Debra Morrisseau v. Hannaford Brothers (January 10, 2013)

STATE OF VERMONT
DEPARTMENT OF LABOR

Debra Morrisseau

v.

Hannaford Brothers

Opinion No. 21SJ-12WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. BB-00676

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Robert Mabey, Esq., for Defendant

ISSUE:

Is Defendant entitled to summary judgment in its favor on the question whether it is obligated to pay for voice recognition technology (including computer assessment, software and/or equipment) as a consequence of Claimant's compensable injury?

FINDINGS OF FACT:

Judicial notice is taken of all relevant forms, reports and correspondence contained in the Department's file relating to this claim. Judicial notice also is taken of the Commissioner's prior decision in this claim, *Morrisseau v. Hannaford Brothers*, Opinion No. 21-12WC (August 8, 2012).

Considering the evidence in the light most favorable to Claimant as the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. At the time of her compensable injury in August 2009, Claimant was working as a bakery associate at Defendant's supermarket. She also held concurrent employment with the Visiting Nurse Association as a personal care attendant, and previously had been employed as a hospital dietary worker at Fletcher Allen Health Care.

2. Claimant's average weekly wage at the time of her work injury was $421.05.

3. As a result of her work injury, Claimant suffered a permanent impairment to her right wrist. Despite both surgery and conservative treatment, she continues to experience chronic pain and weakness in her hand, wrist and upper extremity.

4. Claimant was determined to be entitled to vocational rehabilitation services on January 20, 2011. In February 2011 she underwent a functional capacity evaluation, which concluded that she was capable of full-time sedentary work. Of note, with the appropriate ergonomic equipment, such as a split keyboard, Claimant demonstrated a tolerance for frequent computer work, including up to thirty minutes of sustained typing per hour. Increased right wrist pain was primarily associated with material handling tasks, with somewhat less pain reported during activities requiring forward reaching, dexterity or hand use.

5. In June 2011 the Department approved the parties' proposed Return to Work Plan. The primary goal stated was for Claimant to pursue work as a medical or dental office receptionist/clerk, or as a customer service representative in other settings. Secondary goals included human services work with agencies providing assistance to persons with disabilities, for example, as a community support worker or supervised apartment staff. To accomplish these goals, the plan proposed that the following vocational rehabilitation services be provided, at Defendant's expense:

    - Vocational exploration, work readiness training and placement assistance;

    - Concurrent short-term computer skills training, Microsoft Office software to support home practice and proficiency and an ergonomic keyboard and mouse; and

    - Upon securing work, an ergonomic evaluation to assure optimal work station set-up, so as to reduce the cumulative impact of repetitive activities or computer use.

6. The approved Return to Work Plan contemplated the possibility that additional assistive devices might be identified that would enhance Claimant's ability to locate suitable employment notwithstanding both her physical restrictions and her limited experience in sedentary jobs. For example, voice recognition software allows for computer control with minimal use of one's hands. However, speaking aloud may not be viable in all work settings. Whether with that in mind or for other reasons, the plan as submitted and approved did not specifically require Defendant to pay for voice activated computer assessment, software or equipment.

7. In mid-August 2011 Claimant began working as a home support aide for developmentally disabled adults. She also worked briefly as a substitute teacher, but stopped doing so when her home support aide hours increased. Claimant's home support aide job is located within a reasonable commuting distance from her home. The work is non-physical and therefore is largely unaffected by the ongoing symptoms in her wrist. According to her vocational rehabilitation counselor's written progress report, as of January 2012 Claimant expressed that she was generally satisfied with her new employment, particularly because of the opportunity it allows for her to manage her upper extremity symptoms by changing her activities.

8. Claimant's earnings in her current job fluctuate depending on the number of clients requiring home support services. For the first few months of her employment, her gross weekly wages were less than what her pre-injury average weekly wage had been. More recently, beginning in mid-February and extending at least through mid-May 2012 (the last month for which wage evidence was submitted), for the most part her current wages have either equaled or exceeded her pre-injury wages.

9. Claimant's work hours in her current job have fluctuated similarly. However, as she credibly testified in the context of the prior formal hearing in this claim, at least since February 2012 this has been due primarily to client scheduling issues rather than any injury-related disability.

10. In April 2012 Claimant filed a Notice and Application for Hearing in which she sought coverage for voice recognition software as a "reasonable vocational benefit." Defendant denied the request on the grounds that Claimant already had returned to suitable employment, such that further vocational rehabilitation services were neither reasonable nor necessary.

11. As of mid-May 2012 Claimant had been successfully employed in her current job for at least 60 days.

12. On July 19, 2012 the Department's Vocational Rehabilitation Specialist approved Defendant's discontinuance of vocational rehabilitation services on the grounds that Claimant had successfully returned to suitable employment. In addition, the Specialist denied Claimant's request for voice recognition software, on the grounds that she had failed to present any evidence indicating that she required the technology in order to perform the essential functions of her job.

13. Claimant's current treating physician, Dr. Fenton, has strongly recommended that she use voice activated software for all of her computer tasks. In his opinion, use of such software "will improve [her] productivity, help prevent pain flares and loss of function that can result in missed work, and improve her function overall."

14. Claimant's vocational rehabilitation counselor, Jay Spiegel, supports the use of voice recognition technology as a means of "help[ing] Ms. Morrisseau with symptom control, expand[ing] her workplace skills and also facilitat[ing] her return to fulltime suitable employment." According to Mr. Spiegel, "improved tolerance and ability to use the computer will invariably lead to increased employability and utility to her employer." Among the job opportunities Mr. Spiegel posited might exist were job trainer/coach and/or administrative assistant.

15. No evidence was submitted as to the extent, if any, to which Claimant's current job involves computer tasks. Nor was there any evidence tending to show that her work-related injury has resulted in decreased productivity or missed work at her current job, or that her functional restrictions have rendered her unable to perform her current job responsibilities in a manner acceptable to her employer.

DISCUSSION:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank,* 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).

2. A defendant who moves for summary judgment satisfies its legal burden when it presents at least one legally sufficient defense that would bar the opposing party's claim. *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 266 (1981). Once a properly supported summary judgment motion has been made, the non-moving party may not rest on mere allegations in its pleadings. *Pierce v. Rigas*, 149 Vt. 136, 139-140 (1987). Rather, it must respond with sufficient evidence to support a prima facie case. If an essential element of the non-movant's case cannot be established, summary judgment is appropriate. *State of Vermont v. G.S.Blodgett Company*, 163 Vt. 175, 180 (1995).

3. The disputed issue here is whether Defendant should be obligated to pay for the voice recognition technology Claimant has requested, either as a vocational rehabilitation service or as a medical benefit. Defendant asserts first, that as a matter of law its vocational rehabilitation responsibilities must be deemed to have ended by virtue of Claimant's successful return to suitable employment without such assistive technology. Second, Defendant asserts that the benefit Claimant seeks does not fit the legal definition of a medical service or supply as those terms are used in Vermont's workers' compensation statute. Either way, Defendant argues, as a matter of law there is no basis for compelling it to provide the voice recognition technology Claimant claims to need.

Voice Recognition Technology as an Adjunct to Defendant's Vocational Rehabilitation Responsibilities

4. Vermont's workers' compensation law makes the following provision for injured workers whose functional restrictions preclude them from resuming their prior jobs after a work-related injury:

> When as a result of an injury covered by this chapter, an employee is unable to perform work for which the employee has previous training or experience, the employee shall be entitled to vocational rehabilitation services, including retraining and job placement, *as may be reasonably necessary to restore the employee to suitable employment.*

21 V.S.A. §641(a) (emphasis supplied).

5. Workers' Compensation Rule 51.2600 defines "suitable employment" as follows:

> "Suitable employment" means employment for which the employee has the necessary mental and physical capacities, knowledge, skills and abilities;
>
> 51.2601 Located where the employee customarily worked, or within reasonable commuting distance of the employee's residence;
>
> 51.2602 Which pays or would average on a year-round basis a suitable wage;[1] **AND**
>
> 51.2603 Which is regular full-time work.[2] Temporary work is suitable if the employee's job at injury was temporary and it can be shown that the temporary job will duplicate his/her annual income from the job at injury.

6. Of note, neither the statute nor the rules require that an injured worker be returned to specific employment in order for an employer's vocational rehabilitation responsibilities to be fulfilled. The goal of vocational rehabilitation is to restore earning skills, not necessarily to procure a particular job. *Bishop v. Town of Barre*, 140 Vt. 564, 578 (1982); *Wentworth v. Crawford & Co.*, 174 Vt. 118 (2002); Workers' Compensation Rule 50.0000. Nevertheless, the workers' compensation rules acknowledge that a claimant's successful return to suitable employment for at least 60 days is itself sufficient proof of employability as to justify terminating vocational rehabilitation services. Workers' Compensation Rule 56.1110.

7. Considering the evidence in the light most favorable to Claimant, *State v. Delaney*, *supra*, I conclude that her current job fulfills the necessary requirements of suitable employment as delineated in Rule 51.2600. It is within her mental and physical capabilities, knowledge, skills and abilities. It is located in the same general vicinity as her prior employment. It pays a suitable wage as that term is defined in Rule 51.2700, and constitutes regular full-time employment as defined in Rule 51.2100.

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[1] "Suitable wage" is defined as one that is as close as is reasonably attainable to 100 percent of the employee's pre-injury average weekly wage. Workers' Compensation Rule 51.2700.

[2] "Regular full-time" employment is defined as a job that "at the time of hire was, or is currently expected to continue indefinitely." Workers' Compensation Rule 51.2100.

8. Claimant argues that despite having been successfully re-employed for at least 60 days, long enough to trigger termination of vocational rehabilitation services under Rule 56.1110, she still should not yet be considered fully rehabilitated. She asserts that voice recognition technology is a necessary adjunct to her vocational rehabilitation, in that it will provide her with "flexibility in employment choice," rather than "condemnation to a specific employment." In essence, Claimant argues for a far broader standard by which to measure whether an injured worker's vocational rehabilitation goals have been met than simply focusing on his or her first suitable post-injury job. Under this standard, an employer would be responsible not just for restoring current earning skills but for creating alternative career paths as well.

9. Claimant's standard goes far beyond the express language of Rule 51.2600, which specifically defines the statutory concept of "suitable employment," and also of Rule 56.1110, which identifies a 60-day timeframe as the appropriate measure of vocational rehabilitation success in re-employment situations. Both rules were lawfully promulgated in accordance with the statutory authority granted in 21 V.S.A. §602. Neither rule conflicts with the language or intent of §641(a). Both rules reasonably reflect the compromise that underlies the general purpose of Vermont's workers' compensation law – to provide employees with a speedy and certain remedy for their work-related injuries, *St. Paul Fire & Marine Insurance Co. v. Surdam*, 156 Vt. 585 (1991), while at the same time guaranteeing to employers a liability that is "limited and determinate," *Morrisseau v. Legac*, 123 Vt. 70, 76 (1962). Both rules were legally enacted and are fully enforceable, therefore. *Compare In re Baptist Fellowship of Randolph, Inc.*, 144 Vt. 636 (1984) *with In re Vermont Verde Antique International, Inc.*, 174 Vt. 208 (2002).

10. Had Claimant presented any evidence at all from which I might conclude that additional vocational rehabilitation services are necessary in order for her to continue to be successfully and suitably employed as those terms are currently defined, then this might justify a different result. As it is, even considering the evidence in the light most favorable to Claimant, I conclude that by virtue of her return to suitable employment for more than 60 days, Defendant was justified in terminating her vocational rehabilitation benefits. Therefore, I conclude as a matter of law that it is not currently obligated to pay for voice recognition technology as a vocational rehabilitation expense.[3]

[3] It is possible that at some future point Claimant might again become entitled to vocational rehabilitation services, for example, if her injury-related functional restrictions change so as to render her current employment unsuitable. Whether Defendant might be obligated to pay for voice recognition technology under those circumstances would depend on as yet unpredictable variables.

Voice Recognition Technology as a Medical Benefit

11. Vermont's workers' compensation law requires an employer to furnish an injured employee with "reasonable surgical, medical and nursing services and supplies, including . . . durable medical equipment," that are necessitated by a compensable injury. 21 V.S.A. §640(a). An employer also might be required to provide assistive devices, but only in situations where the injured worker is determined to have a disability "that substantially and permanently prevents or limits the worker's ability to continue to live at home or perform basic life functions." *Id.; Barrett-Simmons v. Landmark College*, Opinion No. 35-10WC (November 15, 2010); *Danforth v. H.P. Hood*, Opinion No. 11-10WC (March 16, 2010).

12. The statute does not specifically define what constitutes either a "medical service [or] supply" or "durable medical equipment." What guidance there is comes from the Vermont Supreme Court's decision in *Close v. Superior Excavating Co.,* 166 Vt. 318 (1997). The specific question in that case was whether the services provided by an injured worker's spouse, which included not only skilled nursing care but also unskilled care, passive attendance and ordinary household duties, were covered as "nursing services" under §640(a). Considering particularly the injured workers' serious medical problems and need for 24-hour supervision, the Court approved the commissioner's flexible, case-by-case approach, and allowed full reimbursement to the spouse. *Id.* at 321.

13. With *Close* as precedent, in a subsequent claim the commissioner denied coverage for home care services that included housekeeping only, with no aspect of nursing care. *Hanson v. Goldsmith*, Opinion No. 11-03WC (February 28, 2003), *affirmed*, 834 A.2d 50 (Vt. 2003). "[I]n fashioning a workers' compensation system in which a claimant need not prove fault and the employer has limited liability, the legislature necessarily chose to cover some, but not all, potential services for an injured worker," the commissioner noted. *Id.* at Conclusion of Law No. 1. Thus, notwithstanding medical opinions justifying the need for such services, absent a clear statutory directive they could not be deemed compensable. *Id.*

14. The same is true in the current claim. The fact that Claimant's treating physician has recommended that she use voice recognition technology for her computer tasks does not magically transform the apparatus from a non-medical device to a medical one. To be sure, it may be helpful to her, in much the same way that having assistance with household chores was helpful to the claimant in *Hanson*. But its purpose is not medical, in that it neither cures nor relieves injury-related symptoms. *See, e.g., ABC Disposal Services v. Fortier*, 809 P.2d 1071 (Co. Ct. App. 1990) (snow blower not a medical apparatus). Even construed broadly, the plain language of the statute does not cover it, as either a "medical service [or] supply" or as "durable medical equipment."

15. Indeed, the language of §640(a) that comes closest to approximating the purpose of the voice recognition technology Claimant seeks is that allowing coverage for "assistive devices."[4] To qualify, however, Claimant must show that her injury "substantially and permanently prevents or limits [her] ability to . . . perform basic life functions." *Id.* With reference to the commissioner's analysis of this language in *Danforth v. H.P. Hood, supra*, I conclude as a matter of law that performing computer tasks is not such a "basic life function" as to trigger this coverage.

Summary

16. Even considering the evidence in the light most favorable to Claimant, I conclude that because she already has successfully returned to suitable employment, as a matter of law she is not currently entitled to voice recognition technology as a vocational rehabilitation benefit. I further conclude as a matter of law that the plain language of §640(a) does not cover voice recognition technology as either a "medical service or supply" or as "durable medical equipment." Last, I conclude as a matter of law that Claimant's injury-related disability is not so severe as to limit her ability to perform a basic life function, and that therefore she is not entitled to voice recognition technology as an "assistive device."

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's claim for voice recognition technology as a compensable benefit causally related to her August 2009 work injury is hereby **DENIED**.

DATED at Montpelier, Vermont this 10th day of January 2013.

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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.

[4] This term as well is not specifically defined in the workers' compensation context. Vermont's consumer protection statute defines it as "an item, piece of equipment, or product system, whether acquired commercially off-the-shelf, modified, or customized, that is used or designed to be used to increase, maintain, or improve any functional capability of an individual with disabilities." 9 V.S.A. §2467.