Keith Cyr v. Record Concrete Inc. (November 25, 2013)

STATE OF VERMONT
DEPARTMENT OF LABOR

Keith Cyr

v.

Record Concrete, Inc.

Opinion No. 26-13WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. EE-54219

RULING ON DEFENDANT NGM INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

David Schoen, Esq., for Claimant
Jeffrey Dickson, Esq., for Defendant NGM Insurance Co.
John Valente, Esq., for Defendant FirstComp Insurance Co.

ISSUE PRESENTED:

Is Defendant NGM entitled to summary judgment in its favor as to the appropriate calculation of Claimant's average weekly wage for temporary total disability benefits payable after his September 12, 2012 work injury?

EXHIBITS:

Defendant FirstComp's Exhibit A:	Workers' compensation medical form, June 1, 2011
Defendant FirstComp's Exhibit B:	Dr. Huyck progress notes, September 5, 2012
Defendant FirstComp's Exhibit C:	Family Medicine Associates progress notes, October 7, 2011
Defendant FirstComp's Exhibit D:	Family Medicine Associates progress notes, October 14, 2011
Defendant FirstComp's Exhibit E:	Dr. Huyck progress notes, November 30, 2011
Defendant FirstComp's Exhibit F:	Workers' compensation medical form, January 2, 2013

FINDINGS OF FACT:

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

1. At all times relevant to these proceedings, Claimant was an employee of Record Concrete, Inc. He initially suffered a work-related neck injury in June 2011 while Defendant FirstComp ("FirstComp") was on the risk. At that time, Claimant's average weekly wage was $1,080.47. This yielded a weekly compensation rate of $740.31.

2. Dr. Huyck, Claimant's treating physician, returned him to part-time, restricted duty work in late August 2011. This status continued until October 21, 2011 when he was laid off for the winter months, as was customary. From late August until his layoff from work, FirstComp paid Claimant temporary partial disability benefits. He was called back to work in April 2012. FirstComp did not reinstate temporary partial disability benefits, as it considered Claimant's return to work to have been successful. Claimant did not appeal that determination.

3. Claimant followed up with Dr. Huyck on April 4, 2012. She indicated that he could return to full time work, with restrictions on his lifting and rest breaks as needed.

4. Claimant returned to see Dr. Huyck on September 5, 2012. By that time, overall he felt fifty percent improved. However, he reported that he worked only when his employer had light duty work available, as he had been unable to increase his lifting capacity to the heavy physical demand level. Dr. Huyck recommended that he continue working with lifting restrictions and rest breaks as needed.

5. On September 12, 2012 Claimant suffered a new work-related injury to his low back. By this time, Defendant NGM ("NGM") was on the risk. Claimant's average weekly wage during the 26 weeks prior to this injury was approximately $534.00. NGM accepted the injury as compensable and began paying temporary total disability benefits based upon those earnings. Including two dependents, his compensation rate was $402.00 per week.

6. Initially, the Department's workers' compensation specialist disagreed with NGM's average weekly wage calculation, and instead instructed the carrier to use the 26-week period prior to Claimant's 2011 neck injury as the basis for calculating his temporary total disability payments. NGM objected to this analysis.

7. Following an informal conference in which both defendants participated, in March 2013 the specialist issued an interim order. Because Claimant had not yet reached an end medical result for his neck injury at the time that he injured his low back, the specialist determined that both carriers should share responsibility for his ongoing temporary disability benefits. Based on Claimant's average weekly wage for the 26 weeks prior to his low back injury, NGM was ordered to pay $402.00 per week. On top of that, FirstComp was ordered to pay an additional $225.33 per week as a temporary partial disability benefit. That amount represented two-thirds of the difference between Claimant's compensation rate at the time of his 2011 neck injury and the amount he was to receive from NGM. *See* 21 V.S.A. §646.

8. In response to the Department's interim order, in May 2013 FirstComp requested a formal hearing. NGM filed the present motion for summary judgment in August 2013, to which FirstComp responded in September 2013. Claimant did not file a response to the motion.

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. The issue presented in this case concerns the appropriate average weekly wage and compensation rate at which the temporary disability benefits Claimant is owed should be paid. NGM asserts that as a matter of law the temporary total disability benefits referable to the injury for which it is responsible should be based on his average weekly wage for the 26 weeks immediately prior to September 12, 2012.

3. The workers' compensation statute, 21 V.S.A. §650(a), is clear on this point, which likely explains why even FirstComp concedes it. It reads in pertinent part: "Average weekly wages shall be computed in such a manner as is calculated to give the average weekly earnings of the worker during the 26 weeks preceding an injury . . .." When a statute in not ambiguous, "this Department must 'apply the provision using the plain meaning of the words chosen by the Legislature.'" *Didio v. State of Vermont*, Opinion No.05-03WC (January 16, 2003), quoting *Barrett/Canfield, LLC v. City of Rutland,* 171 Vt. 196, 200 (2000).

4. In *Didio*, the commissioner was faced with a similar fact pattern to the one presented in this case – a claimant who suffered two compensable, though entirely unrelated, work injuries, with higher average wages earned prior to the first injury as compared to the second injury. The commissioner ruled that the claimant's compensation rate for temporary disability benefits referable to the later injury had to be based on his average weekly wages for the period preceding that injury, not on the higher wages he had earned prior to his earlier injury. As rationale for this conclusion, the commissioner pointed both to the plain language of §650(a) and to the "requisite relationship between an injury and the benefits claimed." *Id.*, Conclusion of Law No. 7.

5. This analysis applies equally well in the case before me now. Thus, I conclude that the compensation rate at which NGM must pay temporary total disability benefits properly should be based on Claimant's average weekly wage during the period immediately preceding his September 2012 injury, or $534.00. As noted above, this yields a compensation rate of $402.00 per week.

6. FirstComp asserts two arguments against imposing responsibility on it for the additional $225.33 that the specialist determined Claimant was owed as a weekly temporary partial disability benefit. First, it argues that Claimant waived his right to make a claim for temporary partial disability benefits when he failed to object either to their discontinuance in October 2011 (when he was laid off for the season) or to FirstComp's failure to reinstate them in April 2012 (when he returned to work with modified duty restrictions).

7. Whether FirstComp can allege facts sufficient to establish an effective waiver defense against Claimant is not for me to decide here, in the context of NGM's summary judgment motion. The only question raised by that motion is whether as a matter of law NGM is shielded from liability for anything other than the $402.00 weekly temporary total disability benefit that the specialist ordered it to pay. Procedurally, the defenses FirstComp should be asserting in response are those that apply as against NGM, not those that apply only as against Claimant.

8. FirstComp's second argument against summary judgment in NGM's favor is appropriately raised, but ultimately unconvincing. Citing to *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997), FirstComp argues that until Claimant reaches an end medical result for his September 2012 injury, NGM should be solely responsible for whatever temporary disability benefits are due him.

9. The claimant in *Pacher* suffered a work-related injury in 1977, resulting in recurring pain in his left lower back and left leg. The employer on the risk paid benefits accordingly. In 1992 he suffered another injury, this time to his right lower back, while in the employ of a different company. When a dispute arose between the two employers as to which should bear responsibility for any ongoing workers' compensation benefits, the commissioner ordered the second employer to pay, but only until the claimant returned to his baseline condition, at which point the first employer was ordered to resume responsibility. The Supreme Court affirmed. Critical to its analysis was the determination that the claimant's 1992 injury was a new and distinct injury from the 1977 injury. Under those circumstances, "[w]here different accidents produce distinct injuries," each employer's liability could be defined and apportioned without confusion. *Id.* at 628, n.2. Thus, the Court upheld the commissioner's apportionment determination as appropriate. It instructed, "Where an employee suffers unrelated injuries during different employments, the employer at the time of each accident becomes responsible for the respective workers' compensation benefits." *Id*.

10. The same circumstances apply here. That Claimant's September 2012 low back injury was entirely separate and distinct from his earlier neck injury is undisputed. Consistent with the holding in *Pacher*, it is appropriate to hold NGM responsible for the temporary total disability benefits it owes as a consequence of the low back injury. As a matter of law, there is no basis for imposing liability upon NGM for temporary partial disability benefits that, if owed at all, flow directly from the neck injury for which FirstComp is still responsible.

ORDER:

Summary judgment is hereby **GRANTED** in favor of Defendant NGM Insurance Company as to the appropriate calculation of the temporary total disability benefits owed Claimant as a consequence of his September 2012 work-related injury. Defendant NGM Insurance Company is hereby **ORDERED** to pay temporary total disability benefits in the amount of $402.00 weekly (updated as appropriate in accordance with 21 V.S.A. §650(d)), until such time as Claimant either reaches an end medical result for this injury or successfully returns to work, whichever comes first.

The Department's March 2013 interim order remains in full force in effect as against Defendant FirstComp Insurance Company.

DATED at Montpelier, Vermont this 25th day of November 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.