Jeffrey Wimble v. Green Mountain Coffee Roaster/ MEMIC and Green Mountain Coffee Roasters/Liberty Mutual Ins. Co. (May 2, 2014)

STATE OF VERMONT
DEPARTMENT OF LABOR

Jeffrey Wimble	Opinion No. 08-14WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
Green Mountain Coffee Roasters/MEMIC and Green Mountain Coffee Roasters/ Liberty Mutual Insurance Co.	For: Anne M. Noonan Commissioner
	State File Nos. X-60513 and DD-61994

RULING ON DEFENDANT MEMIC'S MOTION FOR RELIEF FROM ARBITRATION ORDER

APPEARANCES:

John Valente, Esq., for Defendant MEMIC
Keith Kasper, Esq., for Defendant Liberty Mutual Insurance Co.

Background:

This claim originated as an aggravation/recurrence dispute between two successive insurers for the same employer. Claimant initially suffered a compensable injury to his left elbow in 2006. As the carrier on the risk at the time, Defendant MEMIC paid workers' compensation benefits accordingly, including a period of temporary total disability following surgery in October 2006. Claimant returned to work and was determined to have reached an end medical result in May 2007.

In October 2011 Claimant sought additional treatment, which culminated in a second surgery on April 11, 2013. By that time, he was working for another employer, his employment for Green Mountain Coffee Roasters (GMCR) having terminated as of February 29, 2012. On March 3, 2012 GMCR had filed a new First Report of Injury, with an injury date of February 28, 2012. Defendant Liberty Mutual Insurance Co. was the carrier on the risk as of that date.

Liberty denied responsibility for the additional workers' compensation benefits Claimant sought on the grounds that no new injury had occurred on February 28, 2012. To the contrary, it asserted that he had suffered a recurrence of his 2006 injury, such that MEMIC remained liable for any benefits due him.

Faced with an aggravation/recurrence dispute, the Department issued an interim order under 21 V.S.A. §662(c) requiring Liberty, as the more recent carrier on the risk, to pay benefits. Concurrently, it ordered both carriers to submit to arbitration as to which of them bore ultimate responsibility for Claimant's renewed treatment, pursuant to 21 V.S.A. §662(e).

Notwithstanding that he had resumed treatment as of October 2011, Claimant did not lose time from work until his April 2013 surgery. Thereafter, Liberty calculated his compensation rate for temporary total disability based on the wages he had earned prior to February 28, 2012, the date of injury alleged in GMCR's March 3, 2012 First Report of Injury.

On February 6, 2014 the arbitrator issued his Arbitration Decision and Order. Based on the evidence presented, he determined that Claimant's renewed treatment represented a recurrence of his 2006 injury, for which MEMIC remained responsible. He thus ordered MEMIC to "assume responsibility for the current medical treatment and ancillary workers' compensation benefits." In addition, he ordered MEMIC to "reimburse Liberty Mutual for all sums paid, by Liberty Mutual, to or on behalf of [Claimant] in this matter."

MEMIC does not question the arbitrator's finding of recurrence, and therefore does not assert any error as to the first part of his order. As to the second part, however, it argues that the arbitrator exceeded his authority by ordering reimbursement for all of the monies Liberty previously paid to Claimant. Specifically, it claims that because Liberty erroneously calculated Claimant's compensation rate for temporary total disability benefits,[1] Liberty should bear full responsibility for any resulting overpayment, and MEMIC should be excused from reimbursing any overpaid amounts.

Discussion:

Vermont's workers' compensation statute authorizes the commissioner to order arbitration as to "any dispute between employers and insurers" that arises "whenever payment of a compensable claim is refused, on the basis that another employer or insurer is liable." 21 V.S.A. §§662(c) and (e). If arbitration is ordered, the statute imposes responsibility upon the arbitrator as follows:

> [To] determine apportionment of the liability for the claim . . . among the respective employers or insurers, or both. The apportionment may be limited to one or more parties.

21 V.S.A. §662(e)(2)(A). The arbitrator also must issue a written decision, "which shall be final." 21 V.S.A. §662(e)(2)(B). An arbitrator's award can only be vacated by a showing of "corruption, fraud or partiality," Workers' Compensation Rule 8.6211, and can only be modified "if there is a miscalculation of figures or mistake describing any person, thing or property referred to in the award." Workers' Compensation Rule 8.7110.
As the statute specifically reflects, 21 V.S.A. §662(e)(2), arbitration thus replaces the formal hearing process for any disputes so referred. This includes not only disputes as to which employer or carrier bears ultimate responsibility to the claimant, as is the case in most aggravation/recurrence claims, *see, e.g., Raymond v. SD Ireland Concrete Construction Co.*, State File Nos. T-19436 and BB-01610, Arbitration Decision dated February 26, 2014, but also disputes regarding the extent, if any, to which responsibility for specific benefits should be

[1] MEMIC asserts that Claimant's compensation rate should have been based either on his average wages prior to April 11, 2013 (the date of his most recent disability), or on his average wages at the time of his first period of disability in October 2006. Instead, Liberty's payments were based on Claimant's average wages prior to February 28, 2012, the injury date reflected on GMCR's second First Report of Injury.

shared among multiple employers or carriers. *See, e.g.*, *Webster v. Steven's Gas*, State File No. S-15680, Arbitration Decision dated June 8, 2006; *Bothwell v. North Country Hospital*, State File Nos. L-15688 and T-17209, Arbitration Decision dated June 2, 2006.

MEMIC argues that the second part of the arbitrator's award here should be vacated, on the grounds that the statutory authority granted him "to determine apportionment of the liability" for a claim did not encompass the authority to order reimbursement of amounts already paid. Given the statutory requirement that the commissioner order arbitration among various carriers only "after payment to the claimant" has been made, 21 V.S.A. §662(e), by necessity one of the parties already will have paid benefits by the time arbitration occurs. If ultimately the arbitrator concludes that liability should have rested on another party's shoulders instead, it follows that the first party will have to be reimbursed for the amounts it was ordered to pay initially, *see* 21 V.S.A. §662(c). To limit the arbitrator's award solely to responsibility for future benefits would be manifestly unfair. Nothing in the statutory language supports such an interpretation, and for this reason, I reject this basis for MEMIC's request that the award be vacated.

Short of vacating the award, MEMIC argues in the alternative that the arbitrator's order should be modified under Workers' Compensation Rule 8.7110, on the grounds of a "miscalculation of figures or mistake describing . . . property." It challenges the arbitrator's failure to make findings either as to the manner in which Liberty calculated Claimant's compensation rate or as to the total amount it paid. By then ordering reimbursement of an unspecified sum, it argues, the arbitrator impliedly adopted Liberty's "miscalculations." And by requiring MEMIC to reimburse Liberty in an amount greater than what Claimant actually was due, he thus mistakenly "described" MEMIC's "property."

I agree that had MEMIC raised the compensation rate issue in the course of the arbitration proceedings, the arbitrator would have been obligated to decide it. Had sufficient credible evidence been presented to him, certainly it would have been within his authority to order MEMIC to reimburse Liberty only for the benefits he determined Claimant should have received, and not for any overpayments he found Liberty to have made. MEMIC failed to present any evidence at all on the issue, however. As a consequence, there simply is no basis from which to conclude that the arbitrator's decision was flawed as a result of some miscalculation or mistake in description.

In effect, the "modification" MEMIC seeks now is an opportunity to litigate before the commissioner a question that it should have raised before the arbitrator. It asserts that it did not have access at the time to the financial information it would have required to question Liberty's compensation rate calculations, but I find this argument unconvincing. Faced with potential liability for all or a portion of the benefits Liberty had paid, it should have been a routine exercise for MEMIC to request an itemized list of the payments made to date, along with the wage statements and compensation agreements upon which any indemnity payments were based. That it failed to do so is unfortunate, but it is not grounds for modifying the arbitrator's award.

I agree, as MEMIC asserts, that public policy favors accuracy in calculating the benefits due an injured worker under the workers' compensation statute. When mistakes occur, public policy favors that the factual and legal issues be promptly raised so that they can be resolved in a timely and effective manner. Public policy also favors that disputes not be litigated in piecemeal fashion. Last, public policy favors respect for the arbitration process, and particularly for the statutorily imposed finality of the arbitrator's decision and order. Balancing all of these policy considerations, I conclude that there is no basis for either vacating or modifying the award in this case.

ORDER:

Based on the foregoing, Defendant MEMIC's Motion for Relief from Arbitration Order is hereby **DENIED**.

DATED at Montpelier, Vermont this 2nd day of May 2014.

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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.