Calvin McKiernan v. Standard Register Co. (December 21, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Calvin McKiernan

v.

Standard Register Co.

Opinion No. 47R-09WC

By: J. Stephen Monahan, Esq.
Division Director

For: Patricia Moulton Powden
Commissioner

State File Numbers Z-1455 and T-14760

APPEARANCES:

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

RULING ON CLAIMANT'S MOTION TO RECONSIDER

Claimant requests that the Commissioner reconsider a portion of her December 2, 2009 award of benefits. Claimant asserts that the decision misinterpreted the Department's Worker's Compensation Rule 18.1100. He claims that ¶20 of the findings "unduly narrows the scope of the Rule limiting the beneficial intent of the Rule which is to impose an affirmative obligation on the employer/carrier to determine whether an injured worker has a permanent partial impairment."

RECONSIDERATION DENIED

The disputed Paragraph 20 of the decision provides:

> 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.

Claimant attempts to portray the provision as a "gutting" of the Rule, but that is simply not the case. By its express language, the paragraph noted that the Rule did not anticipate the precise

fact pattern in this case, and the department declined to try and interpret the rule to cover a situation not anticipated.

Furthermore, if we look at all of the language in the Rule in effect at the time of this injury, it reads:

> **18.1100** Unless the claimant has successfully returned to work, temporary disability compensation shall not be terminated until a Notice of Intention to Discontinue Payments (Form 27), adequately supported by evidence, is received by both the commissioner and the claimant. If the claimant is represented by counsel, a copy of the notice shall also be sent to his or her attorney. 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.

It places an affirmative obligation on a worker's compensation insurer to determine the existence of any permanent impairment at the point the worker reached medical end result. The Rule places no obligation on the worker's compensation insurer prior to that medical endpoint determination. In this case that determination was only made by medical professionals retrospectively, at the time a new claim was filed.

Since Claimant's request for reconsideration is without merit it is DENIED.

DATED at Montpelier, Vermont this 21st day of December 2009.

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Patricia Moulton Powden
Commissioner