

C. F. v. National Life Insurance Co.

(November 17, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

C. F.

Opinion No. 44-06WC

v.

By: Margaret A. Mangan
Hearing Officer

National Life Insurance Co.

For: Patricia Moulton Powden
Commissioner

State File No. T-20446

Hearing held in Montpelier on August 22 and 23, 2006

Record closed on September 20, 2006

APPEARANCES:

Steven P. Robinson, Esq. and Jennifer Ciarlo Pacholek, Esq., for the Claimant
Keith J. Kasper, Esq. and David Berman for the Defendant

ISSUES:

1. Is Claimant's August 19, 2003 fall at home a compensable result of her March 10, 2003 work related injury?
2. If so, what injuries did she suffer as a result of her August 19, 2003 incident?
3. If the August 19, 2003 injuries are compensable, has she reached a medical end result for those injuries? Is she entitled to additional temporary total disability benefits and, if so, for what time periods?
4. If the August 19, 2003 injuries are compensable, what is the extent of the resulting permanent partial impairment?
5. Is Claimant permanently and totally disabled as a result of her work related injury or injuries?

EXHIBITS:

Joint:

- I: Medical records
- II: Performance evaluations
- III: School Records

Claimant:

- 1: Defense counsel's December 13, 2005 letter
- 2: Claimant's counsel's December 27, 2004

Defendant:

- A: Private Investigator Videotape

STIPULATION:

1. On March 10, 2003, Claimant was an employee of Defendant within the meaning of the Vermont Employer's Liability and Workers' Compensation Act (Act).
2. On March 10, 2003, Defendant was the employer of Claimant within the meaning of the Act.
3. On March 10, 2003, Claimant had one dependent within the meaning of the Act who turned twenty-one years old on November 19, 2004 at which time he was no longer dependent.
4. On March 10, 2003, Claimant had an average weekly wage of \$482.31 resulting in an initial compensation rate of \$321.54.
5. On March 10, 2003 Claimant suffered a work-related injury.
6. On August 19, 2003, Claimant fell at home. Defendant contests the compensability of this incident and any resulting injuries, but Claimant alleges that the fall was the direct result of her work-related March 10, 2003 injury.
7. On January 5, 2005, Defendant filed a Form 27 terminating Claimant's indemnity benefits for her accepted work-related right knee injury, based on a determination of medical end result with 4% whole person impairment due to the accepted right knee claim.
8. On August 4, 2005, Claimant was separated from her employment at National Life.
9. To date, Claimant has received all indemnity and medical benefits associated with her right knee claim.

CLAIM:

Claimant seeks additional medical, temporary total, permanent partial, vocational and permanent total disability benefits as a result of her work-related injury or injuries, and if successful, an award of attorney fees and costs.

OVERVIEW:

It is undisputed that Claimant suffered a work related fall in March of 2003, although the full extent of the injuries from that fall is contested. Six months later, Claimant fell again, but this time at home. Did the second fall result from the earlier, work-related fall? If so, what injuries did Claimant suffer? Is Claimant capable of regular, gainful employment? Several experts have rendered opinions on the sequelae of the falls. Because some of the opinions were obtained years after the two falls, when facts supporting the opinions differ from contemporaneous medical records, the earlier records will control.

FINDINGS OF FACT:

1. During the two-day hearing, Claimant was alert. She testified with no signs of anomia (difficulty finding words) and answered questions clearly and coherently. She exhibited no overt signs of lack of concentration or attention.
2. Before any of the events giving rise to this claim occurred, Claimant had worked running machinery at Rock of Ages for about twenty years and at National Life for about eighteen years.
3. Claimant was a responsible, reliable worker, missing time from work only for an occasional cold.
4. Claimant's work for National Life was that of a full time set up person. She cleaned trucks, ran errands, checked the cleanliness of restrooms and ensured the proper set up of meetings. Claimant took pride in her work.
5. On March 10, 2003, Claimant fell when she was leaving work. She stubbed her toe and fell forward, landing on hands, knees and hitting her face.
6. At a doctor's visit on April 29, 2003, Claimant reported to her primary care physician, Dr. Kristopher Jensen, that she had fallen three weeks earlier, injuring her right knee and that she had what the doctor described as "short lived loss of consciousness" at the time of the fall. Dr. Jensen noted no "obvious instability" when Claimant was walking. He also suggested that the persistent pain may have been due to her being on her feet most of the day at work.
7. In June 2003, Claimant telephoned Dr. Jensen's office, reporting that she still had pain and intermittent swelling in her right knee.

8. In mid June 2003, Claimant saw Dr. Stafford who noted increase in her knee pain after moving a lot of furniture at work.
9. On July 8, 2003, Claimant was seen again for knee pain and stiffness, which she reported was worse when she was working. On examination, the knee was tender but had “near full range of motion.”
10. On July 31, 2003, Claimant was seen by Charles Butterick, Physician Assistant at Green Mountain Orthopaedic Surgery, who noted a complaint of persistent knee pain. Mr. Butterick recommended physical therapy.
11. At physical therapy Claimant demonstrated weakness in her right leg. A program was set up with goals of increasing the strength and flexion in her right leg and decreasing the pain.
12. In June and June of 2003, Claimant had two instances when her right knee gave out, although she did not fall either time. The first was in the cafeteria in the National Life Building when she caught herself on the salad bar as the knee gave way. The second time was while she was cleaning a rest room, when she again caught herself and prevented a fall. Claimant recalled both instances in some detail at hearing.
13. On August 19, 2003, Claimant fell down her stairs at home. She then went to the emergency department at Copley Hospital where her complaints of left shoulder and back pain were noted. At that time, there was no evidence of head trauma.
14. Claimant fractured her left wrist in the fall at home, a diagnosis made the day of the fall. The fracture required surgery that Dr. Landvater performed on August 25, 2003. Sometime later, it was learned that she also fractured her left lower leg, the fibula.
15. On August 25, 2003, Dr. Landvater operated on Claimant’s fractured left wrist.
16. Also on August 25, 2003, the day of the left wrist surgery, Claimant saw Dr. Jensen who noted that Claimant broke her wrist in the fall and hit her head, although she had no loss of consciousness.
17. An October 21, 2003 physical therapy note documented Claimant’s description of having lost her balance when she fell down the steps at home.
18. In addition to surgery on the wrist, Claimant received medical care and physical therapy for her left wrist, leg and shoulder.
19. In November 2003, Dr. Landvater noted that Claimant was not yet to resume work.
20. In December 2003, Dr. Stephanie Landvater noted that Claimant was to return for treatment if she had continued “catching and buckling” in her left knee.

21. On January 7, 2004, Dr. Landvater wrote that Claimant could only work four hours per day because of her work related right knee problem. Dr. Landvater reiterated that opinion on January 27th when she diagnosed a meniscal tear in Claimant's right knee of a year's duration.
22. In January 2004, Dr. Jensen also saw the Claimant, noting that she was alert and oriented, but making no mention of mental deficits.
23. Dr. Williams noted on a prescription pad dated January 19, 2004 that Claimant had work related fasciitis. He may have been unaware that Claimant had only been working half time for two weeks and not at all for several months before that.
24. On February 26, 2004, Claimant was in a motor vehicle accident (MVA). When she was examined a few days later, it was noted that she had a headache and some dizziness, although dizziness predated the MVA. It was also noted that she had an upper back strain.
25. By April 2004, Claimant's headaches had resolved and she was back to work half time performing the same work she had been doing before the MVA.
26. On May 5, 2004, Dr. Landvater operated on Claimant's right knee for what was determined to have been a work related meniscal tear from the fall in March 2003.
27. A July 16, 2004 Physical therapy note recorded Claimant's comment that "I get dizzy since I started coming here."
28. Dr. Landvater released Claimant to work at modified duty from August 4, 2004 to September 2, 2004, four hours a day.
29. On August 17, 2004, Claimant reported to a physical therapist that she was working four hours a day, limping a lot at work and "they don't like it."
30. On August 30, 2004, a therapist noted that Claimant's pain behaviors were hindering her progress. She "declined" to perform some recommended activities. And she reported limping and being sore at work after moving some things. Yet, she also reported walking two hours at a fair the previous Sunday.
31. In September 2004, Claimant spent one day at work on the building inspection and inventory.
32. Claimant worked until August 2005 when her employment at National Life ended. During the time Claimant worked after her injury, she did less physical work, but was assigned to tasks that required more computer work. She was terminated because of her inability to perform physical functions necessary for her job, not because of any mental disabilities.

33. Dr. Landvater placed Claimant at medical end result on November 2, 2004 with 4% whole person impairment for the injury to her right knee from the March 2003 fall at work.
34. At work, Claimant did not show any signs of problems with memory or concentration, even when she was on light duty part-time work in August of 2003.
35. Claimant had satisfactory performance evaluations at work from June 2004 through March 2005.
36. A private investigator videotape shows Claimant walking without a cane, even when it was snowing. Although slow while walking, Claimant was able to hold items in her arms and maintain her balance. She did not use a cane at the hearing, although she limped when walking.
37. One of Claimant's activities is bingo, which she plays with eighteen cards.

Experts

38. Dr. Victor Gennaro is an orthopedic surgeon who evaluated this case for the Claimant. Based on his examination and history that Claimant's knee was painful as she descended the stairs in August 2003, Dr. Gennaro opined that the original work related injury led to that fall. He based that opinion on the fact that she had an untreated meniscal tear in that knee at the time of the fall, a diagnosis well supported by Dr. Landvater's records and surgical findings. However, Dr. Gennaro was not able to link the fasciitis to Claimant's work.
39. Dr. Gennaro opined that Claimant is unable to return to gainful employment because of her cognitive difficulties, deconditioning and painful knees.
40. In March of 2006, Dr. Gennaro opined, and I find, that Claimant had not yet reached medical end result for her left shoulder and left knee, injuries she sustained when she fell down the stairs at home in August of 2003.
41. Dr. John Johansson, medical director of Vermont Center for Occupational Rehabilitation, performed an IME of the Claimant in 2004. At that time, she was working full eight hours days, with breaks as needed. Claimant provided a history to Dr. Johansson without any signs of anomia or memory problems. When he saw her again in 2005, when Claimant had been out of work with foot problems, he opined that she could return to work with good footwear.

Functional Capacity Evaluations

42. Louise Lynch performed a functional capacity evaluation on Claimant in January 2006. Ms. Lynch understood that Claimant used a cane when she walked outside, a finding inconsistent with the videotape. After testing, Ms. Lynch concluded that Claimant had a part-time sedentary work capacity. She opined, based on Claimant's physical limitations and her observations, that Claimant is not employable in the competitive work place.
43. Leslie Bell performed a functional capacity evaluation of the Claimant in April 2006. During that evaluation, Claimant self limited in 25% of the tasks, behavior that "influenced the outcome of the test." Ms. Bell determined that Claimant had a sedentary work capacity for an eight-hour day based on that evaluation. Further, she opined that Claimant could navigate stairs only rarely, such as for entering a building, but should not have regular stairs climbing throughout the day.

Vocational Rehabilitation Opinions

44. George Fotinopoulos, Vocational Rehabilitation (VR) Counselor, initially determined that Claimant was entitled to vocational rehabilitation services. By agreement of the parties, an extension was granted for the submission of a rehabilitation plan. Claimant now alleges that the carrier refused to pay for VR services. The carrier alleges that Mr. Fotinopoulos never followed up after the extension was granted. Regardless, Claimant never received VR services.
45. John May, Vocational Rehabilitation Counselor, performed a forensic vocational assessment in this case. He based his opinions on a private investigator videotape, functional capacity evaluations, Claimant's vocational history, the medical records and his VR expertise. He concluded that Claimant would benefit from vocational rehabilitation services that would "enhance her employability." He predicted that with such services, Claimant will return to gainful employment.

Expert Opinions

Head injury

46. Highly disputed is whether Claimant suffered a head injury in the fall down the stairs, and if so, whether such an injury, combined with other injuries, disables her. In support of her claim is the opinion from Dr. Solomon, based on neuropsychological examinations. Dr. Solomon is the director and founder of the Memory Clinic. He opined that Claimant meets the criteria for a traumatic brain injury (TBI) for both of her work related falls. That opinion is based on a comparison in what he determined was her pre injury IQ, school performance, and current testing. Based on cognitive deficits, he assessed her neuropsychological impairments at 25% whole person.

47. Dr. Solomon's opinion was based in part on an inaccurate history Claimant and her cousin gave him. For example, they described retrograde and posttraumatic amnesia that is recorded nowhere in the records. They also described a precise mechanism of the fall ---falling backwards and hitting her head multiple times---that is described to Dr. Solomon for the first time in the several years since the accident.
48. Dr. Peyser, also a neuropsychologist with expertise working with patients who have had brain injuries, evaluated the Claimant for the defense. Based on the records and her expertise, Dr. Peyser found no record of posttraumatic amnesia, which is relevant to the issue of head injury. Retrograde amnesia is not relevant to the inquiry, in her opinion. Dr. Peyser, too, tested Claimant, finding no residual cognitive deficits from the falls. Claimant described cognitive losses to Dr. Peyser, yet those losses are not recorded in the records until September 2005. Claimant described difficulty finding words, yet did not demonstrate that difficulty during interview. Based on testing, Dr. Peyser attributed low or borderline results to low effort. Dr. Peyser concluded that, with the exception of Claimant's self-reports, "there is no evidence ...that Ms. Fisher suffered a head injury with significant cognitive deficits to interfere with her function on the job or in daily life."

Attorney fees and costs

49. Claimant submitted evidence that her attorneys worked 170.3 hours on this claim and paralegals 5.8 hours. She incurred \$6,629.78 in necessary costs, including \$900 for Dr. Solomon's record review and \$1,000 for Dr. Gennaro's two-hour preparation and one hour of deposition testimony.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). This Claimant 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).
2. Where the claimant's injury is obscure and the layperson could have no well-grounded opinion as to its nature or extent, expert testimony is the sole means of laying a foundation for an award for both compensability issues as well as the extent of the award sought. *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979).

Causation of Second fall

3. Every natural consequence of a work related injury is also compensable. See *Fleury v. Legion Ins.*, Opinion No. 43-02WC (2002) (citing 1 Larson's Workers' Compensation Law. § 10.00).

4. Three factors convince me that it is more probable than not that the work related injury led to the fall at home. First, Claimant testified convincingly that her knee had given way twice before the fall at home. Second, at the time of the fall she had an untreated torn meniscus. Third, an orthopedic expert familiar with the signs and symptoms of a torn meniscus, Dr. Gennaro, attributed the fall to the untreated tear.
5. As a result of the second fall, Claimant injured her head, left wrist, shoulder, leg and her back.
6. Any head injury she may have sustained has since resolved without residual deficits, a conclusion well supported by Dr. Peyser's opinion. Claimant's work performance after that fall and her embellished history undercut the opinion proffered by Dr. Solomon to the contrary. Therefore, Claimant is not entitled to permanent partial disability benefits for a traumatic brain injury.
7. To prevail on her claim for permanent total disability (PTD), Claimant must prove that a work related injury or injuries caused impairments that render her unable to sustain regular gainful employment. Her age, experience, training, education, occupation and mental capacity are all factors relevant to a finding of PTD. 21 V.S.A. § 644(b). WC Rule 11.3100. One who is permanently and totally disabled must have no reasonable prospect of finding regular employment." § 645.
8. When one is unable to return to work for which she has had previous training or experience, the worker is entitled to vocational rehabilitation services. 21 V.S.A. § 641(a).
9. Claimant has failed to prove that she is permanently and totally disabled. Although she may not have had the most successful academic record as a child, Claimant has proven herself a competent, affable and dedicated worker for her adult life. It is unfortunate that employment with National Life did not work out for her. It is also unfortunate that vocational rehabilitation services were not provided. However, she is capable of participating in vocational rehabilitation.
10. Therefore, Claimant is entitled to vocational rehabilitation benefits. She is also entitled to temporary total disability retroactive to their discontinuance until she reaches medical end result for the physical injuries incurred in the work related fall. Interest on those benefits must be calculated from the date those benefits were due until paid. 21 V.S.A. § 664.
11. Pursuant to 21 V.S.A. § 678(a) and WC Rule 10.000, a prevailing Claimant is entitled to a mandatory award of necessary costs and discretionary award of reasonable attorney fees when she prevails. Claimant submitted evidence that her attorneys worked 170.3 hours on this claim and paralegals 5.8 hours. She incurred \$6,629.78 in necessary costs.

12. The fees requested are awarded at \$90 .00 per hour for attorney time under WC Rule 10.1210 and \$60.00 per hour for paralegal time. *C. C. v. Eveready Battery Co*, Opinion No. 38-05 (2005). Although Claimant has not prevailed on the permanent total disability claim, she has proven that the second fall is compensable, a highly contested claim. She has prevailed on her claim for additional temporary total disability benefits. The hours her attorney worked to achieve this success were reasonable.
13. The costs associated with the unnecessary aspects of the claim, including Dr. Solomon's fees, must be subtracted from the total cost request. In other respects, the costs were necessary to the successful aspects of the claim.

Summary

14. In sum, Claimant's August 19, 2003 fall at home was a compensable result of her March 10, 2003 work related injury. As a result of that fall, Claimant suffered a head injury that has resolved as well as shoulder and leg injuries that have not yet reached medical end result. She is entitled to temporary total disability benefits until she reaches medical end result or successfully returns to work. 21 V.S.A. § 642; 643a. Claimant is not permanently and totally disabled as a result of her work related injury or injuries.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim for permanent total disability benefits is DENIED. However, Defendant is ORDERED to:

- Provide vocational rehabilitation benefits to Claimant;
- Pay TTD retroactive to the discontinuance with interest accruing from the date payment would have been made had the second fall been accepted until paid;
- Pay attorney fees and costs;
- Otherwise adjust the claim for the second fall, including payment of permanent partial disability benefits when Claimant reaches medical end result.

Dated at Montpelier, Vermont this 17th day of November 2006

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.