

Stephen Duffy v. Sisler Builders Inc

(August 28, 2013)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Stephen Duffy

Opinion No. 20-13WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Sisler Builders, Inc.

For: Anne M. Noonan
Commissioner

State File No. H-06654

OPINION AND ORDER

No hearing held; claim submitted on written records and briefs
Record closed on July 8, 2013

APPEARANCES:

Stephen Duffy, *pro se*
Bonnie Badgewick, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to temporary total disability benefits referable to his April 12, 2013 surgery?
2. If yes, at what compensation rate should such benefits be paid?

EXHIBITS:

Joint Exhibit I:	Medical records
Defendant's Exhibit 1:	Letter from Claimant, July 25, 2012
Defendant's Exhibit 2:	Income tax returns, 2011 and 2012
Defendant's Exhibit 3:	Records relating to Claimant's Arizona workers' compensation claims

CLAIM:

Temporary total disability benefits commencing on April 12, 2013 and ongoing, 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 carpenter. On August 3, 1994 he dislocated his left big toe while at work. Defendant accepted the injury as compensable and began paying workers' compensation benefits accordingly.
4. Claimant underwent surgery on his left big toe in May 1996, as a result of which Defendant paid temporary total disability benefits from May 10, 1996 until his return to work on June 12, 1996. Subsequently Defendant paid permanency benefits in accordance with a 1.5 percent permanent impairment rating referable to the left foot.
5. At some point thereafter, Claimant relocated to Arizona, where he currently resides.
6. As of January 3, 2007 Claimant was employed by Omni Cabinets, located in Scottsdale, Arizona, as a cabinet installer. On that date, he suffered a work-related injury to his right knee. As a consequence of that injury, on February 8, 2007 he underwent arthroscopic surgery to repair a torn medial meniscus. By March 26, 2007 he had reached an end medical result and returned to full duty work.
7. In its June 19, 2007 Findings and Award for Unscheduled Permanent Partial Disability, the Industrial Commission of Arizona concluded that Claimant's earning capacity had not been reduced to any extent as a result of his January 2007 work injury. Pursuant to Arizona law, it awarded permanent compensation benefits in accordance with a seven percent permanent impairment of the right knee, as rated by Claimant's treating orthopedic surgeon.
8. In April 2011 Claimant resumed treatment for his 1994 work injury, complaining of pain and swelling in both his left big toe and left ankle. Ultimately he was diagnosed with three problems: (1) a ganglion cyst in his left ankle; (2) degenerative changes resulting in stiffness in the joints of his big toe; and (3) a ruptured tendon in his left ankle. According to his treating orthopedic surgeon, Dr. Armendariz, the first two conditions were likely caused and/or aggravated by his original work injury. In Dr. Armendariz' opinion, the third condition was

related as well, though he could not state this to the same degree of medical certainty.

9. After resuming treatment for his left toe and ankle symptoms, in 2012 Claimant also began treating again for recurrent symptoms referable to his January 2007 right knee injury, for which another employer, not Defendant, bore responsibility. *See* Finding of Fact No. 6 *supra*. On April 27, 2012 he underwent a second right knee surgery, as a result of which he was totally disabled from working until August 27, 2012. Thereafter, he was released to return to modified duty work. On March 4, 2013 his treating physician determined that he had reached an end medical result for his right knee injury, with permanent restrictions that precluded him from resuming construction or cabinet installation work as before.
10. Claimant's medical records do not document any disability from working causally related to his left toe and/or ankle problems until March 11, 2013. On that date, Dr. Armendariz placed him on limited duty status, with restrictions against climbing stairs and sustained walking or standing. Prior to that time, none of the providers who treated those conditions ever disabled him from working, either totally or partially.
11. On April 12, 2013 Claimant underwent surgery on his left toe and ankle. Defendant voluntarily accepted responsibility for those portions of the surgery that addressed the ganglion cyst in his ankle and the degenerative changes in his toe. It continues to dispute responsibility for the tendon tear, but has agreed to pay for that portion of the surgery as well, on a without prejudice basis.
12. It appears from the record that as a consequence of his right knee injury Claimant received temporary disability benefits under Arizona law between April 27, 2012 and March 4, 2013. It is unclear from the record exactly for what periods and in what amounts these wage replacement benefits were paid. What is clear is that during the 26 weeks preceding any total disability causally related to his left toe and ankle surgery, that is, from October 13, 2012 until April 12, 2013, Claimant did not work, and therefore did not earn any wages at all.
13. As reflected in both the contemporaneous medical records and his federal income tax returns, in 2011 and 2012 Claimant variously described his work status as either a self-employed carpenter or as unemployed. His wife reported taxable wages from her employment in both years, but Claimant did not report any taxable wages or self-employment income in either year.
14. In a July 2012 letter to Defendant's adjuster, Claimant confirmed that he had earned no wages at all during the previous six months. In his pretrial pleadings, he acknowledged having taken some time off to mourn his father's death and settle his estate, but from the evidence submitted I am unable to discern whether this occurred during the period when he was disabled from working as a consequence of his knee injury or at some point previously.

15. Although not specifically documented in the medical records, for the purposes of the pending dispute I presume that Claimant was totally disabled from working for at least some time after his April 12, 2013 left toe and ankle surgery. The record does not reflect whether he remains totally disabled to date or whether he has since regained some partial work capacity.

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. The issue presented in this claim is whether Claimant should be disqualified from receiving temporary disability benefits as a consequence of his April 2013 left toe and ankle surgery because he did not earn any wages in the preceding weeks. Defendant argues that if no wages were earned, there is nothing to replace, and therefore no basis for an award. Claimant argues that the temporary disability benefits he was receiving on account of his right knee injury in the months prior to his April 2013 surgery were themselves "wage replacement" benefits and therefore should be counted as "wages."
3. An injured worker is entitled to temporary total disability benefits "where the injury causes total disability for work." 21 V.S.A. §642. These benefits are payable "during such disability," *id.*, and cease "after such disability ends." 21 V.S.A. §643.
4. Defendant correctly asserts that temporary total disability benefits are designed to replace the wages an injured worker likely would be earning had his or her work injury not occurred. Because their purpose is to compensate for the worker's *current* inability to work, they are calculated with reference to his or her *present* earning capacity. *Orvis v. Hutchins*, 123 Vt. 18, 22 (1962).
5. Under Vermont's statutory scheme, an injured worker's present earning capacity is determined by reviewing his or her "average weekly earnings during the 26 weeks preceding an injury[.]"¹ Thus, our workers' compensation law assumes

¹ At the time of Claimant's original injury in 1994, the calculation period for determining average weekly wage was only 12 weeks. The statute was amended in 2008 to allow for the current 26-week time frame. Both parties apparently have assumed that the 26-week calculation period applies here, though neither has

that the most accurate way to estimate a worker's *present* earning capacity is to look back at his or her most recent *past* earnings. *Machia v. Comet Confectionery*, Opinion No. 32-07WC (December 4, 2007).

6. When an injured worker has not earned any wages at all during the weeks preceding a period of total disability, it is appropriate to question whether he or she is entitled to wage replacement benefits. Unless the evidence establishes that the failure to earn wages was the result of an injury-related consequence rather than a personal choice, in most cases no benefits will be due. *See, e.g., Bacon v. Gerald E. Morrissey, Inc.*, Opinion No. 32-11WC (October 12, 2011); *Giacobbe v. Verizon*, Opinion No. 72-05WC (December 30, 2005); *Knoff v. Joe Knoff Illuminating*, Opinion No. 39-05WC (July 12, 2005); *see also, Plante v. State of Vermont Agency of Transportation*, Opinion No. 19-13WC (August 22, 2013) (applying same analysis to compensation rate computation for successive period of disability); *Griggs v. New Generation Communications*, Opinion No. 30-10WC (October 1, 2010) (same).
7. In this case, Claimant asserts that his failure to earn wages in the weeks prior to his April 2013 surgery was not due to any personal choice or voluntary decision on his part, but rather to a disabling work-related medical condition, albeit one caused by a different injury than the one for which Defendant is responsible. He points to the commissioner's holding in *Machia, supra*, as support for a somewhat different outcome in this limited circumstance.
8. The facts in *Machia* were in many respects similar to those presented here. As here, the claimant in that case suffered two distinct injuries – one to her knee, the other to her shoulder – as a result of two distinct work-related events occurring some years apart, and for which two distinct insurance carriers were liable. When ultimately she required repeat surgery for her knee injury, it was delayed while she recovered from surgery on her shoulder. The shoulder surgery having disabled her from working for more than a year, she earned no wages in the months prior to her knee surgery. Her sole source of income during that period were the temporary disability benefits paid on account of her shoulder, which were based on the wages she had earned before either injury became disabling.
9. The commissioner concluded that the claimant was not barred from receiving additional temporary total disability benefits following her knee surgery despite having earned no wages for many months previously. In doing so, the commissioner placed specific emphasis on the fact that the claimant had returned to work after each prior period of disability as soon as she was released to do so.

briefed the question whether the amendment more properly should be deemed substantive rather than procedural, in which case the 12-week period applicable at the time of the original injury would control. *See Sanz v. Douglas Collins Construction*, 2006 VT 102; *Smiley v. State of Vermont*, Opinion No. 15-13WC (June 3, 2013). Given the context in which the current dispute arises, and the fact that Claimant earned no wages within either the 12- or 26-week period prior to his current disability, it is not necessary to decide the issue here.

With this track record, it was reasonable to presume that but for the shoulder injury she would have been working – to the same extent that she had in the past – up until the date when she became disabled on account of the knee injury. To penalize her for being unable to do so because of a work-related medical condition rather than a personal choice would have been inconsistent with the remedial character of Vermont’s Workers’ Compensation Act. *Id.* at Conclusion of Law Nos. 13-14; *Morrisseau v. Legac*, 123 Vt. 70, 77 (1962).

10. The facts in this case establish no such track record, and therefore permit no such presumption. Here, Claimant’s 2011 and 2012 federal income tax returns, in which he reported neither taxable wages nor income from self-employment, document that he ceased earning wages well before April 2012, when his recurrent knee problems first became disabling. Not even the exception carved out in *Machia* permits an award of wage replacement benefits under these circumstances.
11. I conclude that Claimant has failed to sustain his burden of proving that but for his work-related right knee injury he would have been working in the weeks prior to his April 2013 left toe and ankle surgery. As it is, even looking back more than a year prior to any medically established disability I can find no wages to be replaced. For this reason, I conclude that he is not entitled to temporary disability benefits.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant’s claim for temporary total disability benefits referable to his April 12, 2013 surgery is hereby **DENIED**.

DATED at Montpelier, Vermont this 28th day of August 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.