

T. P. v. Ebizz, Inc.

(August 4, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

T. P.

Opinion No. 33-06WC

v.

By: Margaret A. Mangan
Hearing Officer

EBizz, Inc.

For: Thomas W. Douse
Acting Commissioner

State File No. W-59631

Hearing held in Montpelier on April 25, 2006
Record closed on May 16, 2006

APPEARANCES:

William B. Skiff, II, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUE:

Is Claimant entitled to four weeks of temporary total disability benefits after April 1, 2005?

EXHIBITS:

Medical records

STIPULATION:

1. On March 29, 2005, Claimant was an employee and Defendant his employer within the meaning of the Vermont Workers' Compensation Act (Act).
2. On March 29, 2005, Claimant injured his right hand in an accident that arose out of and in the course of his employment with Defendant.
3. At the time of the accident, Claimant had an average weekly wage of \$686.39, resulting in an initial compensation rate of \$457.60.
4. At the time of the accident and at all relevant times thereafter, Claimant had three dependents.
5. Claimant is no longer employed with Defendant as of April 4, 2005.

FINDINGS OF FACT:

1. Claimant worked for EBizz doing bodywork on cars before the employment relationship ended on April 4, 2005.
2. The injury at issue occurred in the morning of Tuesday, March 29, 2005 while Claimant was repairing a car door. The window slipped down and cut Claimant's left index finger severely.
3. Claimant left work for treatment at Milton Family Practice where the wound was cleaned, sutured and bandaged. He was released with instructions to return in five to seven days for suture removal.
4. Claimant returned to the EBizz shop in the late afternoon of March 29, 2005. He worked for a brief period of time that day.
5. The next day, Claimant sought additional treatment for a likely infection in the affected hand. He was given a plaster splint and told not to work with the left hand "until seen by ortho on Friday."
6. Also on March 30th, Claimant was sent at the Fletcher Allen Health Care Emergency Department (ED) where he was given intravenous antibiotic. A plaster splint was placed on his hand and wrist.
7. On April 1, he was seen again at the ED where the wound was cleansed and redressed. He was discharged to his home in "good" condition. The examiner noted that the wound was healing. He was instructed to wear elastic wrap with a bulky dressing for "four until better." It is impossible to tell if the note was meant to mean four days, four weeks, or some other time. Claimant was instructed to see his doctor if he had pain, swelling or draining from the wound.
8. Claimant worked for a short time on April 1 before and after his appointment.
9. If Claimant received any further medical treatment after April 1, he has not produced those records.
10. The employment relationship between Claimant and EBizz ended on Monday, April 4, 2005 with sharp words between the Claimant and employer Eric Bissonnette. Claimant insisted that he be paid for the time he lost for his injured finger. The employer insisted that no one would be paid for time not worked. Claimant walked out.
11. Claimant never asked for light duty work and it was never offered to him.
12. A First Report of Injury was filed with this Department on April 12, 2005. A hand written form, dated and faxed from Eric Bissonnette on April 4, 2005, is also in the Department's file.

13. Claimant and a friend opined that Claimant wore a bulky dressing that prevented him from working in a manual labor job for about three to four weeks. He seeks temporary total disability benefits for that time.
14. Liberty Mutual, the insurer for EBizz, accepted the claim as work-related but not the claim for four weeks of TTD.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962).
2. 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 inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. Claimant's quotes the well-known principle that provides for the shifting of the burden to the Defendant to establish the propriety of ceasing or denying further compensation. See *Merrill v. University of Vermont*, 133 Vt. 101 (1974). Such a burden shifting analysis does not apply here, however, because Claimant must prove in the first instance that he was entitled to TTD.
4. Temporary total disability benefits are due an injured worker who is disabled from that injury "but not including the first three days, the day of the accident to be counted as the first day, unless the employee received full wages for that day.... If the total disability continues after the third day for a period of seven consecutive calendar days or more, compensation shall be paid for the whole period of the total disability." 21 V.S.A. § 642.
5. At most Claimant has proven that he had medical instructions not to work with the affected hand for some indeterminate length of time. Whether light duty work was available remains unknown. But it is clear that Claimant did some work until he and his employer had their argument.
6. The question of Claimant's total disability following the injury is a medical one, beyond the ken of a layperson, thereby requiring medical support. See *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979). Claimant's and his friends lay testimony on this issue without support of medical evidence is an insufficient basis for an award on the current record. As such, Claimant is not entitled to the month of TTD he claims is due.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 4th day of August 2006.

Thomas W. Douse
Acting 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.