

T. W. v. Black Ink Property Mgmt d/b/a James & Sally Black (September 26, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

T. W.

Opinion No. 37-08WC

v.

By: Jane Gomez Dimotsis
Hearing Officer

Black Ink Property
Management, Inc. d/b/a
James and Sally Black

For: Patricia Moulton Powden
Commissioner

State File No. R-16122

OPINION AND ORDER

Submitted on Written Arguments
Record Closed May 2008

APPEARANCES:

Patricia Turley, Esq. for Claimant
Keith Kasper, Esq. for Defendant

ISSUES:

What, if anything, is owed to the Claimant for temporary total disability benefits beyond what has already been paid?

EXHIBITS:

Joint Medical Exhibit

CLAIM:

Temporary total disability for intervals from November 12, 2004 to present pursuant to 21 V.S.A. §642;
Attorney's fees and costs pursuant to 21 V.S.A. §678.

FINDINGS OF FACT:

1. Claimant was an employee of Black Ink Property Management, Inc. within the meaning of the Workers' Compensation Act at the time of the injury. Black Ink Property Management was an employer as defined under the Workers' Compensation Act on the date of the injury.
2. Judicial notice is taken of all forms contained in the Department of Labor's file relating to this claim.

3. On December 21, 2000 Claimant was employed by Sally and James Black, who were doing business as Black Ink Property Management. While at work that day, the Claimant fell down a flight of stairs, landing on his elbows and forearms with his arms behind him.
4. Claimant's injuries included a torn rotator cuff in his right shoulder, which restricted the range of motion in claimant's right shoulder and caused him substantial pain. Defendant accepted the right shoulder injury as compensable in February or March of 2001.
5. Claimant also sustained a neck injury in the fall, with damage to his left shoulder associated with the neck injury. Claimant's claims for that injury were resolved in Thomas Wilson v. Sally and James Black, and, TIG Insurance Co, Op. No. 54-03WC (January 29, 2004). In that decision, the parties stipulated that "[a]ny issues regarding benefits for the right shoulder are not ripe for this hearing." Accordingly, that decision did not address Claimant's claims for workers' compensation benefits for the right shoulder injury.
6. Pursuant to the parties' Form 21 agreement, filed with the Department on March 28, 2002 and approved on April 8, 2002, Claimant's entitlement to temporary total disability benefit payments for the right shoulder injury commenced on December 25, 2000.
7. Claimant underwent two surgeries to repair the torn rotator cuff. The first surgery was performed in June, 2001 by Dr. Charles Meriam in Vermont. However, an MRI of Claimant's right shoulder taken on March 1, 2002 indicated a recurrent tear to his rotator cuff.
8. The second surgery to repair the rotator cuff tear was performed in May 2002 by Dr. Pierre Girard in Florida, where Claimant had moved. Following that surgery Claimant underwent a course of physical rehabilitation. By October 2002 an examination of Claimant revealed normal right shoulder motion with nearly normal rotator cuff strength.
9. In late February 2003 Claimant underwent successful surgery for the neck injury that he had sustained in his fall.
10. When Dr. Girard examined him in July 2003 it was evident that after the neck surgery Claimant suffered a setback in his right shoulder. He experienced trouble reaching overhead and showed some decreased range of motion compared to previous examinations, particularly with internal and external rotation. Dr. Girard attributed the setback to Claimant's being fairly inactive and not aggressively stretching after his neck surgery. Claimant could not exert any substantial effort while healing from the neck surgery. Dr. Girard recommended physical therapy for the right shoulder.
11. A few days after his visit with Dr. Girard, an MRI was taken of Claimant's right shoulder at the St. Lucie Medical Center in Florida. A report dated July 19, 2003 described the MRI results as consistent with a full thickness tear to the rotator cuff.

12. On August 27, 2003 Dr. Girard noted that in his view the MRI did not necessarily indicate a recurrence of the rotator cuff tear, although it did show leakage of fluid from the rotator cuff into the subacromial space. Consistent with his earlier recommendation, Dr. Girard concluded that Claimant needed physical therapy to improve his shoulder.
13. Shortly thereafter, in September 2003 Claimant was examined by Dr. John Robinson, who had earlier performed his neck surgery. Dr. Robinson concluded that Claimant's rotator cuff was torn and that he was experiencing increasing weakness in his right shoulder. Dr. Robinson recommended physical therapy and noted that approval for such treatment had been sought for "many, many months now, to no avail."
14. Claimant was examined on June 14, 2004 by Dr. Girard who noted "a questionable tear of questionable significance" to Claimant's rotator cuff. He also noted: "[a]t this point, I have advised him to continue with his activities as tolerated and see how he does in the future. He may need revision surgery on his shoulder." Finally, Dr. Girard reported Claimant was reaching a steady range of improvement in his right shoulder.
15. At Defendant's request, on October 19, 2004 Claimant underwent an independent medical evaluation with Dr. Edward Spievack. In his October 24, 2004 report of that examination, Dr. Spievack concurred with Dr. Robinson's interpretation of the July 2003 MRI as indicating a recurrent tear to the Claimant's right rotator cuff. However, noting two previously unsuccessful surgeries, Dr. Spievack doubted that a third surgery to repair the rotator cuff was warranted because in his view Claimant was "poorly motivated." Specifically, Dr. Spievack reported that Claimant was not doing motion and stretching exercises. Also, with regard to whether additional surgery was warranted, Dr. Spievack opined that weakness at one of the rotator cuff tendons "does not create a problem except with respect to repetitive overhead activities." Consequently, Dr. Spievack concluded Claimant had reached end medical result with respect to the right shoulder injury.
16. On November 9, 2004 the Department approved Defendant's Form 27 request to cease temporary total and other disability benefits to Claimant on the basis that he had reached an end medical result as to the right shoulder injury.
17. At his own behest Claimant underwent an independent medical evaluation with Dr. Craig Lichtblau on or about December 6, 2004. Dr. Lichtblau concluded that Claimant has a recurrent tear to his rotator cuff. Dr. Lichtblau noted that "surgical intervention may be warranted. I do not believe that physical medicine and rehabilitation has anything to offer him." In connection with the possibility of a third surgery, Dr. Lichtblau called for a second surgical opinion. He concluded that Claimant "had not reached maximum medical improvement in regard to conservative care for his right shoulder injury."
18. In connection with Dr. Lichtblau's suggestion for a second opinion on further surgery, another MRI of the claimant's right shoulder was taken at the St. Lucie Medical Center in Florida on March 3, 2005. The MRI results were consistent with a complete rotator cuff tear.

19. The second opinion with respect to a third surgery on the Claimant's right shoulder was provided to Dr. Chaim Arlosoroff, who saw Claimant several times to attempt to determine the condition of his right shoulder.
20. On March 23, 2005 Dr. Arlosoroff advised Claimant that "this is a very complex situation" and, "if another surgery is to be done, the prognosis is not as good as the first two and there may be some limitation and permanent disability as a result of the surgery." He also opined that the Claimant "is not at MMI yet." (MMI refers to maximum medical improvement and is a term some doctors use instead of the statutory language "end medical result.")
21. On May 11, 2005 Dr. Arlosoroff examined Claimant again and, for the first time, viewed the March 2005 MRI. According to Dr. Arlosoroff's report of that examination, Claimant wanted to proceed with surgery to remedy the right rotator cuff tear. Nevertheless, Dr. Arlosoroff was not confident the Claimant understood the risks of a third shoulder surgery. Specifically, Dr. Arlosoroff noted that after two surgeries the tissue may be friable and weak. He opined that since two sets of anchors already had been placed in the shoulder during previous surgeries, placing a third set of anchors might prove to be technically difficult. Claimant hoped a third surgery would restore function to his right shoulder. However, Dr. Arlosoroff related that he tried to explain to Claimant he could not guarantee that result. Dr. Arlosoroff's report concluded with a request to Claimant to think more about another surgical intervention, but also indicated that the preliminary paperwork for the third surgery was prepared pending both a response by the Claimant and authorization to perform the surgery. Based on the record Claimant never requested authorization for surgery.
22. In the fall of 2005 Claimant moved to New Jersey, where he treated with Dr. Randall N. Smith. Claimant continued to experience pain and diminished range of motion in his right shoulder and arm.
23. On September 27, 2005 Dr. Smith wrote a letter to another of Claimant's health care providers, opining that there was a "50/50" chance that additional shoulder surgery would give claimant some relief, and that "whether the rotator cuff is repairable or not will be determined at the time of surgery."
24. On December 8, 2005 Dr. Smith noted that more diagnostic tests were needed to determine if the Claimant would be better off with shoulder surgery or cervical facet blocks. He estimated a "40-60" percent chance of shoulder surgery success.
25. On January 26, 2006 Dr. Smith reviewed Claimant's possible treatment options, which were limited to either referral to a shoulder specialist with regard to possible surgery or continued pain medications. On February 23, 2006 Dr. Smith noted "we could always go back in and try to clean it out, but the prognosis for anything like that would not be optimistic."

26. On March 22, 2006 Dr. Smith reviewed another MRI of Claimant's right shoulder taken on January 18, 2006. He concluded in part that "what we need now is some updated diagnostic studies to find out what it is we are treating for a time, and what we can do. What comes to mind is different types of injectable treatments and different types of surgical options."
27. On May 19, 2006 Dr. Smith wrote that Claimant was experiencing "severe and constant" pain in his neck, right shoulder and right arm. Dr Smith suggested acupuncture or injection treatments to help Claimant with pain.
28. On June 27, 2006 Dr. Smith wrote to Claimant's attorney that Claimant "has chronic shoulder pain that has not responded to more conservative measures. There are some studies indicating hyaluronic acid injections into an inflamed joint with some post traumatic degenerative changes would be successful. As a result, in order to try to avoid surgery, I have recommended Euflexxa injections" for Claimant.
29. The next significant mention of shoulder surgery in Dr. Smith's reports is on December 1, 2006. In his report he noted that he spoke with Claimant about injection treatments and "the only other option is extensive reconstructive surgery on the right shoulder, which is quite risky" and "presently, the best we can hope for is to control the pain."
30. After several more visits and a round of injection therapy, Dr. Smith noted on April 17, 2007 that "as far as the right shoulder, the intraarticular Cortisone and Synvisc injections have not helped. That leaves us now with physical therapy, acupuncture, or surgery. We could get a 2nd opinion from a shoulder specialist, or we could do just do arthroscopic surgery for diagnostic and therapeutic purposes."
31. Following more visits with Claimant, Dr. Smith concluded he had reached an end medical result with respect to his right shoulder.

CONCLUSIONS OF LAW:

1. At issue here is whether Claimant is entitled to any further temporary total disability benefits. As Claimant has not returned to work, resolving this question turns on when he reached end medical result. As seen in the foregoing findings, different doctors made medical determinations regarding end medical result at different times over a period of years. The final determination of end medical result is a legal decision, based only in part on the determinations of the doctors involved.
2. Under Vermont's workers' compensation law, a Claimant is entitled to receive temporary disability compensation for a compensable injury either until the injury reaches an end medical result or until the claimant successfully returns to work, whichever comes first. 21 V.S.A. §§643, 643a; *Coburn v. Frank Dodge and Sons*, 165 Vt. 529, 532 (1996), citing *Orvis v. Hutchins*, 123 Vt.18, 24 (1962).

3. “End Medical Result” means 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. In this case, the underlying injury to Claimant’s right shoulder is the tear to the rotator cuff. Accordingly, whether the Claimant has reached a substantial plateau in the medical recovery process must be evaluated with respect to that injury.
4. Because Defendant accepted the injury to the Claimant’s right shoulder, it bears the burden of proving that the basis for disability payments has ceased. *Merrill v. U.V.M.*, 133 Vt. 101, 105 (1974).

End medical result

5. As mentioned above, the Commissioner’s designee approved the Defendant’s Form 27 request to cease payments of temporary total disability to Claimant for his right shoulder injury effective November 12, 2004. Dr. Spievack’s October 26, 2004 IME report supported Defendant’s request. That report amply supports the conclusion that Claimant had reached end medical result with respect to his right shoulder injury.
6. The basis of Dr. Spievack’s opinion that Claimant reached end medical result is essentially twofold. First, by October 2004 Claimant had undergone not one, but two previous unsuccessful surgeries to mend his torn rotator cuff. Second, in the context of post-operative rehabilitation, physical therapy and pain management, Claimant was left with only a limited range of motion in his shoulder, and he was not doing stretching exercises. In view of the foregoing, Dr. Spievack’s report cannot fairly be discounted as merely “conclusory” with respect to his opinion that Claimant had reached end medical result and that further surgery “should not be entertained.”
7. Butressing the conclusion of end medical result is the fact that Claimant was released from the care of his treating orthopedist in Florida, Dr. Girard, who noted on June 14, 2004 that Claimant’s shoulder “is remaining stable” and released him without any recommendation for further surgery.
8. Thus, by October 2004, Claimant’s right shoulder had stabilized, and it was unlikely that a third surgery would result in any further restoration of function. However, Claimant continued to experience significant pain in his shoulder at that point and thereafter. Claimant’s pain management therapy is further discussed below.

Surgical options and other treatment after October 2004

9. Claimant had the opportunity to decide whether to undergo a third surgery to fix the tear and it cannot be disputed that he wanted a third surgery and hoped it would be successful. However, the doctors treating Claimant after October 2004 clearly were not as optimistic as Claimant that a third surgery would improve his condition significantly.

10. Dr. Lichtblau's December 6, 2004 report recommended a second surgical opinion as to whether, to quote Dr. Girard, a third surgery "may" be needed at some point in order to address a "questionable tear of questionable significance." Under the circumstances, Dr. Lichtblau's recommendation is not a sufficient basis upon which to conclude that a third surgery was likely to improve Claimant's shoulder significantly.
11. As for Dr. Arlosoroff, his view of the prognosis for success from a third surgery was not as good as for the first two. He felt that a third surgery would present a degree of technical difficulty not previously encountered, and that Claimant, while wanting and believing a third surgery would be successful, did not fully appreciate the risks or possible outcomes of a third attempt at his shoulder and needed to think more about that. Given both Dr. Arlosoroff's reservations about the surgery and Claimant's own decision not to proceed with it at the time, Dr. Arlosoroff's opinion cannot be read as an indication that the surgery was likely to benefit Claimant significantly. Nor is the fact that Claimant had the option to undergo additional surgery inconsistent with a finding of end medical result.
12. Last, nothing in Dr. Smith's examinations compel a conclusion that additional surgical or other treatment was likely to benefit Claimant's underlying injury significantly. To the contrary, Dr. Smith's assessments of continued surgery were equivocal at best, if not pessimistic. His estimates of the chances that a third surgery would be successful varied from "50/50" on September 27, 2005 to "40% - 60%" in his December 8, 2005 report. On February 23, 2006 Dr. Smith noted "we could always go back in and try to clean it out [the right shoulder], but the prognosis for anything like that would not be optimistic." Later, Dr. Smith's December 1, 2006 report simply indicates that the option for a third surgery exists but, that such would be "quite risky." In sum, there is nothing in Dr. Smith's reports that indicates a reasonable likelihood that Claimant's underlying condition would significantly improve with more surgery.

The injection treatments

13. The Euflexxa (Synvisc) injections administered to Claimant's right shoulder by Dr. Smith in 2007 were clearly to provide palliative care to Claimant, who was experiencing considerable pain. Although Claimant argues that such injections indicate that he was not at end medical result, he argues only that "it [the injected substance] changes the condition of the joint and is not simply palliative in nature." Claimant does not explain, and I am unable to discover in the record, any indication of how the injections, or the physical changes created thereby, significantly improve the underlying injury, that is, the torn rotator cuff. What is clear is that Dr. Smith prescribed the injections to alleviate the considerable pain Claimant was experiencing in his right shoulder. Thus, these treatments fall within the definition of palliative care found in the Worker's Compensation Rule 2.1310: "'Palliative care' means medical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition."

14. I conclude, therefore, that Defendant has met its burden of establishing that Claimant had reached an end medical result as to his right shoulder injury by November 12, 2004, the date on which Defendant's discontinuance of benefits became effective. There is no basis reasonably to conclude that the surgical options remaining for Claimant after that date likely would result in significant improvement in his underlying condition. Accordingly, Defendant is not liable to Claimant for any additional temporary total disability benefit payments for the right shoulder injury.

Maladjustment of claim as basis for awarding temporary disability benefits

15. Claimant contends that Defendant improperly adjusted Claimant's claim either by not authorizing or by delaying authorization for requests for physical therapy and pre-payment of certain expensive prescriptions. As a consequence, he argues that he should be awarded temporary total disability benefits from March 12, 2004 through February 23, 2007.

16. As noted above, the sole issue for consideration here is when Claimant reached an end medical result as to his shoulder injury. Claimant does not present any legal basis for extending the date of end medical result because Defendant allegedly adjusted his claim improperly. Vermont law provides other penalties to be imposed against a carrier for improper claims adjustment practices. *See* 8 V.S.A. §§4724(9), 4726; Workers' Compensation Rule 45. Absent specific statutory authorization, it would be inappropriate to create a new penalty here.

ORDER:

Claimant's claim for additional temporary total disability benefits after November 12, 2004 is **DENIED**.

Having failed to prevail on his claim, Claimant's request for attorney's fees and costs is **DENIED**.

DATED at Montpelier, Vermont this 26th day of September 2008.

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.