Anthony Pelissier v. Hannaford Brothers (September 9, 2011)

STATE OF VERMONT
DEPARTMENT OF LABOR

Anthony Pelissier

v.

Hannaford Brothers

Opinion No. 26-11WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. AA-3847

OPINION AND ORDER

Hearing held in Montpelier, Vermont on November 8, 2010 and April 15, 2011
Record closed on May 26, 2011

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUES PRESENTED:

1. Was Claimant's May 2010 fusion surgery reasonable, necessary and causally related to his May 15, 2009 work injury?

2. Should Defendant's contribution to Claimant's group health insurance premium be included in his average weekly wage and compensation rate calculation?

EXHIBITS:

Joint Exhibit I:	Medical records
Joint Exhibit II:	Additional medical records
Claimant's Exhibit 1:	Health insurance premium contributions, 2008-2010
Claimant's Exhibit 2:	Letter to Claimant, 1/1/2010
Defendant's Exhibit A:	Deposition of James Forbes, M.D., April 1, 2011

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642, recalculated after February 27, 2010 to include the value of Defendant's contribution to Claimant's group health insurance premium;

All workers' compensation benefits to which Claimant is deemed entitled as a consequence of his May 2010 fusion surgery;

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 began working for Defendant in 2004, first as a night crew associate and later as a frozen foods supervisor. His primary duty was stocking shelves. This involved breaking down pallets of merchandise, loading cases of product onto carts, pushing and pulling the carts to the appropriate aisle, and then unloading the product onto the shelves. The work was physically demanding, and entailed a significant amount of lifting, bending, walking and kneeling.

Claimant's Prior Medical History

4. Claimant's medical history includes treatment for two episodes of low back pain prior to May 15, 2009. The first incident occurred in September 2006, when he strained his back while boxing. His symptoms were not disabling, and resolved quickly with ibuprofen and stretching.

5. Claimant treated again for low back pain, with symptoms radiating primarily into his right hip, beginning in October 2008. There was no inciting event or trauma, work-related or otherwise. A December 2008 MRI revealed some degenerative disc disease, and also an old pars defect, or stress fracture, in his L5 lumbar vertebra. Fractures of this type render unstable a specific segment of the spine. The condition, also known as spondylolysis, is not uncommon. Most cases are thought to be congenital in origin, and many never become symptomatic at all unless exacerbated, either by specific trauma or by age-related degeneration.

6. It is unclear from the medical records whether the symptoms Claimant experienced in October 2008 were causally related to his pre-existing pars defect. Although he later alleged that they were either caused or aggravated by his work activities, he never reported them to Defendant as such. Nor does the medical evidence establish any work-related connection. In any event, after a course of physical therapy and injections, Claimant's symptoms resolved. By February 2009 he had resumed his regular activities, both recreationally and at work.

Claimant's May 2009 Work Injury and Subsequent Course

7. On May 15, 2009 Claimant was breaking down a pallet of merchandise. He bent over to pick up a case of cat litter weighing thirty to forty pounds and immediately felt a tearing sensation in his left lower back. The pain dropped him to the floor, and it was a few minutes before he could stand. It radiated down his left leg and caused numbness and tingling into his left foot. Claimant reported the injury to his supervisor, and then drove home. His wife took him to the hospital emergency room for treatment.

8. Defendant accepted Claimant's injury as compensable and began paying workers' compensation benefits accordingly.

9. Claimant treated conservatively for his injury, which initially was diagnosed as a lumbar strain. Unfortunately, he failed to improve with physical therapy, and was unable to complete a multidisciplinary work hardening program due to his ongoing pain complaints. A course of injections also proved unsuccessful. Claimant experienced some symptom relief with narcotic pain medications, but was understandably fearful of becoming addicted.

10. Throughout his course of conservative treatment Claimant's primary complaint was low back pain, and to a lesser extent left leg pain and numbness. Claimant credibly testified, and the medical records corroborate, that these symptoms were both qualitatively and quantitatively different from the episodes of low back pain he had experienced prior to May 15, 2009. Most notably, his prior episodes of low back pain always had resolved to the point where he was able to resume full activity. After the May 2009 incident, however, he was unable to do so.

11. In July 2009 Claimant's primary treatment provider referred him to Dr. Barnum, a board-certified orthopedic surgeon, for evaluation. Dr. Barnum's clinical practice focuses almost exclusively on treating spine injuries and disorders. He estimates that he has performed more than 300 fusion surgeries in the past two years.

12. According to Dr. Barnum, the mechanism of Claimant's May 2009 work injury caused his pre-existing pars defect to become symptomatic. Though the event itself – bending and lifting a case of cat litter – was not dramatic, the resulting inflammatory process in the area of the defect caused persistent pain that did not abate with conservative treatment. Rather than allow Claimant to become dependent on narcotic medications for long-term pain relief, Dr. Barnum determined that the better treatment course was lumbar fusion surgery.

13. Claimant underwent a two-level (L4-S1) surgical fusion on May 26, 2010. Since then his pain complaints have lessened significantly. He no longer requires narcotic medications for pain relief. As of the formal hearing he had not yet undergone a functional capacity evaluation, nor had Dr. Barnum yet determined that he was at end medical result.

Defendant's Expert Medical Opinions

14. At Defendant's request, Claimant underwent two independent medical examinations with Dr. Forbes, the first in July 2009 and then again in May 2010. Dr. Forbes is an orthopedic surgeon. Although earlier in his career he routinely performed and/or assisted at spine surgeries, his current practice is a mix of non-surgical clinical work and independent medical examinations.

15. Dr. Forbes' opinion as to the causal link between Claimant's ongoing symptoms and his May 2009 work injury is somewhat variable. Specifically:

- In the context of his July 2009 examination, Dr. Forbes determined that Claimant had suffered an acute lumbosacral strain as a result of the May 2009 lifting incident, which likely exacerbated the symptoms of his underlying degenerative disc disease.

- Subsequently, in a March 2010 letter to Defendant's attorney, Dr. Forbes asserted that the symptoms attributable to the May 2009 work injury had resolved, and that Claimant's ongoing need for treatment was related instead to the preexisting condition for which he had been treating from October 2008 until February 2009.

- Upon reexamining Claimant in May 2010, Dr. Forbes stated that Claimant's current condition appeared to be a continuation of his May 2009 injury, and did not appear to be related to the symptoms he had exhibited in October 2008.

- In his April 2011 preservation deposition, Dr. Forbes testified that Claimant's condition was causally related either to his preexisting degenerative disc disease and/or to his preexisting spondylolysis, neither of which had been exacerbated in any way by his May 2009 work injury.

16. In his deposition testimony, Dr. Forbes denied that a lifting incident such as the one Claimant described in May 2009 could cause spondylolysis. Instead, he thought that Claimant's boxing activities were the most likely cause. According to Dr. Forbes, boxers and figure skaters are among the groups with a higher incidence of spondylolysis, due to the repetitive extension of the spine that such activities entail.

17. Claimant credibly testified that he has not engaged in boxing activities since approximately 2006. With this time frame in mind, even were I to accept Dr. Forbes' theory as to the initial cause of Claimant's pars defect, this still would not eliminate the May 2009 lifting incident as an exacerbating event. For this reason, I find Dr. Forbes' opinion denying a causal link between Claimant's ongoing symptoms and his May 2009 work injury to be somewhat incomplete.

18. In Dr. Forbes' opinion, the fusion surgery that Claimant underwent in May 2010 was neither reasonable and necessary nor causally related to his May 2009 work injury. Having observed what he considered to be significant pain behavior during his examinations, Dr. Forbes did not think that Claimant was an appropriate surgical candidate. Even if he was, the purpose of the surgery was to repair Claimant's spondylolysis, a preexisting condition that in Dr. Forbes' view had not been worsened in any way by the May 2009 lifting incident.

Defendant's Contribution to Claimant's Group Health Insurance Premium

19. Claimant has been disabled from performing his regular job duties for Defendant since his May 15, 2009 injury. He briefly returned to work in a modified-duty capacity during the summer of 2009, but after August 2009 Defendant could no longer accommodate his restrictions. Claimant's treating physician subsequently determined that he was unable to work at all, following which the Department ordered Defendant to pay temporary total disability benefits.

20. As a full-time employee, Claimant had been receiving group health insurance coverage through Defendant since July 2004. Defendant paid a portion of the premium. In 2009, Defendant's share of the total premium cost was 55% ($109.57 weekly); in 2010 its share increased to 68% ($114.96 weekly).

21. In January 2010 Defendant notified Claimant that because of his extended absence from work, and in compliance with its leave of absence policy, it was terminating its contribution to his group health insurance premium effective February 27, 2010.

22. At the time of Claimant's May 15, 2009 work injury, his average weekly wage was $561.41, which yielded a weekly compensation rate of $374.29. Had Defendant's contribution to Claimant's group health insurance premium been factored in, his average weekly wage would have increased to $670.98, which would have yielded a weekly compensation rate of $447.34.

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).

Compensability of Fusion Surgery

2. The first disputed issue presented here is whether Claimant's May 2010 fusion surgery is compensable. Vermont's workers' compensation statute obligates an employer to pay only for those medical treatments that are determined to be both "reasonable" and causally related to the compensable injury. 21 V.S.A. §§618, 640(a); *Lackey v. Brattleboro Retreat,* Opinion No. 15-10WC (April 21, 2010). The Commissioner has discretion to determine what constitutes reasonable medical treatment given the particular circumstances of each case. *Id.* A treatment can be unreasonable either because it is not medically necessary or because it is not related to the compensable injury. *Id.; Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010).

3. Conflicting medical testimony was offered as to both the reasonableness of Claimant's fusion surgery and its causal relationship to the May 2009 work injury.[1] 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 (September 17, 2003).

4. Here I conclude that Dr. Barnum's opinion was more credible than Dr. Forbes'. As the treating orthopedic surgeon, he was better positioned to evaluate Claimant's pain behaviors, his potential for narcotic addiction and his readiness, both psychological and physical, for surgical intervention. With a current practice that focuses primarily on spine surgeries, furthermore, his relevant experience outweighs that of Dr. Forbes. Considering these factors, I conclude that his opinion as to the medical necessity of Claimant's fusion surgery is the most credible.

[1] No medical evidence was introduced to establish any connection between Claimant's need for fusion surgery and his work activities in October 2008. Without competent expert medical testimony to support a causal link, any claim for workers' compensation benefits arising out of Claimant's work during this period must fail. *Marsigli's Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95 (1964).

5. I also conclude that Dr. Barnum's opinion as to the causal link between Claimant's May 2009 work injury and his need for fusion surgery is more persuasive than Dr. Forbes'. Dr. Barnum's opinion was clearly stated and thorough. It adequately explained how Claimant's work injury likely exacerbated his preexisting pars defect, rendering symptomatic a condition that previously had not been so. In contrast, Dr. Forbes' opinion was inconsistently stated and incomplete.

6. I conclude that Claimant's May 2010 fusion surgery was both medically necessary and causally related to his compensable work injury. It therefore constitutes reasonable medical treatment, for which Defendant is obligated to pay all associated medical and indemnity benefits.

Defendant's Contributions to Claimant's Group Health Insurance Premium as Includable in Average Weekly Wage and Compensation Rate Calculation

7. Claimant argues that the value of Defendant's contributions to his group health insurance premium should be included in his average weekly wage and compensation rate calculation. In keeping with the U.S. Supreme Court's holding in *Morrison-Knudsen Construction Co. v. Director, OWCP,* 461 U.S. 624 (1983), this Department consistently has rejected such arguments in the past. *T.K. v. Green Mountain Steel Erectors,* Opinion No. 29-08WC (July 3, 2008); *P.M. v. L.F. Hurtubise,* Opinion No. 15-07WC (June 12, 2007); *Pickens v. NSA Industries,* Opinion No. 36-98WC (June 24, 1998); *Antilla v. Edlund Co., Inc.*, Opinion No. 7-90WC (September 19, 1990).

8. In *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624 (1983), the U.S. Supreme Court considered whether employer contributions to union trust funds for health and welfare, pensions and training should be included in calculating an injured worker's average weekly wage and compensation rate under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. That statute defined "wages" as "the money rate at which the service rendered is recompensed . . . including the reasonable value of board, rent, housing, lodging, *or similar advantage* received from the employer . . ." 33 U.S.C. §902(13) (emphasis added).

9. Faced with this statutory language, the Court declined to reinterpret the term "wages" to include the employer's contributions. Although it recognized the economic value of such benefits to employees, it also acknowledged that to change the compensation rate calculation in this way would "dramatically alter[] the cost factors upon which employers and their insurers have relied in ordering their affairs." *Id.* at 636. The workers' compensation act being "not a simple remedial statute intended for the benefit of workers," but rather one designed to strike a balance between the concerns of both employers and employees, the Court concluded that it was up to Congress to decide whether or not to effect such a change.[2] *Id.* at 636.

[2] In fact, after *Morrison-Knudsen* Congress did consider the issue. In 1984 it amended the Longshoremen's Act to clarify that the term "wages" does not include such fringe benefits as employer-paid contributions to an employee's health insurance plan. Pub.L. No. 98-426 §2(13), 98 Stat. 1639 (1984).

10. Claimant argues that the definition of "wages" in Vermont's workers' compensation act is sufficiently different from the one discussed in *Morrison-Knudsen* as to justify a different result. Our statute defines wages as including "bonuses and the market value of board, lodging, fuel and *other advantages* which can be estimated in money and which the employee receives from the employer as a part of his or her remuneration." 21 V.S.A. §601(13) (emphasis added). Claimant asserts that by its reference to "other advantages" rather than to "similar advantages," Vermont's statute is intended to be more inclusive than the federal statute.

11. This same argument was well considered, discussed and rejected in *Pickens, supra*. As the commissioner concluded there, I do not discern from the language of §601(13) any legislative intent to include an employer's health care premium contribution in the same class of "other advantages" as bonuses, board, lodging or fuel so as to mandate its incorporation into an employee's average weekly wage calculation.

12. Most courts that have considered the issue have declined to order that the value of an employer's health insurance premium contribution be included in an injured worker's compensation rate calculation. *See, e.g., Lazarus v. Industrial Commission of Arizona,* 947 P.2d 875, 877 n.2 (Ariz.App. 1997) and cases cited therein; 5 Lex K. Larson, *Larson's Workers' Compensation* §93.01[2][b] at p. 93-22 (Matthew Bender, Rev. Ed.) and cases cited therein. Many have done so on the grounds that the proper branch of government to consider such a change is the legislature, not the judiciary. *See, e.g., Lazarus, supra* at 879; *Theuer v. Labor & Industry Review Commission*, 624 N.W.2d 110, 116 (Wisc. 2001); *Groover v. Johnson Controls World Serv.*, 527 S.E.2d 639, 641 (Ga.App. 2000); *Borofsky's Case*, 582 N.E.2d 538, 539 (Mass. 1991); *Gajan v. Bradlick Co.*, 355 S.E.2d 899, 902 (Va.App. 1987).

13. Vermont's workers' compensation act is to be liberally construed to achieve the humane purpose for which it was passed, but a liberal construction does not mean an unreasonable or unwarranted construction. *Herbert v. Layman*, 125 Vt. 481 (1966). If a statute seems unfair or unjust, the appropriate remedy lies with the legislature; it cannot be furnished by judicial action under the guise of interpretation. *Quinn v. Pate*, 124 Vt. 121, 127 (1964).

14. The change for which Claimant advocates could dramatically impact the delicate balance that the workers' compensation act seeks to maintain between employers and employees. It has the potential to increase significantly an employer's workers' compensation insurance premium, which might act as a disincentive for offering any employer-paid group health insurance coverage at all. At the same time, it might complicate the wage calculation process to the point where the injured worker's right to timely benefits is compromised. Considerations of this magnitude are best debated and decided in the legislature, not here.

15. I conclude that Claimant's average weekly wage and compensation rate were calculated properly under §601(13) as currently written, without including the value of any employer-paid contributions to his group health insurance premium.

16. As Claimant has prevailed on his claim for benefits causally related to his May 2010 fusion surgery, he is entitled to an award of those costs that relate directly thereto. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997). As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. Subject to these limitations, Claimant shall have 30 days from the date of this opinion to submit evidence of his allowable costs and attorney fees.

ORDER:

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

1. All workers' compensation benefits to which Claimant proves his entitlement as causally related to his May 2010 fusion surgery; and

2. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 9th day of September 2011.

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Anne M. Noonan
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.