R. F. v. Fleming Oil (March 20, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

R. F. Opinion No. 35S-07WC

v. By: Jane Gomez-Dimotsis
Hearing Officer

Fleming Oil For: Patricia Moulton Powden
Commissioner

State File No. U-51056 and X-06231

OPINION AND ORDER REGARDING DEFENDANT'S MOTION TO RECONSIDER AND/OR STAY THE ORDER

Defendant asks for reconsideration of the decision issued December 28, 2007 in the above entitled case. Defendant argues a number of errors were made in the Department's original decision and that the decision be reversed or in the alternative that the judgment should be stayed.

Perhaps foremost in the Defendant's numerous and vigorous arguments is the accusation that the Claimant was not entitled to benefits because he had made material misstatements of fact regarding both his previous health care and health conditions. 21 V.S.A. § 708 provides benefits are forfeited if misstatements of material facts are willfully made.

It is well recognized law that the trier of fact has the burden of judging credibility. In the instant case, there was a judgment on the part of the fact finder that the Claimant was credible when describing why any misstatements of facts concerning his health were made. The judgment made was that the Claimant did not deliberately or willfully tell falsehoods regarding any material facts. Also, the medical experts in this case determined that the Claimant was not deliberately making up pain symptoms. In fact, conversion disorder, somatoform disorders and PTSD were all mentioned as possible diagnoses. These conditions, by their very definitions, rely upon the premise that the Claimant is not deliberating creating false symptoms. Therefore, Defendant's argument must fail both on the issue of whether he was deliberately telling falsehoods regarding his prior medical treatment and whether he was deliberately making up symptoms about his health conditions.

In addition, Defendant should read *J.B. v. Two Go Dry Cleaning, Inc*., Opinion No. 02-08WC (January 24, 2008). In this recent case, the Department awarded benefits and the Claimant did make misstatements. However, it was determined that even though the Claimant did not tell the truth regarding a number of issues and lied under oath regarding her employment, and that she played fast and loose with the truth to suit her own purposes, she was awarded benefits because there was some objective medical evidence to support her claim. In the instant case there is also an MRI which showed an injury that Claimant's doctor related to his work injuries and psychological tests which indicated problems which are both objective medical evidence. There

were also statements made to doctors almost immediately following the injury regarding neck and shoulder pain. Therefore, 21 V.S.A. § 708 does not apply.

Second, the Defendant argues strenuously that because the decision was issued beyond sixty days after the record closed and because part of the Claimant's testimony did not record, the fact finder could not make a proper decision. This argument must also fail. First, the Vermont Supreme Court has stated that the sixty day time limit for the issuance of workers' compensation is a guideline only. *Coleman v. United Parcel Service*, 155 Vt. 646 (1990) (mem.). Although it is unfortunate that a part of the Claimant's testimony was not preserved electronically, this did not hamper the ultimate decision in the case. The fact finder had complete and detailed notes from which to work to review the Claimant's testimony and was present at the hearing to observe the testimony and the Claimant's demeanor. There was no error attributable to either a small lack of testimony not being recorded or the extended length of time needed to make the decision regarding compensability of this complicated and somewhat unusual claim.

All parties may agree that the Claimant's symptoms and medical issues do not follow an easily explainable course. Defendant stresses the fact that the Claimant fell only on his elbow. If it were possible or even conceivable to fall on an elbow and not any other body part the Defendant's argument might carry more weight. However, it defies the law of gravity to fall to the ground and somehow be balanced on an elbow alone with the rest of one's body suspended in air. Therefore, it would make sense if a doctor noted tenderness or complaints of pain to the Claimant's neck or back and that some injury to these body parts were compensable.

The Defendant hired Dr. Mann to do an independent psychological analysis and evaluation of the Claimant. He tested the Claimant vigorously with a number of his "objective tests". Although Dr. Mann, himself, admits his results may be erroneous in that they call for a conclusion that the Claimant was schizophrenic, Defendant argues that Dr. Mann's other conclusions be adopted without question. Dr. Mann's ultimate conclusion that the Claimant was suffering from somatoform disorder was accepted. However, the date of the onset of the condition was not. It was the conclusion of the fact finder that the somatoform disorder did not precede the injuries suffered at work. This was due to the high level of functioning the Claimant was able to maintain prior to his two work injuries.

Defendant also complains that the opinion of a treating nurse with a master's degree and a treating physical therapist were found more compelling than his independent psychologist examiner. Defendant should read the recent opinion, *J.D. v. Employer R*, Opinion No. 22-07WC (August 2, 2007) in which it states that the opinion of the treating Physician's Assistant was given great weight and cited the case of *Drew v. Northeast Kingdom Human Services*, Opinion No. 47-06 WC (2007) in which the testimony of a nurse practitioner was found more credible than a countervailing expert opinion by a medical doctor. The same argument applies to the Defendant's complaint regarding the physical therapist's and nurse psychologist's opinions.

There is nothing that Defendant has raised in his arguments that change the previous decision. Therefore, the Motion to Reconsider is denied.

Defendant also asks for a stay of the previous order and judgment against his client. 21 V.S.A. § 675(b) requires an order for a stay to be granted four criteria must all be met. They are: 1) a strong likelihood of success on the merits; 2) irreparable injury if the stay is not granted; 3)

the stay will not substantially harm either party and; 4) the stay will serve the best interests of the public.

Benefits have been ordered to be paid. Defendant argues irreparable harm will result to the insurance carrier if a stay is not granted. However, this is not the case. First of all, after a full evidentiary hearing, it was determined that the Claimant was entitled to benefits. Although, the Department does not believe reversal is likely, the longstanding policy of the Department is to differentiate between payment by an insurer and irreparable harm if reversal occurs. See *Durand v. Okemo Mountain,* Opinion No. 41S-98WC (September 1, 1998). Also, the stay will not serve the best interests of the public. The public is best served by decisions that are not further delayed. The legislative policy is that worker's compensation cases are to be a less expensive resolution of claims. This policy would be undermined if a stay were granted. Thus, since all four of the necessary criteria are not met, the Motion for Stay is denied.

Dated at Montpelier, Vermont this 20th day of March 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.