

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Selajdin Sadriu

Opinion No. 07-12WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

The Home Depot

For: Anne M. Noonan
Commissioner

State File No. Y-50633

OPINION AND ORDER

Hearing held in Montpelier, Vermont on December 5, 2011

Record closed on January 13, 2012

APPEARANCES:

Selajdin Sadriu, *pro se*

Christopher Callahan, Esq., for Defendant

ISSUES PRESENTED:

1. Was Defendant justified in discontinuing Claimant's temporary total disability benefits effective March 24, 2011 on the grounds that he had failed to conduct a good faith search for suitable work?
2. Was Defendant justified in discontinuing Claimant's temporary total disability benefits effective June 25, 2011 on the grounds that he had reached an end medical result?

EXHIBITS:

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|------------------------|--|
| Claimant's Exhibit 1: | Job search logs |
| Claimant's Exhibit 2: | Dr. Braun Consultation Summary, April 4, 2011 |
| Claimant's Exhibit 3: | Dr. Krag After-Visit Summary, November 9, 2011 |
| Claimant's Exhibit 4: | English language instruction log |
| Defendant's Exhibit A: | Medical records (CD) |
| Defendant's Exhibit B: | Letter from Attorney Callahan, March 1, 2011 |
| Defendant's Exhibit C: | Letter from Anne Coutermarsh, March 14, 2011 |
| Defendant's Exhibit D: | Letter from Attorney Callahan, March 14, 2011 |
| Defendant's Exhibit E: | Leunig's Bistro employment application |
| Defendant's Exhibit F: | Letter from Anne Coutermarsh, May 4, 2011 |
| Defendant's Exhibit G: | Letter from John May, April 1, 2010 [sic] |

Defendant's Exhibit H: Letter from Attorney McVeigh, June 17, 2011
Defendant's Exhibit I: Payment history

CLAIM:

Temporary total disability benefits retroactive to March 30, 2011 and continuing, 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 contained in the Department's file relating to this claim.
3. Claimant worked for Defendant as a stock clerk. His primary language is Albanian, though he is able to speak, comprehend and read English to at least a limited extent. He was assisted by an Albanian interpreter at the formal hearing.
4. On July 8, 2006 Claimant injured his lower back while lifting at work. Defendant accepted this injury as compensable and began paying workers' compensation benefits accordingly.
5. Claimant's symptoms failed to respond to conservative therapies. In April 2007 he underwent L4-5 disc surgery. After a prolonged recovery, in September 2008 he returned to work for Defendant.
6. Following his return to work Claimant's symptoms gradually recurred. After some time he left Defendant's employment and began working instead as a cab driver. By April 2010 his symptoms had progressed to the point where he was again unable to work.
7. Defendant initially denied responsibility for Claimant's renewed disability, but did not appeal when the Department ordered it to resume temporary total disability benefits as of April 27, 2010.
8. In October 2010 Claimant underwent L4-5 fusion surgery with Dr. Braun, an orthopedic surgeon. Since the surgery his low back pain has improved; however, he continues to experience constant pain radiating into his right hip, thigh and leg. The pain worsens with prolonged sitting or driving, and interferes with his sleep. Claimant is able to walk, and in fact that activity is less bothersome than either sitting or standing in a static position for an extended period of time.

Defendant's March 2011 Discontinuance

9. At Defendant's request, in February 2011 Claimant underwent an independent medical examination with Dr. White, a specialist in occupational medicine. Dr. White determined that Claimant's ongoing symptoms were causally related to his July 2006 work injury and

that his medical treatment to date had been reasonable and necessary. He further determined that Claimant had not yet reached an end medical result.

10. As to work capacity, Dr. White concluded that Claimant's injury was only partially disabling. He recommended that Claimant return to work in a position that would allow him to sit, stand and change positions as necessary, with restrictions against heavy or repetitive lifting and bending or twisting. In imposing these restrictions, Dr. White noted that they were based solely on Claimant's symptom tolerance, not on any specific anatomical or physiologic factor *per se*. Dr. White also encouraged Claimant to walk as much as tolerable.
11. On March 1, 2011 Defendant notified Claimant by letter of his obligation, pursuant to Workers' Compensation Rule 18, to conduct a good faith search for suitable work in accordance with Dr. White's February 2011 report, or else risk termination of his workers' compensation benefits. Defendant enclosed a job search log for Claimant to complete and submit weekly, documenting between ten and twenty contacts each time.
12. Two weeks after receiving Defendant's Rule 18 notification, on March 14, 2011 Claimant telephoned the Department's workers' compensation specialist to inquire whether he was in fact obligated to seek work in accordance with Dr. White's report. The specialist confirmed that he was. As reflected in the specialist's letter to both parties dated that same day, Claimant asserted that he would not search for work until his next scheduled follow-up evaluation with Dr. Braun, his treating orthopedic surgeon, on April 4, 2011.
13. Claimant having failed to submit any job search logs up to that point, and having indicated that he would not immediately commence to do so, Defendant filed a Notice of Intention to Discontinue Benefits (Form 27), which the Department approved effective March 24, 2011. Defendant's final temporary total disability check paid Claimant through March 30, 2011.
14. As scheduled, Claimant followed up with Dr. Braun on April 4, 2011. Dr. Braun noted that while Claimant's low back pain had improved significantly, his right leg pain continued. As to his work capacity and Dr. White's report, Dr. Braun remarked:

[Claimant] did request additional time off work given his persistent symptoms, and I gave him a form for this. [Claimant] may indeed need a formal disability exam if he is not able to return to work in 3 months. He did have an IME recently that suggested he should be actively looking for work but he states that he is not able to do this as he is not able to sit in a car for a prolonged period of time.
15. The form referred to in Dr. Braun's remarks was a one-page "Consultation Summary," in which he stated, "Claimant is recovering from a lumbar fusion surgery and is not ready to return to work" until July 5, 2011. Dr. Braun did not otherwise explain why in his opinion Claimant was unable to seek work within the restrictions that Dr. White had suggested.

16. As for further treatment, Dr. Braun recommended reconditioning exercises and possibly an epidural steroid injection to reduce Claimant's leg pain. The latter treatment was not immediately scheduled, presumably to give Claimant additional time either to improve and/or to consider his treatment options.
17. Between mid-March and mid-June 2011 Claimant submitted various job search logs, ostensibly documenting his efforts to find work. Many of the log entries were incomplete, unverifiable or otherwise deficient; in one instance, for example, the same telephone number was listed for two entirely separate and unaffiliated employers. Between the logs themselves and Claimant's conflicting and confusing formal hearing testimony, it is impossible to decipher which of the listed employers he actually contacted, and for which jobs he actually submitted applications. At least one application that he did submit (a copy of which Defendant introduced at hearing) was completed in such haphazard fashion that it could not possibly have led to employment.
18. Having been determined eligible for vocational rehabilitation services, from February through July 2011 Claimant was assisted in his job search efforts by John May, a certified vocational rehabilitation counselor. Mr. May informed Claimant of local job fairs, instructed him as to completing Defendant's job search log and provided specific job leads. One such lead was for a delivery driver at a Domino's Pizza that was only one mile from Claimant's house. Because Claimant had experience as a cab driver and was not restricted from driving, Mr. May thought this to be a particularly good opportunity for him. Unfortunately, Claimant failed to apply for the position. Nor did he attend any of the job fairs or follow up on the contacts Mr. May forwarded to him thereafter.
19. Mr. May also suggested that Claimant enroll in free English classes, offered weekly at the local library, as a means of enhancing his employability. Claimant attended four such classes and then stopped.
20. Mr. May testified that in his opinion Claimant did not participate in the vocational rehabilitation process to the extent necessary to establish that he was making a good faith search for suitable work. Based on the evidence presented, I concur.

Defendant's June 2011 Discontinuance

21. At Defendant's request, in June 2011 Claimant underwent a second independent medical examination with Dr. White. Dr. White reported that Claimant was anticipating another consultation with Dr. Braun, that spinal injections might be offered and that "further investigation" might lead to a plan for another surgical procedure. Notwithstanding these potentially ameliorative treatments, Dr. White determined that Claimant had reached an end medical result, with a 22 percent whole person permanent impairment referable to his lower back.¹

¹ Of the 22 percent rated, 10 percent had been paid in accordance with a previous impairment rating done in 2009. Pursuant to the Department's interim order, on July 1, 2011 Defendant began making weekly payments on the remaining 12 percent due in accordance with Dr. White's rating.

22. With Dr. White's June 2011 report as support, the Department approved Defendant's discontinuance of Claimant's temporary total disability benefits on end medical result grounds effective June 25, 2011.
23. Claimant did in fact consult again with Dr. Braun, in August 2011. Subsequently he underwent a spinal injection, both to help diagnose the source of his radiating pain and to provide some therapeutic relief. Most recently, in October and November 2011 Claimant underwent a surgical consult with Dr. Krag. Dr. Krag has rejected surgery as an appropriate treatment option for Claimant's current symptoms. Instead he has recommended that Claimant be evaluated for possible entry in an interdisciplinary rehabilitation program.² Claimant was scheduled to undergo this evaluation within days after the formal hearing.

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); *Luff v. Rent Way*, Opinion No. 07-10WC (February 16, 2010).
3. Defendant here asserts two grounds for discontinuing Claimant's temporary disability benefits – first, that he failed to conduct a good faith search for suitable work once released to do so; and second, that he reached an end medical result for his work-related injury.
4. Discontinuances based on a claimant's failure to conduct a good faith search for suitable work are governed by Workers' Compensation Rule 18.1300. Underlying any such discontinuance there must be credible evidence establishing that it is medically appropriate for the claimant to return to work, either with or without restrictions. Worker's Compensation Rule 18.1310.

² Dr. Krag's brief "After Visit Summary" includes the following remark as to Claimant's work capacity: "Temporary total disability until at least completion of the [interdisciplinary evaluation]." As discussed *infra*, Conclusion of Law No. 5, I consider this statement to have the same weight as that accorded Dr. Braun's April 2011 disability determination, *see* Finding of Fact No. 15 *supra*.

5. I conclude that Dr. White's February 2011 report and opinion as to Claimant's work capacity constitutes sufficiently credible medical evidence to establish Claimant's obligation to seek suitable work. In reaching this conclusion, I must discount both Dr. Braun's and Dr. Krag's conclusory statements to the contrary. Dr. Braun's statement is particularly troublesome because it appears to have been motivated at least in part by Claimant's own preference to remain off work rather than by a well-reasoned medical determination as to his work capacity. Beyond that, merely stating that a patient is "not ready to return to work" or is "totally disabled" is unlikely to be persuasive in cases such as this one, where the claimant obviously retains the ability to engage in at least some work-related activities. *See, e.g., Lewia v. Stowe Motel*, Opinion No. 19-11WC (July 25, 2011).
6. Having concluded that it was medically appropriate for Claimant to return to work, I further conclude that he failed to conduct a good faith search for suitable work once Defendant informed him of his obligation to do so. At best he was passive and inept; at worst, he was non-compliant. In either case, his actions fell far short of what reasonably should be expected of someone who is truly invested in the process of finding a job.
7. I conclude that Defendant was justified in terminating Claimant's temporary total disability benefits effective March 24, 2011 on the grounds that he had failed to conduct a good faith search for suitable work.
8. Provided a claimant has not yet reached end medical result, benefits that were discontinued for failure to conduct a good faith search for suitable work can be reinstated once he or she engages appropriately in the job search process. *Lewia, supra*. With that in mind, it is necessary to consider Defendant's alternate ground for discontinuing Claimant's temporary disability benefits – that he reached an end medical result for his work-related injury in June 2011. I conclude that he did not.
9. Vermont's workers' compensation rules define "end medical result" as "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. If reasonable treatment options exist that might yet yield positive results once they are adequately explored, then the claimant has not yet reached end medical result. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 533 (1996); *Luff v. Rent Way*, Opinion No. 07-10WC (February 16, 2010).
10. In this case, Dr. White determined that Claimant had reached an end medical result by June 2011, but even he acknowledged that further treatment options were still under consideration, including possibly another surgery. Dr. White thus negated his own end medical result determination. And although surgery now has been ruled out, as of the date of the formal hearing Claimant had yet to be evaluated for possible entry into an interdisciplinary rehabilitation program. This is another treatment option that, until adequately investigated, might well preclude a finding of end medical result. *Cochran v. Northeast Kingdom Human Services*, Opinion No. 31-09WC (August 12, 2009).

11. I conclude that Defendant has failed to sustain its burden of proving that Claimant had reached an end medical result by June 25, 2011. Its discontinuance of benefits on those grounds, therefore, was inappropriate.
12. In sum, I conclude that Defendant was justified in discontinuing Claimant's temporary disability benefits on the grounds that he had failed to conduct a good faith search for suitable work, but not on the grounds that he had reached an end medical result. Should Claimant re-engage in the job search process at any time before he reaches an end medical result, Defendant will be obligated to reinstate his benefits accordingly. *Lewia, supra*. Defendant also remains obligated to pay for all reasonable and necessary medical services and supplies causally related to Claimant's compensable work injury.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for temporary total disability benefits retroactive to March 30, 2011 and continuing is **DENIED**.

DATED at Montpelier, Vermont this 23rd day of February 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.