Borislavka Lukic v. Rhino Foods (December 15, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Borislavka Lukic

v.

Rhino Foods

Opinion No. 49-09WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. X-61669

OPINION AND ORDER

No hearing held; claim submitted on written record and pleadings
Record closed on July 29, 2009

APPEARANCES:

Douglas Bishop, Esq., for Claimant
William Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Has Claimant reached an end medical result for her January 25, 2006 work injury and if so, when did that occur?

2. Is Defendant obligated under 21 V.S.A. §640 to pay for Claimant's September 23, 2008 evaluation by the Work Enhancement and Rehabilitation Center and/or for her February 2, 2009 MR arthrogram?

3. Is Defendant obligated under 21 V.S.A. §640 to pay for Claimant's March 19, 2009 rotator cuff revision surgery and associated follow-up treatment?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Form 27 filed September 18, 2008
Claimant's Exhibit 2: Form 2 filed November 15, 2008
Claimant's Exhibit 3: February 24, 2009 correspondence from Attorney Blake
Claimant's Exhibit 4: Form 2 filed June 30, 2009
Claimant's Exhibit 5: Deposition of John Macy, M.D., May 12, 2009
Claimant's Exhibit 6: Deposition of Claimant, March 4, 2009
Claimant's Exhibit 7: *Curriculum vitae,* John Macy, M.D.
Claimant's Exhibit 8: Itemized statement of costs and attorney fees

Claimant's Exhibit 9: Correspondence from Claimant's attorney
Claimant's Exhibit 10: Correspondence from Claimant's attorney

Defendant's Exhibit A: Form 2
Defendant's Exhibit B: First Report of Injury
Defendant's Exhibit C: Form 27 and accompanying correspondence, July 3, 2007
Defendant's Exhibit D: August 2, 2007 correspondence from Marge McCluskey
Defendant's Exhibit E: Stipulation and Order
Defendant's Exhibit F: April 28, 2008 correspondence from Attorney Blake
Defendant's Exhibit G: July 30, 2008 correspondence from Attorney Bishop
Defendant's Exhibit H: August 22, 2008 correspondence from Attorney Blake
Defendant's Exhibit I: Form 27 approved 9/26/08
Defendant's Exhibit J: September 19, 2008 correspondence from Marge McCluskey
Defendant's Exhibit K: January 9, 2009 correspondence from Attorney Bishop
Defendant's Exhibit L: February 4, 2009 correspondence and attached Interim Order
Defendant's Exhibit M: April 30, 2009 correspondence and attached Interim Order

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640
Costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

3. Defendant hired Claimant to work on its production line in January 2001. Her duties were varied, as she rotated among seven or eight different positions on the line. Most of her work was repetitive in nature.

4. Claimant's prior medical history includes two work-related right upper extremity injuries. In August 2003 she was diagnosed with a repetitive use syndrome. Claimant treated conservatively for this condition, and by November 2003 she had reached an end medical result and returned to work without restrictions. In April 2004 Claimant again treated conservatively for a right upper extremity injury, this time diagnosed as a trapezius strain. By September 2004 she was able to return to full duty work.

5. On January 25, 2006 Claimant injured her right shoulder while performing repetitive tasks on the production line. Defendant accepted the injury as compensable and began paying workers' compensation benefits accordingly.

6. As she had in the past, Claimant treated conservatively for this injury, diagnosed initially as a right shoulder strain. She continued to work, but with various restrictions, including no excessive repetitive use of her right arm or reaching above her right shoulder. Subsequently additional restrictions were added, and Defendant could no longer accommodate them. As a result, Claimant ceased work on May 31, 2006 and Defendant began paying temporary total disability benefits.

7. Claimant's right shoulder pain persisted, and radiated into her neck as well. An MRI revealed a small partial rotator cuff tear, which Dr. Macy, her treating orthopedic surgeon and a fellowship-trained shoulder specialist, surgically repaired on August 29, 2006.

8. Following surgery Claimant underwent physical therapy. She made slow progress, but continued to experience pain, reduced strength and ongoing impingement symptoms.

9. In May 2007 Claimant underwent a functional capacities evaluation, which determined that she had a medium work capacity, albeit with restrictions. At a follow-up appointment in June 2007 Dr. Macy determined that Claimant had reached an end medical result and released her to return to work in accordance with the functional capacities evaluation. Shortly thereafter, at her attorney's referral Claimant underwent a permanency evaluation with Dr. Davignon, who rated her with a 4% whole person impairment.

10. With Dr. Macy's end medical result opinion as support, the Department approved Defendant's discontinuance of Claimant's temporary total disability benefits effective July 7, 2007. Also as of that date Defendant began advancing permanency benefits in accordance with Dr. Davignon's 4% impairment rating.

11. Still Claimant's symptoms persisted. At the suggestion of both Dr. Macy and Dr. Davignon, in August 2007 Claimant underwent an evaluation with Dr. Rinehart to determine if there might be a cervical origin to her complaints. A prior MRI had revealed degenerative disc disease in Claimant's neck, but nerve conduction studies revealed no evidence of cervical radiculopathy. Dr. Rinehart concluded that Claimant's symptoms most likely represented musculoskeletal shoulder dysfunction, not cervical nerve root involvement.

12. Dr. Monsey, the orthopedic surgeon to whom Claimant was referred by Dr. Rinehart, agreed with this analysis. He recommended against any treatment for the neck, surgical or otherwise, and instead advocated that treatment be focused on Claimant's shoulder.

13. There is insufficient evidence from which to conclude, to the required degree of medical certainty, that Claimant's cervical disc disease was either caused or aggravated by her work for Defendant.

14. Claimant returned to Dr. Macy for a re-evaluation of her ongoing shoulder complaints in mid-September 2007. Dr. Macy suspected a partial re-tear, subacromial adhesions or chronic rotator cuff tendinitis. To aid in diagnosis and further treatment Dr. Macy recommended an MR arthrogram. Pending the results of that testing, he determined that Claimant was no longer at end medical result.

15. The MR arthrogram revealed a small full thickness re-tear of Claimant's rotator cuff tendon. As treatment, Dr. Macy performed a second rotator cuff surgery on January 24, 2008.

16. Dr. Macy having determined that Claimant was no longer at end medical result, the parties negotiated a resumption of her temporary total disability benefits effective October 30, 2007. At the same time, they stipulated to leave as is the permanency benefits Claimant had received from July through October, representing the 4% impairment that Dr. Davignon had rated.

17. Again Claimant underwent post-surgical physical therapy. Again she made at best only inconsistent gains and continued to complain of disabling pain and reduced strength and mobility. Nevertheless, upon re-evaluating Claimant's condition in July 2008 Dr. Macy anticipated that she would reach an end medical result by the end of September.

18. At Defendant's referral, in August 2008 Claimant underwent an independent medical evaluation with Dr. Backus. Dr. Backus determined that Claimant had reached an end medical result and rated her with a 9% whole person permanent impairment. Based on this opinion, Defendant again sought to terminate Claimant's temporary total disability benefits on end medical result grounds. The Department approved this discontinuance effective September 28, 2008. Defendant began advancing permanency benefits in accordance with Dr. Backus' rating (taking a credit for the 4% previously paid pursuant to Dr. Davignon's earlier rating).

19. In the meantime, Claimant had returned to both Dr. Monsey and Dr. Macy for further evaluation of her ongoing symptoms. Dr. Monsey again concluded that Claimant's complaints most likely were referable to her shoulder, not her neck. As treatment he recommended that she be referred to the Work Enhancement and Rehabilitation Center (WERC) for possible participation in a multidisciplinary functional restoration program.

20. Claimant underwent the WERC evaluation on September 23, 2008 and was determined an appropriate candidate for their program. Defendant refused either to pay for the evaluation or to approve Claimant's participation in the program, however. Defendant asserted that the WERC program did not constitute reasonably necessary treatment causally related to Claimant's compensable shoulder injury, but rather was focused on treating her non-work-related cervical condition.

21. Dr. Macy supported Claimant's entry into the WERC program as reasonably necessary treatment directed at her work-related shoulder injury. Pending Claimant's completion of the program, furthermore, Dr. Macy determined that she was not yet at end medical result.

22. Dr. Macy also supported Claimant's request for a repeat MR arthrogram, though somewhat tepidly. An MR arthrogram might reveal another re-tear in Claimant's rotator cuff. Even if it did, however, Dr. Macy feared that further revision surgery might not alleviate her pain complaints completely, given the chronic nature of her symptoms, the fact that she already had undergone one only marginally successful revision surgery and the fact that she suffered concurrently from cervical disc disease in addition to her rotator cuff issues.

23. Notwithstanding that Dr. Macy did not concur with Dr. Backus' end medical result determination, Claimant did not initially notify the Department that she disputed Defendant's discontinuance of her temporary disability benefits. Instead, Claimant used the ongoing-treatment-versus-end-medical-result issue as the starting point for a discussion with Defendant as to the possibility of negotiating a global settlement of her workers' compensation claim. This discussion continued throughout November and December 2008, but the parties were unable to reach agreement. Thus, in early January 2009 Claimant notified the Department that she disputed Dr. Backus' end medical result determination and asked that it rescind its approval of Defendant's discontinuance. This the Department declined to do.

24. Claimant underwent the MR arthrogram, which Dr. Macy ultimately had endorsed, in February 2009. It revealed another small full thickness re-tear in her rotator cuff tendon. On March 19, 2009 Dr. Macy performed a third surgery to repair the tear. Claimant has not yet reached an end medical result from that procedure. She is again in physical therapy and has reported that she feels better than she did at this point in her recovery from either of her previous surgeries. She has not yet been released to return to work, although Dr. Macy testified that she might be able to do so provided the job is sedentary and involves no use at all of her right upper extremity.

25. At Defendant's request, Dr. Backus reviewed Dr. Macy's most recent operative report, as well as Claimant's physical therapy progress notes since undergoing the third surgery. Dr. Backus concluded that it is impossible to tell if Claimant will achieve significant further improvement from the March 2009 surgery. In his opinion, her prognosis is guarded.

26. Defendant has refused to pay either for the February 2009 MR arthrogram or for the March 2009 surgery and ensuing treatment. It asserts that these treatments were neither reasonably necessary nor causally related to Claimant's compensable shoulder injury.

27. Dr. Macy testified that Claimant's treatment has been both reasonably necessary and causally related. He noted that once repaired, rotator cuff tendons have a very high re-tear rate. To compound the problem, Claimant's rotator cuff tendon is very thin, and therefore even more susceptible to re-tearing. According to Dr. Macy, Claimant's re-tear most likely occurred because her tendon was both thin (a result of her anatomy) and diseased (a result of her original work injury). In his opinion, therefore, it was causally related to her compensable injury to the same extent as each of her prior tears and re-tears were.

28. Dr. Macy also testified that the treatment Claimant has received to date, including her most recent surgery, has been reasonably necessary. He noted that Claimant was relatively young, did not smoke, had not reinjured herself and although slightly obese, did not have any other significant biological factors working against her. In his opinion, it was reasonable to attempt a third surgical repair. Dr. Macy admitted, however, that it was highly unlikely that he would consider any additional surgeries at this point.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide,* 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press,* 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. Once a claim has been accepted and benefits have been paid, the party seeking to discontinue bears the burden of proving that it is proper to do so. *Merrill v. University of Vermont,* 133 Vt. 101, 105 (1974). As to the reasonable necessity of medical treatment, however, Claimant bears the burden of proof. *MacAskill v. Kelly Services,* Opinion No. 04-09WC (January 30, 2009).

3. In this claim, Defendant maintains that Claimant reached an end medical result, as Dr. Backus determined, in August 2008. It asserts that all subsequent treatment, including the September 2008 WERC evaluation, the February 2009 MR arthrogram and the March 2009 rotator cuff revision surgery, was either palliative in nature or not causally related. Therefore, it argues, its discontinuance was proper.

4. With Dr. Macy's testimony as support, Claimant counters that the treatment she has undergone since September 2008 was reasonably calculated to lead to further improvement in her medical condition, and that it therefore negates a finding of end medical result.

5. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).

6. I find Dr. Macy's opinion to be the most credible one here. His credentials as an orthopedic surgeon and shoulder specialist are strong, and his opinion as to the causal relationship between Claimant's original rotator cuff tear and her subsequent re-tears is based on his own surgical experience. Although he might initially have viewed the third surgery with some trepidation, his decision to go forward with it represented a reasonable attempt to restore a higher level of function in Claimant's shoulder.

7. In contrast, Dr. Backus' opinion does not even address the causal relationship between Claimant's original work injury and her treatment after September 2008. As to reasonable necessity, furthermore, Dr. Backus states only that Claimant's prognosis remains guarded and that it is impossible to predict whether she will realize significant further improvement from the March 2009 surgery. The reasonable necessity of medical treatment is to be determined from the perspective of what was known at the time it was undertaken, however, not in hindsight. *MacAskill, supra.*

8. I conclude, therefore, that the more credible medical evidence establishes that Claimant's treatment from September 2008 forward was both reasonably necessary and causally related to her work injury. I further conclude that the treatment was reasonably calculated to lead to further improvement in her medical condition. For that reason, I conclude that Claimant did not reach an end medical result in August 2008, that she has not yet reached an end medical result and that Defendant's September 2008 discontinuance was improper.

9. As a final defense, Defendant argues that Claimant should be precluded from disputing its September 2008 discontinuance because she did not seasonably notify the Department of her intention to do so. I can find neither a legal nor an equitable basis for this assertion. The statute is silent as to the appropriate time frame for a claimant to request that the Department reconsider its approval of an employer's discontinuance. Without a clear legislative directive, I am unwilling to apply a thirty-day limit, as is mandated both in the context of appealing a formal hearing decision, *see* 21 V.S.A. §§670, 672, and in the context of appealing a trial court decision to the Vermont Supreme Court, *see* V.R.A.P. 4. Nor is the ten-day limit for filing post-judgment motions under V.R.C.P. 59(e) appropriate. Perhaps the six-month time frame provided by 21 V.S.A. §656(a) and/or the three-year statute of limitations provided by §660(a) might be appropriate, but even those provisions are not on their face applicable to the current situation.

10. Under the particular circumstances of this case, furthermore, Defendant was fully aware that Claimant disputed Dr. Backus' end medical result determination, and was not prejudiced in any way by her delay in triggering the Department's involvement. To be sure, following the Department's approval of its discontinuance Defendant did advance permanency benefits in accordance with Dr. Backus' impairment rating, but these were benefits that would have been owed in any case. The fact that in hindsight Defendant may have paid them prematurely does not affect Claimant's entitlement to temporary disability benefits in any respect.

11. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $40.80 and attorney fees totaling $6,174.00. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded. As for attorney fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded as well.

ORDER:

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

1. Temporary total disability benefits retroactive to their discontinuance on September 28, 2008 and ongoing properly discontinued pursuant to 21 V.S.A. §643a and Workers' Compensation Rule 18;

2. Medical benefits covering all reasonably necessary medical services and supplies causally related to Claimant's January 25, 2006 work injury, including but not limited to the September 2008 WERC evaluation, the February 2009 MR arthrogram and the March 2009 rotator cuff revision surgery and associated follow-up treatment;

3. Interest on the above amounts in accordance with 21 V.S.A. §664; and

4. Costs totaling $40.80 and attorney fees totaling $6,174.00.

DATED at Montpelier, Vermont this 15th day of December 2009.

_____
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.