Paul Baldwin v. Velan Valve (November 19, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Paul Baldwin

v.

Velan Valve

Opinion No. 45-09WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. W-04562

OPINION AND ORDER

Hearing held in Montpelier on October 2, 2009
Record closed on October 26, 2009

APPEARANCES:

Ron Fox, Esq., for Claimant
Gregory Boulbol, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to additional workers' compensation benefits causally related to his March 15, 2005 compensable injury?

2. If yes, to what benefits is Claimant entitled?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Deposition of Elizabeth McLarney, M.D., September 24, 2009
Claimant's Exhibit 2: Trash bag (offered for identification only)

Defendant's Exhibit A: *Curriculum vitae*, George White, M.D.

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640
Interest, 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 his employer as those terms are defined in Vermont's Workers' Compensation Act.

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

3. Claimant's vocational training and experience is as a machinist. In January 2005 he began working for Defendant. His job required him to float from spot to spot, filling in for other employees. On any given day he might run a mill, set up a lathe or operate some other machine.

4. On March 15, 2005 Claimant was setting up a job on a lathe. Due to a programming error, a part got caught in the machine and Claimant had to remove it. As he pulled on the part, which weighed approximately 50 pounds, he injured his lower back. Defendant accepted this injury as compensable and paid workers' compensation benefits accordingly.

5. As a result of this injury Claimant experienced low back pain radiating into his left leg. He was diagnosed with a disc herniation at L5-S1, which affected the S1 nerve root as well. After conservative measures failed to alleviate his symptoms, Claimant underwent L5-S1 disc surgery in June 2005.

6. Claimant had only temporary pain relief following surgery, and then his symptoms recurred. He was left with chronic, constant low back pain, radiating from his left buttocks down his left leg and into his left ankle. Claimant treated for this pain with narcotic pain medications, including oxycontin and methadone, which he took daily. Later, Claimant began taking oxycodone as well for breakthrough pain.

7. Following an independent medical evaluation with Dr. Fenton in May 2006 Claimant was placed at end medical result and rated with a 13 percent whole person permanent impairment. Defendant paid permanent partial disability benefits in accordance with this rating.

8. In late 2006 Claimant returned to work, briefly first for Hayward Tyler Co. and then for Moscow Mills. Initially Claimant's job at Moscow Mills was as a machinist; later he was promoted to a position involving purchasing, planning and quoting. Claimant enjoyed his work at Moscow Mills, and because his job responsibilities accommodated his need to change positions he was able to work full-time and full-duty notwithstanding his ongoing low back and left leg symptoms.

9. As is common in patients with chronic low back pain, Claimant experienced occasional activity-related flare-ups. In November 2006, for example, he strained his back while playing with his children. In February 2007 he did so again after shoveling snow, and in February 2008 he reported increased pain, again after shoveling snow. Following each of these incidents Claimant briefly increased his dosage of narcotic pain medications, after which his symptoms returned to their baseline level.

10. Notably, even when his symptoms were at their baseline, Claimant required fairly high levels of narcotic pain medications to control them. With those medications, however, he was "going along with his life," working full time and engaging in routine activities of daily living.

11. One of Claimant's routine household-related duties was to help his wife take care of the trash. Every other day or so Claimant's wife would leave a full 13-gallon white kitchen trash bag outside the front door of their home. When Claimant came home, he would put the bag in the back of his pickup truck, where it would stay until his next trip to the dump. The weight of each bag varied depending on its contents, but Claimant testified credibly that an "average" trash bag probably weighed about 12 pounds. Claimant testified that he regularly performed this activity with no detrimental effect on his low back or left leg pain.

12. On November 12, 2008 Claimant came home and found a trash bag waiting at the door. As was his practice, he carried the bag to his truck, dropped the tailgate and placed the bag in the truck bed. As he did so he felt a sharp pain in his lower back, radiating into his left buttocks and down his left leg. Claimant left the tailgate as it was, immediately went inside and lay down on the couch.

13. Claimant testified that the location of his pain was exactly as it had been at the time of his original injury, but that it was two to three times more intense. Unlike previous flare-ups, furthermore, this time the increased pain did not respond to additional narcotics and did not resolve back to its baseline. Instead, it has remained steady at the new, more intense level.

14. Claimant testified that the increased pain he has experienced since the trash bag incident has precluded him from engaging in almost any activity. He has not worked since the incident occurred, and spends most of his day lying on his back. His left leg gives out on him at times, so to prevent himself from falling he now walks with a cane. Clearly he no longer is "going along with his life" to the extent that he was previously.

15. Claimant has undergone two independent medical evaluations since the trash bag incident, one at Defendant's request with Dr. White, an occupational medicine specialist, and one at his own attorney's referral with Dr. McLarney, an orthopedic surgeon. The areas of agreement between the two doctors far outnumber the issues upon which their opinions diverge:

- Both doctors agree that Claimant's 2005 work injury caused his L5-S1 disc to herniate, which left his spine in a weakened condition and his disc more susceptible to future exacerbations. Both further agree that the trash bag incident resulted in an increase in symptoms emanating primarily from the same area of the back. Both agree that but for the fact that Claimant's back already was weakened in that area, it is unlikely that lifting the bag and placing it in his truck would have been in any way problematic. In that sense, therefore, both agree that the trash bag incident somehow acted upon Claimant's preexisting condition and thereby became the instigating event for the worsened symptoms that followed.

- Both doctors agree that whether Claimant's worsened symptoms are due to scar tissue caused by his June 2005 disc surgery or to a new disc herniation is unclear. To clarify the diagnosis, both agree that it would be reasonable for Claimant to undergo an MRI with gadolinium, or contrast dye.

- Both doctors agree that if the MRI reveals the problem to be scar tissue, surgery will be ineffective at relieving Claimant's symptoms. If the MRI reveals new disc material, both doctors agree that surgery might be an option, although for various reasons Dr. White believes Claimant is not a good surgical candidate.

- Both doctors agree that a multidisciplinary functional restoration or rehabilitation program may present an efficacious treatment route for Claimant. By participating in such a program hopefully Claimant would be able to decrease his dependence on narcotic pain medications, increase his exercise tolerance and improve his overall strength and conditioning level.

- Both doctors agree that Claimant should be able to return to work, at least at a sedentary work capacity. Dr. White believes that Claimant has no structurally limiting condition that would preclude him from doing so immediately. Dr. McLarney believes that it would be unrealistic to expect Claimant to transition directly back to work in his current condition, given his narcotic drug dependency, his deconditioned physical state and his extended time out of work. She is optimistic, however, that he would be able to do so after completing a functional restoration program.

- Both doctors agree that Claimant has not yet reached an end medical result from the trash bag incident.

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. This claim raises the question to what extent an intervening activity or event can operate to sever the causal link between a work-related accident and the natural consequences that flow from it. As such, its resolution depends more on legal analysis than medical analysis. Medically, there is no dispute that Claimant's activities on November 12, 2008 – placing a 12-pound trash bag into the back of his truck – caused the low back and left leg symptoms he had experienced since his original 2005 work injury to worsen significantly. The real dispute is as to the legal ramifications of that incident in the context of this claim.

3. This Department has maintained on a fairly consistent basis that when a claimant's condition worsens, or his or her symptoms flare, after engaging in normal, routine activities of daily living the causal link back to the original work injury remains intact, such that further medical treatment and/or periods of disability remain compensable. *See, e.g., Church v. Springfield Hospital*, Opinion No. 40-08WC (October 8, 2008) (climbing a single step at home does not sever causal connection); *Verchereau v. Meals on Wheels*, Opinion No. 20-88WC (1988) (carrying groceries); *Correll v. Burlington Office Equipment*, Opinion No. 64-94WC (May 1, 1995) (shoveling); *but c.f. Signorini v. Northeast Cooperative*, Opinion No. 36-04WC (September 1, 2004) (rising from chair; causal link severed due to nine-year gap back to original injury); *Read v. W.E. Aubuchon Co.*, Opinion No. 24-04WC (July 13, 2004) (building rock garden and painting not properly categorized as normal activities of daily living).

4. This policy comports well with the mandate that in order to accomplish its humane purpose Vermont's Workers' Compensation Act must be construed liberally in favor of injured workers. *Montgomery v. Brinver Corp.*, 142 Vt. 461 (1983). It also recognizes the practical reality that even injured workers must continue to go about their daily lives despite whatever underlying condition or weakness their work injury has caused. Were employers allowed to use reasonable, routine activities of daily living as a basis for terminating their ongoing responsibility for the natural consequences of a work injury, workers' compensation would be a short-lived and hollow remedy indeed.

5. With those principles in mind, I find that Claimant's activities on November 12, 2008 qualify as the type of normal, routine activities of daily living that do not operate to sever the causal link back to the original work injury. Defendant remains responsible, therefore, for all causally related workers' compensation benefits arising from either event.

6. As for medical benefits, I find credible Dr. McLarney's opinion, with which Dr. White essentially concurred, that Claimant should undergo an MRI with gadolinium followed by a surgical consult. Should surgery not be indicated, I find that a multidisciplinary functional restoration program is the appropriate next step.

7. I also find that Claimant has been temporarily totally disabled since November 12, 2008 and that his disability is ongoing currently. In that respect, I accept Dr. McLarney's opinion that Claimant is unable to transition immediately back to work, but that with the benefit of further treatment hopefully he will be able to do so soon.

8. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $3,217.59 and attorney fees based on a contingent fee of 20% of the recovery, not to exceed $9,000.00, in accordance with Workers' Compensation Rule 10.1220. An award of costs to a prevailing claimant is mandatory under the statute. To be allowable, however, costs must be reasonable and must comply with the applicable provisions of the medical fee schedule. I find it unreasonable to hold Defendant responsible for Dr. McLarney's $350.00 no-show fee, and therefore that charge is disallowed. I also note that Dr. McLarney's $1,050.00 deposition fee appears well in excess of the $300 hourly rate mandated by Workers' Compensation Rule 40.110. The deposition itself took approximately one hour, and the time spent consulting with Claimant's attorney either before or after is not recoverable. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003). This charge is reduced to $600.00. The total costs awarded, therefore, are $2,417.59.

9. As for attorney fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded to the extent allowed by Workers' Compensation Rule 10.1220.

ORDER:

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

1. Temporary total disability benefits beginning on November 13, 2008 and continuing until Defendant produces sufficient evidence to justify their discontinuance in accordance with Workers' Compensation Rule 18.0000;

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

3. Medical benefits covering all reasonably necessary medical treatment causally related either to Claimant's March 2005 work injury and/or to the November 12, 2008 incident, specifically including the treatment referred to in Conclusion of Law No. 6 above;

4. Costs totaling $2,417.59 and attorney fees computed in accordance with Workers' Compensation Rule 10.1220.

DATED at Montpelier, Vermont this 19th day of November 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.