

Deborah Ribis v. Coventry Health Care (July 17, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Deborah Ribis

Opinion No. 26-09WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

Coventry Health Care

For: Patricia Moulton Powden
Commissioner

State File No. Z-52695

OPINION AND ORDER

Hearing held in Montpelier on January 12, 2009

Record closed on February 17, 2009

APPEARANCES:

Frank Talbott, Esq. for Claimant
Jason Ferreira, Esq. for Defendant

ISSUES:

1. Is Claimant entitled to temporary partial disability benefits from September 19, 2007 until the date upon which Defendant terminated her employment?
2. Is Claimant entitled to temporary total disability benefits from the date upon which Defendant terminated her employment until the date she reached end medical result?

EXHIBITS:

Joint Exhibit I: Joint Medical Exhibit

Claimant's Exhibit A: *Curriculum Vitae* of Dr. Ellen C. Gaughan

Claimant's Exhibit B: Supplemental medical records including neuropsychological evaluation

Claimant's Exhibit C: Performance appraisal

Defendant's Exhibit 1: Portion of Claimant's personnel file

Defendant's Exhibit 2: Letter from Yul Garces, June 20, 2008

Defendant's Exhibit 3: Newspaper articles authored by Claimant

Defendant's Exhibit 5: Various letters from Claimant to Department of Labor

CLAIM:

Temporary partial disability benefits pursuant to 21 V.S.A. §646

Temporary total disability benefits pursuant to 21 V.S.A. §642

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 proceeding, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Worker's Compensation Act.
2. Judicial notice is taken of all forms contained in the Department's file relating to this claim.
3. Claimant worked as a nurse life care planner for Defendant. Her job entailed preparing cost projections for insurance companies and devising life care plans. Claimant received a base salary as well as a \$600.00 monthly bonus if she met certain performance-based criteria. Claimant regularly received this bonus prior to her work injury.
4. Claimant also earned money from other sources. She wrote a bi-monthly newspaper column on health care advocacy issues and magazine articles on similar topics. From these activities she earned several hundred dollars annually. In addition, she wrote a book, "*Get Back on Your Feet! What Every Injured and Ill Person Needs to Know.*"
5. Prior to her employment for Defendant Claimant had worked for another company for whom her primary responsibility was to prepare Medicare Set-Aside agreements. When she began working for Defendant, however, Claimant told her supervisor that she would prefer not to do Medicare Set-Asides because she was "burned out" on them.

Claimant's Work-Related Injury

6. On August 7, 2007, while Claimant was working at home, she rose from her chair to retrieve some work-related materials from a bookcase and caught her foot on her desk. She fell headfirst into the bookcase, injuring her forehead, knee and back. She did not lose consciousness.
7. Claimant's son brought her to the hospital. She had suffered a gash on her upper forehead that required fourteen stitches to close. She was not diagnosed with a concussion.
8. Claimant's primary care physician, Dr. Hobbs, initially diagnosed her with a head laceration and a wrist sprain, and later with neck and cervical pain also. Dr. Hobbs determined that Claimant was unable to work until September 4, 2007.

9. Although it was not immediately diagnosed, Claimant later was determined to have suffered a traumatic brain injury as a consequence of her fall as well. Dr. Hobbs, Dr. Gaughan (a neuropsychiatrist), Dr. Staunton (a neurologist and independent medical examiner) and a speech pathologist all concurred in this diagnosis. This injury affected her ability to concentrate at work, and also resulted in memory, language and other cognitive impairments.

Claimant's Medical Treatment

Dr. Gaughan

10. At Dr. Hobb's referral, Claimant began treating with Dr. Gaughan in December 2007. Dr. Gaughan is board certified in neurology, neuropsychiatry and neuropsychology.
11. Dr. Gaughan diagnosed Claimant with a mild concussion syndrome, a form of traumatic brain injury. The resulting cognitive dysfunction included difficulties with memory, attention span, impulse control, language retrieval and abstract verbal reasoning. Dr. Gaughan also noted that Claimant suffered from vertigo and was anxious and depressed. In Dr. Gaughan's opinion, all of these symptoms were causally related to Claimant's work injury, and all impaired her ability to perform her job responsibilities as effectively as she had previously.
12. Dr. Gaughan has treated Claimant regularly since December 2007. She testified at the formal hearing that after so much time it is unlikely that Claimant will experience significant additional improvement in her condition.

Speech Pathologist Orlofsky

13. Since her injury Claimant has undergone speech therapy with Deborah Orlofsky, a speech pathologist. Ms. Orlofsky specializes in patients with traumatic brain injuries, helping them to develop alternative strategies to overcome both speech and cognitive limitations.
14. Ms. Orlofsky began treating Claimant in December 2007 and discharged her from her care in June 2008. Although Claimant's cognitive thinking processing time had improved, Ms. Orlofsky anticipated that she would continue to experience cognitive difficulties.

Dr. Staunton

15. At Defendant's request, Dr. Staunton, a neurologist, conducted an independent medical evaluation in February 2008. Dr. Staunton acknowledged that Claimant had suffered a traumatic brain injury, as a result of which she was experiencing short-term memory problems, poor concentration and receptive language difficulties. As treatment, he recommended continued physical and cognitive therapy. Dr. Staunton anticipated that Claimant would recover fully within six months and predicted that she would have no residual permanent impairment.

16. Dr. Staunton re-evaluated Claimant in September 2008. At that time he found her statements to be inconsistent and questioned whether she might be exaggerating both her physical and her cognitive symptoms for secondary gain. Dr. Staunton recommended a neuropsychological examination to evaluate the extent of Claimant's perceived cognitive deficiencies.

Neuropsychological Evaluation

17. Claimant underwent a neuropsychological evaluation in December 2008. The evaluator concurred in the diagnosis of traumatic brain injury. Testing revealed various symptoms of cognitive, executive and emotional dysfunction, and language impairment as well. The evaluator recommended vocational, educational and rehabilitative services to assist Claimant in overcoming deficits relating to lack of organization, forgetfulness, confusion, fatigue and executive functioning.

Post-Injury Job Performance Issues

18. When Claimant returned to work in September 2007, approximately one month post-injury, she experienced a variety of cognitive deficiencies, including diminished reading comprehension, problems with short-term memory and difficulty organizing her work. She also had feelings of dizziness and fatigue. As a result of these symptoms Claimant was unable to work as quickly and efficiently as she had in the past. Her productivity suffered.
19. Claimant did continue to work but because her productivity was down she no longer received the monthly performance-related bonuses she regularly had earned before her injury. Because of her cognitive difficulties Defendant opted not to assign her life care plans, so Claimant only did medical cost projections for insurance companies. Claimant's supervisor, Ms. Payne, specifically noted in Claimant's work records that although she continued to meet her deadlines her cognitive difficulties caused her to take more time to finish her assignments.
20. Claimant also was noted to be billing fewer hours than what was required, again because of her post-injury limitations. For the eight months prior to her injury, she billed 90.5% of the available billable hours, but after the injury her total billings decreased to only 52.7% of the available billable hours.
21. Claimant testified that her cognitive difficulties also precluded Defendant from training her to prepare Medicare Set-Aside agreements, which she alleged it had intended to do before her injury. This assertion is somewhat at odds, however, with her testimony, noted earlier, that she was "burned out" on these agreements and did not wish to be trained to do them for Defendant.
22. Last, Claimant's cognitive difficulties also affected her ability to write outside of her work for Defendant. Although she continued to write some health advocacy articles, these took longer to produce than they had in the past.

Decrease in Wages Post-Injury

23. Claimant's supervisor acknowledged that Claimant's average wages decreased as a result of the cognitive difficulties she experienced post-injury. As noted above, prior to her injury Claimant consistently earned her monthly performance-based bonus, resulting in an average weekly wage of \$1,601.25. After the injury her average weekly wage decreased to \$1,430.63, an average difference of \$170.62 weekly.

Claimant's Termination from Employment

24. In early 2008 Defendant's Senior Director of Operations, Yul Garces, was instructed to reduce staff because the company had lost revenue. Claimant's supervisor, Ms. Payne, was charged with identifying the criteria to be used to lay off two life care planners from Claimant's area.
25. Ms. Payne identified the following factors to be considered in determining whom to lay off:
- (a) Regional assignment;
 - (b) Wage level;
 - (c) Years of service;
 - (d) Quality of reports;
 - (e) Turn-around time for reports;
 - (f) Proficiency with customer relations;
 - (g) Attitude; and
 - (h) Availability to work with Defendant's three products (life care plans, medical cost projections and Medicare Set-Aside agreements).
26. Applying these factors, Ms. Payne recommended to Mr. Garces that Claimant be one of the two employees to be laid off. Claimant was assigned to the eastern region, where Defendant had the most coverage. She was one of its highest paid employees, but had the fewest years of service. She was only available to work on one of Defendant's three products. On the positive side, Ms. Payne acknowledged that the quality of Claimant's reports was high, and her turn-around time, although increased since her injury, still was within acceptable limits. Unfortunately, however, faced with declining revenues, these positive attributes were not enough to justify retaining Claimant and laying off someone else instead.
27. Mr. Garces accepted Ms. Payne's recommendation and on April 3, 2008 terminated Claimant's employment. He testified that Claimant was chosen to be laid off because she had the second highest salary, she had less experience, she was assigned to the east region and she was available to work on only one of Defendant's three products. According to Mr. Garces, the fact that Claimant's billable hours had decreased was not a factor in her selection, as the company's declining referrals had caused other life care planners' billable hours to be lower as well. Thus, Mr. Garces testified, his decision to lay off Claimant had nothing whatsoever to do with her injury. In fact, he disclaimed even knowing that Claimant had been injured.

Claimant's Work Capacity

28. Since her injury Claimant has continued to do house work, pay her own bills, drive her car, and take care of her dog. She also has continued to write health advocacy articles, though not at the same pace as before her injury.
29. After Claimant was laid off Dr. Gaughan determined that she was disabled from working. Dr. Gaughan stated that the reason she did so was because Claimant's injury precluded her from learning a new job and also restricted her from driving very far. Prior to this time Claimant had been working full time with no restrictions. Dr. Gaughan admitted that she would not have taken Claimant out of work if she had not been laid off.
30. In June 2008 Claimant's speech pathologist, Ms. Orlofsky, recommended that Claimant return to the type of work with which she was familiar, at least part-time to start, and full time if she felt ready to do so.
31. At the time of his second independent medical evaluation, in December 2008, Dr. Staunton stated that Claimant was fully capable of working.
32. At the time of the formal hearing, Claimant was continuing to collect unemployment benefits in the state of New York, where she resides. She could not remember any job contacts except those recently made. As to those, she told none of the employers with whom she spoke about her traumatic brain injury.
33. Since being laid off, Claimant has availed herself of both vocational and educational services and is preparing to become self-employed doing the same type of work as she did for Defendant. Dr. Gaughan has fully endorsed her ability to do so. Claimant has written a business plan and recently received a grant for funds to purchase necessary equipment. Claimant has been successfully self-employed in the past.

Attorney Fees and Costs

34. Claimant's attorney has submitted a request for costs totaling \$2,250.50 and attorney fees totaling \$10,026.00 (111.40 hours at the mandated rate of \$90.00 per hour).

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. In the instant case, there is no dispute that Claimant suffered a work-related traumatic brain injury. All of the medical experts agree on this fact. The issues in dispute relate not to the injury itself, but to its alleged impact on Claimant's ability to work, both before and after Defendant terminated her employment.

Claimant's Entitlement to Temporary Partial Disability Benefits

3. Claimant alleges that from the time she returned to work after her injury, the week ending September 10, 2007, until the time she was laid off, April 3, 2008, her work injury precluded her from earning as much as she had previously. Specifically, she points to the fact that she regularly had received performance-related bonuses before her injury, but she asserts that her post-injury cognitive deficits prevented her from meeting the criteria thereafter. If her assertion is correct, then under 21 V.S.A. §646 she is entitled to a weekly benefit totaling two-thirds of the difference between her pre-injury average wage (\$1,601.25) and her post-injury average wage (\$1,430.63). The difference is \$170.62, two-thirds of which totals \$113.74 weekly.
4. Temporary partial disability benefits are payable to an injured worker who (a) has not yet fully regained his or her earning power; and (b) has not yet reached an end medical result. 21 V.S.A. §646; *Orvis v. Hutchins*, 123 Vt. 18 (1962).
5. Here, the medical experts all agreed that Claimant's injury did in fact affect her cognitive function, and thereby her work capabilities as well. Claimant's supervisor, Ms. Payne, acknowledged that Claimant's cognitive deficits caused her to take more time to complete assignments, with the result that her billable hours decreased and she could no longer meet the performance-based criteria for monthly bonuses. Having thus established the necessary relationship between Claimant's work injury and her reduced earnings, Claimant is entitled to temporary partial disability benefits from the time she returned to work, the week ending September 10, 2007, until the time her employment terminated, April 3, 2008.

Claimant's Entitlement to Temporary Total Disability Benefits

6. Claimant's entitlement to temporary total disability benefits stands on a different footing, however. Her claim for these benefits is complicated by the fact that notwithstanding her injury and resulting cognitive deficits, she was able to work full time and without restrictions until she was laid off. To qualify for temporary total disability benefits, therefore, she must show either that Defendant terminated her employment because of her injury and/or that her subsequent unemployment was caused by injury-related factors, not unrelated ones.
7. I find, first of all, that Defendant terminated Claimant's employment for legitimate business reasons that were unrelated to her injury. Claimant's supervisor adequately explained the criteria by which she selected Claimant for lay-off, and Mr. Garces reinforced that the decision was based primarily on business revenue and expense considerations. I am convinced by their testimony that given Claimant's regional assignment, high salary and relatively short tenure, she likely would have been one of the employees chosen for lay-off even if she had not been injured.
8. Nor does the fact that Dr. Gaughan disabled Claimant from working *after* she had been laid off convince me otherwise. Claimant had been working full time and full duty until Defendant terminated her employment, and Dr. Gaughan herself admitted that she would not have taken Claimant out of work at all had Defendant not taken that action. The reasons Dr. Gaughan cited in support of her determination that Claimant became totally disabled thereafter – that she could not drive long distances or learn a new job – might be relevant to vocational rehabilitation considerations but cannot justify a finding that Claimant was totally unable to work.
9. The fact that Claimant's lay-off itself was not injury-related, however, does not necessarily preclude her from qualifying for temporary disability benefits for a subsequent period. In order to do so, she must provide persuasive evidence of the following: (a) a work injury; (b) a reasonably diligent attempt to return to the work force; and (c) that any ongoing inability to find suitable work is related to the work injury, not to other factors. *Pitaniello v. GE Transportation*, Opinion No. 03-08WC (January 17, 2008), citing *Andrew v. Johnson Controls*, Opinion No. 3-93WC (June 13, 1993) (voluntary quit); and *Ducharme v. DEW Construction*, Opinion No. 24-07WC (August 27, 2007) (lay-off).
10. Claimant fails to meet this test. Although she credibly established the fact of her work injury, I cannot find from the evidence presented that she has met either of the other two factors.

11. As to the second factor cited in *Pitaniello*, Claimant was able to document only a marginally diligent job search. As to the third factor, I can only conclude from the fact that Claimant did not tell any prospective employers of her injury that this was not the reason for their failure to hire her. Most recently, furthermore, Claimant has demonstrated her ability to develop a self-employment plan, doing essentially the same work she was doing before Defendant terminated her employment, and has even garnered funding for it. There is nothing in the record from which to conclude that Claimant's injury precluded her from choosing this career path sooner.
12. I am left, therefore, with a claimant who suffered a work injury, successfully returned to work and subsequently was laid off for unrelated reasons. There is insufficient evidence to establish that her unemployment for any period of time thereafter was injury-related. Under these circumstances, she does not qualify for temporary total disability benefits.
13. As Claimant has prevailed only on her claim for temporary partial disability benefits, she is entitled to an award of only those costs that relate directly thereto. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997). Here, however, Claimant's litigation costs related equally to both aspects of her claim and are not reasonably divisible. It is appropriate in this situation to award all of the costs requested. *Hill v. CV Oil Co., Inc.*, Opinion No. 15-09WC (May 26, 2009).
14. As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. I find it appropriate here to award Claimant sixty percent of the fees requested, or \$6,015.60.

ORDER:

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

1. Temporary partial disability benefits at the rate of \$113.74 weekly, beginning on September 10, 2007 and ending on April 3, 2008;
2. Interest on the above amounts in accordance with 21 V.S.A. §664;
3. Costs totaling \$2,250.00 and attorney fees totaling \$6,015.60.
4. Claimant's claim for temporary total disability benefits subsequent to her termination from employment is hereby **DENIED**.

DATED at Montpelier, Vermont this 17th 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.