M. M. v. Comet confectionery (December 4, 2007)

STATE OF VERMONT
DEPARTMENT OF LABOR

M. M.

v.

Comet Confectionery

Opinion No. 32-07WC

By: Phyllis Phillips, Esq.,
Contract Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. K-09632

OPINION AND ORDER

Claim submitted on briefs without evidentiary hearing.

APPEARANCES:

William Skiff, Esq. for Claimant
J. Justin Sluka, Esq. for Defendant

ISSUE PRESENTED:

Whether Claimant is entitled to indemnity benefits beginning on March 18, 2007 as a consequence of her compensable knee injury and if so, at what compensation rate.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records

CLAIM:

Temporary total disability benefits under 21 V.S.A. §642
Attorney's fees and costs under 21 V.S.A. §678

FINDINGS OF FACT:

1. Judicial notice is taken of all forms in the Department's file in this matter.

2. Claimant was at all relevant times an employee as defined under Vermont's Workers' Compensation Act.

3. Defendant was at all relevant times an employer as defined under Vermont's Workers' Compensation Act.

4. On November 8, 1996 Claimant suffered a work-related injury to her right knee when she tripped and fell down some stairs. Claimant also dislocated her left shoulder in the fall.

5. At the time of this injury Defendant's workers' compensation insurance carrier was USF&G. USF&G accepted Claimant's injury as compensable and paid benefits accordingly.

6. At the time of this injury Claimant's average weekly wage was $673.30, resulting in a compensation rate of $448.87. Claimant's weekly net income at the time of this injury was $519.80.

7. As a result of this injury Claimant was temporarily totally disabled from November 9, 1996 through April 11, 1997. She returned to work part-time on April 14, 1997 and full-time on June 7, 1997. USF&G paid the appropriate temporary total and temporary partial disability benefits during these periods. In addition, upon Claimant's return to work full-time USF&G paid permanent partial disability benefits to reflect a 4% whole person impairment referable to Claimant's right knee and left upper extremity injuries.

8. Claimant treated with Bruce Foerster, M.D., an orthopedic surgeon, for her right knee injury. In July 1998 she underwent arthroscopic surgery. Following this surgery she was unable to work until November 1998. USF&G accepted the surgery as related to Claimant's November 8, 1996 injury and paid temporary total disability benefits accordingly. At the conclusion of Claimant's disability period she returned to work for Defendant.

9. In October 2001 Claimant underwent a second right knee surgery. Following this surgery she was unable to work until February 2002. Again, USF&G accepted the surgery as related to Claimant's original injury and paid workers' compensation benefits accordingly. Again, at the conclusion of Claimant's disability period she returned to work for Defendant.

10. The record does not reflect the average weekly wage calculations USF&G used to determine Claimant's compensation rate for the temporary total disability benefits it paid after either the July 1998 or October 2001 knee surgeries.

11. On August 25, 2004 Claimant suffered a new injury to her left shoulder causally related to her work for Defendant.[1] This injury was not related in any way to the injury Claimant had suffered in November 1996. USF&G was no longer on the risk at the time of this new injury. Instead, Gallagher Bassett Services, Inc. was the third-party administrator responsible for adjusting Claimant's claim for workers' compensation benefits associated with it.

[1] Claimant's employer at this time was Barry Callebaut, U.S.A., the new owner of Comet Confectionery.

12. Claimant treated with Robert Beattie, M.D., an orthopedic surgeon, for her left shoulder injury. She underwent three surgeries as treatment for this injury – the first on April 8, 2005, the second on November 8, 2005 and the last on September 18, 2006. Gallagher Bassett accepted all of these surgeries as causally related and paid benefits accordingly.

13. Defendant's time sheets reflect that after Claimant's first shoulder surgery she did not work at all from April 8, 2005 until June 14, 2005. Thereafter she worked part-time from June 15, 2005 until mid-August 2005, when she returned to work full-time. Claimant stopped working again on November 8, 2005 when she underwent her second shoulder surgery. She has not returned to work since that time.

14. Following Claimant's first shoulder surgery in April 2005, Gallagher Bassett paid temporary total disability benefits based upon an average weekly wage of $717.78 and weekly compensation rate of $478.52. Although the record does not specifically reflect it, presumably Gallagher Bassett began paying temporary total disability benefits again following Claimant's second shoulder surgery in November 2005. These benefits were terminated on the basis of end medical result on March 15, 2007. With cost of living adjustments, Claimant's compensation rate at that time was $509.12.

15. On March 10, 2006 Defendant terminated Claimant's employment on the grounds that she had exhausted all available leave time and still was unable to return to work.

16. On April 13, 2006 Dr. Beattie performed a follow-up examination of Claimant's left shoulder. As to Claimant's employment status, Dr. Beattie reported as follows:

> [Claimant] notes that her job was terminated at Barry Callebaut. She does have a nurse case manager, Nancy Cousino, with her. She has been encouraged to pursue a job search.

Dr. Beattie noted that Claimant continued to report symptoms in her elbow, arm, shoulder and neck, which appeared to worsen with increased physical therapy. In light of these persistent symptoms, he referred Claimant for an MRI of her cervical spine. Notably, he did not release Claimant to return to work, either full- or modified-duty.

17. Dr. Beattie next examined Claimant's left shoulder in May 2006. Claimant reported that she had discontinued physical therapy and felt much better. With that improvement in mind, Dr. Beattie advised that Claimant could return to work with restrictions pertaining to her shoulder and upper extremities.

18. Apparently Claimant's left shoulder pain did not continue to improve, but rather worsened to the point where she required yet another surgery, in September 2006, performed by John Macy, M.D.

19. The record does not reflect the extent to which Claimant sought work within Dr. Beattie's May 2006 restrictions between the time when he released her to do so and her September 2006 surgery. It appears that her temporary disability benefits continued unabated during this period, however. Presumably Gallagher Bassett determined that the combination of her work search efforts, if any and her medical condition merited that these benefits not be stopped.

20. Claimant's right knee symptoms never fully abated following her 2001 surgery, but instead gradually worsened. In April 2006 she resumed treatment with Dr. Foerster, complaining of progressively increasing pain, swelling and episodes of catching and locking. Dr. Foerster recommended a partial knee replacement, but noted, "We will obviously have to time this appropriately based on the fact that she still has significant problems with the left shoulder." For that reason, knee surgery was not immediately scheduled but rather was postponed.

21. Claimant was determined to be at end medical result for her left shoulder injury on March 7, 2007 and she was released to return to work without restrictions as of that date. Her temporary total disability benefits were terminated on March 17, 2007.

22. On March 29, 2007 Claimant met with Dr. Beattie to discuss the right knee replacement surgery that had been on hold since April 2006. Dr. Beattie completed an "Employee/Employer Medical Status Form" on that date in which he took Claimant "off work" pending the surgery.

23. Claimant underwent right knee replacement surgery on May 14, 2007. USF&G accepted responsibility for the medical expenses associated with this surgery but denied Claimant's claim for temporary disability benefits during her recovery period on the grounds that Claimant had "no wages in the twelve weeks preceding the disability."

CONCLUSIONS OF LAW:

1. The sole issue to be decided in this claim is whether Claimant is disqualified from receiving temporary disability benefits related to her May 2007 knee surgery because she did not earn any wages in the twelve preceding weeks. Defendant argues that temporary disability benefits are intended to replace wages a claimant otherwise would have earned but for his or her injury-related disability, and if there are no wages being earned then there is nothing to be replaced. Claimant argues that the temporary disability benefits she was receiving on account of her shoulder injury in the twelve weeks prior to her knee surgery were themselves "wage replacement" benefits and therefore should be counted as "wages."

2. An injured worker is entitled to temporary total disability benefits "where the injury causes total disability for work." 21 V.S.A. §642. These benefits are payable "during such disability," *id.*, and cease "after such disability ends." 21 V.S.A. §643.

3. With this statutory language in mind, it is important to determine what exactly is being disputed in this claim and what is not. Defendant does not dispute that Claimant suffered a compensable injury to her right knee in 1996, that the May 2007 surgery was causally related to and necessitated by that injury, and that as a result of the surgery Claimant was totally disabled from working for a period of time thereafter. Defendant must be deemed to have conceded, therefore, that Claimant has met the threshold requirements of §642 and is entitled – theoretically, at least – to temporary total disability benefits.

4. What Defendant does dispute is the means by which such temporary total disability benefits are to be calculated and whether, once calculated, they amount to anything greater than zero.

5. Defendant correctly asserts that temporary total disability benefits are designed to be "wage replacement" benefits. Their purpose is to compensate for an injured worker's *current* inability to work; they are calculated, therefore, with reference to his or her *present* earning capacity. *Orvis v. Hutchins*, 123 Vt. 18, 22 (1962).

6. Under Vermont's statutory scheme, for the purposes of calculating temporary disability benefits an injured worker's present earning capacity is determined by reviewing his or her "average weekly earnings during the twelve weeks preceding" the injury. 21 V.S.A. §650(a). Thus, our workers' compensation law assumes that the most accurate way to estimate a worker's *present* earning capacity is to look back at his or her most recent *past* earnings.

7. In most cases, the period of an injured worker's temporary total disability immediately follows his or her injury. Sometimes, however, the worker does not become disabled from working until some time after the initial injury. In addition, sometimes the worker's inability to work does not move forward in one uninterrupted period, but rather occurs at separate intervals. As to these situations, the statute states as follows:

> When temporary disability, either total or partial, does not occur in a continuous period but occurs in separate intervals each resulting from the original injury, compensation shall be adjusted for each recurrence of disability to reflect any increases in wages or benefits prevailing at that time. For the purpose of computation, the adjustments shall be based upon the compensation received by a person in the same grade employed in the same class of employment and in the same district.

21 V.S.A. §650(c).

8. Thus, §650(c) mandates that a claimant's compensation rate for a successive period of disability can never fall below the rate paid for his or her initial period of disability. It can be higher, but it can never be lower. *V.S. v. Kenametal*, Opinion No. 19-07WC (August 2, 2007), citing *Bollhardt v. Mace Security International, Inc.*, Opinion No. 51-04WC (December 17, 2004).

9. Section 650(c) clearly applies in this case. Claimant has suffered four distinct periods of disability causally related to her original 1996 injury – one immediately following the accident itself and one after each of the three surgeries she has undergone – July 1998, October 2001 and May 2007. According to §650(c), her compensation rate for each of these periods of disability "must be adjusted to reflect any increases in wages or benefits prevailing at that time."

10. Defendant argues that the Department has carved out an exception to §650(c) and has declined to award temporary disability benefits in situations where the claimant has not worked at all prior to the most recent period of disability and therefore has no wages to replace. *J.K. v. Joe Knoff Illuminating*, Opinion No. 39-05WC (July 12, 2005); *J.P. v. Pollution Solutions of Vermont*, Opinion No. 23A-01WC (October 5, 2001); *Plante v. Slalom Skiwear*, Opinion No. 19-95WC (May 24, 1995). The cases Defendant cites in support of this position, however, are either inapposite or distinguishable from the current claim.

11. In *J.P. v. Pollution Solutions of Vermont* the claimant was denied temporary disability benefits not because he had no wages in the twelve weeks preceding his claimed periods of disability, but rather because there was insufficient medical evidence to support any disability from working during those times. In *J.K. v. Joe Knoff Illuminating* admittedly the claimant had no wages in the twelve weeks preceding his disability, but that was because he had sold his business and was receiving profits, not wages, instead. Last, in *Plante v. Slalom Skiwear*, the Commissioner specifically found that the claimant's unemployment in the twelve weeks preceding her disability was "due to reasons other than her work-related injury."

12. In each of the cases cited by Defendant, therefore, the claimants' injuries could not be said to have caused their "total disability for work," 21 V.S.A. §642, because they already had opted out of paid employment situations voluntarily, for their own personal reasons rather than because of any medically established disabling condition. Under these circumstances, to award them wage replacement benefits would have amounted to an undeserved windfall, one inconsistent with the statute's intent. *See generally,* 5 *Larson's Workers' Compensation Law* §93.02 and cases cited therein.

13. In contrast, it is significant that in the current claim Claimant's decision not to work in the twelve weeks preceding her May 2007 disability cannot be said to have been voluntary at all. Rather, it was medically necessary as a consequence of her work-related shoulder injury. It is reasonable to presume that were it not for that injury Claimant would have been working – to the same extent that she had in the past – up until March 29, 2007 when her treating physician disabled her on account of her right knee injury. *SeeWood v. Fletcher Allen Health Care*, Opinion No. 15R-98WC (May 5, 1998)(temporary disability benefits awarded where surgery for work-related injury was delayed on account of claimant's pregnancy because it was reasonable to assume that claimant would have continued to work throughout her pregnancy if not for the work injury). Such a presumption is consistent both with the remedial character of Vermont's Workers' Compensation Act and with the liberal construction it is to be given in order to "'achieve its manifest purpose.'" *Wood*, citing *Morrisseau v. Legac*, 123 Vt. 70, 77 (1962).

14. I find, therefore, that it would be unfair to penalize Claimant for having earned no wages in the twelve weeks prior to her most recent period of disability where her failure to do so resulted from a disabling work-related medical condition rather than a voluntary decision on her part.[2] I find that it is appropriate to determine Claimant's average weekly wage with reference to §650(c).

15. The record establishes that Claimant's average weekly wage for the twelve weeks prior to her initial injury and period of disability was $673.30. No evidence was introduced, however, as to Claimant's average weekly wage for the twelve weeks preceding either the July 1998 or October 2001 disability periods. Nor is there any evidence as to "the compensation received by a person in the same grade employed in the same class of employment and in the same district" – the wages of a comparable employee, in other words – during the twelve weeks prior to the most recent period of disability, which I find began on March 29, 2007. *See Cote v. Vermont Transit and St. Johnsbury Academy*, Opinion No. 33-96 (June 19, 1996). In accordance with §650(c), the appropriate compensation rate should be based on whichever of the above periods yields the highest average weekly wage, subject to the applicable weekly net income cap imposed by the statute in effect at the time of Claimant's original injury. *Bollhardt v. Mace Security International, Inc., supra.*

16. Claimant has submitted a request under 21 V.S.A. §678 and Workers' Compensation Rule 10.0000 for costs totaling $52.66 and attorney's fees totaling $2,871.00. I find that Claimant has substantially prevailed on her claim and that the costs and fees requested are reasonable.

[2] Under the circumstances of this claim, I need not decide whether the same conclusion should apply to situations where the disabling medical condition is *not* work-related. Although a claimant's lack of wages may be equally involuntary in such situations, other monetary safety nets may be available to protect against economic hardship in those cases. *See Case of Louis*, 676 N.E.2d 791 (Ma. 1997).

ORDER:

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

1. Temporary disability benefits causally related to Claimant's right knee injury commencing on March 29, 2007 at a rate to be determined in accordance with Conclusion of Law #15 above; and

2. Costs in the amount of $52.66 and attorney's fees totaling $2,871.00.

DATED at Montpelier, Vermont this 4th day of December 2007.

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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.