

Dennis LaFarr v. Trapp Family Lodge

(November 15, 2010)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Dennis LaFarr

Opinion No. 34-10WC

v.

By: Sal Spinosa, Esq.
Hearing Officer

Trapp Family Lodge

For: Valerie Rickert
Acting Commissioner

State File No. BB-52069

OPINION AND ORDER

Hearing held in Montpelier on July 14, 2010

Record closed on August 31, 2010

APPEARANCES:

Stephen Cusick, Esq., for Claimant

Jeffrey Spencer, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant suffer a compensable work-related injury on August 11, 2009?
2. If yes, to what workers' compensation benefits is he entitled?

EXHIBITS:

Joint Exhibit A: Social Security records

Joint Exhibit B: Medical records

Joint Exhibit C: Additional records from Dr. Sullivan

Defendant's Exhibit 1: Dr. Adamo report and *curriculum vitae*

Defendant's Exhibit 2: Transcribed telephone interview with Claimant, August 27, 2009

Defendant's Exhibit 3: Letter to Julie Charonko and Stephen Cusick, November
9, 2009 (first page only)

Defendant's Exhibit 4: Approved Form 22 (with supporting documents) relating to
Claim #U-16938

Defendant's Exhibit 5: Dr. Backus report, February 3, 2005

CLAIM:

Temporary disability benefits pursuant to 21 V.S.A. §§642 and/or 646

Medical benefits pursuant to 21 V.S.A. §640

Vocational rehabilitation benefits pursuant to 21 V.S.A. §641
Interest, costs and attorney's 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 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 began working as a housekeeper for Defendant in 2004. In 2007 he was promoted to a position as the leader of a housecleaning crew.

Claimant's Prior Medical History

4. Claimant has an extensive prior medical history. He has suffered from chronic neck pain since a motor vehicle accident in 1974. In 1986 he was diagnosed with bipolar disorder, which is currently under good control with medication. Claimant also has a history of recurrent symptoms related to a painful, chronic condition in his left foot. He had contemplated surgery to remedy the condition in 2007, but decided against it due to the amount of time he would have had to take off work in order to recover.
5. Claimant also has a prior history of back pain. In 2004 he injured his mid- and lower back while working for a previous employer. As a result of this injury he missed some weeks from work and ultimately was paid permanency benefits in accordance with a 6% whole person impairment.
6. Following his 2004 injury Claimant continued to experience occasional back pain, sometimes attributable to specific activities such as lifting, sometimes not. Claimant treated for these episodes with Dr. Crowley, his primary care provider. For the most part, Dr. Crowley prescribed pain medications, both narcotic and non-narcotic. At times Dr. Crowley questioned the veracity of Claimant's pain complaints, as they seemed excessive given the minimal findings documented on diagnostic imaging studies. Dr. Crowley also expressed uncertainty about whether Claimant's bipolar disorder rendered him an unreliable historian. In the end, however, Dr. Crowley determined that Claimant's requests for pain medications, though regular, were spaced sufficiently far apart that misuse was unlikely.
7. In 2001 Claimant was approved for Social Security Disability benefits on account of his bipolar disorder. To remain entitled to these benefits, Claimant was limited in the amount of wages he could earn. Defendant was aware of this limitation and accommodated Claimant accordingly.
8. In 2007 Claimant exceeded the allowable limit and his Social Security benefits were terminated. Claimant subsequently reapplied, listing not only his bipolar disorder but also his chronic neck, back and foot pain as limiting his ability to work. His claim for

reinstatement was denied on the grounds that none of the conditions from which he suffered prevented him from working to the extent necessary to qualify for benefits.

Claimant's August 11, 2009 Injury and Related Medical Treatment

9. On the afternoon of August 11, 2009 Claimant was leaning into an outdoor bathtub to clean it when he felt the acute onset of low back pain.¹ His pain rapidly worsened, such that by the time he got home that evening he was barely able to walk. Claimant's wife credibly confirmed that Claimant was slow to exit his vehicle when he arrived home and walked in a stooped posture.
10. Medical records verify that Claimant called Dr. Crowley's office the next day, August 12, 2009, to report that he had hurt his back at work and could "hardly walk." The office prescribed a muscle relaxant by telephone. On August 13, 2009 Claimant called back and reported that his symptoms had not abated and that he was unable to go to work. He was advised to increase his medications, and an office visit was scheduled for August 15, 2009.
11. Dr. Crowley was not available at the time of Claimant's scheduled visit, so his associate, Dr. Sullivan, evaluated him instead. As a family practitioner, Dr. Sullivan is well versed in the evaluation and treatment of work-related low back injuries.
12. Dr. Sullivan reported that Claimant had hurt his back while cleaning an outdoor tub, an activity that involved "a lot of extending and scrubbing as well as his usual lifting of supplies and machines." Dr. Sullivan observed that Claimant walked with an antalgic gait, exhibited significant spasm and experienced pain with both lateral rotation and straight leg raise. These are all objective physical findings indicative of a lower back injury.
13. Dr. Sullivan's diagnosis was lumbo-sacral strain with significant spasm "caused by the lifting and extended position of cleaning at work." In making this diagnosis, Dr. Sullivan specifically noted that Claimant's current condition was "not necessarily related to his chronic back pain at all." Dr. Sullivan did not review all of Claimant's prior medical records, but found him to be a credible and consistent historian, particularly in distinguishing the acute nature of his current pain from his longstanding chronic back pain. Dr. Sullivan also testified that Claimant's injury was consistent with his use of poor body mechanics when performing his work. I find this testimony credible in all respects.
14. As treatment for Claimant's symptoms, Dr. Sullivan prescribed muscle relaxers, pain medications and rest. He determined that Claimant was disabled from working at least until the following week.

¹ Defendant challenges the veracity of this account, citing to a prior recorded statement Claimant had given in which he asserted that he was bending and reaching from inside the tub, not outside, when his back pain arose. Notwithstanding this minor discrepancy, I find Claimant's testimony to be credible and accept his version of the incident as both truthful and accurate.

15. Claimant next treated with his regular physician, Dr. Crowley, on August 21, 2009. Claimant reported continuing pain, for which Dr. Crowley recommended physical therapy. Claimant diligently applied himself to this treatment, and overall experienced significant improvement in his low back pain, albeit with various activity-related fluctuations.
16. In October 2009 Claimant underwent surgery to remedy the chronic, painful condition in his left foot. Claimant had considered this surgery in 2007, *see* Finding of Fact No. 4 *supra*, but had not felt able to afford the necessary time out of work.
17. Claimant was totally disabled from working on account of his low back injury from August 12, 2009 through November 20, 2009. On that date Dr. Sullivan released him to return to work three days a week. Shortly thereafter Claimant notified Robyn Hark, Defendant's human resources specialist, that he was available for part-time work. Ms. Hark advised that she would need a written release from Claimant's doctor, which Claimant agreed to provide. He did not do so, however. Instead, Claimant secured a job elsewhere, though for reasons unrelated to his injury his employment was terminated on his first day. As of the formal hearing, Claimant remained unemployed.
18. Claimant last treated with Dr. Sullivan in April 2010. He had undergone a course of aquatic physical therapy, which offered temporary relief of his symptoms, but he continued to experience low back pain, particularly with prolonged standing, walking or lifting. Diagnostic imaging results were essentially normal, indicating that these ongoing symptoms most likely are mechanical or muscular. As treatment, Dr. Sullivan adjusted Claimant's pain medications. He also anticipated referring Claimant to a work hardening program, though there is no evidence that that has yet occurred.

Defendant's Denial

19. Defendant has denied Claimant's claim for workers' compensation benefits from the outset. Initially, it asserted that Claimant's condition was related to his pre-existing chronic low back pain rather than to a work injury. Later it asserted that Claimant's credibility was suspect.
20. Dr. Adamo, an occupational medicine specialist, testified in support of Defendant's position. Dr. Adamo reviewed Claimant's medical records but did not examine him.
21. Dr. Adamo diagnosed Claimant with degenerative joint disease and chronic low back pain, neither caused nor aggravated by any work-related injury. Dr. Adamo initially cited two factors in support of this opinion: first, the absence of objective physical findings in Dr. Sullivan's August 15, 2009 examination, and second, questions concerning Claimant's credibility. As to the latter, Dr. Adamo expressed his understanding that Claimant had not reported the August 11, 2009 injury to Defendant until more than two weeks later.

22. In fact, however, Dr. Sullivan did note the presence of objective physical findings in his initial examination, *see* Finding of Fact No. 11 *supra*. And while Claimant did not file a claim for workers' compensation benefits until some time after the injury, he did telephone his supervisor the next day to report that he had hurt himself at work.²
23. Defendant pointed to other evidence that in its view indicated that Claimant had ulterior motives for claiming a work-related injury and therefore was not credible. There was evidence that Claimant did not like his new supervisor because she was "mean" and worked him "too hard." There was a notation in Dr. Crowley's medical records that Claimant regretted ever having returned to work after being granted Social Security Disability benefits, that he was dissatisfied with his job even before his alleged work injury and that he later told Dr. Crowley that he did not intend to work again. There was the fact that during his period of temporary total disability Claimant underwent the foot surgery he previously had delayed because he could not afford the time off from work. As much as Defendant would like to make of this evidence, I find that it is insufficient to undermine Claimant's account of the events of August 11, 2009 as he reported them to both his supervisor and to his medical providers and as he testified to them at 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. Where, as here, there are conflicting medical opinions the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

² Rather than filing a claim for workers' compensation benefits, initially Claimant sought, and was granted, vacation time. He hoped that his back pain would abate during his time off. When Ms. Hark learned that he had done so, she took the necessary steps to begin the workers' compensation process.

3. Applying this test to the facts of this claim, I conclude that Dr. Sullivan's opinion is the most persuasive. Dr. Sullivan established a treating relationship with Claimant. Although he did not review all of Claimant's prior medical records, he determined from his own personal observation that Claimant was a credible and consistent historian. He examined Claimant only days after the injury, and noted objective physical findings that supported the mechanism of injury as Claimant had described it.
4. In contrast, Dr. Adamo's opinion was based largely on assumptions he made as to Claimant's credibility. Dr. Adamo never personally examined Claimant and his opinion lacked objective support.
5. I conclude that Claimant has sustained his burden of proving that he injured his lower back while engaged in the course and scope of his employment for Defendant on August 11, 2009.
6. I further conclude that Claimant has established his entitlement to temporary total disability benefits from August 12, 2009 through November 20, 2009. He is entitled as well to coverage for all reasonable and necessary medical treatment causally related to his compensable injury. Claimant has not established his entitlement to any other workers' compensation benefits, though upon further proof he may yet do so.
7. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$453.82 and attorney fees totaling \$11,443.50. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded.
8. As for attorney fees, these lie within the Commissioner's discretion. I find an award of fees to be appropriate here. However, Claimant's claim for fees fails to account for the fact that the amendment to Workers' Compensation Rule 10.0000, which raised the hourly rate at which attorney fees can be assessed, applies only to fees incurred after its effective date, June 15, 2010. With that in mind, and in accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit his revised claim. Defendant shall have 15 days thereafter within which to respond.

ORDER:

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

1. Temporary disability benefits from August 12, 2009 through November 20, 2009 pursuant to 21 V.S.A. §642, with interest calculated pursuant to 21 V.S.A. §664;
2. Medical costs associated with reasonable and necessary medical treatment of Claimant's August 11, 2009 work injury, pursuant to 21 V.S.A. §640;
3. Such other workers' compensation benefits causally related to his August 11, 2009 work injury as Claimant proves his entitlement; and
4. Costs of \$453.82 and attorney fees to be determined in accordance with Conclusion of Law No. 8 above.

DATED at Montpelier, Vermont this 15th day of November 2010.

Valerie Rickert
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.