

Lorianne Lewia v. Stowe Motel

(July 25, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Lorieann Lewia

Opinion No. 19-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Stowe Motel

For: Anne M. Noonan
Commissioner

State File No. BB-55471

OPINION AND ORDER

Hearing held in Montpelier, Vermont on March 17, 2011

Record closed on April 5, 2011

APPEARANCES:

Vincent Illuzzi, Esq., for Claimant
Jason Ferreira, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant entitled to temporary total disability benefits for the period from June 18, 2010 through August 6, 2010?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	Various work capabilities forms
Claimant's Exhibit 2:	Letter from Scott Ward, April 2, 2010
Claimant's Exhibit 3:	<i>Curriculum vitae</i> , W. Thomas Turek, D.C.
Defendant's Exhibit 1:	<i>Curriculum vitae</i> , Verne Backus, M.D.
Defendant's Exhibit 2:	Letter from Scott Ward, May 27, 2010
Defendant's Exhibit 3:	Letter from Attorney Illuzzi, June 2, 2010
Defendant's Exhibit 4:	Letter from Scott Ward, June 8, 2010
Defendant's Exhibit 5:	Form 27, approved June 18, 2010
Defendant's Exhibit 6:	Letter from Anne Coutermarsh, August 30, 2010

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her 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. Claimant worked for Defendant as a housekeeper. On November 5, 2009 she was moving lawn furniture as part of the fall cleanup process. As she bent down to pick up a heavy hammock, she felt a pop in her left shoulder, and then a stabbing, burning pain. Claimant stopped working and immediately sought medical treatment.
4. Defendant accepted Claimant's injury as compensable and began paying workers' compensation benefits accordingly.

Claimant's Prior Medical History

5. Claimant's prior medical history includes a left upper extremity injury sustained in 1998 while working for a different employer. Claimant underwent two elbow surgeries, but continued to complain of disabling pain for years thereafter. The medical records reflect that during this period Claimant demonstrated anger towards her surgeon and poor insight into her condition. She held her arm in a significantly guarded position and was unwilling to participate in treatment options that were likely to increase her pain temporarily, such as functional restoration.
6. Claimant did not return to work after her 1998 injury until September 2004. At that point her primary care physician cleared her to work with a restriction against lifting in excess of 20 pounds with her left arm. Claimant worked for a time as a licensed nursing assistant. Later she went to work for Defendant.
7. Although originally left-handed, Claimant testified that the restriction against lifting with her left arm was not problematic. She taught herself to do more things with her right hand and now considers herself to be right-handed. Claimant described her right arm as being "pretty strong and rugged" now. I find this testimony to be credible.

Claimant's Medical Course Since November 2009

8. After her November 2009 injury Claimant treated conservatively, first with Dr. James, and later with both Maria Calderwood, a family nurse practitioner, and Dr. Carr, an orthopedic surgeon. Her response to treatment has been poor, and in many respects it mirrors her experience following her 1998 injury. Claimant complains of exquisite pain throughout her shoulder joint, in any motion, in any position and at all times. She holds her left arm in an immobile position, with her left shoulder elevated, her neck flexed and her arm folded close across her body. She manages her pain with narcotic medicines.

9. Both Dr. Carr and Dr. Shafritz, another orthopedic surgeon with whom Claimant consulted, have determined that there is no surgical remedy for her injury. The etiology of her current symptoms is unclear. As with her 1998 injury, there likely is a myofascial pain component, which is complicated by Claimant's high pain perception and tendency for pain magnification. Diagnostic testing has ruled out adhesive capsulitis.

Claimant's Work Capacity

10. Claimant has not returned to work since her November 2009 injury. In a January 25, 2010 "To Whom It May Concern" letter, Dr. Carr stated that she would be unable to work as a housekeeper indefinitely. Dr. Carr has reiterated this opinion on three occasions since then, most recently in August 2010. He has done so, however, merely by checking the appropriate box for "no work capability" on standardized workers' compensation medical forms. Without further explanation as to the basis for his opinions, I find these determinations to be of little value.¹
11. At Defendant's request, Claimant underwent two independent medical evaluations with Dr. Backus, the first in March 2010 and the second in January 2011. Dr. Backus is board certified in occupational medicine. He is experienced at treating patients with chronic pain, particularly with respect to return to work issues.
12. Based both on his physical exam findings and his review of Claimant's medical records, Dr. Backus concluded that Claimant is capable of performing full-time sedentary to light duty work. In reaching this conclusion, Dr. Backus specifically noted that after her 1998 injury Claimant suffered from chronic pain to much the same extent that she does now, but still was able to return to work so long as she limited the use of her left arm. Dr. Backus recommended that Claimant abide by the same restriction now.
13. According to Dr. Backus, aside from the limitation involving her left arm there are no other medical barriers that preclude Claimant from working. She has full use of her right arm and no functional restrictions involving either her back or her lower extremities. She is not restricted from driving and has not complained of any disabling side effects related to her use of pain medications. Indeed, in Dr. Backus' opinion, for Claimant to return to work likely would be quite beneficial. In his experience, chronic pain patients usually get better once they do so. I find this testimony to be credible.
14. Dr. Backus acknowledged that Claimant has never undergone a functional capacity evaluation. He testified that although such testing is helpful, it is not always necessary. In this case, Dr. Backus felt confident in his ability to gauge Claimant's work capacity without it. I find this testimony to be credible.
15. At her attorney's referral, Claimant underwent an evaluation with Dr. Turek, a chiropractor, in February 2011. Dr. Turek is a diplomate in chiropractic orthopedics, a designation akin to board certification for medical doctors. His practice primarily involves treating orthopedic problems and musculoskeletal disorders.

¹ Dr. Fanciullo, a pain management specialist to whom Claimant was referred for a consultation in May 2010, completed a similar form and checked the same box after his evaluation. This determination also came with no explanation, and therefore I find its value as limited as Dr. Carr's.

16. Based on his review of Claimant's medical records, Dr. Turek concluded that Claimant had been totally disabled from working during the summer of 2010. Given how restricted the range of motion in Claimant's left arm was during that period, in Dr. Turek's opinion Claimant would have risked developing an overuse problem in her right arm had she attempted to return to work.
17. Dr. Turek acknowledged that his opinion as to Claimant's work capacity during the summer of 2010 was based solely on his review of her medical records, as he did not have occasion to examine her until some eight months later. Dr. Turek also admitted that Claimant has not complained of any right arm symptoms, despite the fact that she uses her left arm only sparingly. Last, Dr. Turek was unaware of the fact that following her 1998 injury Claimant had been released to return to work with only limited use of her left arm and had managed successfully to do so. I find that Dr. Turek's opinion is weakened as a result of these factors.

Defendant's Termination of Temporary Disability Benefits

18. With Dr. Backus' work capacity opinion as support, on May 27, 2010 Defendant notified Claimant's attorney that Claimant had been released to return to work. Defendant demanded that Claimant begin searching for suitable work immediately and submit at least five job contacts weekly beginning June 4, 2010. Should she fail to do so, Defendant advised, it would seek to discontinue her temporary total disability benefits.
19. Claimant's attorney objected to Defendant's work search requirement. In correspondence to the Department, he argued: (1) that Claimant's treating physicians had not yet released her to work; (2) that to expect Claimant to make five job contacts per week was unreasonable given both the rural nature of her labor market area and her physical limitations; and (3) that there was insufficient time for Claimant to comply with Defendant's June 4th deadline for completing the first weekly work search.
20. Between June 2, 2010 (the date when Claimant's attorney received Defendant's work search notice) and June 8, 2010 Claimant failed to submit evidence of any job contacts to Defendant. Consequently, on June 8th Defendant submitted its Notice of Intention to Discontinue Payments (Form 27) to the Department, in which it sought to discontinue Claimant's temporary total disability benefits for failure to conduct a good faith search for suitable work. The Department approved the discontinuance effective June 18, 2010.
21. Claimant did not make any job search efforts between June 18, 2010 and August 6, 2010. She did not receive any temporary total disability benefits during this period. Following an informal conference on July 28, 2010 the parties agreed that she would commence a job search and would submit evidence to Defendant of at least two contacts weekly. Claimant did so beginning on August 7, 2010 and Defendant reinstated her temporary total disability benefits accordingly.

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. The issue here is whether Defendant properly discontinued Claimant's temporary total disability benefits from June 18, 2010 through August 6, 2010 on the grounds that she had failed to conduct a good faith search for suitable work once released to do so. See *Workers' Compensation Rule 13.0000*. Having initially accepted Claimant's injury as compensable, the burden is on Defendant to establish that its discontinuance was proper. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974); *Luff v. Rent Way*, Opinion No. 07-10WC (February 16, 2010).
3. The test for determining entitlement to temporary total disability benefits "is not whether the injured employee is totally incapacitated from performing the same type of labor as he was performing at the time of his injury but whether he is capable of performing any kind of available work." *Sivret v. Knight*, 118 Vt. 343, 346 (1954), cited with approval in *Hotaling v. St. Johnsbury Trucking Co.*, 153 Vt. 581, 584 (1990).
4. Conflicting medical evidence was produced as to whether Claimant meets this standard. According to Drs. Carr and Turek, she does. According to Dr. Backus, she does not.
5. 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 (September 17, 2003).
6. Notwithstanding his status as Claimant's treating physician, Dr. Carr's opinion as to work capacity was never stated in sufficient detail for me even to consider it. Checking a box on a form may be a useful way for an adjuster to quickly monitor an injured worker's status as his or her recovery progresses, but this method of stating an opinion has little value otherwise.

7. Neither Dr. Turek nor Dr. Backus was a treating physician, and both were qualified to express opinions as to Claimant's work capacity during the summer of 2010. Both examined pertinent records. Both conducted comprehensive evaluations, though the fact that Dr. Backus' exam occurred shortly before the period in question while Dr. Turek's did not occur until some eight months later makes the former more persuasive.
8. Aside from stating his fear that Claimant might develop an overuse injury in her right arm if she returned to work, Dr. Turek provided no basis for his conclusion that she was precluded from performing any work at all. He was unaware that Claimant had returned to work successfully after her 1998 injury, in part by teaching herself to perform most tasks right-handed. In these respects, his opinion lacked objective support and was not sufficiently thorough for me to accept it.
9. Dr. Backus' opinion was better supported by the available evidence. The fact is, Claimant has full use of her other extremities and does not suffer from any other limiting impairments, either physical or psychological. She was able to return to work following her 1998 injury despite having only limited use of her left arm. There is no reason to believe that she cannot do so again now.
10. I conclude that Dr. Backus' opinion as to Claimant's work capacity is more persuasive than Dr. Turek's.
11. Having concluded that Claimant had a work capacity during the summer of 2010, I also conclude that Defendant appropriately notified her of her obligation to search for suitable work, and appropriately terminated her temporary disability benefits when she failed to do so.
12. As Claimant has failed to prevail on her claim for benefits, she is not entitled to an award of costs or attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for temporary total disability benefits for the period from June 18, 2010 through August 6, 2010 is hereby **DENIED**.

DATED at Montpelier, Vermont this 25th day of July 2011.

Anne M. Noonan
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.