George Plante v. State of Vermont, Agency of Transportation (September 14, 2012)

**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

George Plante

v.

State of Vermont
Agency of Transportation

Opinion No. 24-12WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File Nos. X-4039 and BB-0900

## OPINION AND ORDER

Claim submitted on stipulated facts, exhibits, issues and briefs without an evidentiary hearing.

Record closed on July 16, 2012

**APPEARANCES:**

Frank Talbott, Esq., for Claimant
Keith Kasper, Esq., for Defendant

**STIPULATED ISSUES:**

1. What is the proper determination of the date of Claimant's cervical injury?

2. What is the appropriate average weekly wage and compensation rate for the purposes of calculating the indemnity benefits referable to Claimant's cervical injury?

**STIPULATED EXHIBITS:**

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| Joint Exhibit 1: | Medical records |
| Joint Exhibit 2: | Franklin Superior Court trial transcript, November 8-9, 2011 |
| Joint Exhibit 3: | Photographs (19) |
| Joint Exhibit 4: | Illustration of median and ulnar nerves |
| Joint Exhibit 5: | Various wage statements and compensation agreements |
| | |
| Claimant's Exhibit 1: | Letter from Attorney Talbott, October 13, 2009 |
| Claimant's Exhibit 2: | Letter from Workers' Compensation Specialist, October 19, 2009 |
| Claimant's Exhibit 3: | Notice of Injury and Claim for Compensation (Form 5), received October 14, 2009 |
| Claimant's Exhibit 4: | Claimant's proposed findings of fact and conclusions of law, June 1, 2010 |

**CLAIM:**

Temporary total disability benefits pursuant to 21 V.S.A. §642
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

**FINDINGS OF FACT:**

The parties stipulated to the following facts and I accept them as true:

1. At all relevant times, Claimant has been an employee and Defendant an employer within the meaning of Vermont's Workers' Compensation Act.

2. In 2005 Claimant asserted a workers' compensation claim for bilateral upper extremity pain that he alleged was caused by progressive injury due to his work for Defendant.

3. Defendant accepted Claimant's claim for bilateral wrist injuries as compensable, with a date of injury of July 1, 2005. This claim was assigned State File No. X-4039.

4. Claimant was originally diagnosed with bilateral carpal tunnel syndrome.

5. A Wage Statement (Form 25) was prepared and filed for the twelve weeks prior to July 1, 2005, which showed an average weekly wage of $640.48. However, no Form 25 was obtained from the concurrent employer for this period until May 25, 2006. At that point, Claimant's average weekly wage for the twelve weeks prior to July 1, 2005 was recalculated to be $817.47.

6. Claimant did not lose any time from work as a result of his July 1, 2005 injury until March 22, 2006. On that date he underwent a right-sided carpal tunnel release.

7. During the twelve weeks prior to March 22, 2006 Claimant was employed by a concurrent employer, the Air National Guard. Wage statements were obtained from both employers, which documented a combined average weekly wage of $1,269.54. This yields a compensation rate of $846.36.

8. An Agreement for Temporary Total Disability Benefits (Form 21) was entered into and approved by the Department, providing that beginning March 25, 2006 Defendant would pay temporary total disability benefits at the rate of $846.36 weekly.

9. Claimant returned to work on May 15, 2006 and continued to work until December 2, 2008.

10. On December 2, 2008 Claimant underwent a repeat right-sided carpal tunnel release.

11. A Wage Statement was filed that documented an average weekly wage for the 26 weeks prior to this period of disability of $788.46.[1]

12. On or about October 13, 2009 Claimant, through his counsel, filed an Employee's Notice of Injury and Claim for Compensation (Form 5), in which he alleged "cervical degenerative disk disease aggravated by heavy work; disk herniation caused/aggravated by heavy work" and a "progressive" date of injury.

13. This Form 5 was given a new State File No. BB-0900.

14. On December 23, 2009 Claimant underwent cervical disc surgery.[2]

15. On April 22, 2010 the commissioner held a formal hearing on the disputed issue of whether Claimant's cervical disc surgery was causally related to an injury arising out of and in the course of his employment for Defendant.

16. By a written decision issued on August 5, 2010 the commissioner concluded that Claimant's cervical condition was neither caused nor aggravated by his employment for Defendant.

17. Claimant appealed the commissioner's decision to the Superior Court, Franklin County Unit.

18. Claimant was successful in his appeal. In November 2011 the Superior Court jury responded "yes" to the certified question "whether the Claimant's cervical condition was caused and/or aggravated by his employment for the Defendant."

19. On January 18, 2012 the commissioner entered an Amended Order stating that pursuant to the Superior Court jury verdict Defendant was obligated to pay "all workers' compensation benefits to which Claimant establishes his entitlement."

Based upon the record evidence presented, the following additional facts are found:

20. Claimant initially experienced improvement in his right upper extremity after his first carpal tunnel release in March 2006. However, within months of that surgery he again complained of right upper extremity pain, numbness and tingling. A second right carpal tunnel release in December 2008 provided no relief.

[1] The 26-week calculation period was in keeping with legislative amendments to 21 V.S.A. §650(a), effective July 1, 2008.

[2] Though incorrectly stated in their Stipulation of Facts, the parties agree that this is the correct date of Claimant's cervical surgery.

21. In January 2009 Claimant continued to complain of pain. He was referred to Dr. Rinehart, who evaluated him in early April 2009. Dr. Rinehart described Claimant's problem as severe numbness and pain in the right upper extremity. He noted that there had been noticeable improvement documented on EMG and nerve conduction tests in May 2008 and March 2009, but that this improvement "did not mirror his clinical picture which continues to present with severe numbness and pain in his right upper extremity."

21. Based on these findings, Dr. Rinehart concluded that Claimant's symptoms were more likely related to cervical pathology rather than to any carpal tunnel problem. As a result, he recommended that Claimant undergo cervical surgery.

22. In October 2009 Claimant sought treatment with Dr. Barnum, a board certified spine surgeon. His complaints at that time included bilateral arm pain with numbness and tingling in his hands. Dr. Barnum found evidence of what he believed to be nerve impingement in Claimant's neck. Considering that finding together with Claimant's other symptoms, he diagnosed a so-called "double crush syndrome."

23. Double crush syndrome is a condition that occurs when a single nerve becomes pinched in two distinct areas. In Claimant's case the nerve was pinched in his wrist and also in his neck. The preferred course of treatment in this type of situation is to release the nerve first at the wrist, as that is the least invasive procedure. In some circumstances doing so will correct the impingement in the neck as well, and the more invasive cervical surgery can be avoided.

24. Unfortunately, Claimant had continued to have symptoms after his carpal tunnel releases, such that cervical surgery was now necessary. Dr. Barnum performed that surgery on December 23, 2009. Claimant recuperated for approximately six weeks thereafter. He returned to work full time on February 1, 2010.

25. Claimant credibly described the symptoms in his right arm as 80 percent improved following his cervical surgery. The pain in his left arm he described as 100 percent resolved.

26. As a consequence of Claimant's compensable cervical injury, I find that Defendant is obligated to pay temporary total disability benefits for the period from December 23, 2009 to February 1, 2010 as well as permanency benefits specifically referable to that condition.

27. Claimant's average weekly wage for the 26 weeks prior to December 23, 2009 was $814.41. This yields a compensation rate of $542.96.

**CONCLUSIONS OF LAW:**

1. The principal disputed issue in this case concerns the appropriate average weekly wage and compensation rate for indemnity benefits payable as a consequence of Claimant's December 2009 cervical surgery. Resolving this dispute requires a determination as to when the "injury" necessitating that surgery occurred.

2. Vermont's workers' compensation statute provides that an injured worker's average weekly wages "shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the 26 weeks preceding an injury . . ." 21 V.S.A. §650(a). Elsewhere, in the context of its notice and statute of limitations provisions the statute states, "The date of injury . . . shall be the point in time when the injury . . . and its relationship to the employment is reasonably discoverable and apparent." 21 V.S.A. §656. Workers' Compensation Rule 3.0540 reiterates this language, and the Vermont Supreme Court has consistently applied it in cases involving notice and statute of limitations disputes. *Longe v. Boise Cascade Corp.*, 171 Vt. 214, 219 (2000); *Hartman v. Ouellette*, 146 Vt. 443, 447 1985).

3. Aside from notice and statute of limitations issues, neither the statute nor the Supreme Court has delineated what constitutes the "date of injury" for the purposes of determining the rate at which temporary disability benefits should be paid. In prior decisions, the commissioner has at times held that the "date of injury" in this context is not the date upon which the injury itself occurred, but rather the date upon which it became disabling. *See, e.g., V.S. v. Kenametal, Inc.*, Opinion No. 19-07WC (August 2, 2007); *Plante v. Slalom Skiwear, Inc.*, Opinion No. 19-95WC (May 24, 1995). In other cases, the average weekly wage calculation has been based solely on the date when the injury and its relationship to the employment became reasonably discoverable and apparent, regardless of when it first became disabling. *See, e.g., Hepburn v. Concrete Professionals, Inc.*, Opinion No. 16-03WC (May 14, 2003); *Groman v. Peck Auto and Glass and Middlebury College,* Opinion No. 3-95WC (March 13, 1995). In all cases, the commissioner has applied the analysis that best incorporates the statute's intent with respect to indemnity benefits – to replace wages lost as a direct result of a compensable injury. *Orvis v. Hutchins*, 123 Vt. 18 (1962).

4. Turning to the current claim, I conclude that the date of Claimant's cervical injury was July 1, 2005. This was the date assigned to his complaints of bilateral upper extremity pain, which Defendant accepted as compensable. The Superior Court jury since has determined that Claimant's cervical complaints were also causally related. Having now been diagnosed as a double crush syndrome, the medical evidence establishes that both complaints likely resulted from the same primary injury.

5. Defendant argues that Claimant's cervical injury, and particularly its relationship to his employment, did not become reasonably discoverable and apparent until April 2009, when Dr. Rinehart first posited that his ongoing symptoms were originating in his neck rather than in his wrists. I disagree. That the complaints referable to Claimant's July 1, 2005 compensable injury were initially misdiagnosed as involving solely carpal tunnel syndrome rather than a double crush syndrome as well does not change the date of their occurrence. An injury claim begins with a symptom or complaint, not a diagnosis.

6. I conclude, therefore, that the date of Claimant's compensable injury, which includes both his upper extremity and his neck complaints, was July 1, 2005.

7. Establishing the date of Claimant's injury does not resolve the dispute as to how to calculate his average weekly wage and compensation rate, however. This is because Claimant has endured three separate periods of disability – the first following his March 2006 carpal tunnel surgery, the second following his December 2008 carpal tunnel surgery, and the third following his December 2009 cervical surgery. According to the statute, 21 V.S.A. §650(c), in circumstances such as this the rate at which benefits must be paid may be subject to change.

8. Section 650(c) states, "When temporary disability . . . does not occur in a continuous period but occurs in separate intervals each resulting from the original injury, compensation shall be adjusted for each recurrence of disability to reflect any increases in wages or benefits prevailing at that time." According to Claimant, this means that whichever date yields the highest average weekly wage – in this case, March 22, 2006 – is the one that must control his current compensation rate.

9. Historically the Department has interpreted the language of §650(c) to mandate that a claimant's compensation rate can only be adjusted *upward*, that is, when his or her wages have *increased* since a prior period of disability, but never *downward*, that is, to reflect a *decrease* in wages during the intervening period. *See, e.g., Bollhardt v. Mace Security International, Inc.*, Opinion No. 51-04WC (December 17, 2004).

10. As the commissioner previously has observed, this interpretation makes sense when the work injury itself accounts for the reduction in earnings. *Griggs v. New Generation Communications*, Opinion No. 30-10WC (October 1, 2010). In this case, for example, Claimant should not be penalized if at some point after March 22, 2006 the functional restrictions imposed as a result of his work injury precluded him from maintaining his concurrent employment for the Air National Guard. If that is in fact what happened, then his compensation rate thereafter should reflect the loss of those wages. This would be in keeping with the spirit of workers' compensation – to provide wage replacement benefits that compensate fully for an injured worker's diminished earning capacity. *Orvis*, *supra* at 22.

11. Fairness also requires, however, that Claimant not receive a windfall should the evidence establish that his reduction in earnings was due to circumstances completely unrelated to his work injury, such as a personal decision not to continue his concurrent employment. *See, e.g., D.P. v. GE Transportation*, Opinion No. 03-08WC (January 17, 2008). To hold otherwise would amount to wage enhancement, not wage replacement. *Griggs, supra.*

12. The parties have not submitted any evidence as to why Claimant's average weekly wage was lower in both December 2008 and December 2009 than it had been in March 2006. Without such evidence, I cannot determine which date is most compatible with the statute's intent – to replace rather than supplement lost wages.

13. Under these circumstances, rather than making a determination based on incomplete information, it makes better sense to allow the parties an opportunity to present additional evidence, whether by stipulation, affidavit or formal hearing.

**ORDER:**

Based on the foregoing findings of fact and conclusions of law, the date of injury referable to Claimant's cervical condition is determined to be July 1, 2005. The parties shall have 30 days from the date of this decision within which to present additional evidence and/or to request an evidentiary hearing as to the issues raised in Conclusion of Law No. 12 above.

**DATED** at Montpelier, Vermont this 14th day of September 2012.

_____
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.