Benefits in which it accepted the claim as compensable and paid both medical and indemnity benefits accordingly.

In February 2005 the Department approved Defendant's discontinuance of temporary disability benefits on the grounds that Claimant had reached an end medical result. Claimant did not appeal the discontinuance.

Also in February 2005 Defendant referred Claimant for vocational rehabilitation services. These services were discontinued, and Claimant's vocational rehabilitation file was closed, in November 2005. The stated grounds for the closure was that Claimant had withdrawn from the process voluntarily because he was concerned that returning to work would jeopardize his entitlement to social security and medical coverage. Claimant disputes that that was the case, however. Instead he asserts that he wanted to return to work but was in too much pain to do so. *Letter from Claimant to Department, January 20, 2007 (Exhibit 1).*

In October 2006 Claimant underwent left elbow surgery. Defendant accepted responsibility for the medical costs associated with this surgery as causally related to the July 2004 right elbow claim. However, it denied that it owed Claimant any temporary disability benefits during his recovery period, on the grounds that Claimant had opted out of the vocational rehabilitation process, had not worked during the intervening years and therefore had no wages to replace. *Letter from Danielle Lewis to Claimant, November 3, 2006 (Exhibit 2).* The Department subsequently notified the parties that it was considering Claimant's January 20, 2007 letter to be a request for hearing pursuant to Workers' Compensation Rule 4.1100. *Exhibit 3.* The dispute now has made its way onto the formal hearing docket.

DISCUSSION:

Claimant argues that the fact that he earned no wages during the twelve weeks prior to his most recent disability is, as a matter of law, an insufficient basis for denying his entitlement to temporary disability benefits. In support of his argument, Claimant cites a Windsor Superior Court case, *Harrness v. Therrian Foundations*, Docket No. 557-11-05 Wrcv. In that case, the Superior Court overturned the Commissioner's determination that Mr. Harrness was not entitled to temporary disability benefits because he had earned no wages during the twelve weeks preceding his most recent period of disability. The Court ruled that the legislature's intent was not to deny benefits entirely in this situation, but rather to refer back to the wages earned at the time of the original injury in order to calculate the amount due.

Claimant asserts that the Court's ruling in *Harrness* is binding on the Commissioner, not solely in that claim but in all similar claims as well, including this one. For both practical and legal reasons, however, I cannot give the Superior Court's ruling such broad effect.

As an unpublished decision, first of all, the Superior Court's ruling in *Harrness* is not binding precedent. *See generally,* 21 *Corpus Juris Secundum* Courts §234; *Town of Calais v. County Road Commissioners*, 173 Vt. 620 (2002) (Morse, J., dissenting) (as to non-binding precedential nature of unpublished Supreme Court opinion). By their very nature, such decisions are not uniformly disseminated other than to the parties who are directly involved. It would be unfair to build a body of case law around them when those who would be bound may not even be aware that they exist.

Given the potential, furthermore, that different superior courts may – and often do – interpret the law differently, it would be impractical to hold up one court's decision as binding precedent in the face of another court's conflicting determination on the same legal issue. Certainly each court's decision is binding upon the Commissioner with respect to the particular claim before it, *see* 21 V.S.A. §671; *Sargent v. Town of Randolph*, 2007 VT 56. But to choose which of two conflicting superior court decisions is binding on all claims would make no sense, as choosing one would mean rejecting the other, in violation of §671.

Last, even if I could be persuaded that the Superior Court's determination in *Harrness* created a binding precedent, the facts of the current claim would dictate against its application here. At issue here is not solely whether Claimant is barred from receiving temporary disability benefits because he earned no wages in the twelve weeks preceding his disability, but also whether he should be barred by virtue of his withdrawal from the vocational rehabilitation process and consequent failure to seek suitable employment. In making its ruling, the *Harrness* court specifically refrained from reaching that issue.[1]

I conclude, therefore, that the *Harrness* decision is not binding precedent in this claim, not only for the practical and policy reasons stated above but also because its facts are distinguishable from those before me now. For that reason, I must deny Claimant's motion for summary judgment.

I must deny Defendant's cross-motion for summary judgment as well. The first stated ground for Defendant's motion – that Claimant's "voluntary" withdrawal from the vocational rehabilitation process disqualifies him from receiving temporary disability benefits – is based on facts that are genuinely and materially disputed, thus precluding summary judgment. *Samlid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).

Defendant's second argument in favor of summary judgment – that Claimant has failed to sustain his burden of proving that his injury is work-related – fails as well. Viewing the evidence in the light most favorable to Claimant, as is required in this context, *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990), I find that the small portion of the treating physician's deposition testimony to which Defendant cites does not conclusively establish, as a matter of law, that Claimant's injury is not work-related. Beyond that, both factual and legal issues exist as to the extent to which Defendant may have waived its right to contest compensability. These too dictate against summary judgment.

Defendant's third argument – that Claimant's claim for benefits is time-barred – has no merit. As is clear from the appended exhibits, Claimant seasonably appealed Defendant's denial of temporary disability benefits within the time limits imposed by statute and rule.

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[1] The Court's conclusion that Mr. Harrness was entitled to temporary disability benefits was predicated on its determination that, contrary to both the employer's assertion and the Commissioner's opinion, he had not yet reached end medical result. Thus the Court stated, "This is not a case in which termination of TTD benefits is properly premised upon release and failure to seek or accept suitable employment." *Harrness, supra* at p. 18, fn. 7.

Defendant's final, alternative argument – that Claimant's entitlement to temporary disability benefits be limited as a matter of law to the period from October 24, 2006 to December 4, 2006 – again raises questions of fact that are not amenable to disposition on summary judgment.

Defendant has failed to establish, therefore, that it is entitled to judgment in its favor as a matter of law on any of the grounds it has asserted. I must therefore deny its motion for summary judgment as well.

ORDER:

Based on the foregoing, both Claimant's Motion for Partial Summary Judgment and Defendant's Cross-Motion for Partial Summary Judgment are **DENIED**.

DATED at Montpelier, Vermont this 9 day of July 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.

W-993

EXHIBIT 1

Date: 1/20/2007

To: Vermont Department of Labor
From: Refik Jandric
P.O. Box 46
Salisbury, VT 05769
State file No: W993

I'm writing this letter to you because, I was denied Workers' Compensation benefits from February 2005 to the present. I am unable to work and I haven't worked since November, 2004.

Some of the confusion may have happened because a Vocational Rehabilitation counselor who worked with me misunderstood my desire to work. I do not speak English very well, and I think he misunderstood me. (I am getting help with this letter). He was trying to send me out for interviews so I would go back to work immediately but I was still in too much pain. I still needed further medical treatment at that time. That did not mean I didn't want to go back to work; it just meant I couldn't work right then. I did not refuse Vocational Rehabilitation services (see attached).

In addition, my orthopaedic surgeon Dr. Adam B Shafritz wrote a letter to one of my primary care physicians Dr. Fifield on May 1, 2006 (attached) indicating that I had suffered elbow pain for 10-11 years; that was actually the length of time I had been in the United States.. I have actually had the pain since July of 2004, and that mistake has been corrected (see attached). The correct date is also confirmed by a letter from Dr. Benz. (See attached)

Finally, Dr. Benz from Champlain Valley Orthopaedics (see attached) said that I was better after the steroid shots, but I still would need surgery. Dr. Benz sent me back to work for "light

duty." But Danforth Pewter, my employer, didn't have any light duty. They assigned me to work I couldn't do because of excruciating pain. The pain kept coming back. I had to rest almost as much as I worked. So they let me go. I did not quit my job. That's when Vocational Rehabilitation began to work with me, because Danforth had laid me off. The Voc Rehab counselor couldn't seem to understand about the continuing pain. After that, I had a lot more medical treatment. Then I had surgery on my left elbow. (See attached letters from Dr. Benoit and Dartmouth-Hitchcock Medical Center). Now it's better on the left, but I still need surgery on the right elbow. According to Dr Benoit, I can't have the second surgery, however, until the first is completely healed. And, according to Dr. Cope of Champlain Valley Health Associates, I am still unable to work (see attached).

I believe I am still eligible for Workers' Compensation. I believe there have been several mistakes that resulted in Workers' Comp's terminating my benefits. I believe that after you review this letter and the attachments you will reinstate my benefits. I hope to go back to work after my second surgery has healed.

Thanks you for your consideration.

Sincerely,

Refik Jandric

Refik Jandric
(802) 352-4202

VERMONT

Working Together For Vermont

ermont Department Of Labor
orkers' Compensation and Safety Division
National Life Building, Drawer 20
Montpelier, VT 05620-3401
http://www.labor.vermont.gov

[phone] **802-828-2288**
[fax] **802-828-2195 or**
802-828-0408
[tdd] **802-828-4203**

EXHIBIT 2

January 30, 2007

Refik Jandric
PO Box 46
Salisbury VT 05769

Danielle Lewis
Cardinal Comp
P O Box 926
Burlington VT 05402-0926

Re: Refik Jandric v. Danforth Pewterers
State File #W-993; Ins. Co. #003-0004271

Dear Mr. Jandric and Ms. Lewis:

Enclosed please find Mr. Jandric's written communication, which is being treated as a request for hearing in the above matter pursuant to Rule 4.1100. This communication is to formally put all parties on **NOTICE** of this request for hearing pursuant to Rule 4.1100.

Pursuant to the above request, an **INFORMAL TELEPHONE CONFERENCE** has been scheduled for **Wednesday, March 7, 2007 at 11:30 a.m.** I will conduct the conference over the phone, therefore, no personal appearance is required. This office will initiate the call at the scheduled time. If for some reason this time is not convenient for you, please notify me immediately.

The parties are urged to speak to one another PRIOR to the conference date to ensure each has complete information and to discuss the issues to see if you can make any progress towards resolution. If you cannot resolve the dispute prior to the conference date, please take note that a decision will be made at the time of the conference based upon the evidence available. Therefore, you are encouraged to make sure all information upon which you intend to rely to support your respective positions is received **prior** to the conference date.

Please note, Rule 4.1400 states, in part, "Every paper or document filled by a party after the Notice and Application for Hearing shall be served by that party upon all other parties and the commissioner." Therefore, you must provide each other with any information you submit to this office.

Ms. Lewis, please review the medical evidence Mr. Jandric provided with his letter including the December 12, 2006 letter from Dr. Cope that indicates Mr. Jandric has been unable to work due to the work injury since summer 2004.

In accordance with Rule 4.13000, the opposing party shall serve an answer specifically stating the defenses to each claim asserted, accompanied by copies of all relevant supportive evidence, upon the applicant and the commissioner within 21 days from the date the Notice and Application for Hearing is mailed by the Division. If specific facts sufficient to support the claim have been provided by an employee, failure to answer by the employer may be treated as an unreasonable denial subject to an order to pay compensation pursuant to 21 V.S.A. Section 662(b). This provision shall not be construed to bar the timely assertion of additional defenses when justice requires.

If you have any questions, please feel free to contact me.

Thank you for your cooperation.

Sincerely,

Luanne Biron
Workers' Compensation Specialist

Encl.

CardinalComp LLC

EXHIBIT 3

November 3, 2006

Refik Jandric
P.O. Box 46
905 Maple Street
Salisbury, VT 05769

RE: Refik Jandric
DOI: 7/26/04
Claim #: 3-4271
Insured: Danforth Pewterers

Dear Mr. Jandric:

As you are aware I am the adjuster assigned to your above referenced claim. You and I have had several conversations recently in regard to your claim. I would like to take a moment to outline our position.

You have a claim for bilateral epicondylitis. Dr. Benz placed you at medical end result for your injury on February 8, 2005. We sent you to Dr. Backus to have permanency addressed, as Dr. Benz does not handle permanency ratings. Dr. Backus agreed with the medical end result determination and assessed a 0% permanency rating on March 7, 2005. You have not worked since approximately October or November of 2004. You opted out of vocational rehabilitation services.

Recently Dr. Shafritz recommended release of your ECRB at the lateral epicondyle and a VY lengthening with fixation. As surgery was being recommended we set you up for an independent medical evaluation with Dr. McLellan. Dr. McLellan concluded that your current symptoms were still related to your work injury from Danforth Pewterers. For this reason we agreed to pay for your medical treatment in relation to the work injury, including the surgery and post-surgical therapy.

As I have explained to you. We are not paying for any Temporary Total Disability benefits at this time, as you are not entitled to any Temporary Total Disability benefits. You were placed at medical end result, you opted out of vocational rehabilitation and you have not worked for two years. Temporary Total Disability is to replace lost wages. Since you do not have 12 weeks of wages prior to the period of disability (your surgery) there are no wages to be replaced.

P.O. Box 926
Burlington, VT 05402
(888) 805-8050
(802) 857-1000
(802) 857-1010 (fax)
www.firstcardinal.com

CardinalComp LLC

If you have any questions, or concerns, please contact me at 1-888-805-8050, ext. 1027.

Sincerely,

Danielle V. Lewis

Danielle Varricchione Lewis
Claim Adjuster

CC: Vermont Department of Labor & Industry
Danforth Pewterers

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