

Robert Bruno v. Directech Holding Co.

(May 19, 2010)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Robert Bruno

Opinion No. 18-10WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

Directech Holding Co.

For: Patricia Moulton Powden  
Commissioner

State File No. Y-50514

**OPINION AND ORDER**

Hearing held in Montpelier, Vermont on February 8, 2010

Record closed on March 19, 2010

**APPEARANCES:**

Christopher McVeigh, Esq., for Claimant

Marion Ferguson, Esq., for Defendant

**ISSUE PRESENTED:**

1. Has Claimant reached an end medical result for his July 7, 2006 work-related injury and, if so, when did that occur?
2. What is the appropriate permanent impairment rating referable to Claimant's July 7, 2006 work injury?

**EXHIBITS:**

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Preservation deposition of Robert Beattie, M.D., January 8, 2010

**CLAIM:**

Temporary total disability benefits pursuant to 21 V.S.A. §642

Permanent partial disability benefits pursuant to 21 V.S.A. §648

Medical benefits pursuant to 21 V.S.A. §640

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

## **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 contained in the Department's file relating to this claim. Judicial notice also is taken of the relevant portions of the *AMA Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> ed.* (the "AMA Guides").
3. Claimant worked for Defendant as a satellite television installer. His job required him to climb ladders, carry equipment and run wires in tight spaces.
4. Claimant's prior medical history includes cervical degenerative disc disease, migraine headaches and fibromyalgia, a generalized chronic pain syndrome. Notwithstanding these conditions Claimant was able to work with no formal restrictions prior to the injury at issue here.

### *Claimant's Work Injury and Subsequent Treatment*

5. On July 7, 2006 Claimant was completing a service call at a customer's home when he fell from a small step. Claimant landed directly on his right knee, which immediately became swollen and painful.
6. Defendant accepted Claimant's right knee injury as compensable and began paying workers' compensation benefits accordingly.
7. Claimant's knee pain failed to respond to conservative therapy. His knee remained swollen and painful and he was unable to bear weight on it. In October 2006 he underwent arthroscopic surgery with Dr. Beattie, an orthopedic surgeon. Dr. Beattie maintains a general orthopedic practice with an interest in sports medicine that has evolved predominantly towards knee and shoulder injuries.
8. Dr. Beattie surgically repaired Claimant's torn meniscus, debrided his patellofemoral joint and removed a sebaceous cyst, all as treatment causally related to Claimant's July 2006 fall.
9. Claimant's symptoms failed to improve with surgery, and in fact worsened instead. He underwent a series of joint lubrication injections in early 2007, and then a second arthroscopic surgery in August 2007, but neither of these interventions alleviated his symptoms. Claimant continued to experience sensations of clicking, locking and popping in his knee, which Dr. Beattie attributed specifically to his patellofemoral joint. In addition, however, Claimant also experienced burning pain and numbness around the perimeter of his kneecap, down his shin and into his foot. These symptoms were more suggestive to Dr. Beattie of post-traumatic neuritis, or nerve irritation. Dr. Beattie suspected that a neuroma might have formed in a small subcutaneous branch of Claimant's saphenous nerve, a sensory nerve in the lower leg.

10. Claimant underwent a second series of joint lubricating injections in April and May 2008, but again to no avail. Dr. Beattie continued to believe that Claimant's symptoms were multi-factorial, a combination of osteoarthritis in his knee joint and post-traumatic neuritis. Dr. Beattie postulated as well that Claimant might have developed complex regional pain syndrome (CRPS) in his right leg.

Neurologic and Orthopedic Consultations

11. In order to further evaluate and identify possible treatment options for Claimant's multi-factorial symptoms, in May 2008 Dr. Beattie made two subsequent referrals – one to Dr. Howe, an orthopedic surgeon, for a second opinion primarily as to Claimant's joint pain, and one to Dr. Tranmer, a neurosurgeon, for consideration of a neurectomy to treat his nerve pain. The purpose of a neurectomy is to decrease the irritation in the nerve by excising the neuroma and burying the nerve ending in a less vulnerable site. By doing so, the affected area becomes numb, but is no longer painful.
12. Dr. Tranmer first evaluated Claimant in July 2008. Although he noted the neurogenic nature of Claimant's pain, in his clinical exam he could not identify any region where a neuroma likely was present. Thus Dr. Tranmer could not recommend a neurectomy. As an alternative, however, Dr. Tranmer suggested that Claimant might benefit from a spinal cord stimulator. A spinal cord stimulator does not address the root cause of a patient's pain, but rather treats his or her pain symptoms in a more non-specific manner.
13. Even after evaluations by two other specialists, it remains unclear whether Claimant's neurogenic symptoms are due to a neuroma. Dr. Pino, a pain management specialist who evaluated Claimant at Dr. Tranmer's request in October 2008, concluded that a neuroma had formed in Claimant's knee. However, after evaluating Claimant in December 2008 Dr. Penar, another neurosurgeon in Dr. Tranmer's practice, concluded that the clinical findings were too equivocal to support the presence of a neuroma.
14. As Dr. Tranmer had, Dr. Penar also advised against a neurectomy as a means of addressing Claimant's symptoms. According to Dr. Penar, because there is no specific well-defined single branch of the saphenous nerve, it would be very difficult to pinpoint and find a neuroma even by surgically exploring the area. In addition, Dr. Penar reported that Claimant "did not want" additional numbness in his foot, and therefore might not be satisfied with the outcome of such a procedure.
15. With these considerations in mind, Dr. Penar concurred with Dr. Tranmer that a spinal cord stimulator represented a better treatment option for Claimant's nerve pain. If successful, a stimulator would provide long-lasting relief of Claimant's pain. It also would treat a broader area of sensitivity than that likely due to a neuroma.
16. As to the orthopedic aspect of Dr. Beattie's multi-factorial diagnosis, Claimant underwent a second opinion consultation with Dr. Howe in October 2008. Dr. Howe acknowledged that it was difficult to confirm the exact etiology of Claimant's symptoms, whether orthopedic or neurologic. From an orthopedic perspective, in his opinion Claimant was not a candidate for a total knee replacement.

17. As to Claimant's nerve pain, Dr. Howe found "clear evidence" of a neuroma in Claimant's clinical examination. Of note, furthermore, after Dr. Howe injected the suspected area of the neuroma with an anesthetic, Claimant reported significant pain relief. Dr. Howe interpreted this finding as further diagnostic evidence that a neuroma was in fact causing Claimant's neurogenic symptoms. He deferred to make any treatment recommendations, however, and instead referred Claimant back to Drs. Beattie and/or Tranmer for further consideration of his options.

*Evaluation for Complex Regional Pain Syndrome (CRPS)*

18. At his attorney's referral, in February 2009 Claimant underwent an evaluation with Dr. Zweber to assess whether he suffered from CRPS in his right lower extremity. Dr. Zweber is board-certified in physical medicine and rehabilitation, and has extensive credentials and experience in treating CRPS patients.
19. Dr. Zweber determined that Claimant did in fact suffer from CRPS. In reaching this conclusion Dr. Zweber noted such physical findings as changes in skin color, temperature and texture, joint stiffness, edema and abnormal hair and nail growth.
20. Notwithstanding his diagnostic conclusions, Dr. Zweber acknowledged that his examination of Claimant did not reveal sufficient physical findings to meet the diagnostic criteria for CRPS as contained in the *AMA Guides*. According to those criteria, a patient must exhibit at least eight of eleven designated signs and symptoms of the condition in order for the diagnosis to be used as the basis for rating permanent impairment. Dr. Zweber testified that the *AMA Guides'* criteria were fairly arbitrary, somewhat outdated and not considered a "diagnostic bible" by CRPS practitioners.
21. Dr. Zweber testified that recent treatment advances have identified spinal cord stimulators as possibly effective in improving CRPS symptoms. If successful, the device is designed to control a patient's pain level on a "more or less" permanent basis, though admittedly it is not in any way curative of the condition itself.
22. Dr. Zweber determined that "other than consideration for a spinal cord stimulator," Claimant had reached an end medical result as of his February 2009 evaluation.
23. Even though Claimant did not satisfy the *AMA Guides'* diagnostic criteria for CRPS, in rating the extent of his permanent impairment Dr. Zweber utilized the *Guides'* methodology nonetheless. That method directs practitioners to consider the extent of a patient's gait impairment when rating permanency due to CRPS in a lower extremity. Dr. Zweber categorized Claimant's gait impairment as "moderate," and therefore accorded him a 19% whole person impairment rating.

Dr. White's Independent Medical Evaluations

24. At Defendant's request, Claimant underwent an independent medical evaluation with Dr. White, an occupational medicine specialist, in April 2008. At the time of this evaluation, Claimant had not yet completed Dr. Beattie's second series of joint lubricating injections. Nevertheless, Dr. White determined that it was appropriate to rate the extent of Claimant's permanent impairment. Having observed no signs of CRPS in his physical examination, Dr. White based his rating solely on range of motion deficits in Claimant's knee. According to his calculation, Claimant had suffered a 4% whole person impairment.
25. With Dr. White's report as support, the Department approved Defendant's Notice of Intention to Discontinue Benefits (Form 27) on the grounds that Claimant had reached an end medical result. The discontinuance was effective May 8, 2008.
26. Dr. White supplemented his report with an addendum in January 2009, in which he clarified that Claimant had in fact reached an end medical result as of that date. Thereafter, Dr. White conducted a second independent medical evaluation in May 2009, followed by another addendum in June 2009. In the intervening months since Dr. White's first evaluation Claimant had undergone the consultations noted above (with Drs. Tranmer, Pino, Penar and Howe), all of which were aimed primarily at evaluating possible treatment options to address his ongoing symptoms.
27. Dr. White found no basis in this interval history for retracting his previous end medical result determination. He acknowledged that a spinal cord stimulator was a reasonable treatment option, and that if successful it might provide up to 60% improvement in Claimant's symptoms for as long as two years.<sup>1</sup> Nevertheless, the treatment was not designed to be curative – it would not address the underlying cause of Claimant's symptoms, but instead would serve only to mask his pain. Citing to both the definition of "end medical result" contained in Workers' Compensation Rule 2.1200 and the concept of "maximum medical improvement" as defined by the *AMA Guides*, Dr. White concluded that Claimant's condition was unlikely to change substantially, either with or without further treatment. Therefore, he remained at end medical result.
28. Dr. White considered the possibility of a neurectomy in a similar vein. In his opinion, that too would be a reasonable treatment option, but again one that due to its small likelihood of success probably would not significantly affect Claimant's underlying condition.
29. Dr. White acknowledged that despite the additional consultations Claimant had undergone, the anatomic etiology of his symptoms remained unclear.

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<sup>1</sup> Dr. White testified that a spinal cord stimulator's efficacy sometimes can be extended beyond two years by replacing its batteries, though eventually the device's positive effect will dissipate nonetheless.

30. As for permanency, Dr. White reiterated that his examination failed to reveal sufficient signs or symptoms of CRPS to justify an impairment rating for that condition under the *AMA Guides*. As a consequence, he could not support Dr. Zweber's 19% rating. However, Dr. White did determine that Claimant exhibited greater losses in range of motion in his May 2009 evaluation than he had at the time of his April 2008 evaluation. On those grounds, he increased Claimant's permanent impairment rating from 4% whole person to 8%.

*Claimant's Recent Treatment and Current Status*

31. At Dr. Pino's direction, on August 6, 2009 Claimant underwent a spinal cord stimulator trial. Unfortunately he did not experience effective symptom relief and therefore was determined not to be a good candidate for permanent implantation. Dr. Pino removed the device on August 13, 2009.
32. Dr. Beattie last evaluated Claimant in September 2009. His treatment note for that date does not reflect any additional recommendations or referrals for Claimant's ongoing right knee symptoms. In his January 2010 deposition, however, Dr. Beattie continued to maintain that Claimant might benefit from a neurectomy. In his opinion, the fact that Claimant had experienced significant pain relief after Dr. Howe injected his saphenous nerve with anesthetic was evidence that a neuroma existed at the site. Notwithstanding both Dr. Tranmer's and Dr. Penar's misgivings, therefore, Dr. Beattie testified that "if it was my knee, I would consider another opinion." Dr. Beattie acknowledged that if it was determined after a third neurosurgical opinion that Claimant was not an appropriate candidate for a neurectomy, then he would be at end medical result.
33. Claimant testified at the formal hearing that at Dr. Beattie's referral he was scheduled to see a third neurosurgeon, Dr. Ball, in the coming week. Aside from Dr. Beattie's deposition testimony, however, there is no medical record documenting that referral.
34. Claimant has not returned to work since his injury. He wears a knee brace and walks with a cane. He takes a variety of prescription medications, some of which affect his concentration and make him sleepy during the day. He described his pain level as "intolerable." Recently he began seeing a therapist for depression and anxiety.

## 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. Once a claim has been accepted and benefits have been paid, the party seeking to discontinue bears the burden of proving that it is proper to do so. *Merrill v. University of Vermont*, 133 Vt. 101,105 (1974); *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010).
3. This claim raises two distinct issues. Defendant bears the burden of proof as to the first issue – whether it properly discontinued Claimant's temporary disability benefits on end medical result grounds in May 2008. Claimant bears the burden of proof as to the second issue – what is the extent of his permanent impairment and specifically, whether it is appropriate to consider CRPS as a rating factor.

### End Medical Result

4. Vermont's workers' compensation rules define the terms "end medical result" and "palliative care" as follows:

"End medical result" . . . means the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment. *Workers' Compensation Rule 2.1200*.

"Palliative care" means medical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition. *Workers' Compensation Rule 2.1310*.

5. With those terms in mind, I find that Defendant's May 2008 discontinuance on end medical result grounds was premature. Not only was Claimant in the midst of a series of joint lubrication injections at the time, but in the subsequent months he underwent additional evaluations, both orthopedic and neurosurgical, with the goal of properly diagnosing his condition and developing an appropriate treatment plan. Dr. White himself admitted that the anatomic etiology of Claimant's symptoms was unclear. The specialist evaluations Claimant underwent with Drs. Tranmer, Howe, Pino and Penar in July, October and December 2008 represented reasonable attempts to remedy that lack of diagnostic clarity and in that way further his medical recovery process.
6. In fact, the evidence establishes that Claimant did not reach an end medical result until August 13, 2009 when his spinal cord stimulator trial concluded. At the time it was undertaken, this treatment was reasonably calculated to lead to further improvement in Claimant's medical recovery process. It is sufficient, therefore, to negate a finding of end medical result as that term is defined in Workers' Compensation Rule 2.1200. *Luff v. Rent Way*, Opinion No. 07-10WC (February 16, 2010).
7. Defendant argues strenuously that *Luff* was incorrectly decided, that it impermissibly conflicts with the Vermont Supreme Court's holding in *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996), and that its precedential value should either be strictly limited or, better yet, reconsidered. Defendant asserts that by endorsing the possibility that a spinal cord stimulator implantation can, in appropriate circumstances, negate a finding of end medical result, the effect of *Luff* is to eliminate the necessary element of finality in a workers' compensation indemnity claim.
8. Defendant's analysis is misguided. As the *Luff* decision explained, a spinal cord stimulator involves a finite course of treatment, consisting of a brief trial and, if successful, surgical implantation shortly thereafter. Once implanted, the device's beneficial effect may last for years, but the treatment itself is concluded and an end medical result is achieved. Unlike open-ended chiropractic maintenance programs such as the Supreme Court considered in *Coburn*, treatment with a spinal cord stimulator does not undermine the element of finality, it enhances it.
9. As for Defendant's fear that *Luff* will be interpreted to allow "an infinite loop of sequential 'finite' treatments" such as "biofeedback, prolotherapy, Vodou or a trip to Lourdes," this is equally groundless. Nothing in *Luff* undermined in any way the requirement that a treatment be reasonable, necessary and likely from a medical perspective to advance the claimant's recovery process in order for it to negate a finding of end medical result.
10. As was the case in *Luff*, I conclude here that Claimant's spinal cord stimulator trial was reasonably calculated to lead to further improvement in his medical recovery process and that therefore he did not reach an end medical result at least until August 13, 2009 when the effort proved unsuccessful.



11. Claimant maintains that even that date is premature, however. With Dr. Beattie's deposition testimony as support, he argues that he should not be deemed to be at end medical result at least until he has obtained a third neurosurgical opinion as to whether a neurectomy might still be a reasonable treatment option.
12. I cannot agree. First, notwithstanding Dr. Beattie's deposition testimony, the medical records themselves do not reflect any discussion of a third neurosurgical opinion, nor a specific referral for that purpose. Discussing treatment options with one's patient in the context of a medical appointment is qualitatively different from discussing them in the context of a legal proceeding. I am reluctant to extend the date of end medical result based solely on the latter, with no documentation of the former having occurred as well.
13. Having not seen Dr. Beattie since September 2009, furthermore, Claimant cannot be said to have actively treated in the intervening months. Without having done so, it would be inappropriate to extend his end medical result date to cover that period.
14. Depending on the outcome of Claimant's third neurosurgical opinion, it is conceivable that Defendant will be obligated to resume his temporary disability benefits. This will depend, of course, on what treatment recommendations, if any, that opinion yields, and whether they are deemed reasonable in the context of the entire medical record. That issue is not before me now. In the meantime, as noted above, I find it appropriate to consider Claimant to have reached an end medical result as of August 13, 2009.

#### Permanent Impairment Rating

15. The second disputed issue in this claim concerns the extent of Claimant's permanent impairment. At the heart of this issue is whether it is appropriate to consider CRPS as a basis for rating impairment, as Dr. Zweber did, or whether that diagnosis should be excluded for rating purposes, as Dr. White did.
16. As was noted in a very recent opinion, Vermont's workers' compensation statute specifically mandates that all permanency ratings be made in accordance with the fifth edition of the *AMA Guides*. 21 V.S.A. §648(b); *Brown v. W.T. Martin Plumbing & Heating*, Opinion No. 14-10WC (April 15, 2010). In the context of CRPS, this means that the *AMA Guides*' diagnostic criteria must be met in order for the condition to form the basis of an impairment rating.
17. Here, Dr. Zweber acknowledged that Claimant had failed to exhibit sufficient signs or symptoms of CRPS to meet the *AMA Guides*' criteria. And while I might agree that the *AMA Guides* is not a "diagnostic bible" for CRPS practitioners generally, when the issue is permanency the statute leaves no room for discretion.<sup>2</sup>

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<sup>2</sup> As was noted in *Brown*, Conclusion of Law No. 7 at note 4, the statutory mandate in favor of the *AMA Guides* applies only in the context of determining the "existence and degree" of an injured worker's permanent impairment. The *Guides*' diagnostic criteria are not necessarily determinative where other workers' compensation benefits are at issue.

18. As Dr. Zweber's rating does not comport with the *AMA Guides*' criteria I have no choice but to discard it. Instead, I accept Dr. White's 8% whole person impairment rating as the appropriate measurement of Claimant's permanency.
19. As Claimant has prevailed only on his claim for temporary disability benefits, he is entitled to an award of those costs that relate directly thereto. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997). As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. Subject to these limitations, Claimant shall have 30 days from the date of this opinion to submit evidence of his allowable costs and attorney fees.

**ORDER:**

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Temporary disability benefits from May 8, 2008 through August 13, 2009;
2. Permanent partial disability benefits in accordance with Dr. White's 8% whole person impairment rating;
3. Interest on the above amounts in accordance with 21 V.S.A. §664; and
4. Costs and attorney fees in amounts to be determined pursuant to 21 V.S.A. §678.

**DATED** at Montpelier, Vermont this 19<sup>th</sup> day of May 2010.

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Patricia Moulton Powden  
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.