STATE OF VERMONT
DEPARTMENT OF LABOR

Calvin McKiernan

v.

Standard Register Co.

Opinion No. 47-09WC

By: J. Stephen Monahan, Esq.
Division Director

For: Patricia Moulton Powden
Commissioner

State File Numbers Z-01455 and T-14760

OPINION AND ORDER

Hearing held in Montpelier, Vermont on August 27, 2008
Record closed on September 15, 2008

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
David Berman, Esq., for Defendant Liberty Mutual Insurance Company
Justin Sluka, Esq., for Defendant Travelers Insurance Company

ISSUES PRESENTED:

1. Did Claimant's current low back condition arise out of and in the course of his employment at Standard Register?

2. Did Claimant's right shoulder injury arise out of and in the course of his employment at Standard Register?

3. Is Claimant entitled to temporary disability benefits for any time after Standard Register closed for business and he was laid off?

4. Has Claimant reached an end medical result with regard to his current back and shoulder condition?

5. Is Claimant entitled to permanent partial disability compensation for an earlier workers' compensation claim that occurred in February 2003 while Travelers Insurance Company was on the risk?

PRE-HEARING MOTIONS:

Summary judgment shall be awarded to the moving party if it can demonstrate that there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. Summary judgment is mandated when, after an adequate time for discovery, a party "fails to make a showing sufficient to establish the existence of an element" essential to the case and on which it has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251 (1989), citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In evaluating the propriety of a summary judgment motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22 (1996); *Murray v. White*, 155 Vt. 621 (1991).

In this case, genuine issues of material fact exist that preclude summary judgment for any party. First, the parties dispute the relationship of Claimant's current low back and shoulder complaints to his employment at Standard Register. Claimant's evidence suggests that his stressful, repetitive work with the Hunkler2 machine aggravated his low back and shoulder condition. In contrast, one of Defendants' experts is of the opinion that Claimant's problems are the result of degenerative changes associated with the aging process. The evidence diverges on the critical question of causation, therefore, making summary judgment on the issue inappropriate.

Assuming that Claimant's condition is found to be work-related, furthermore, the parties dispute whether he is either totally or partially disabled from working. Although the parties agree that the reason Claimant ceased working for Standard Register was because the company closed, not because of his injury, they dispute whether his injuries currently prevent him from finding employment. This too presents a genuine issue of material fact.

Last, Claimant and Defendant Travelers dispute whether he is entitled to any permanent partial disability benefits for the February 21, 2003 back injury. This issue as well poses genuine issues of material fact.

Because each of these issues raise disputed questions of material fact, summary judgment is not appropriate, and all such motions are denied.

FINDINGS OF FACTS:

1. At all times relevant to this proceeding, Claimant was an employee and Defendant Standard Register was his employer as these terms are defined in Vermont's Workers' Compensation Act.

2. Travelers Insurance Company ("Travelers") was Defendant's workers' compensation insurer at the time of Claimant's February 2003 compensable work-related injury (State File No. T-14760).

3. Liberty Mutual Insurance Company ("Liberty") was Defendant's workers' compensation insurer from July 1, 2003 until Standard Register ceased doing business in Vermont. Thus, Liberty was on the risk at the time of Claimant's March 2007 injury claim (State File No. Z-1425).

4. The parties have stipulated that Travelers does not bear any liability for Claimant's current back and shoulder claim. It may be liable for permanency benefits related to the 2003 injury.

5. Standard Register closed and ceased business on or about March 27, 2007.

6. Claimant worked full-time for Standard Register until the day the company closed.

7. Claimant did not seek treatment for his current alleged low back injury between July 2003 and March 14, 2007 (six days prior to his last day of work). Claimant worked full-time during that period, and no medical provider restricted his work activities during that period.

8. Claimant also first reported shoulder complaints on March 14, 2007. He saw a physician but no work restrictions were placed on him at that time.

9. According to Claimant, he had both back and shoulder complaints between July 2003 and March 14, 2007, but he feared losing his job if he reported another injury and so decided not to do so until just a week prior to being laid off. I do not find Claimant's fear-of-termination story credible. He had filed complaints in the past, and had not been penalized by the company. In fact, he filed a mental stress claim during this period, and even quit his job for a week, but was rehired with no loss of seniority or benefits. I think it more likely that if Claimant was reluctant to file a claim, it was because he feared that if he were taken out of work he would be deemed ineligible for the severance package that the company was offering.

10. By his own admission, Claimant was willing to tailor his story to achieve a possible end. For example, after learning that the plant would be closing, Claimant thought he might want to become a truck driver. To that end, he went to a Dr. Iqbal, told the doctor that he had no complaints at all and sought a medical opinion that he was physically able to drive a truck. Claimant now alleges that these statements were not accurate, and that he only made them in order to obtain a medical release to drive a truck.[1]

[1] As an aside, Claimant's entire truck-driver scheme was rather unorthodox and demonstrates questionable judgment. He did not seek any formal training or evaluation, and evidently did not fully comprehend the demands of truck driving in any respect. After arranging to drive a friend's truck, Claimant discovered that the job was harder than he initially had imagined and thereafter abandoned the plan.

11. Claimant's testimony surrounding the termination of physical therapy treatment for his 2003 back injury is also telling. The physical therapy notes indicate that his condition was improving over time. On March 28, 2003 Claimant cancelled his appointment with the physical therapist, reporting that he had no symptoms. He sought no further treatment. At his deposition in 2008 Claimant acknowledged that his back had improved with physical therapy. At the formal hearing, however, Claimant's testimony was somewhat different. There he stated that he cancelled his physical therapy appointment because he was unhappy and angry with his employer, who was asking when treatment would finish. Claimant also suggested that he did not like the "light duty" jobs offered by Standard Register, so he decided to stop going to physical therapy and return himself to full duty work status. This pattern of changing his story to achieve what he perceived to be a more beneficial result makes Claimant a less than credible witness.

Temporary Disability Benefits

12. Notwithstanding Claimant's limited credibility, I find Dr. Bucksbaum's opinion, supported in part by Dr. Ensalada's opinion as well, compelling. Claimant was employed for several years in a difficult job. The stresses and strains of that job caused him injury and accelerated the onset of his arthritic degenerative condition.

13. Drs. Bucksbaum and Ensalada believe that Claimant's current back injury is not a recurrence of his February 2003 injury. Rather, they believe that Claimant's work at Standard Register after the arrival of the Hunkler2 machine in July 2003 resulted in an aggravation of his pre-existing condition.

14. In contrast, Dr. Johansson is of the opinion that Claimant's current back and shoulder problems are the result of age-related degenerative changes, and have not been caused by his work for Standard Register. Dr. Johansson does not adequately address whether Claimant's work in any way accelerated the pre-existing condition. In this respect, I find Dr. Johansson's opinion to be both less complete and less credible than the opinions of Drs. Bucksbaum and Ensalada.

15. Based on the medical records submitted, Claimant did not seek medical treatment for his low back or right shoulder between November 2003 and August 2006.

16. On or about June 11, 2007 Dr. Bucksbaum placed work restrictions on Claimant but did not bar him from all work. According to Dr. Bucksbaum, Claimant had a limited work capacity dating back to March 20, 2007. Under the circumstances, I find that opinion too speculative to accept. Claimant had managed to work a full schedule right up until that date, and presumably would have continued to work thereafter had he not been laid off due to the company's closure. I find that the evidence establishes that June 11, 2007 is the earliest date that Claimant established an entitlement to temporary partial disability.

17. Claimant began looking for work, and kept a job search log as soon as he learned that he was required to do so. Claimant is entitled to temporary partial disability benefits from June 11, 2007 through April 2008, and thereafter for each week in which he establishes that he performed a good faith work search. Notwithstanding the fact that he has some work capacity, Claimant has not worked at all during this period. Therefore, his temporary partial disability rate is equivalent to the temporary total disability benefit – two-thirds of his average weekly wage for the twelve weeks preceding March 20, 2007.

Permanent Partial Disability Benefits

18. Claimant essentially declared himself at end medical result on March 28, 2003 when he cancelled his physical therapy appointment and announced that he was ready for full duty work. He made no request for permanent partial disability benefits at that time, and the insurer on the risk at the time (Travelers) made no effort to evaluate whether any permanency benefits were due.

19. In 2003 the applicable statute of limitations within which to make a workers' compensation claim was six years. Claimant's claim for permanency benefits attributable to this earlier injury is timely. Because of the lapse of time between claimant's "medical end" relating to the 2003 injury and the date of his permanency evaluations, an accurate determination is difficult, but not impossible.

20. Workers' Compensation Rule 18.1100 provides that "The employer (insurer) shall take action necessary to determine whether an employee has any permanent impairment as a result of the work injury at such time as the employee reaches a medical end result." Taken in its proper context, the rule contemplates that the trigger for the insurer's action will be either a medical opinion establishing end medical result or a claim for permanent disability benefits. The rule does not anticipate a circumstance where a claimant would deem him- or herself at end medical result. As that is essentially what happened in this instance, I will not interpret Rule 18.1100 to require the insurer to have sought a permanency opinion before a claim was made or a medical determination rendered. I do note, however, that an insurer certainly could protect itself by seeking a determination of both end medical result and permanency at the time a claimant returns to work.

21. I find that Claimant had no impairment after the 2003 injury. Although Dr. Bucksbaum offered an opinion that Claimant had a 5% whole person impairment, he could not credibly testify that Claimant exhibited muscle spasm or guarding, asymmetric loss of range of motion, or non-verifiable radicular complaints at the time he returned to full duty work. I am therefore left with the opinion of Dr. Ensalada, which, although it appears to be an effort to offer a legal opinion rather than a medical opinion, is at least consistent with the 5th edition of the AMA Guides. Since the burden of establishing an entitlement to any permanency benefits is on the claimant, and Claimant has not met that burden, no benefits are awarded.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, sufficient competent evidence must be submitted verifying the causal connection between an injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984). Where the causal connection between an accident and an injury is obscure, and a lay person would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).

2. There must be created in the mind of the trier of fact something more than possibility, suspicion or surmise that the incidents complained of were the cause of the injury and resulting disability. Claimant must demonstrate that the most probable hypothesis is that the work incidents caused or aggravated the injury. *See, Burton v. Holden Lumber*, 112 Vt 17 (1941).

3. If a claimant has a pre-existing condition, he or she may still be entitled to workers' compensation benefits if he or she is able to demonstrate that the work incident has aggravated or accelerated that pre-existing condition. *See Jackson v. True Temper*, 151 Vt. 592, 595 (1989).

4. The general rule is that a claimant who voluntarily quits his or her job for reasons unrelated to a compensable work injury is not entitled to temporary total disability. The workers' compensation statute is remedial in nature, and so, to avoid harsh, unfair results, there is an exception to the general rule for a claimant who can demonstrate: (a) a work injury; (b) a reasonably diligent attempt to return to the work force; and (c) that the inability to return to the work force (or a return at reduced wages) is related to the work injury and not to other unrelated factors. *See, e.g., J. D. v. Putney Paper Co.*, Opinion No. 13-08WC (April 8, 2008); *J.P. v. Pollution Solutions of Vermont*, Opinion No. 23A-01WC (October 5, 2001), citing *Andrew v. Johnson Controls*, Opinion No 3-93WC (June 13, 1993).

5. When a claimant had no wages prior to the date of disability, workers' compensation benefits are calculated based on the pre-injury wages plus any additional cost of living increases that may have accrued in the interim. See *J. D. v. Putney Paper Co., supra*; *J.P. v. Pollution Solutions of Vermont, supra*.

6. I conclude that Claimant's receipt of severance benefits does not prohibit his receiving workers' compensation benefits for the same period. Severance benefits are paid in exchange for the release and waiver by the employee of any right to sue the employer. They are sufficiently different from wages so as not to be considered when evaluating a right to temporary disability benefits.

7. I also conclude that Claimant's application for and receipt of unemployment benefits does not defeat his claim for temporary disability benefits. Claimant's physician had placed work restrictions on him, but had not prohibited all forms of work. Furthermore, to the extent that Claimant receives temporary disability benefits during a period when he also received unemployment benefits, he will have to repay the latter.

8. The Workers' Compensation Act provides:

> Where the disability for work resulting from an injury is partial, during the disability and beginning on the eighth day thereof, the employer shall pay the injured employee a weekly compensation equal to two-thirds of the difference between his average wage before the injury and the average weekly wage which he or she is able to earn thereafter.

21 V.S.A. §646.

9. Claimant has established that he was temporarily partially disabled as of June 11, 2007. He is entitled to temporary partial disability benefits from June 19, 2007 through April 2008, and thereafter for each week in which he establishes that he performed a good faith work search. Since Claimant was unable to find employment consistent with his limited ability to work payment shall be based on two-thirds of his average weekly wage for the twelve weeks preceding March 20, 2007.

10. For the purposes of workers' compensation, "permanent disability" is established when the injured employee either reaches an end medical result or when maximum earning power is restored through resumption of employment. *Wroten v. Lamphere*, 147 Vt. 606, 610, (1987); *Orvis v. Hutchins,* 123 Vt. 18, (1962). The claimant has the burden of proving that a work injury has resulted in a permanent impairment. The degree of impairment must be determined using the 5th edition of the AMA guides. 21 V.S.A. §648. Claimant failed to meet his burden of establishing that he had a permanent partial disability impairment when he returned to full duty work in March of 2003.

ORDER:

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that:

1. Claimant's request for an award of permanent partial disability benefits based on the 2003 injury is **DENIED**.

2. Liberty Mutual is **ORDERED** to pay:

    a. All medical benefits that are determined to be reasonable and necessary treatment for Claimant's compensable March 2007 work injury;

    b. Temporary partial disability benefits from June 19, 2007 through April 2008, and thereafter for each week in which Claimant establishes that he performed a good faith work search;

    c. Liberty Mutual is further ordered to promptly evaluate Claimant's entitlement to vocational rehabilitation services.

4. Claimant shall have 30 days from the date of this Order to submit his request for costs and attorney fees.

DATED at Montpelier, Vermont this 2nd day of December 2009.

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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.