

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Robert LeClaire, Sr.

Opinion No. 01-13WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Ford of Brattleboro, Inc.

For: Anne M. Noonan
Commissioner

State File No. BB-54077

OPINION AND ORDER

No hearing held; claim submitted on briefs and written evidence only¹
Record closed on November 20, 2012

APPEARANCES:

Spencer Crispe, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUES PRESENTED:

1. Should Claimant's temporary total disability benefits have terminated either on February 1, 2012 or on August 19, 2012 on the grounds that his ongoing disability was causally related to a personal medical condition rather than to his compensable work injury?
2. Alternatively, should Claimant's temporary total disability benefits have terminated on August 19, 2012 on the grounds that he had delayed seeking medical treatment for his compensable work injury without a reasonable basis for doing so?

EXHIBITS:

Defendant's Exhibit 1: Deposition of Claimant, July 18, 2012
Defendant's Exhibit 2: Deposition of Burton Tepfer, M.D., October 1, 2012
Defendant's Exhibit 3: Medical records
Defendant's Exhibit 4: Email correspondence, November 19, 2012
Defendant's Exhibit 5: Notice of Intention to Discontinue Payments (Form 27), effective February 1, 2012
Defendant's Exhibit 6: Email correspondence, November 19-20, 2012

¹ The parties having agreed to submit this claim on briefs and written evidence only, Defendant's Motion to Strike those portions of Claimant's proposed Findings of Fact and Conclusions of Law that reference Dr. Abdu's "expected" testimony is hereby **GRANTED**.

Defendant's Exhibit 7: Email correspondence, November 20, 2012

CLAIM:

Credit/offset against future compensation pursuant to 21 V.S.A. §651

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 was the head of maintenance at Defendant's automobile dealership. His duties were varied, and included both janitorial work and general maintenance.
4. On October 5, 2009 Claimant was at work, removing a pressure washer from the bed of a pickup truck. As he pulled on the washer, the hose got caught in the tailgate. Claimant felt a burning pain in his lower back, with radiating pain down his right leg.
5. Defendant accepted Claimant's lower back injury as compensable, and began paying workers' compensation benefits accordingly.
6. Initially Claimant treated conservatively for his injury, first with Dr. Bresnahan, his primary care provider, and later with Wendy King, a physician's assistant. Early on, Dr. Bresnahan determined that he had a modified duty work capacity, with restrictions against lifting or bending, but Defendant had no such work available and therefore Claimant continued on temporary total disability. Ms. King imposed similar restrictions in the context of Claimant's April 2010 office visit, but her office note in May indicated that he was "unlikely to tolerate work" and in June she instructed that he was to "remain out of work for now."
7. Claimant's symptoms having failed to resolve with either physical therapy or injections, in June 2010 Ms. King referred him to Dr. Abdu, an orthopedic surgeon, for further evaluation. For a number of reasons, initially Dr. Abdu suggested additional conservative management and physical therapy rather than surgery. For that, he directed Claimant back to Ms. King. In the meantime, on a form questionnaire he indicated that Claimant had no work capacity as of the date of his examination.
8. Ms. King next evaluated Claimant in August 2010. Based on her examination, she concluded that modified duty work "should be tolerable;" however, she noted that were Claimant to consider vocational rehabilitation a functional capacity evaluation likely would be necessary. Thereafter, in September 2010 Ms. King's practice partner, Dr. Hynninen, suggested that work hardening might be a consideration in the future, as apparently Defendant still had not been able to make modified duty work available.

9. Because his symptoms had not responded to further conservative management, in November 2010 Ms. King referred Claimant back to Dr. Abdu. This time, Dr. Abdu determined that surgical intervention was appropriate. Due to a number of factors, however, the procedure was not scheduled until mid-October 2011. In the interim, on form questionnaires completed in both May and October 2011 Dr. Abdu continued to indicate that Claimant was totally disabled from working as a result of his lower back injury.
10. Unfortunately, in early October 2011 Claimant began to experience symptoms indicative of a serious cardiac problem, including shortness of breath, chest tightness and atrial fibrillation, or rapid and irregular heartbeat. As a result, Dr. Abdu's surgery had to be delayed indefinitely so that Claimant could undergo treatment for his heart condition.
11. From October 2011 through July 2012 Claimant treated regularly with Dr. Tepfer, a cardiologist. Dr. Tepfer diagnosed dilated cardiomyopathy, a condition in which the heart becomes enlarged and weakened to the point where it cannot pump blood efficiently. Cardiomyopathy can be treated with medications, but finding the correct drug combinations and dosages requires cautious medical management and frequent monitoring. In Claimant's case, this process was further complicated by the fact that he continued to suffer from both atrial fibrillation and congestive heart failure. The latter condition occurs when the heart is not able to pump enough blood to the rest of the body.
12. As of the time he first evaluated Claimant in October 2011, Dr. Tepfer characterized his condition as severe and life-threatening. He could hardly walk and was in very great distress. While he made good progress with treatment over the ensuing months, his heart function remained abnormal and his physical capacity was diminished. I find from the medical evidence that while the disability referable to Claimant's lower back injury persisted during this time, concurrently his heart condition rendered him totally disabled as well.
13. Dr. Tepfer last examined Claimant on July 27, 2012. On that date, he advised Dr. Bresnahan that Claimant's heart condition had improved sufficiently for him to undergo back surgery, and that at least from a cardiac perspective he was no longer disabled. Because he was closing his practice, Dr. Tepfer arranged for Claimant to follow up with another cardiologist, Dr. Burke, thereafter. The medical records do not indicate whether or when Claimant did so.
14. As of the date the record closed, Claimant had not yet been scheduled for back surgery. He was to undergo a pre-operative visit with Dr. Abdu on December 5, 2012. The record does not indicate whether Dr. Abdu will require updated medical clearance from either Claimant's current cardiologist and/or from his primary care physician prior to proceeding with surgery.
15. There is no evidence establishing that Dr. Abdu has at any time rescinded or otherwise amended his October 2011 determination that Claimant was totally disabled from working as a consequence of his work-related lower back injury. Nor has any other medical provider stated a contrary opinion since that time.

16. Defendant has twice sought to discontinue Claimant's temporary disability benefits, once on February 1, 2012 and more recently on August 19, 2012. As grounds for the first discontinuance, Defendant alluded to the fact that Claimant's heart condition was preventing him from undergoing treatment for his work-related lower back injury. As grounds for the second discontinuance, it stated that Claimant's heart condition constituted an intervening event that had both delayed treatment for his work injury and further deteriorated his physical capabilities.² The Department denied both discontinuances on the grounds that they were not reasonably supported.

CONCLUSIONS OF LAW:

1. The disputed issue in this case is whether the disability associated with Claimant's non-work-related heart condition has at any time since February 2012 justified discontinuing the temporary disability benefits referable to his work-related lower back injury. Defendant having accepted and paid benefits on account of the latter injury, the burden is on it to prove that discontinuing those payments is proper. *Merrill v. University of Vermont*, 133 Vt. 101, 105 (1974); *Luff v. Rent Way*, Opinion No. 07-10WC (February 16, 2010).
2. The Vermont Supreme Court has considered the question whether temporary disability benefits can be suspended when treatment for a work-related injury is delayed on account of a non-work-related condition. In *Wood v. Fletcher Allen Health Care*, 169 Vt. 419 (1999), it held that a claimant who could not undergo surgery for a work-related shoulder injury because she was pregnant was entitled to ongoing disability payments notwithstanding that the period during which she remained unable to work was prolonged as a result. Noting the directive that Vermont's workers' compensation statute be liberally construed in favor of injured workers, *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983), the court concluded that the pregnancy was not a superseding, intervening event sufficient to break the causal link between the claimant's work-related injury and her resulting disability. *Id.* at 424.
3. A key difference between the circumstances presented here and those described in *Wood* is that the non-work-related condition in the latter case – the claimant's pregnancy – was not independently disabling.³ That is not the case here; rather, the undisputed evidence establishes that Claimant's cardiomyopathy was, at least for a time, not just totally disabling but indeed life threatening. The question, therefore, is whether this fact justifies a different result.

² In its proposed Findings of Fact and Conclusions of Law, Defendant asserts as an additional ground in support of its August 2012 discontinuance that Claimant has unreasonably delayed pursuing surgical treatment for his low back injury following clearance from his cardiologist to do so.

³ Likewise the other cases cited by Claimant in support of his position, *Schock v. Morristown Memorial Hospital*, Superior Court of New Jersey, Appellate Div. No. A-1658-09T2 (July 2, 2010), *Thomas v. Burggraf Restoration*, 31 P.3d 402 (Okla. 2001), and *Workmen's Compensation Appeal Board v. Chamberlain Manufacturing Corp.*, 336 A.2d 659 (Pa. 1975).

4. I conclude that it does not. As it was in *Wood*, the critical fact here is that during the time when Claimant's non-work-related condition precluded treatment, his work-related injury continued to be totally disabling. Given the express language of the statute, which mandates that temporary total disability benefits be paid for so long as the work injury "causes total disability for work," 21 V.S.A. §642, sufficient grounds for discontinuing them in this case do not yet exist.
5. Had there been credible evidence establishing that Claimant's lower back injury ceased to be totally disabling at any time after Dr. Abdu's October 2011 determination that it was, the facts might justify a different result. Without such evidence, to assert that Claimant's heart condition rendered him even more totally disabled than he already was is a *non sequitur*.
6. I conclude that Defendant has failed to sustain its burden of proving that Claimant's work-related disability had ended as of either February 1, 2012 or August 19, 2012. Its attempts to discontinue temporary total disability benefits on those dates were appropriately rejected, therefore.
7. As for whether Defendant should be allowed to terminate Claimant's temporary disability benefits on the grounds that he has unreasonably delayed seeking surgical treatment since Dr. Tepfer cleared him to do so, I conclude that the evidence is similarly lacking. Although the medical records do not document any recent treatment, there is no way for me to know whether this is due to Claimant's inaction, scheduling difficulties with his doctors or some combination of both. Under the circumstances of this case, particularly the serious nature of Claimant's cardiac condition and the need for him to transfer his care to a new cardiologist, Defendant has failed to establish that a four-month delay in resuming treatment for his lower back condition is so egregious as to warrant a suspension of benefits.
8. I conclude that Defendant has failed to establish sufficient grounds to justify terminating Claimant's temporary total disability benefits on either February 1, 2012 or August 19, 2012. Therefore, it is not entitled to any offset or credit against future wage replacement benefits to be paid on account of Claimant's October 5, 2009 work-related injury.
9. As Claimant has prevailed, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit his itemized claim.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant's claim for a credit or offset against future wage replacement benefits for temporary total disability benefits paid since either February 1, 2012 or August 19, 2012 is hereby **DENIED**. Defendant is hereby **ORDERED** to pay Claimant's costs and attorney fees as awarded in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 3rd day of January 2013.

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.