P. G. v. Village Auto & Tire (March 17, 2006)

STATE OF VERMONT
DEPARTMENT OF LABOR

P. G. Opinion No.: 71S-05WC

By: Laura K. Collins
v. Hearing Officer

Village Auto & Tire, Inc. For: Patricia A. McDonald
Commissioner

State File No.: W-01621

RULING ON DEFENSE MOTION FOR STAY

Defendant moves for a stay of the order that it pay claimant's medical bills, attorney fees, costs, interest and adjust the claim for further benefits related to the August 24, 2004 work incident. See Op. No. 71-05 WC, (December 13, 2005). Claimant has filed an appeal to superior court for a trial *de novo* pursuant to 21 V.S.A. § 670.

Any award or order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner, an appeal notwithstanding, 21 V.S.A. § 675. To prevail on its request, the employer must demonstrate: "(1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) a stay will not substantially harm the other party; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co*., 132 Vt. 554 (1974). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v.Webster Corporation*, Opinion No. 62S-96WC (1996).

We must first consider the likelihood of success on the merits. Claimant prevailed in part in his claim for benefits based upon the weight of the medical and corroborating evidence that supported a temporary worsening of the claimant's condition. While the defendant provided ample evidence diminishing the significance of the claim and the benefits due, the defendant's own medical expert opined that the work incident could have played a "minor contributing role" in claimant's symptoms. It is unlikely that a jury will view this evidence differently. Consequently, defendant has not met the first criterion.

With regard to the second criteria, defendant argues that it will be irreparably injured if the order is not stayed. This assertion is not supported. Defendant has been ordered to pay bills, fees and costs totaling less than $10,000, not an amount that will irreparably injure the Defendant. Further, ordering Defendant to adjust the claim causes no harm and in fact, continued and timely adjusting of this claim can serve to benefit the Defendant.

Finally, with regard to the third and fourth criterion, while the defendant argues that a stay will not irreparably harm the claimant and the granting of the stay is in the public interest, the Department finds the contrary of both to be true. Mr. Gifford was awarded only a portion of the benefits he sought. Such award was due to the efforts of his legal counsel in this hotly contested case and his legal counsel deserves to be compensated accordingly. Further, this Department has previously ruled, "If law firms representing claimants can not be paid in a timely way, when they do prevail, they are less likely to provide representation in the future." *Bollhardt v. Mace Security International,* Op. No. 10-05 WC and *Pease v. Ames,* Op. No. 52S-04WC (2004). A grant of a stay would go against the public interest.

Therefore, the motion for a stay is hereby DENIED.

Dated at Montpelier, Vermont this 17th day of March 2006.

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Patricia A. McDonald
Commissioner

P. G. v. Village Auto & Tire, Inc. (January 25, 2006)

STATE OF VERMONT
DEPARTMENT OF LABOR

P. G.	)	Opinion No.: 71R-05WC
	)	
	)	By: Laura K. Collins
v.	)	Hearing Officer
	)	
Village Auto & Tire, Inc.	)	Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No.: W-1621

RULING ON CLAIMANT'S MOTION FOR RECONSIDERATION

Claimant, through counsel, moves for reconsideration of certain aspects of the decision dated December 13, 2005 and requests reversal of the denial of Temporary Total Disability benefits. First, claimant argues that the Department improperly characterized the work injury as a flare-up. Second, he argues that his disability was unchallenged. The Defendant, through counsel, opposes the motion.

Claimant argues that the Department mischaracterized the claimant's work injury as a "flare-up." As indicated in the decision, a flare-up refers to a temporary increase in symptoms with no corresponding worsening of the underlying condition. The claimant asserts that the flare-up doctrine is applicable only in a dispute between employers. Review of hearing decisions does not support this narrow interpretation.

The claimant also argues that application of the flare-up doctrine overlooks evidence that claimant's condition did not return to a clearly established baseline. The testimony and evidence, however, convincingly demonstrated that claimant's condition prior to August 24, 2004, while problematic, was not fully known. Signs of nerve impingement pre-dated the work incident. Claimant's own witnesses testified that claimant experienced worsening of pain and symptoms over the weeks prior to August 24, 2004. The argument of less than full return to pre-injury baseline is equally unsupported. Claimant works full time as a mechanic, leads a very active life and has not sought further medical care.

On the issue of disability for work, the claimant did not present persuasive evidence of medical disability for work attributable to the work incident.

The testimony and evidence amply supports the decision rendered. The motion for reconsideration, therefore, is DENIED.

Dated at Montpelier, Vermont this 25th day of January, 2006.

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Patricia A. McDonald
Commissioner

STATE OF VERMONT
DEPARTMENT OF LABOR

Paul Gifford	)	Opinion No.: 71-05WC
	)	
	)	By: Laura K. Collins
v.	)	Hearing Officer
	)	
Village Auto & Tire, Inc.	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No.: W-01621

Pretrial conference held on August 8, 2005
Expedited hearing held in Montpelier on October 27, 2005
Record closed on November 18, 2005

APPEARANCES:

Patty Turley, Esq., for the Claimant
Wesley Lawrence, Esq., for the Defendant

ISSUES:

1. Did claimant Paul Gifford suffer a compensable work-related injury to his neck on August 24, 2004?

2. If so, to what benefits is he entitled?

EXHIBITS:

Joint I:	Medical records
Claimant 1:	Medical record requests from Ellis & Boxer
Claimant 2:	Medical bills
Defendant A:	Calendars for August and September 2004
Defendant B:	Time cards for August and September 2004
Defendant C:	Main Street Chiropractic letter and billing
Defendant D:	George White M.D. Curriculum Vitae
Defendant E:	Videotape

STIPULATION:

1. On August 24, 2004, claimant Paul Gifford was an employee of Village Auto & Tire, Inc. within the meaning of the Vermont Workers' Compensation Act (Act).

2. The incident alleged to have caused injury was captured on video surveillance tape.

FINDINGS OF FACT:

1. On August 24, 2004, claimant and a co-worker pushed a disabled vehicle in the parking lot at work then jumped on. A third employee was at the wheel. In the videotape the employees are seen riding on the vehicle with the claimant holding onto the rear gate with both hands and kneeling. The driver stops short and both employees get off. The claimant proceeds to help push the truck into the garage bay.

2. Several witnesses provided testimony as to the speed of the vehicle, the nature of the stop and other events depicted on the video surveillance tape. One co-worker described the speed as "a little bit faster than a walk" and explained that when the vehicle stopped, "nothing really happened…"

3. Claimant felt no pain or discomfort at the time of the incident, or for days afterward. On the day of the incident he did not report injury or any difficulty to his employer, to his co-workers or to his girlfriend. Over the next three days he worked without complaint or change in his activities.

4. On September 1, 2004, claimant attended a medical visit with his chiropractor, Dr. Richard Evans, with complaints of severe neck pain with paresthesia into his left arm and hand.

5. Claimant worked through September 9, 2004 then took himself out of work.

6. Claimant treated with Dr. Evans regularly through the month of September 2004, with reports of continuing neck and left arm and shoulder pain, numbness and weakness. Dr. Evans notes over that month, claimant experienced gradual improvement in pain and symptoms.

7. Claimant resumed work on October 18, 2004.

8. Claimant continued to treat with Dr. Evans after September 2004, but less frequently than he had through the month of September 2004.

9. On November 11, 2004 claimant had a MRI of the cervical spine that revealed a C5-6 disc herniation with left sided cord compression.

10. On December 8, 2004, claimant attended an independent medical examination with Dr. George White. At that time claimant reported some neck discomfort with certain activities but denied hand symptoms. He further reported some pain free days and indicated, "most of the time it is not bad at all." He was continuing to receive chiropractic adjustments and took ibuprofen.

11. On July 8, 2005, claimant's physician placed him at maximum medical improvement for chiropractic care for the 2004 incident.

12. On September 6, 2005 claimant saw Dr. Binter, a Neurological Surgeon with complaints of limitations in over-head work and left arm weakness. Dr. Binter diagnosed persistent C-6 radiculopathy.

Medical History

13. In 1990 claimant sustained an injury to his upper back while working on a farm.

14. In August 2000, claimant sustained injury to his lower back and neck due to slipping on the floor at work. He treated with Dr. Evans 2-3 times a week for several weeks, then less frequently for a period of time. Treatment included spinal manipulation and moist heat. Treatment notes contain frequent references to neck pain. Dr. Evans did not place claimant at medical end result for this injury.

15. In 2001 claimant injured his right shoulder and back in a motorcycle accident. He underwent a MRI (magnetic resonance imaging) of his shoulder and missed two weeks of work.

16. Claimant continued to treat with Dr. Evans following his 2000 work injury up until September 3, 2003. In May 2003 Dr. Evans noted ongoing and worsening neck symptoms and recommended regularly monthly treatment. It is not clear if the continuation of treatment was related to the 2000 work injury, to other events, or to a combination of causes. The medical notes indicate pain and problems with claimant's low back, upper back, mid back, neck and cervical spine.

17. It is unclear when claimant last received chiropractic treatment prior to August 24, 2004. Dr. Evans computer tracking of visits was not comprehensive in that it identified primarily visits for which their was insurance to bill. Co-workers testified that claimant sought chiropractic care and a "tune-up" over the weeks before the incident. Claimant himself could not recall the date of his last treatment before the incident.

18. Claimant wore both a back brace and a wrist brace at work. He testified that he wore the wrist brace for support. Co-workers testified that claimant wore the brace due to hand numbness.

19. Claimant complained of neck pain over the months preceding the August 24, 2004 incident. His girlfriend recalled his complaint of neck pain in connection with claimant installing laminate flooring. Both claimant's employer and a co-worker testified that claimant complained of neck pain and exhibited restricted neck motion over the month prior to the August 24, 2004 incident.

Activities

20. Claimant has led and continues to lead a physically active life.

21. He was active prior to the August 24, 2004, incident. In the spring or summer of 2004 he installed laminate flooring. In the late summer or early fall of 2004 he spent three weeks building a deck with a friend. During the summer he also purchased and used a Bowflex machine to strengthen his arms. He also rode a motorcycle and an all-terrain vehicle.

22. Claimant continued to be physically active over the months following the August 24, 2004 incident. He traveled to Connecticut Labor Day weekend to attend a motorcycle rally. He hunted nearly every weekend through the fall of 2004. He harvested two deer, including an eight-pointer weighing in at 130 pounds, which together with his girlfriend he dragged for ½ mile.

23. Claimant resumed full duty work on October 18, 2004.

Medical Opinions

24. The medical experts provide conflicting opinions as to whether claimant was injured on August 24, 2004, and if so, the severity of the injury.

25. Dr. Evans was claimant's treating physician for his neck injury. He is a chiropractor. Claimant reported to Dr. Evans that his neck pain and symptoms started a day or so after the pick up truck incident. Dr. Evans diagnosed a cervical strain. He opined that the strain worsened claimant's pre-existing disc disease, thus causing cervical radiculopathy. In support of his opinion he points to the absence of prior debilitating neck pain or neurologic findings, however, on both of these issues the accuracy of his recall is found lacking. He further explained that the action of the truck moving forward, then suddenly stopping caused claimant's head and shoulders to move forward and that such mechanism of injury was consistent with the trauma seen on the MRI. Regardless of the findings, Dr. Evans acknowledged that the MRI did not indicate just when the disc herniation occurred. He treated claimant, noted improvement and made a referral for a MRI. In July 2005 he also made a referral to a neurosurgeon. On the issue of disability, he mentioned claimant's removal from work after the fact.

26. Dr. White performed an Independent Medical Examination for the defendant. Dr. White is board certified in Occupational Medicine. He reviewed the medical records, examined the claimant and viewed the videotape. Dr. White opined that claimant suffered from pre-existing cervical degenerative disc disease. From his review of the videotape he opined that the August incident did not cause injury and could not have caused disc herniation. He explained that when the vehicle stopped, claimant's head, neck and trunk appear to move together as a unit, and not separately as with whiplash. He also noted that if claimant had sustained an acute disc herniation in the incident, his symptoms would have surfaced within a few hours of the event. He noted that individuals with degenerative disc disease commonly have flare ups from time to time, as claimant had in the past. He considered it possible that the incident played a "minor contributing role" in claimant's symptoms, however, he also stated that the symptoms could result from the natural progression of his disease.

Disability For Work

27. Claimant continued to work at Village Auto & Tire until September 9, 2004, then took himself out of work until October 18, 2004.

28. Claimant treated with Dr. Evans regularly through the month of September 2004, yet Dr. Evans prepares no note nor explanation of disability at the time claimant takes himself out of work. Claimant treated with Dr. Evans both the day before and the day after removal from work, yet neither note indicates that claimant had difficulty performing work activities nor disability for work. Instead, the medical notes from September 10, 2004 forward indicate a pattern of slow improvement in both pain and symptoms.

29. Dr. Evans first medical note referencing Claimant's absence from work is on September 20, 2004. At that time he indicates that claimant continues not working.

30. On September 24, 2004, Dr. Evans notes that claimant has been off from work since August 30, 2004. The note is erroneous as claimant worked until September 9, 2004. Four days later, on September 24, 2004, Dr. Evans also releases claimant to return to work, ½ days for a period of three days and full time work thereafter.

31. Claimant returned to work on October 18, 2004 and has worked as a mechanic, full time, without restrictions since.

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 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

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. In weighing the evidence, some consideration is given to the events of August 24, 2004 that are memorialized on tape. The claimant testified that he was dazed following the incident, yet that is not observed. He displays no surprise or discomfort and registers no concern. Based upon review of the videotape and considering the testimony of various witnesses, the events of August 24, 2004 are viewed as a minor incident.

4. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).

5. The Department must also consider the opinion of the medical experts as to causation. In weighing expert's opinions the department considers: 1) whether the expert has had a treating physician relationship with the claimant; 2) the professional's qualifications, including education and experience; 3) the evaluation performed, including whether the expert had all relevant medical records in making the assessment; and 4) the objective bases underlying the opinion. *Yee v. International Business Machines*, Op. No. 38-00WC (2000).

6. Dr. Evans attributes the disc herniation to the truck incident, relying in part on claimant's only "occasional" neck pain prior to the incident and the absence of neurologic findings. From review of the medical records, however, Dr. Evans downplays both, thus his testimony must be discounted. On the issue of the significance of the events of August 24, 2004, his reasoning is also found lacking.

7. Dr. White lacks a treating relationship with claimant, yet his training and specialization exceed that of Dr. Evans. Moreover, his credibility is not questioned. His opinion that claimant did not reveal significant flexion/extension motion in the truck incident is found plausible. Moreover, after consideration of claimant's treatment history, delay in onset of symptoms and return to baseline symptoms, his opinion that the incident could play only a small role in claimant's condition is convincing.

8. The credible evidence supports that the incident played a minor role in contributing to claimant's symptoms. Claimant fails to present the requisite burden of proof necessary to conclude that the disc herniation was caused by the incident.

9. Having determined that the incident played some role in claimant's symptoms, we must proceed to determine the nature and extent of that role. The Department applies several principles in analyzing whether an increase in symptoms represents an "aggravation" or a "flare-up".

10. An aggravation means "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." WC Rule 2.110.

11. A flare-up refers to a temporary increase in symptoms with no corresponding worsening of the underlying condition. *Smiel v. Okemo,* Opinion No. 10-93WC (1993), see also *Cehic v. Mack Molding Co., Inc.* Opinion No. 16-04 WC (2004).

12. The "underlying condition" in this claim is degenerative disc disease. The claimant previously suffered a waxing and waning of symptoms that ranged from severe to mild. Nine days following the incident there is some increase in symptoms, followed by gradual improvement and return to full duty work without restriction. Within a few months of the incident claimant reported low level problems (0-3 on a scale of 10) with some pain free days and no functional limitations. He is placed at maximum medical improvement for chiropractic care in July 2005.

13. The claimant's symptom course, considered along with his treatment history and active lifestyle convincingly establish that the incident caused a temporary flare in symptoms but did not alter the claimant's underlying condition. In the case of a flare-up, the employer is responsible for the workers' compensation benefits that are attributable to the causative incident.

14. On the issue of disability the claimant's evidence fails. Claimant presented no evidence nor explanation of disability at the time that he removed himself from work, this despite the fact that he was seeing Dr. Evans with some frequency. The claimant has the burden of establishing his disability and medical support for it. Dr. Evans mere recitation of claimant being out of work after the fact does not support an award of benefits for disability.

15. A prevailing Claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. §678(a). Claimant has submitted a claim for attorney fees of $7,756.50 and necessary costs of $720.29. These claims are supported with the contingency fee agreement and itemized statements for hours worked and a specific list of charges.

ORDER:

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

1. Pay medical bills related to claimant's flare-up of symptoms totaling 2,889.61
2. Adjust this claim for any further benefits related to the August 24, 2004 incident
3. Pay claimant's attorney fees in proportion to the benefits awarded; one half of total fees which amounts to $3,878.25
4. Pay necessary costs of $720.29
5. Pay interest at the statutory rate from the date the benefit was due until it is paid

Dated at Montpelier, Vermont this 13th day of December 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.