

Namir Puric v. Dunkin Donuts

(July 29, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Namir Puric

Opinion No. 20-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Dunkin Donuts

For: Anne M. Noonan
Commissioner

State File No. Z-59994

OPINION AND ORDER

Hearing held in Montpelier, Vermont on March 9, 2011

Record closed on April 12, 2011

APPEARANCES:

Namir Puric, *pro se*
Eric Johnson, Esq., for Defendant

ISSUE PRESENTED:

1. Did Defendant appropriately discontinue Claimant's temporary total disability benefits on end medical result grounds?
2. Are Claimant's current symptoms, need for medical treatment and/or alleged disability causally related to his February 6, 2008 work injury?
3. Has Claimant willfully made false statements and/or representations so as to justify forfeiture of his right to workers' compensation benefits under 21 V.S.A. §708(a)?

EXHIBITS:

Joint Exhibit I:	Medical records
Defendant's Exhibit A:	Deposition of Locke Bryan, M.D., February 17, 2009
Defendant's Exhibit B:	Surveillance video DVDs
Defendant's Exhibit C:	Deposition of Namir Puric, February 6, 2009 ¹
Defendant's Exhibit D:	Police incident report, August 9, 2008
Defendant's Exhibit E:	Chittenden Criminal Division records
Defendant's Exhibit F:	Employment application, December 4, 2007

CLAIM:

Additional workers' compensation benefits to which Claimant proves his entitlement as causally related to his February 6, 2008 work injury.

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. Claimant worked for Defendant as a baking finisher. His job involved preparing and decorating doughnuts.

Claimant's Work Injury and Subsequent Course

4. On February 6, 2008 Claimant experienced groin pain while lifting a 50-pound bag of powdered sugar. The following day he presented to the Fletcher Allen Health Care (FAHC) emergency department for treatment. In listing Claimant's symptoms, the notes for that encounter specifically state, "No back pain." Claimant was diagnosed with a right groin strain and possible inguinal hernia, for which he was advised to follow up with a surgeon.
5. On March 3, 2008 Claimant presented to Dr. Hebert for a surgical consult. Dr. Hebert doubted that Claimant's groin pain was due to a hernia, and suspected instead that he had pulled a muscle in the area. Notably, on physical examination Dr. Hebert reported that Claimant looked well, could stand straight and had no back tenderness.

¹ The Department granted Claimant's attorney's Motion to Withdraw in February 2010. Thereafter, Claimant pursued his claim *pro se*. He personally participated in a telephone status conference on September 22, 2010 at which time the March 9, 2011 formal hearing was scheduled. The Department confirmed this date in writing. Despite being thus duly notified, Claimant failed to appear at the formal hearing. On Defendant's motion, in lieu of Claimant's live testimony, his deposition testimony was admitted into evidence instead.

6. Claimant sought treatment thereafter with his primary care providers, first Dr. Brooklyn and later Dr. Bryan. Over the course of time he began to complain of severe, disabling low back pain, with radiating symptoms into his lower extremities bilaterally. Diagnostic imaging studies have failed to reveal any disc herniation or other pathology sufficient to account for these symptoms. At this point, their etiology is unclear.
7. In relating the history of his injury to his providers, and also in his sworn deposition testimony, Claimant asserted that his low back and leg symptoms came on immediately after the February 6, 2008 lifting incident. This version of events is directly contradicted by both the contemporaneous emergency department record and by Dr. Hebert's examination, and on those grounds I find it is not credible.
8. Claimant's deposition testimony is rife with other inconsistencies. He testified that he had never sought treatment for lower back or leg complaints prior to the February 2008 incident, but his medical records very clearly indicate otherwise. He asserted that he had never suffered from depression until after he began experiencing chronic low back pain following that incident, when in fact the medical records document both depression and a prior suicide attempt in 2005. He testified that he no longer consumes alcohol, having sworn off of it in 2006, but medical and criminal records document more recent episodes of use and/or intoxication.
9. Claimant testified in his deposition that his pain is constant, even with narcotic medications. He stated that since his injury he walks slowly, carefully and with a limp, which worsens if he walks for more than five minutes or so. He asserted that he cannot bend, lift more than five pounds, sit for more than 30 minutes or negotiate stairs without increased pain. He alleged that he cannot drive, not only because he cannot tolerate sitting but also because he cannot easily rotate his torso to the right or left in order to see behind him.
10. Claimant presented to his providers in a similar manner, as a person who was in chronic, constant pain. He reported that the pain affected his ability to engage in such activities as walking, sitting, carrying groceries, driving any distance, riding his bicycle or playing soccer. The only symptom relief he reported was with narcotic pain medications.
11. Surveillance video taken on five different occasions – May 14th and 19th, 2008 and February 6th, 10th and 19th, 2009 – show Claimant engaging in activities entirely inconsistent with both his presentation to providers and with his deposition testimony. On one video he is observed walking, at a brisk pace and with a relatively normal gait, for more than an hour through downtown Burlington. In the course of his travels on this day he is observed to walk easily and with fluid movements down a short flight of steps. On another occasion he is seen sitting in a chair at the library for 15 minutes without moving about, changing position or getting up to stretch. On two separate days he is observed bending forward from the waist, once to straighten some papers and another time to pick something up off the ground. At no time do any of these movements appear guarded or apprehensive. Nor are they accompanied by grimacing, wincing or other obvious pain behaviors.

12. At times Claimant is observed on surveillance to be walking with a slight limp, sometimes favoring his right leg, sometimes his left. On one occasion – May 14, 2008 – he is seen walking slowly, stiffly and with a stooped posture into his doctor’s office for a scheduled appointment. At that appointment Claimant rated his pain as a 7 out of 10 and described it as discomforting, sharp and aggravated by daily activities. Earlier on that same day, however, Claimant was observed putting in and around his car, performing tasks that involved bending and leaning forward from the waist without hesitation. And later, after leaving the appointment, Claimant was observed walking to his car with a more fluid gait, climbing into his seat and then turning his torso first to the left to reach his seat belt and then to the right to fasten it. I cannot reconcile the discrepancy between the limping gait and stooped posture that Claimant demonstrated upon entering his doctor’s office on that day with his observed ability to move about more freely both before and after.
13. The only surveillance video that depicts Claimant walking with a cane is on February 6, 2009, as he was entering and later leaving the building in which his deposition was held.
14. The medical records reveal other inconsistencies as to Claimant’s ability to engage in certain activities. Despite telling his medical providers that he could not ride his bicycle on account of his pain, in June 2008 Claimant sought treatment at the FAHC emergency department for injuries sustained while doing just that. And in a similar vein, Claimant presented to the emergency department in September 2009 for treatment of a right toe injury sustained while playing soccer, although he previously had reported that his low back and leg symptoms precluded him from doing so.
15. Aside from narcotic pain medications, Claimant has reported no significant symptom relief from conservative treatments such as physical therapy and injections. In August 2008 he consulted with Dr. Rinehart, an orthopedic surgeon, as to possible surgical treatment measures. Dr. Rinehart noted various discrepancies between Claimant’s clinical presentation and the results of his diagnostic imaging studies. For example, Claimant reported right greater than left leg pain and sat with a list to the left when his MRI findings suggested that his left-sided symptoms should have been more troublesome.
16. As a result of these inconsistencies Dr. Rinehart felt unable to make a specific diagnosis. He therefore concluded that Claimant was not an appropriate surgical candidate. Instead he suggested that Claimant be evaluated for participation in a functional restoration program.

17. Claimant underwent the interdisciplinary evaluation Dr. Rinehart suggested and was determined to be a good candidate for functional restoration, but declined to participate because he felt his pain levels were too high. In his deposition, Claimant testified that he was scheduled to undergo another epidural steroid injection at the time, and preferred to wait for that treatment to conclude before considering functional restoration. In a letter to Defendant's adjuster, however, Dr. Rinehart stated that injection therapy was unlikely to be successful and that functional restoration was the only viable treatment option. Having declined that treatment, Dr. Rinehart determined that Claimant had reached an end medical result for his February 2008 work injury. I find Dr. Rinehart's analysis in this regard to be credible.
18. Claimant was again evaluated for entry into a functional restoration program in January 2011. Because he could not identify any functional or occupational goals, and also because he did not appear willing to work through his pain, he was determined not to be an appropriate candidate.

Expert Medical Opinions

19. At Defendant's request, Claimant underwent two independent medical examinations – first with Dr. White, an occupational medicine specialist, in June 2008 and later with Dr. Ensalada, a specialist in both pain and occupational medicine, in January 2009. Claimant also was scheduled to undergo an evaluation with Dr. Mann, a psychologist, in February 2009 but when he did not appear Dr. Mann performed a medical records review instead. Both Dr. Ensalada and Dr. Mann testified at the formal hearing.

(a) Dr. White

20. Based both on his subjective history and on his clinical presentation, initially Dr. White determined that Claimant's low back and leg symptoms were causally related to the February 2008 lifting incident at work. Later, after viewing the surveillance videos Dr. White acknowledged that Claimant's appearance was inconsistent with the degree of disability his treatment providers previously had described. Later still, Dr. White reviewed both Claimant's deposition and his criminal records. From that review Dr. White concluded that he could no longer trust Claimant's recollection of events as truthful. Therefore, he could no longer state to a reasonable degree of medical certainty that Claimant's low back injury was work-related.

(b) Dr. Ensalada

21. Dr. Ensalada's opinion was more strongly stated. To a reasonable degree of medical certainty he determined that Claimant was malingering, that is, falsely exaggerating his symptoms for external reward. As support for his opinion, Dr. Ensalada pointed to a number of factors, including:
- The lack of any objective findings on physical examination indicative of either lumbar sprain or radiculopathy;
 - The presence of Waddell signs, which are indicative of a non-organic component to a patient's low back pain;
 - The medical records most contemporaneous to the February 2008 incident, in which Claimant specifically denied any low back pain or tenderness;
 - The discrepancies between Claimant's ability to move about as evidenced on the surveillance videos and the pain level he consistently reported to his treatment providers; and
 - Claimant's documented untruthfulness as to his prior medical and psychological treatment, alcohol use and criminal record.
22. Dr. Ensalada concluded that at best Claimant had suffered a minor groin strain as a result of the February 2008 lifting incident, and that his current symptoms were in no way causally related to that event. I find this opinion to be credible.

(c) Dr. Mann

23. Although he did not personally interview or examine Claimant, upon reviewing his medical and criminal records, his deposition testimony and the surveillance videos Dr. Mann also determined that Claimant was malingering. He found most compelling the extent to which Claimant had integrated a pattern of deceptive behavior in many different contexts over many years. With so many misrepresentations evident, in Dr. Mann's opinion Claimant's symptom presentation simply was not credible.

(d) Dr. Bryan

24. Though initially supportive, after reviewing the surveillance videos even Claimant's treating physician, Dr. Bryan, could no longer affirm, to the required degree of medical certainty, that Claimant's current symptoms were causally related to his February 2008 work injury. To the contrary, in his deposition testimony Dr. Bryan reluctantly admitted that more likely than not Claimant had engaged in malingering behavior.

Procedural Posture of Claim

25. Defendant initially accepted Claimant's February 2008 work injury as a compensable low back strain. It paid both temporary total disability and medical benefits accordingly.
26. With Dr. Rinehart's end medical result determination as support, in October 2008 Defendant sought to discontinue Claimant's temporary total disability benefits. The Department approved the discontinuance effective October 13, 2008.
27. Citing to Dr. Ensalada's determination that Claimant's current symptoms were not causally related to the February 2008 lifting incident, in February 2009 Defendant sought to discontinue Claimant's medical benefits. The Department approved this discontinuance effective February 17, 2009.
28. On April 1, 2009 Defendant filed a Form 2 denial of Claimant's claim on the grounds that the medical records, surveillance video and reports of Drs. White and Ensalada all suggested material misrepresentations.

CONCLUSIONS OF LAW:

1. At issue in this claim is (a) whether Defendant appropriately terminated Claimant's temporary disability benefits on end medical result grounds in October 2008; (b) whether it appropriately terminated medical benefits in February 2009 on the grounds that Claimant's symptoms were no longer causally related to his work injury; and (c) whether Claimant's alleged misrepresentations justify forfeiture of his right to further workers' compensation benefits.
2. As to the first two issues, Defendant has produced expert medical evidence that I find sufficient to justify its discontinuance of both temporary disability and medical benefits. Specifically, I conclude that Dr. Rinehart's end medical result determination, based as it was on Claimant's decision not to participate in functional restoration, was credibly supported and is therefore persuasive. I also find credible Dr. Ensalada's determination that Claimant suffered only a minor groin sprain as a result of the February 2008 work injury, the effects of which were no longer causally related to the ongoing symptoms he alleged in February 2009.
3. In reaching these conclusions, I am struck by the many inconsistencies in Claimant's version of how limiting his pain has been since the February 2008 lifting incident as compared with his activity level while under surveillance. The discrepancies between Claimant's documented medical history and criminal record, on the one hand, and what he told his doctors – and swore to at his deposition – on the other, are equally distressing. Reluctantly I must conclude, as Drs. Ensalada, Mann and Bryan did, that Claimant has engaged in malingering behavior for financial gain.

4. Under 21 V.S.A. §708(a), a claimant whom the commissioner determines has willfully made a false statement or representation for the purpose of obtaining a workers' compensation benefit or payment "shall forfeit all or a portion of any right to compensation . . .". The intent of this statute is both to deter and sanction false claims and to relieve employers from responsibility for paying claims they otherwise would not have to honor. *Butler v. Huttig Building Products*, 175 Vt. 323, 328 (2003). By granting the commissioner discretion to determine how great a forfeiture to declare, §708(a) "also evidences an intent that the sanction . . . have some relationship to the claimant's fraud." *Id.*
5. I conclude here that Claimant has willfully misrepresented his condition so as to secure workers' compensation benefits to which he otherwise would not be entitled. From the evidence presented, it is difficult to determine exactly when Claimant's subterfuge began, but certainly it was apparent at least by the time of Defendant's February 17, 2009 discontinuance. Given the nature and extent of his deception, I cannot conceive of any way in which Claimant might establish his right to future benefits, be they temporary total, permanent partial, medical or vocational rehabilitation. I conclude that it is appropriate for Claimant to forfeit his entitlement to all such benefits.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits subsequent to February 17, 2009 is hereby **DENIED**.

DATED at Montpelier, Vermont this 29th 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.