Ferland v. S. D. Ireland Concrete (July 19, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR

Conrad Ferland	)	Opinion No. 42-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
S.D. Ireland Concrete	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. U-52496

Pretrial conference on January 24, 2005
Hearing held in Montpelier on May 2, 2005
Record Closed on May 19, 2005

APPEARANCES:

Steven P. Robinson, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUE:

Did the claimant intentionally misrepresent his medical history in his pre-employment medical examination?

EXHIBITS:

Joint Exhibit: Medical Records

FINDINGS OF FACT:

1. Claimant is a 64-year-old male, who had formal schooling up through the 8th grade and can read and write. Claimant has had experience in logging, construction, operating heavy equipment and driving trucks.

2. Throughout the year preceding his work injury, claimant worked at different jobs, mainly in construction. In the fall of 2003, claimant worked for J. McDonald, and was laid off in November 2003. Afterwards he logged for Judge Meaker, and was then unemployed for 3 weeks prior to applying for a job with defendant.

3. In February 2004, claimant began to see Dr. Farrell, a chiropractor. On his medical history sheet, claimant described the main reason for his visit as "back and shoulder" and that he took Tylenol to try and alleviate this condition. At the hearing, claimant described the main problem that prompted the visit to Dr Farrell was digestion, rather than back and shoulder pains. The statement made in 2004 is the more credible one. However, the symptoms had improved before claimant started working for defendant.

4. In April 2004, claimant applied for a job involving construction work with the defendant. The defendant hired the claimant subject to a pre-employment medical examination conducted by Dr. Fitzgerald. First, claimant was asked to complete a medical history form that included a list of ailments with corresponding blank boxes. Claimant was instructed to identify the problems he had by checking the appropriate box. Claimant left certain boxes unchecked, including one that read, "recurrent back pain/orthopedic problems." He did not think he had "recurrent" back pain at the time. However, claimant provided information concerning a recent x-ray taken by his chiropractor, Dr. Farrell. He did not mention nor was he asked if he was under medical treatment at the time, although he mentioned to his employer after he started work that he was treating with Dr. Farrell.

5. The medical examination lasted 15 minutes, during which Dr. Fitzgerald worked down the chart, asking the patient about any past problems identified. The claimant does not remember Dr. Fitzgerald's specifically asking about shoulder pain. Dr. Fitzgerald also performed an exam on claimant's shoulders, including a range-of-motion exam. After examining the claimant, Dr. Fitzgerald concluded that claimant had no signs of pathological problems and had no restrictions to work. He then faxed this form to the defendant.

6. Claimant began working for the defendant on April 12, 2004. On April 14, 2004 claimant suffered a shoulder injury at work. This injury was later diagnosed as a tear of the rotator cuff. Defendant continued to employ the claimant until he was terminated from his position in June 2004. Carrier refused to pay any benefits to the claimant. In an August 2004 letter, carrier cited the opinions of Dr. Fitzgerald and Steve Myers, defendant's director of safety and training, as evidence of claimant's misrepresentation.

7. In a July 14, 2004 letter to the carrier, Dr. Fitzgerald wrote that he felt the claimant had deceived him during the medical examination. He stated in March 2005 that he "may" have placed restrictions. He later changed this opinion, that he "would" have placed restrictions but could not decide to a degree of medical certainty what those restrictions would have been. Dr. Fitzgerald later concluded that he would have "most likely" placed work restrictions on the claimant and that such restrictions would have prevented the claimant from working with the defendant. Specifically these restrictions were: lifting- no more than 50 pounds, lifting occasionally and occasional climbing. Other restrictions would have been "reaching above shoulders- occasionally with left extremity…occasional pushing/pulling with left arm."

8. Steve Myers, defendant's director of safety and training, acknowledged that he relies on Dr. Fitzgerald's medical examinations in determining whether an employee is capable of carrying out the construction work. He further acknowledged that the claimant's position did not require full physical capacity, though a certain level of restrictions would have prevented the claimant from working with the defendant. Mr. Meyers noted that the specific restrictions determined by Dr. Fitzgerald would have precluded the claimant from working with the defendant.

9. Claimant's chiropractor Dr. Farrell treated the claimant between February 11, 2004 and April 28, 2004. He diagnosed the claimant with subluxation, noting that the condition improved with treatment. He also diagnosed the claimant with arthritis and tendonitis. Dr. Farrell reviewed the job requirements for S.D. Ireland and determined that the claimant was capable of performing the job duties prior to his work injury.

10. Claimant presented evidence supporting his claim for attorney's fees of $11,464.50 (97.2 x $90/hour, 23.5 x $75/hour, 15.9 x $60/hour) and costs of $1,607.35 in expenses

CONCLUSIONS OF LAW:

1. It is undisputed that the claimant incurred a new and distinct injury that arose out of and in the course of his employment with S.D. Ireland. The defense denial is based on its contention that the claimant misrepresented his medical condition at the time of the pre-employment physical.

2. Although in a workers' compensation case, the claimant usually has the burden of proof to establish all facts essential to the rights asserted, *Goodwin v. Fairbanks, Morse & Co*., 123 Vt. 161, 166 (1962), when the defendant employer claims an affirmative defense, it has the burden of proving each element of that defense by a preponderance of the evidence. See *Kelley's Dependents v. Hoosac Lumber,* 95 Vt. 50 (1921); *Kilburn v. Munson Earth Moving*, Opinion No. 19-96WC (1996); *Corrow v. Ethan Allen*, Opinion No. 31-02WC (2002).

3. In order for the defendant to prove this affirmative defense, a three-prong test must be satisfied: (1) The employee must have knowingly and willfully made a false representation as to his physical condition; (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring; (3) There must have been a causal connection between the false representation and the injury. See *Hamilton v Miller Structures*, Opinion No. 64-95WC (1995). The defendant must prove each of these three elements by a preponderance of the evidence. See *Corrow v. Ethan Allen, Inc*., *supra*.

4. The main reason for seeing the chiropractor is in dispute, though the claimant admits he was receiving treatment for back and left shoulder aches. Defendants argue that had Dr. Fitzgerald known about this history, he would have done a more thorough examination and placed the claimant on restrictions.

5. Claimant contests this by challenging all three elements of the defense, with emphasis on the first and second prongs: whether there was intentional and willful misrepresentation, and whether the employer relied on this information.

6. The evidence in the record is not enough to establish that there was an intentional misrepresentation during the medical exam, that the employer relied on the claimant's misrepresentations to Dr. Fitzgerald or that there is a causal connection between the work injury and the misrepresentation.

Knowingly and Willfully

7. On the first required element, the defendant argues that claimant withheld information about back and shoulder problems and appointments with his chiropractor, Dr Farrell, who claimant began seeing in February 2004, and had continued to see past the April 12, 2004 medical examination. However, the scienter or knowledge cannot be inferred from the facts in this case. See *Cunningham v. Miller*, 150 Vt. 263 (1988); *Hamilton v. Miller Structures,* Opinion No. 64-95WC. The fact that the claimant failed to check the "recurrent back pain/ortho" box on the occupational and health history form does not meet the required scienter. The form made no inquiry into past back pain. It is reasonable to believe that the claimant's back and shoulder ailments had improved by the time the medical exam took place. Furthermore, Dr. Fitzgerald at one point agreed that it was reasonable for the claimant to have left the "recurrent back pain" box unmarked.

8. Dr. Fitzgerald's questioning during the physical examination does not establish the claimant's actual knowledge or belief of a false misrepresentation. The claimant could not remember whether Dr. Fitzgerald asked him about past back or shoulder pain. The defendant notes that Dr. Fitzgerald "generally" asks questions about back and shoulder problems during pre-employment physical exams. However, Dr. Fitzgerald could not remember whether he specifically asked claimant the question. This uncertainty, coupled with other inconsistent testimony, does not meet the burden of proof required.

Reliance

9. Next, defendant argues that it would not have hired claimant had it known of his previous problems. However, that requisite reliance by the employer has not been proven. The basis of this conclusion is found in the testimony of Dr. Fitzgerald. Although Dr. Fitzgerald testified to an exact restriction during the hearing, this was inconsistent with his previous testimony. Looking at Dr. Fitzgerald's indecisive conclusions as a whole, even in the best light possible for the defendant, would only show a possibility of restrictions being placed on claimant, and not meeting the burden of proof required to establish the reliance prong.

10. Moreover, claimant's chiropractor Dr Farrell, whose opinion has remained consistent, testified that the claimant had the capacity to perform the job prior to his work injury. This is in contrast to the finding in *Hamilton* where the claimant's doctor requested claimant to let potential employers know he would want to talk to them about his patient's injuries. See *Hamilton v. Miller Structure Inc.* Opinion No. 64-95WC. Claimant's doctor in this case testified to the opposite effect, that claimant's previous back complaints were not substantial enough to prevent claimant from working with the defendant.

Causal Connection

11. Finally, defendant argues that there is a causal connection between the claimant's misrepresentation and his work related injury. The claimant incurred a torn rotator cuff at S.D. Ireland, a condition defendant argues is related to his history of neck and left shoulder pain. But the problems are distinctly different, as Dr. Farrell's records clearly demonstrate. Before he started working at S.D. Ireland, claimant suffered from arthritis and tendonitis, not from any specific injury to his rotator cuff. To accept a causal relationship would amount to stretching the logical connection between the ailments in Dr. Farrell's notes and claimant's torn rotator cuff. With the evidence presented, this is a leap that cannot be made in the present case.

12. The defendant notes the importance of pre employment medical examinations, that the whole point of the medical exam is to prevent work place injuries, and that a ruling against defendant could render such medical exams pointless. However, a pre employment history that never asked if the claimant were actively treating cannot be used to deny this claim, especially when claimant was never questioned about his report that he had a recent x-ray.

13. In sum, the defendant has failed to establish that the claimant willfully misrepresented his medical history, that the employer relied on any misrepresentation or that there is a causal connection between the ailments Dr. Farrell was treating and the work related injury. Without having satisfied all three prongs the affirmative defense must fail.

14. Having prevailed, the claimant is entitled to reasonable attorney's fees and costs pursuant to 21 V.S.A §678(a) and Worker's Compensation Rule 10. The hours claimed are reasonable given the work required to litigate this claim, and costs incurred were necessary.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to:

1. Adjust his claim;
2. Pay attorney's fees of $11,464.50 (97.2 x $90/hour, 23.5 x $75/hour, 15.9 x $60/hour) and costs of $1,607.35 in expenses.

Dated at Montpelier, Vermont this 19th day of July 2005.

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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. §§ 670, 672.