

Robert Ryan v. Dale Martin, Ronald Martin, Martin Brothers Trucking (November 19, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Robert Ryan

Opinion No. 44-09WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

Dale Martin, Ronald Martin
and Martin Brothers Trucking

For: Patricia Moulton Powden
Commissioner

State File No. X-04332

OPINION AND ORDER

Hearing held in Montpelier on June 5, 2009

Record closed on July 8, 2009

APPEARANCES:

Thomas Nuovo, Esq., for Claimant

Frank Talbott, Esq., for Defendants Dale Martin and Martin Brothers Trucking

ISSUE PRESENTED:

To what workers' compensation benefits is Claimant due as a result of his March 25, 2006 work injury?

EXHIBITS:

Claimant's Exhibit 1: First Report of Injury

Claimant's Exhibit 2: Wage Statement

Claimant's Exhibit 3: Interim Order of Benefits

Claimant's Exhibit 4: Claimant's calculation of outstanding benefits due

Claimant's Exhibit 5: Copies of checks paid by Ronald Martin

Claimant's Exhibit 6: Dr. White Independent Medical Evaluation, June 20, 2008

Claimant's Exhibit 7: William Farrell, Ph.D. psychological evaluation, January 10, 2009

Claimant's Exhibit 8: Summary of medical costs

Claimant's Exhibit 9: Medical records and bills

Claimant's Exhibit 10: Fee agreement

Defendant's Exhibit A: Invoice book

Defendant's Exhibit B: Summary of invoices for 2007

Defendant's Exhibit C: 2007 IRS Form 1099

Defendant's Exhibit D: 2007 IRS Form 1040

Defendant's Exhibit E: Copies of checks paid by Ronald Martin

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 Defendants were his employers as those terms are defined in Vermont's Workers' Compensation Act.¹
2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.

Claimant's Compensable Injury, Subsequent Treatment and Permanent Impairment

3. Claimant began working for Defendants as a truck driver in 1994. On March 25, 2006 he was operating a tractor-trailer truck in the course of his employment when he lost control of the vehicle and hit a tree. Claimant fractured both of his ankles in the accident. His wife, who was accompanying him at the time, suffered a severe head injury and later died.
4. Claimant actively treated for his ankle fractures with Dr. Foerster, an orthopedic surgeon, throughout the summer of 2006. By July 2006 he had made gradual progress with physical therapy and was fully weight-bearing on both feet. Dr. Foerster anticipated at that time that Claimant would be able to return to work by September 2006.
5. Dr. Foerster last treated Claimant for his work-related injuries on October 19, 2006. At that visit he reported that Claimant's ankles were still sore and intermittently swollen, but that his progress had reached a plateau. Dr. Foerster determined that no further treatment was necessary for Claimant's physical injuries and therefore released him to return only on an as-needed basis.
6. Dr. Foerster noted in his October 19, 2006 record that Claimant appeared to have emotional issues related to the accident for which psychological counseling might be appropriate. Claimant never sought psychological treatment, however, apparently due to financial constraints.

¹ In her April 29, 2009 Ruling on Claimant's Motion for Summary Judgment, the Commissioner determined that Defendants Dale Martin and Martin Brothers Trucking were precluded from defending Claimant's claim on the grounds that they were not his employer on the date of injury, but rather that Claimant was working solely for Ronald Martin. Based on Defendants' own prior admissions, both before the Department and in Superior Court enforcement proceedings, all three Defendants are jointly considered to be Claimant's employer.

7. Claimant later reported that as a result of the accident he avoided driving a truck for almost two years. He experienced anxiety, a rapid heart rate, racing thoughts and intrusive memories of his wife sitting in the passenger seat. Ultimately Claimant overcame these issues and in July 2008 he returned to full-time truck driving work.
8. At the referral of Defendant Ronald Martin's attorney, Claimant underwent an independent medical evaluation with Dr. George White on June 20, 2008. Dr. White determined that Claimant had reached an end medical result as of that date, and rated him with a 12% whole person permanent impairment attributable to his ankle injuries.
9. William Farrell, Ph.D., a psychologist retained by Claimant's attorney to evaluate Claimant in January 2009, determined that Claimant suffered from chronic post traumatic stress disorder and depression as a result of the accident. Using the Colorado rating scale, Dr. Farrell determined that Claimant suffered a 5% whole person permanent psychological impairment attributable to the March 2006 accident.

Claimant's Concurrent Employment

10. Concurrent with his employment for Defendants, since 2004 Claimant also was involved in a small pallet sales business. Claimant operated this business from a facility known as "the mill," which was located on Defendants' property. Claimant had contracted to pay Defendants \$300 monthly as rent for the use of this facility, but failed to do so after July 2004.
11. No evidence was produced as to Claimant's specific job responsibilities in conjunction with the pallet business prior to the March 2006 truck accident. After the accident, there is evidence that at some point in the fall of 2006 Claimant resumed his activities at the mill, but again few details were provided as to his duties there. At a minimum, it appears that he spent some time at the facility monitoring his partners' work. He also received telephone orders and prepared payment invoices from his home office.
12. On his 2007 federal income tax return Claimant declared a net profit from the pallet business of \$4,397.00. Claimant testified that this amount was consistent with what the business had generated annually since its inception in 2004. Specifically, Claimant testified that his net profit from the business was approximately the same after his March 2006 accident as it had been before.
13. The pallet business closed in June 2007.

Defendants' Workers' Compensation Benefit Payments

14. Defendants were uninsured for workers' compensation at the time of Claimant's injury. Initially they did not file a First Report of Injury. Instead, Claimant initiated his claim for benefits in June 2006 by filing a Notice of Injury and Claim for Compensation (Form 5) with the Department.
15. On July 27, 2006 the Department issued an Interim Order against Defendants. The Order noted that Claimant had provided evidence both of his injury and of his employment, and that Defendants had failed to produce any evidence in dispute. Accordingly, the Order mandated that Defendants immediately commence paying temporary total disability benefits at Claimant's compensation rate of \$463.77 weekly. The Order also mandated that Defendants pay all causally related medical bills.
16. Even before the Department's Order issued, on March 30, 2006 Defendant Ronald Martin began making weekly payments to Claimant and/or on his behalf.² Defendant Martin testified that he did so "to carry [Claimant] through, to help him" while he was injured.
17. In all, from March 30, 2006 through February 1, 2007 Defendant Ronald Martin made weekly payments totaling \$18,808.41. He testified that he stopped making payments both because he could no longer afford to do so and because he frequently had observed Claimant's vehicle at the mill by that point and presumed that he was working at his pallet business again.
18. Defendant Ronald Martin did not increase Claimant's weekly payments to account for the July 1, 2006 cost of living adjustment. Nor did he file the required Notice of Intention to Discontinue Payments (Form 27) with either the Department or with Claimant prior to discontinuing Claimant's weekly checks.
19. Claimant has received no permanent partial disability benefits, nor have Defendants paid any of his causally related medical bills. He does not dispute that his temporary total disability ended on or about June 20, 2008. Dr. White declared him to be at end medical result as of that date, and Claimant returned to full-time work shortly thereafter.
20. There is no medical evidence specifically releasing Claimant to return to work, in either a full- or modified-duty capacity, at any time prior to Dr. White's end medical result date. Even if Dr. Foerster's July 2006 note, which recommended a September return to work date, is interpreted as a specific release, there is no evidence that Defendants notified Claimant thereafter that he was obligated to seek suitable work.

² As he had done when issuing Claimant's paycheck prior to his injury, Defendant Martin issued two checks weekly – one directly to Claimant, and one to the Office of Child Support on his behalf.

CONCLUSIONS OF LAW:

1. The claimant in a workers' compensation claim has the burden of establishing all of the facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). Once the claim is accepted and benefits are paid, however, the burden shifts to the defendant to establish a sufficient basis for terminating compensation. *Merrill v. University of Vermont*, 133 Vt. 101 (1974); *Chamberlain v. Kinney Drugs*, Opinion No. 18-08WC (May 9, 2008).
2. There can be no doubt here but that Defendants accepted Claimant's claim. They produced no evidence to dispute either the injury or its causal relationship to employment, and they began making weekly indemnity payments within days, even before the Department's Interim Order mandated that they do so. The burden is squarely on them, therefore, to establish both the proper basis and the proper procedure for discontinuing benefits.

Claimant's Entitlement to Temporary Total Disability Benefits

3. The undisputed evidence establishes that Claimant was temporarily totally disabled from March 26, 2006 at least until sometime that fall. Defendants assert that Claimant resumed working at his pallet business at that point, but the evidence in support of that claim is woefully deficient. There is no indication as to what, specifically, Claimant was doing there, nor is there any indication that he was paid wages, as opposed to profits, for his activities. Profits from a business are not the equivalent of wages. *Hotaling v. St. Johnsbury Trucking Co.*, 153 Vt. 581, 584 (1990). The mere fact that Claimant's business generated profits during that time does not prove that he had returned to work. Absent additional evidence establishing specifically that Claimant had a work capacity and was employed, this does not provide a sufficient basis for terminating his temporary disability benefits.
4. Nor does Dr. Foerster's July 2006 recommendation that Claimant return to work in September provide sufficient grounds for Defendants to have terminated Claimant's benefits. Putting aside whether Dr. Foerster's note would have been adequate substantively, procedurally Defendants failed to follow the requirements of Workers' Compensation Rule 18.1000. They failed to notify Claimant either of his obligation to seek work or of their intention to discontinue benefits when he allegedly failed to do so.
5. The only appropriate basis for discontinuing Claimant's temporary disability benefits is Dr. White's June 20, 2008 end medical result determination. Claimant testified that he returned to full-time work shortly thereafter and therefore does not dispute that it was appropriate for his temporary disability benefits to terminate at that time. I agree.

6. Claimant's period of temporary total disability, therefore, ran from March 26, 2006 through June 20, 2008. Defendants owe a total of \$37,477.18 for this period, calculated as follows:
 - For the period from March 26, 2006 through June 30, 2006, a total of 13.85 weeks at \$463.77, or \$6,423.21;
 - For the period from July 1, 2006 through June 30, 2007, a total of 52 weeks at \$475.36, or \$24,718.72;
 - For the period from July 1, 2007 through June 20, 2008, a total of 50.86 weeks at \$494.37, or \$25,143.66;
 - Less credit for temporary disability benefits already paid, totaling \$18,808.41.
7. Had Defendants maintained workers' compensation insurance, as the law clearly obligated them to do, and had this claim been properly adjusted, their responsibility to pay temporary disability benefits very well might have ended sooner. Perhaps an adjuster knowledgeable in workers' compensation would have secured a release to return to work from Claimant's treating doctor, and would have notified Claimant of his obligation to search for suitable work. Perhaps he or she would have followed up on the recommendation that Claimant undergo treatment for his psychological issues, such that he might have recovered sooner. Perhaps there would have been a more specific inquiry into Claimant's activities at the pallet business. Perhaps a vocational rehabilitation counselor would have been assigned to assist in the return-to-work process. For the fact that none of these steps were ever taken Defendants have only themselves to blame.

Claimant's Entitlement to Permanent Partial Disability Benefits

8. As for permanent partial disability benefits, the undisputed evidence establishes that Claimant suffered a 12% whole person permanent impairment referable to his physical injuries. This equates to 48.6 weeks of benefits, a total of \$24,959.53, calculated as follows:
 - For the period from June 21, 2008 through June 30, 2008, a total of 1.4 weeks at \$494.37, or \$692.12;
 - For the period from July 1, 2008 through May 27, 2009, a total of 47.2 weeks at \$514.14, or \$24,267.41.
9. Claimant also has been rated with a 5% permanent impairment referable to his psychological injuries. Defendants assert that these injuries relate primarily to the loss of Claimant's wife, who was a passenger in his truck at the time of the accident. Because there was no evidence that her presence in the truck was serving any business purpose in conjunction with Claimant's employment, Defendants argue that Claimant's psychological injury claim is not compensable.

10. Defendants cite no legal authority in support of their position, and I find it unconvincing. Claimant was injured, both physically and psychologically, as a result of an accident that occurred while he was fulfilling the duties of his employment for Defendants. The fact that his wife was accompanying him at the time does nothing to negate this causal relationship. Claimant need establish nothing more in order to be entitled to benefits for his permanent psychological impairment.
11. Claimant's 5% permanent psychological impairment equates to 20.25 weeks of benefits, a total of \$10,705.19, calculated as follows:
 - For the period from May 28, 2009 through June 30, 2009, a total of 4.8 weeks at \$514.14, or \$2,467.87;
 - For the period from July 1, 2009 through October 17, 2009, a total of 15.45 weeks at \$533.16, or \$8,237.32.

Claimant's Medical Bills

12. Defendants also are obligated to pay for all reasonably necessary medical services and supplies causally related to treatment of Claimant's accident-related injuries. Claimant has produced evidence establishing a total of \$18,236.39 in billed medical services. It is unclear, however, whether Claimant paid any or all of these bills, whether some or all remain outstanding, and whether the charges submitted have been audited against the workers' compensation medical fee schedule. Defendants are liable for the audited amounts, either to Claimant or to his providers.

Defendants' Entitlement to Offset for Unpaid Rent

13. Defendants seek an offset for the amount of Claimant's unpaid rent on the mill property from August 2004 until June 2007 against whatever workers' compensation benefits they are determined to owe. Again, Defendants cite no legal authority for this claim. In fact, it runs directly counter to the provisions of 21 V.S.A. §682, which provide for liens to be approved against a claimant's workers' compensation benefits only in favor of medical providers and attorneys. It is not for me to decide whether and to what extent Claimant owes Defendants back rent; other legal forums exist for that purpose. In this forum, Defendants are not entitled to any set-off.
14. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$89.07 and attorney fees based on a contingent fee of 20% of the recovery, not to exceed \$9,000.00, in accordance with Workers' Compensation Rule 10.1220. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded. As for attorney fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded as well.

ORDER:

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

1. Temporary total disability benefits in the amount of \$37,477.18;
2. Permanent partial disability benefits in accordance with a 12 % permanent impairment referable to Claimant's ankle injuries, a total of \$24,959.53;
3. Permanent partial disability benefits in accordance with a 5% permanent impairment referable to Claimant's psychological injuries, a total of \$10,705.19;
4. Interest on the above amounts in accordance with 21 V.S.A. §664;
5. Medical costs associated with all reasonably necessary medical services and supplies causally related to Claimant's March 25, 2006 work injury, all as audited in accordance with the Vermont Workers' Compensation Fee Schedule;
6. Costs totaling \$89.07 and attorney fees totaling \$9,000.00.

DATED at Montpelier, Vermont this 19th day of November 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.