Zewo Maluk v. Plastic Technologies of Vermont (February 5, 2013)

STATE OF VERMONT
DEPARTMENT OF LABOR

Zewo Maluk

v.

Plastic Technologies
of Vermont

Opinion No. 06-13WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. DD-61908

OPINION AND ORDER

Hearing held in Montpelier on December 3, 2012
Record closed on December 17, 2012

APPEARANCES:

Zewo Maluk, *pro se*
John Valente, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant entitled to temporary total disability benefits as a consequence of his November 30, 2011 work injury?

EXHIBITS:

Defendant's Exhibit A:	Medical records
Defendant's Exhibit B:	Timecard Report
Defendant's Exhibit C:	Letter to Claimant, March 30, 2012
Defendant's Exhibit D:	Check register, pay date 12/23/2011
Defendant's Exhibit E:	Check register, pay date 12/09/2011

CLAIM:

Temporary total disability benefits for the period from December 13, 2011 through March 24, 2012 pursuant to 21 V.S.A. §642

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 machine operator. His scheduled work hours were from 2:00 PM until 10:30 PM daily. His attendance was recorded by swiping a time card through a time clock.

4. On the evening of Wednesday, November 30, 2011 Claimant injured his left hand when a machine part fell on it while he was cleaning. He finished his scheduled shift and went home. His hand was swollen and painful. Later that night, he sought treatment at the hospital emergency room, where he was diagnosed with a wrist contusion and discharged without medications.

5. Claimant appeared for his scheduled shift the next day, Thursday, December 1, 2011. Upon reporting the injury to his supervisor, he was directed to Concentra Medical Center for further evaluation and treatment. Mara Limoncelli, a physician's assistant, examined him, diagnosed a hand/wrist contusion and referred him to physical therapy for treatment. In the meantime, she released him to return to work with restrictions against aggravating activities.

6. On Wednesday, December 7th Ms. Limoncelli reevaluated Claimant. Her office note reflects that Claimant requested two days off because of his injury, but she determined that he was able to work, so long as he was restricted from lifting more than ten pounds and pushing or pulling with more than ten pounds of force, and also so long as he continued to wear a wrist brace.

7. Ms. Limoncelli next evaluated Claimant on December 14th. At that point she reduced Claimant's modified duty work restrictions, to permit lifting of up to 20 pounds and pushing/pulling with up to 50 pounds of force.

8. Claimant also underwent physical therapy treatments during this period. From December 5th through December 27th, 2011 he attended a total of six treatments.

9. As reflected on his timecard, Claimant worked his scheduled shifts on Thursday, December 1st, Friday, December 2nd and Monday, December 5th. On Tuesday, Wednesday, Thursday and Friday, December 6th through 9th, 2011, his timecard reflects that he "called out due to hand." Ms. Limoncelli having released him to return to work as of the date of injury, I find that there was no medical basis for Claimant's absence on those days.

10. On Monday, December 12, 2011 Claimant appeared at Defendant's premises to retrieve his paycheck for the pay period ending December December 4, 2011. According to the credible testimony of Kristin Robillard, Defendant's plant manager, Claimant told her on that day that he was going to the doctor's and would be in to work thereafter, but he did not do so. Two weeks later, on Friday, December 23, 2011 Claimant again appeared to retrieve his paycheck, this one for the pay period ending December 18, 2011. According to Ms. Robillard's credible testimony, when asked Claimant advised her that he would be ready to return to work the following week. As by that time Claimant had been absent from work without excuse for more than two weeks, Ms. Robillard suggested that he call first before doing so.

11. Consistent with his timecard report, Claimant's December 9, 2011 paycheck reflected wages paid for both Thursday, December 1st (the date of injury) and Friday, December 2nd, 2011. His December 23, 2011 paycheck reflected wages paid for Monday, December 5th only; this too is consistent with his timecard report.

12. Claimant testified that on at least a few occasions between December 12th and December 23rd, 2011 he appeared at work but was sent home because Defendant could not accommodate his modified duty restrictions. Ms. Robillard disputed this testimony. According to her, aside from coming in to pick up his paychecks on December 12th and 23rd, Claimant never returned to the workplace after Monday, December 5th. Modified duty work within his restrictions was available at all times, so had he appeared for work he would have been accommodated. I find Ms. Robillard's testimony on this issue more credible than Claimant's.

13. Claimant admitted that he did not attempt to return to work for Defendant after December 27, 2011 because a co-worker told him that Defendant was no longer interested in employing him. Ms. Robillard concurred that Claimant's employment was terminated for "job abandonment," though the record does not specify on what date this occurred.

14. Claimant testified that he sought work after his employment with Defendant terminated, though he could only recall three potential employers to whom he submitted applications. He began working for a new employer on March 25, 2012.

15. Claimant returned to Ms. Limoncelli for further evaluation of his wrist pain on April 6, 2012. He reported that he had not been following the previously established treatment program and had not been participating in therapy. Ms. Limoncelli counseled Claimant as to the importance of doing so and referred him for another course of physical therapy. As for functional limitations, she determined that he was able to work, with modified duty restrictions similar to those that had been in force as of mid-December 2011.

16. I find from the medical evidence that at no time was Claimant ever determined to be totally disabled from working as a consequence of his November 30, 2011 work injury.

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. Where a claimant's injury is obscure and a layperson could have no well-grounded opinion as to its nature or extent, expert medical testimony is the sole means of laying a foundation for an award. *Lapan v. Berno's, Inc.*, 137 Vt. 393, 395-96 (1979).

3. Applying this concept to disputes involving temporary total disability, it has long been settled that a claimant cannot disable him- or herself; rather, expert medical testimony is required to establish the extent, if any, to which an injured worker is incapable of working. *See, e.g., Pfalzer v. Pollution Solutions of Vermont*, Opinion No. 23A-01WC (October 5, 2001).

4. Here, the uncontradicted medical evidence establishes that Claimant was capable of working, albeit with modified duty restrictions, at all times subsequent to his November 30, 2011 injury. The credible evidence further establishes that Defendant was providing suitable modified duty work. By first calling in sick and then abandoning his job, Claimant removed himself from the work force without a medical basis for doing so. Whatever wages he lost thereafter were a function of that decision, not of his work injury. For that reason, he is disqualified from receiving temporary total disability benefits.

5. Claimant might have qualified for temporary disability benefits nevertheless, had he provided persuasive evidence that after his employment with Defendant terminated he made a reasonably diligent attempt to return to the work force, but because of his injury was unable to find suitable work. To avoid harsh results, the commissioner has indicated a willingness at least to consider such an exception in the past, though the facts necessary to establish it are difficult to prove. *See, e.g., Ribis v. Coventry Health Care*, Opinion No. 26-09WC (July 17, 2009); *Pitaniello v. GE Transportation*, Opinion No. 03-08WC (January 17, 2008); *Ducharme v. DEW Construction*, Opinion No. 24-07WC (August 20, 2007); *Pfalzer, supra*; *Andrew v. Johnson Controls*, Opinion No. 3-93WC (June 13, 1993).

6. Here, the medical evidence documented only minimal functional restrictions referable to the work injury, and Claimant did not prove any link between those restrictions that did exist and his delayed return to the work force. Under these circumstances, I conclude that he has failed to establish the facts necessary to fit within the exception.

7. I conclude that Claimant has failed to sustain his burden of proving his entitlement to temporary total disability benefits for the period from December 13, 2011 through March 24, 2012.

ORDER:

Claimant's claim for temporary total disability benefits causally related to his November 30, 2011 injury for the period from December 13, 2011 through March 24, 2012 is hereby **DENIED**.

DATED at Montpelier, Vermont this 5th day of February 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.