

R. B. v. M & D Transportation

(November 23, 2005)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Richard Blackmer

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Opinion No. 47A-05WC

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By: George K. Belcher
Hearing Officer

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v.

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)

For: Patricia A. McDonald
Commissioner

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Michelle Hazard &

)

State File No. W-01633

Dale Hazard,

)

M & D transportation Services

)

RULING ON CLAIMANT'S MOTION FOR ATTORNEY FEES

Courtland Corsones, Esq., for the Claimant
Dale and Michelle Hazard Pro se Defendant

ISSUE:

Shall the Claimant be Awarded Attorneys fees?

FINDINGS OF FACT:

1. The Claimant filed an affidavit of attorney's fees on September 7, 2005.
2. There has been no objection to the claim for fees filed by the Employer.
3. The claim for fees complies with Workers' Compensation Rule 10.1210. The fees are reasonable given the nature and complexity of the claim.

ORDER:

Therefore, the Claimant's claim for attorney's fees is allowed. The Employer is obligated to pay directly to attorney Corsones the sum of \$1,350.00 pursuant to Workers' Compensation Rule 10.1100.

Dated at Montpelier, Vermont this 23rd day of November 2005.

Patricia A. McDonald
Commissioner

R. Blackmer v. M & D Transportation Services

(August 18, 2005)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

R. B.)	Opinion No. 47-05WC
)	
)	By: George K. Belcher
v.)	Hearing Officer
)	
)	For: Patricia A. McDonald
Michelle Hazard & Dale Hazard)	Commissioner
M & D Transportation Services)	
)	State File No. W-01633

Pretrial conference held on April 21 with Margaret Mangan, Esq.
Hearing held in Rutland City on June 20, 2005 with Hon. George Belcher
Record closed on June 27, 2005

APPEARANCES:

Courtland Corsones, Esq., for the Claimant
Dale and Michelle Hazard, Pro se

ISSUE:

1. Did the Claimant suffer a compensable injury on March 19, 2004? If so, what benefits are due?
2. Did the Claimant properly report his injury to the Employer and, if not, what effect does that have upon his claim for Workers' Compensation Benefits?

EXHIBITS:

Claimant's Exhibits

- Claimant 1: Letter of Dr. Boynton, dated August 24, 2004
- Claimant 2: Dr. Boynton office notes from March 25, 2004 through May 25, 2005 and work injury tracking forms
- Claimant 3: Dr. Boynton's billing as of September 6, 2004
- Claimant 4: Dr. Delaney office notes from April 8, 2004 to May 20, 2005
- Claimant 5: Dr. Delaney billing as of June 4, 2005
- Claimant 6: Rutland Hospital Operative Report dated June 4, 2004
- Claimant 7: Rutland Hospital Billing as of August 20, 2004
- Claimant 8: Vermont Sports Medicine Center records and progress notes
- Claimant 9: Vermont Sports Medicine Center billing as of April 8, 2005
- Claimant 10: Radiology Report of exam dated April 1, 2004
- Claimant 11: Radiology Bill of June 24, 2004
- Claimant 12: Anesthesia Billing as of July 16, 2004
- Claimant 13: 9 pages of prescriptions
- Claimant 14: M & D checks of "Comp Pay" dated May 7, 2004, June 18, 2004, and July 1, 2004
- Claimant 15: Atty Corsones letter of December 1, 2004 with attached release M authorizations dated November 30, 2004

Defendant's Exhibits

- Employer 1a: Application for Employment
- Employer 1b: Time sheet for the period of 3/12/04 to 3/25/04
- Employer 1c: Dr. Boynton's office notes of March 25, 2004 (2 pages)
- Employer 1d: Dr. Boynton's notes of April 20, 2004
- Employer 1e: Dr. Delaney work release dated April 8, 2004
- Employer 1f: Dr. Boynton's letter of August 24, 2004
- Employer 1g: E-mail copy of correspondence from Rutland Hospital to Michelle Hazard dated September 15, 2004
- Employer 1h: Earnings statements for period of 12/5/03 to 3/12/04
- Employer 1i: Pay stub for September 24, 2004
- Employer 1j: Letter from Mr. Corsones to Mr. and Ms. Hazard of September 21, 2004
- Employer 1k: Medical Authorization of November 30, 2004

CLAIM:

1. Temporary total disability benefits arising from the left shoulder injury of March 19, 2004.
2. Payment of all medical bills associated with the left shoulder injury.

FINDINGS OF FACT:

Uncontested Facts

1. The Claimant, was employed by the Employer on March 19, 2004.
2. Claimant underwent a surgical repair of a torn rotator cuff on his left shoulder on June 4, 2004.

Contested Facts

1. Claimant is a resident of Florence, Vermont. His date of birth is September 21, 1955.
2. Claimant is not a high school graduate. He has been a truck driver for much of his working life. He is married to A. B. and he has one minor child living at his home.
3. Claimant began working for M & D Transportation Services in August of 2002. His job was to drive trucks and to deliver mail to and from various post offices. Part of the job entailed lifting heavy mailbags.
4. When Claimant was hired he was asked about medical restrictions upon his ability to work. He disclosed none. Employer Ex. 1a
5. The Employer is Dale and Michelle Hazard doing business as M & D Transportation Services. "M & D Transportation Services" is a trade name, which stands for "Michele" and "Dale". On all correspondence from the Department to the Employer, Michelle and Dale Hazard were listed as the principals of the business. In all correspondence from M & D Transportation Services to the Department, Michelle Hazard signed as the owner and Dale Hazard signed as the operation manager. The Department ran a check of the trade name filing with the Vermont Secretary of State, which disclosed that Michelle and Dale Hazard were both listed as "members". At no time prior to the hearing did the Employer raise the issue as to identity of the Employer. At the hearing, Michelle Hazard testified that she was the sole owner of the business and that it was a sole proprietorship. This is in direct conflict with the earlier investigation of the Department.

6. M & D Transportation Services is uninsured for this Workers' Compensation claim because its Workers' Compensation insurance lapsed.
7. On March 19, 2004 at the Rochester, Vermont, Post Office, Claimant was making a delivery. He was moving a "dock plate" from the Employer's truck to the loading dock when the heavy metal dock plate jammed and he felt pain, tingling, and pulling in his left arm. He felt pain right away but he completed the day's work. He noticed swelling. The Claimant called his doctor the next day and was referred to Dr. Boynton.
8. Between March 20 and March 25, the Claimant worked with difficulty, putting ice on his arm and shoulder and taking pain relievers. On March 25, 2004 he saw Dr. Boynton. Dr. Boynton suspected that the Claimant had a torn rotator cuff. Claimant Ex.2.
9. On April 1, 2004 an MRI examination confirmed a "partial thickness undersurface tear of the supraspinatus tendon" and the radiologist also suspected a labral tear. Claimant Exhibit 10. On April 8, 2004 Dr. Delaney wrote a statement excusing the Claimant from work.
10. On June 4, 2004 the Claimant underwent a surgical repair of his left shoulder. Dr. Boynton found a small partial-thickness deep rotator cuff tear. Claimant Ex. 6.
11. From June 14, 2004 to October 13, 2004 the Claimant participated in recommended physical therapy. He stopped because his physical therapy bills were not being paid by the employer.
12. In October of 2004 the Claimant was cleared for light duty work. He was unable to find light duty work. He consulted with the Vermont Department of Vocational Rehabilitation in January of 2005. Through their efforts he started with physical therapy again in March of 2005 through April 8, 2005 when he was discharged "due to insurance coverage". Claimant Ex. 8
13. The Claimant has not been able to find light duty work and he is still having some difficulty with his left shoulder. On May 4, 2005 Dr. Boynton expected the Claimant to "get better". On May 25, 2005 the Claimant was still under a light duty restriction and was scheduled to be reexamined on September 26, 2005. According to Dr. Boynton's records, it appears that the Claimant is still improving but has not reached his full work capacity. Claimant Ex. 2.
14. The Claimant stopped work on recommendation of his doctor in early April of 2004 He has been out of work since that time, despite being cleared for light duty work in October of 2004 and despite his efforts at job searching.
15. The Employer paid compensation payments to the Claimant of \$524.57 per week from

April 9, 2004 to September 20, 2004 at which time the payments stopped without explanation. The actual amount of the weekly payments due to the Claimant for this period were \$540.00 per week for a discrepancy of \$370.34. The prescriptions set forth in Claimant's Ex. 13 have been paid, but none of the medical bills (bills for medical providers) have been paid by the Employer.

16. The Employer denies that the claim is compensable for numerous reasons. First, the Employer claims that the Employee had a prior injury which was undisclosed and which was the actual cause of the surgery of June 4, 2004. The Employer claims it could not get information from the medical providers and this contributed to the feeling that the injury may have been caused by non-work activity. Second, the Employer claims that the Claimant was expecting to be cut down on his hours and that this reduction provided an incentive for the Claimant to file a Workers' Compensation Claim. Next, the Employer argues that the "time lines" are not consistent with this injury being work-related. Specifically the Employer argues that the injury was unreported in a timely way and the injury is therefore not compensable. Finally, the Employer argues that the Claimant quit the employment in September of 2004 and that the Employer thereafter did not have to pay him.
17. The Claimant in fact did have a surgical excision of his AC joint and debridement of his left shoulder bursa in 2002. Claimant Ex. 2. Dr. Boynton opined by letter dated August 24, 2004 that the March 19, 2004 shoulder injury was "... a new and separate injury to the left shoulder and not related to a previous left shoulder injury that occurred on June 5, 2000". Claimant Ex. 1. There was no expert evidence offered to show that the torn rotator cuff was in any way related to prior surgeries or shoulder conditions.
18. Dr. Boynton's office notes set forth that the injury occurred on December of 2003, but this was apparently corrected so that the reported date of injury was March 19, 2004. Claimant Ex. 2. The Claimant explained that this was a simple mistake, which was corrected when it was brought to the attention of Dr. Boynton. The Employer did not depose Dr. Boynton, nor did the Employer ask Dr. Boynton for an explanation of this mistake in any meaningful way. It appears that this entry on the records was a simple mistake.
19. The Employer offered no expert evidence as to causation, work capacity or the medical necessity of the treatments. No evidence was offered to refute the clear evidence that the Claimant's injury was incurred on March 19, 2004.

20. The Employer apparently was denied access to medical records at one point following the execution of a release. See Employer Ex. 1g. It does not appear, however, that there was a conscientious effort by the Employer to get to the bottom of the lack of disclosure, nor did the Employer take any significant steps to secure the information when additional releases were provided in November of 2004.
21. The Employer claims that the impending reduction of hours provided a motive for the Claimant to make the claim. This argument is spurious since there was no evidence whatsoever that the Claimant self-injured his shoulder or injured his shoulder any way other than working for the Employer.
22. The Claimant did not report the injury until Mr. and Ms. Hazard returned from a trip. On March 19 and 20, 2004, Dale Hazard was traveling to Massachusetts, although he was available by cellular telephone. Between March 26, 2004 and April 4, 2004 Mr. and Ms. Hazard were vacationing in Myrtle Beach. Ken Bates, Jr. was left in charge of the business. He had telephone numbers where he could reach the Hazards. Claimant did not report his injury until April 6, 2004 when he told the Employer that his shoulder was sore. On April 8, 2004 the Claimant told the Hazards that he would need surgery and on April 9, 2004, the Employer received a medical excuse from work from Dr. Delaney.
23. Between April and May 2004 Claimant's wife had a conversation with Dale Hazard. According to her, Mr. Hazard said that the Claimant was fired due to complaints about him from other post office employees. According to Mr. Hazard, he told Claimant's wife that there were problems but he did not fire Claimant. While the question of whether the Claimant quit or was fired was relevant as to the motivation for the Employer in terminating benefits, it is not relevant to the issue of whether the Employer is liable for payments if the claim is valid.
24. Dr. Boynton's unpaid bill is \$6,192.00 as of September 6, 2004 (Claimant's Ex. 3). Dr. Delaney's bill is \$391.00 as of July 20, 2004 (Claimant's Ex. 5). The Rutland Regional Medical Center has an unpaid bill of \$8,198.68 as of August 20, 2004 (Claimant's Ex. 7). Vermont Sports Medicine Center is owed \$6,350.00 for physical therapy sessions (Claimant's Ex. 9). The Rutland Radiologists, Inc. Bill is \$285.00 as of June 24, 2004 (Claimant's Ex. 11). The bill of Mid-Vermont Anesthesia, P.C. is \$960.00 as of July 16, 2004 (Claimant's Exhibit 12). The total of all these bills as of September 20 is \$22,376.68. This amount does not include subsequent visits by the Claimant to Dr. Boynton following July 27, 2004.

CONCLUSIONS OF LAW:

1. In order for an employer to be liable for workers' compensation benefits to a Claimant, there must be a personal injury by accident arising out of and in the course of employment. 21 VSA Sec. 601(11)(A). It is the burden of the Claimant to establish all facts essential to support his claim. *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963).
2. Sufficient competent evidence must be submitted verifying the character and the extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). When the causal connection between an alleged work accident and an injury is obscure and a layperson would have no well-grounded opinion as to causation, there must be expert medical testimony to sustain the burden of proof. *Jackson v. True Temper Corporation*, 151 Vt. 592 (1989); *Hasey v. Northeast Well Drilling, Op. No. 82-95 WC* (1995). In this case adequate evidence was offered to prove the claim. No contrary medical evidence was offered by the Employer to justify the Employer's suspicion that there may have been other causes for the injury.
3. The Employer paid the Claimant benefits from April 2004 to September of 2004 and then stopped payments with no medical justification or other justification. The burden of justifying the termination of benefits shifted to the employer due to its acceptance of the injury by the employer. *Merrill v. University of Vermont*, 133 Vt. 105 (1974). The Employer claimed that the Claimant quit his employ with the Employer in September of 2004 (because Attorney Corsones requested vacation pay in a letter). This was disputed by the Claimant, but whether there was a change in his status as an employee in September of 2004 has no bearing on the previously filed workers' compensation claim. A termination of employment status after the claim being filed would not relieve the Employer of its duty to pay benefits for a valid claim.
4. Concerning the failure of the Claimant to report his injury until April 8 or 9, 2004, Vermont law requires that an employee report a work injury "as soon as practicable". 21 VSA Sec. 656(a). 21 VSA Sec. 660 provides that "[D]elay in giving notice ...shall not be a bar to proceedings under the provisions of this chapter, if it is shown that the employer, the employer's agent or representative, had knowledge of the accident or that the employer has not been prejudiced by the delay or want of notice". The delay of notice was only for a few days and there was no indication whatsoever that the Employer was prejudiced by this delay. There was no detriment to the Employer's position by reason of the delay of notice. Therefore it is not a valid defense to the Claimant's claim.

5. The Employer offered evidence that the Claimant had not reported his prior shoulder surgery on the job application form. The application form asked the question, "Do you have present or past medical conditions that may impede performance or that may potentially lead to further recurring injury by the performance of repetitive lifting of heavy packages. If yes, please explain." Employer's Ex. 1a. Claimant did not positively respond to this question on the form. The Employer offered no evidence offered to show that Claimant's prior shoulder problem from 2002 had not fully resolved, such that he should have affirmatively answered this question. There is no reason to believe that a shoulder impingement problem, which had been corrected, would, or should, "lead to further recurring injury". According to *Larson's Workers' Compensation Law*, Vol. 3, Sec. 66.04, false statements on a job application will bar benefits if (1) the employee knowingly and willfully made a false statement as to physical condition; (2) the Employer relied on false representations; (3) the reliance was a substantial factor in the hiring; (4) there is a causal connection between the false statement and the injury. In this case, it has not been shown that the job application was knowingly and willfully false, or that there is any causal connection between the earlier surgery and the current injury. Dr. Boynton wrote that the March 19, 2004 shoulder injury was unrelated to a previous shoulder injury of June of 2000. Claimant's Ex. 1 There was no evidence offered to provide causation between the previous shoulder condition and the March 19, 2004 injury. Thus, the defense of the alleged false application fails.
6. At the hearing, Michelle Hazard put forth that she was the sole owner of the business. Ordinarily, that would raise questions concerning the proper party defendant. In this case it is of no consequence for several reasons. First, where an Employer fails to secure workers compensation insurance all partners are liable for benefits owed, if it is a partnership. If it is not a partnership or a corporation, then "... the principals, executive officers, or controlling parties of the business, or all of these, shall be personally liable for any benefits owed to the injured employee..." 21 VSA Sec. 687(b)(3). Second, the claim was filed against M & D Transportation Services, and Michelle and Dale Hazard. The claim was accepted by virtue of the payments being made following the claim. At no time until the hearing did the issue of a the named defendant arise. Even at the hearing, it was unclear whether the Employer was making an issue of the nominated defendant. The Commissioner concludes that the proper defendant in this matter is Michelle Hazard and Dale Hazard, d/b/a M & D Transportation Services.
7. The benefits owed to the Claimant are Medical benefits of \$22,376.68; temporary total benefits of 39 weeks of temporary total disability (from September 20, 2004 to June 20, 2005 at the rate of \$540.00 per week) for a total of \$21,060.00, plus an underpayment of \$370.34, for a total temporary disability amount of \$21,430.34 through June 20, 2005.

8. Pursuant to 21 VSA Sec. 678(a) and Workers' Compensation Rule 10.000, an award of reasonable attorney fees is discretionary and an award of necessary costs is mandatory. Interest on the medical benefits of \$22,376.68 and the underpayment of temporary total benefits of \$370.34 is calculated to be \$2,047.23 from September 20, 2004 until June 20, 2005. Interest on the unpaid temporary total benefits from September 20, 2004 to June 20, 2005 is calculated to be \$964.36. A decision on reasonable attorneys fees is deferred in order to allow for counsel to submit a bill consistent with Workers' Compensation Rule 10.000. This was not a close case. In fact there was an Interim Order for Benefits which was not paid by the Employer and an Administrative Penalty which has not been paid. Reasonable attorney fees are appropriate in this case.
9. The determination of this matter does not rescind or in any way modify the Department's Administrative Citation No. 01-05 WCPen, which assessed a penalty against the Employer of \$5,000.00 on March 17, 2005.

ORDER:

The Claimant is entitled to:

1. Retroactive Temporary Total Benefits from September 20, 2004 to June 20, 2005 in the amount of \$21,060.00, plus payment of the underpayment of \$370.34.
2. Continuing Temporary Total Benefits (or Temporary Partial Benefits if the Claimant becomes, or is, able to work) until Claimant reaches medical end result at which time permanency will be determined. Such rehabilitation benefits as may be provided by the statute and rules.
3. Payment of Medical benefits in the amount of \$22,376.68 (to be paid to the Attorney for the Claimant for distribution to the unpaid medical providers or to reimburse third party payors as necessary).
4. Interest as calculated above in the sum of \$3,011.59.
5. Attorney fees to be supported by Affidavit filed within 15 days of the date of order.

Dated at Montpelier, Vermont this 18th day of August 2005.

Patricia A. McDonald
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. Secs. 670, 672.