

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Cecile Lushima

Opinion No. 38-09WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

Cathedral Square Corporation

For: Patricia Moulton Powden
Commissioner

State File No. Y-50129

OPINION AND ORDER

Hearing held in Montpelier on October 17th and 18th, 2008
Record closed on July 9, 2009

APPEARANCES:

Chris McVeigh, Esq. for Claimant
Wesley Lawrence, Esq. for Defendant

ISSUES:

1. Was Defendant justified in terminating Claimant's temporary disability benefits on September 16, 2007 on the grounds that she had reached an end medical result for her compensable work injury?
2. Is Claimant barred from disputing the date of end medical result and the extent of her permanent impairment by virtue of the signed and approved Agreement for Permanent Partial Disability Compensation (Form 22)?
3. Is Claimant entitled to medical benefits for ongoing treatment of her left shoulder after June 24, 2007?

EXHIBITS:

Defendant's Exhibit 1: Medical records

CLAIM:

Temporary partial disability benefits pursuant to 21 V.S.A. §644;
Medical benefits pursuant to 21 V.S.A. §640;
Permanent partial disability benefits pursuant to 21 V.S.A. §648;
Interest, costs and attorney fees pursuant to V.S.A. 21 §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to the proceedings, Claimant was an employee and Defendant was her employer as those terms are defined under Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all forms and correspondence contained in the Department's file relating to this claim.
3. Claimant was born in the Congo and moved to the United States by way of Niger and Europe. She moved from the Congo for political reasons. Claimant's uncle, the first democratically elected Prime Minister of the Republic of Congo, was overthrown and murdered. Both because of this association and because of the country's general instability, Claimant felt that it was unsafe to remain there. Ultimately she and her family settled in Vermont.
4. On the date of Claimant's injury she was married to Wembo "Alex" Shungo, with whom she raised six children ranging in age from 10 to 20 years old. Claimant's native language is French, but she is fluent in seven other languages, including English, which she reads, writes and speaks well.

Claimant's Initial Work Injury

5. On June 20, 2006 Claimant was working for Defendant as a nurse's aide. In the course of helping a stroke patient into bed, she injured her left shoulder. Defendant accepted the injury as compensable and began paying workers' compensation benefits accordingly. Claimant continued to work, though in a modified-duty capacity, until February 2, 2007.
6. Initially Claimant treated conservatively for her injury, which was diagnosed as a shoulder strain. When her symptoms failed to improve, she underwent an arthrogram, which revealed a labral tear. Claimant continued to treat conservatively, but again her symptoms did not improve. After some time, she was referred to Dr. Lawlis, an orthopedic surgeon, for further evaluation. Dr. Lawlis diagnosed a superior labrum anterior and posterior (SLAP) tear, which he surgically repaired on February 20, 2007.
7. Following her surgery Claimant was referred for "aggressive" physical therapy. Her recovery was slow, and her left shoulder remained painful to such an extent that it severely limited her activities of daily living.
8. On April 6, 2007 Dr. Lawlis reevaluated Claimant on an urgent basis because of her increased pain. He noted that Claimant's range of motion was extremely limited and concluded that she was suffering from severe fibrous capsulitis causally related to her shoulder surgery. Dr. Lawlis prescribed aqua therapy and recommended that Claimant progressively work at gentle stretching more frequently on her own at home. He also prescribed Oxycontin and Percocet for break-through pain.

9. Dr. Lawlis continued to monitor Claimant's progress. On May 8, 2007 he determined that she should continue her pain medications and remain out of work for at least eight more weeks. In the meantime, Claimant continued to work diligently at her exercise regimen. Although her pain persisted, she was doing more. A June 20, 2007 physical therapy progress note indicated that the strength below her shoulder had improved "remarkably," although Claimant still could not use her arm for overhead activity. Claimant's progress at this point represented a significant improvement over what the physical therapy notes had documented in early May.

The June 24, 2007 Border Incident

10. On June 24, 2007 Claimant, her husband, her mother-in-law and her sister-in-law drove to Montreal. Claimant's in-laws had been visiting, and the purpose of the trip to Montreal was to accompany them to the bus station so that they could travel home to western Canada. Claimant's six children stayed home, with the older ones caring for the younger ones.
11. At the time, Claimant's husband was working as a high school teacher in Brattleboro. Neither he nor Claimant had ever been arrested or otherwise involved in any criminal activity. On the trip up, they entered Canada without incident. On the return trip, however, Claimant and her husband were stopped at the Highgate Springs, Vermont entry point. After examining their passports, a border patrol officer directed them to park their car and proceed into the immigration building. The officer kept their passports.
12. A security videotape of the immigration building's lobby depicts what happened next. Once inside, Claimant and her husband sat down. No one approached them. After a time, Claimant's husband inquired of a border patrol officer as to why they were being detained. According to his testimony, he was told to continue waiting. When he tried to inquire further, an argument ensued among him, Claimant and various border patrol officers. Ultimately the border patrol officers approached Claimant's husband and moved to take him into custody.
13. With this unfortunate development, Claimant became very upset. She clung to her husband and attempted to push the border patrol officers away. A struggle ensued, which went on for several minutes. The officers had to physically restrain Claimant in order to separate her from her husband, whom they handcuffed and removed to a detention cell. Claimant continued to remonstrate with the officers, both verbally and physically. Eventually she too was handcuffed, with her arms behind her back, and taken to a detention cell.
14. In the process of being handcuffed, the border patrol officers pushed on Claimant's injured left shoulder, which was very painful to her. Both Claimant and her husband testified that they tried to explain to the border patrol officers that Claimant had recently undergone shoulder surgery, but to no avail.

15. Once in her cell, Claimant began complaining of severe pain in her left shoulder. After holding Claimant and her husband in custody for several hours, eventually border patrol personnel had them transported by ambulance to Northwestern Medical Center. Claimant underwent treatment in the emergency room for her left shoulder. Subsequently, both she and her husband were released from border patrol custody and proceeded home to Burlington.

Medical Evaluation and Treatment after June 25, 2007

16. On the day following the border patrol incident, Claimant saw Dr. Lawlis again. Diagnostic testing later revealed additional tears in the tendons of Claimant's left shoulder, tendons that had been intact at the time of her first surgery. Because Defendant disputed its responsibility for medical treatment related to the incident, Claimant could only afford to treat sparingly, however. She continued her home exercise program and later attended physical therapy. As of the date of the formal hearing, it was unclear whether she would require additional surgery to repair the new tears.
17. After the border incident Claimant returned to work part-time, modified-duty, at a convent in Winooski. Later she began working in a medical office.
18. In Dr. Lawlis' opinion, the border incident aggravated Claimant's original shoulder injury and significantly delayed her recovery. He noted that had Claimant not been recovering from shoulder surgery at the time, the incident probably would not have resulted in any injury at all. As it was, however, the border incident probably caused the new tears in Claimant's shoulder tendons that had not been present at the time of her original injury.
19. Dr. Lawlis determined that Claimant reached an end medical result for the original June 2006 work injury on March 3, 2008. In his opinion, she did not reach end medical result for the border incident injury until June 3, 2008.
20. At Defendant's request, Claimant underwent an independent medical evaluation with Dr. Johansson in July 2007. Dr. Johansson concluded that the June 2007 border incident caused either an aggravation or a new injury to Claimant's left shoulder. In his opinion, had it not been for that event Claimant would have reached end medical result for her original work injury by the date of his evaluation, July 23, 2007. Dr. Johansson further found that Claimant had suffered a 7% whole person permanent impairment referable to her original work injury.

Claimant's Response to Defendant's Form 27 and Proposed Permanency Agreement

21. With Dr. Johansson's opinion as support, in September 2007 Defendant filed a Notice of Intention to Discontinue Benefits (Form 27), seeking to terminate Claimant's temporary disability benefits on end medical result grounds as of September 16, 2007. The Department approved the discontinuance on September 21, 2007.
22. On September 28, 2007 Claimant, who was unrepresented at the time, wrote to Defendant, advising that she disagreed with the decision to terminate her benefits and asking that Defendant reconsider its position. Defendant did not respond to this letter.
23. Shortly thereafter, Defendant mailed to Claimant a proposed Agreement for Permanent Partial Disability Compensation (Form 22). The Form 22 reflected that Claimant's temporary total disability had ended on September 16, 2007. It referenced the Form 27 that had been filed to that effect on the grounds that she had reached an end medical result for her work-related injury, described as a "left shoulder SLAP repair." The Form 22 further proposed to pay permanent partial disability benefits in accordance with Dr. Johansson's 7% whole person impairment rating.
24. Claimant testified that she assumed that the Form 22 had been sent to her in response to her September 28, 2007 letter. She thought that its purpose was to reinstate her temporary disability benefits. She admitted that she did not even read the form, but instead merely signed it and sent it back.
25. The Department approved the Form 22 on October 24, 2007. Thereafter, Claimant received weekly permanent partial disability benefits, totaling \$9,582.30, until March 30, 2008. Claimant testified that at least at first, she presumed that the checks she was receiving were for temporary total disability, not permanency.
26. On November 20, 2007 Claimant's counsel entered his appearance on Claimant's behalf and asked the Department both to reconsider its approval of the Form 27 and to rescind its approval of the Form 22. The Department's Staff Attorney denied both requests and the claim subsequently was forwarded to the formal hearing docket.

CONCLUSIONS OF LAW:

1. Two interesting legal issues are raised by this claim. The first involves whether the June 2007 border incident constitutes an independent intervening event sufficient to break the causal link between Claimant's original work-related injury and her subsequent disability and need for medical treatment. The second involves the extent, if any, to which Claimant is precluded from seeking additional benefits by virtue of the Form 22 permanency agreement that she signed. Because the second issue is somewhat dispositive, it will be considered first.

2. It is generally accepted that once the parties to a workers' compensation claim execute a Form 22 or other form agreement, and the Commissioner (or her designee) approves it, it becomes a binding and enforceable contract. *Workers' Compensation Rule 17.0000*; *Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99WC (July 30, 1999). Absent evidence of fraud or material mistake of fact, the parties will be deemed to have waived their right to contest the material portions of the form, and the Department will consider it to represent a final determination of any dispute as to its contents. *Rule 17.0000*; *id.*
3. There is no evidence of fraud here, nor is there compelling evidence of any material mistake of fact. For such a mistake to exist, it must be mutual. *Maglin v. Tschannerl*, 174 Vt. 39 (2002). Here, only Claimant was mistaken. She thought the purpose of the form she was signing was to reinstate her temporary disability benefits, when in fact it was confirming the basis for their proper termination. Claimant's failure to recognize the form's import may be understandable, particularly because she was unrepresented at the time, but it still provides an insufficient basis for undoing a binding contract. *Hawkins v. Visiting Nurse Association*, Opinion No. 53-04WC (December 3, 2004).
4. The fact is, there was no way for either Defendant or the Department to have known whether Claimant had signed the Form 22 because she did not understand the ramifications of doing so, or whether she signed it because she had decided to take the permanency compensation offered rather than pursue a claim for additional temporary disability benefits. In hindsight, it may seem harsh to hold her to the agreement. To allow her to rescind it unilaterally, however, would result in an untenable loss of certainty as to what constitutes a binding, enforceable contract, not only to pay workers' compensation benefits but also to accept them. *Catani v. A.J. Eckert Co.*, Opinion No. 28-95WC (July 14, 1995).
5. Contrary to Claimant's assertions, furthermore, Defendant was under no affirmative obligation to explain the form to her, or otherwise to caution her against signing it if she intended to pursue further her request that temporary disability benefits be reinstated. In the specific context of a workers' compensation claim, the Vermont Supreme Court has ruled that an employer is under no duty to inform an employee of his or her rights under the Workers' Compensation Act, instead upholding the "time-honored principle that all persons are presumed to know the law." *Longe v. Boise Cascade Corp.*, 171 Vt. 214, 226 (2000).
6. I conclude, therefore, that Claimant is bound by the terms of the Form 22 as to all of its material elements. These include the date upon which she reached end medical result for her work injury (whether aggravated by the June 2007 border incident or not) and the extent of her permanent impairment.

7. As the Form 22 establishes that Claimant reached end medical result on September 16, 2007 she is precluded from seeking additional temporary disability benefits after that date. 21 V.S.A. §§642, 643a. Even with the Form 22, however, her entitlement to further medical benefits remains open, provided she shows that ongoing treatment is necessitated by the work injury rather than by some intervening event for which Defendant bears no responsibility. It is in this context that I next must consider the legal import of the June 2007 border incident.
8. Both Claimant's treating physician, Dr. Lawlis, and Defendant's medical expert, Dr. Johansson, agreed that the border incident caused either an aggravation or a new injury to Claimant's previously injured shoulder. Both also acknowledged, however, that Claimant probably would not have suffered any injury at all during that incident had her shoulder not already been in a weakened state as a result of her primary compensable injury. The question, therefore, is whether the second injury is sufficiently linked to the first to be compensable as well.
9. Once an injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from it likewise is deemed to have arisen out of the employment. 1 *Larson's Workers' Compensation Law*, §10, p. 10-1. An exception to this general rule exists as to consequences that result from an independent intervening non-industrial cause attributable to the claimant's own intentional conduct. *Id.*, quoted in *Bowen v. Jobsite Services*, Opinion No. 23-00WC (July 31, 2000). Such an event may be sufficient to break the chain of causation back to the primary injury and thereby may relieve the employer of further workers' compensation liability.
10. Not all intervening events are sufficient to fall within the exception and thus sever the link between the work injury and any ongoing disability or need for treatment. It is to be expected, for example, that even injured workers will continue to engage in activities of daily living, and therefore injuries sustained during such activities are considered to be a natural consequence of the primary injury. *Church v. Springfield Hospital*, Opinion No. 40-08WC (October 8, 2008) (climbing step at home); *Signorini v. Northeast Cooperatives*, Opinion No. 36-04WC (September 1, 2004) (getting up from chair); *Verchereau v. Meals on Wheels*, Opinion No. 20-88WC (1988) (lifting groceries).
11. Where the intervening event does not arise in any way from the employment relationship, the chain of causation is deemed broken by either intentional or negligent claimant misconduct. *Larson, supra* at §10.05, p. 10-11. Even here, however, exceptions exist. Thus, in defining what constitutes negligent conduct, Professor Larson distinguishes spontaneous acts that may well be "impulsive and momentarily thoughtless," but which because of the circumstances are better characterized as instinctive rather than negligent. *Id.* at §10.06, p. 10-13; *see, e.g., McMillan v. Bertek, Inc.*, Opinion No. 95-95WC (January 29, 1996) (reaching for branch while falling from tree); *Kelly v. Federal Shipbuilding and Drydock Co.*, 64 A.2d 92 (N.J. Super. 1949) (reaching for falling child). The claimant's conduct in such cases does not rise to the level of negligence necessary to break the causal link back to the original injury.

12. The link is severed, however, if a claimant, knowing of certain weaknesses arising from the primary injury, “rashly undertakes activities likely to produce harmful results.” *Johnnie’s Produce Co. v. Benedict & Jordan*, 120 So.2d 12 (Fla. 1960); *Larson, supra* at §10.06[3], p. 10-17.
13. This was the case here. Arguably Claimant’s initial response to the border patrol officers’ approaching her husband and moving to take him into custody might be characterized as the kind of impulsive, momentarily thoughtless act that, though misguided, would not rise to the level of negligence. As the altercation progressed, however, and particularly after Claimant’s husband already had been moved to a detention cell, Claimant reasonably should have known that by continuing the battle she was risking further injury to her already weakened shoulder. Her actions at that point were no longer just “momentarily thoughtless,” they were deliberately so.
14. I conclude, therefore, that Claimant broke the chain of causation back to her primary work-related injury by virtue of her actions during the June 2007 border patrol incident. Defendant is not responsible for any workers’ compensation benefits necessitated as a result of that event.
15. Claimant having failed to prevail on her claim, she is not entitled to an award of costs or attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant’s claim for workers’ compensation benefits is hereby **DENIED**.

DATED at Montpelier, Vermont this 29th day of September 2009.

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.