McAllister v. S. T. Griswold (11/26/03)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Lyse McAllister	)	Opinion No. 48-03WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
	)	For: Michael S. Bertrand
S.T. Griswold	)	Commissioner
	)	
	)	State File No. R-12792

RULING ON DEFENSE MOTION FOR STAY

Defendant moves for a stay of the order for it to pay the claimant permanent partial disability benefits based on the 8% whole person rating assessed by S. Glen Neale, M.D.

Any award or order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner, any appeal notwithstanding. 21 V.S.A. § 675. To prevail on its request in the instant matter, Defendant must demonstrate: "(1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) a stay will not substantially harm the other party; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co*., 132 Vt. 554 (1974). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v.Webster Corporation*, Opinion No. 62S-96WC (1996).

Defendant has failed to meet its burden. The accepted rating was from a treating physician familiar with this case who was asked to clarify a previous rating, making it unlikely that the defendant will succeed on the merits of its appeal. There is no convincing showing that payment of an 8% whole person award will substantially harm the defendant. And the best interests of the public will best be served with the payment of this award without further delay.

Therefore, the motion for stay is denied. Pursuant to 21 V.S.A. § 664, defendant must pay interest on this award computed from the October 22, 2003 order for permanency.

Dated at Montpelier, Vermont this 26th day of November 2003.

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Michael S. Bertrand
Commissioner

McAllister v. S.T. Griswold & Co., Inc. (10/22/03)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Lyse McAllister	)	Opinion No. 07S-03WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
S.T. Griswold & Co., Inc.	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. R-12792

APPEARANCES:

Vincent Illuzzi, Esq. , for the Claimant
Stephen Ellis, Esq., for the Defendant

ORDER FOR PERMANENCY

A decision on the degree of permanent partial impairment, if any, due the claimant for carpal tunnel syndrome was deferred in the original decision in this case because of the need for additional clarity. Based on an August 8, 2003 report of S.Glen Neale, M.D. that the 8% whole person impairment is wholly attributable to the carpal tunnel surgery, that permanency is hereby ORDERED. Defendant is also ordered to pay for Dr. Neale's evaluation.

Dated at Montpelier, Vermont this 22nd day of October 2003.

_____
Michael S. Bertrand
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.

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. R-12792
	)	
Lyse McAllister	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: Michael S. Bertrand
S.T. Griswold & Co.	)	Commissioner
	)	
	)	Opinion No. 07-03WC

Hearing held in Montpelier on June 13, 2002
Record closed on August 5, 2002

APPEARANCES:

Vincent Illuzzi, Esq. for the Claimant
Andrew W. Goodger, Esq. for the Defendant

ISSUES:

1. Is claimant entitled to temporary total disability benefits from May 7, 2001 to January 3, 2002?

    a. Did the Claimant successfully return to work after Dr. Baska released her in May 2001?
    b. Was she at medical end result when Dr. Baska released her?

2. Is claimant entitled to a supplement to temporary total disability benefits for concurrent employment?

3. Was the surgery Dr. Neale performed causally related to a work-related injury?

4. Is the Claimant entitled to 8% whole person impairment for her January 2, 2001 work-related injury?

5. To what medical benefits is the Claimant entitled?

EXHIBITS:

Joint I:	Medical Records
Joint II:	Transcript of deposition of James Mogan, M.D.
Claimant's 1:	Transcript of deposition of S.Glen Neale, M.D.
Claimant's 2:	Federal Motor Carrier Safety Regulation Handbook (3 pgs)
Claimant's 3:	Wages from Jay Peak, Form 25, Form 21 (3 pgs)
Claimant's 4:	Dr. Neale's bills (cover sheer and 3 health insurance forms)
Claimant's 5:	Bill from Copley Hospital re: blood work (2pgs)
Claimant's 6:	Out patient surgery bill (4 pgs)
Claimant's 7:	Copley Occupational therapy bill (2 pgs)
Claimant's 8:	Bill from Copley Hospital re: blood work November, 2001
Claimant's 9:	Copley bills for lab work and bad debt, 4 pages:
Claimant's 10:	Copley Bill for services 11/30/01
Claimant's 11:	Health Insurance Claim form for services 12/01 by C. Holton
Claimant's 12:	Copley bill for x-ray copy
Claimant's 13:	Statement from Corey Mercer
Defendant's A:	Letter from Gonillo to McAllister 5/7/01
Defendant's B:	Videotape
Defendant's C:	McAllister job application for S.T. Griswold
Defendant's D:	Undated fax from S. T. Griswold to Acadia
Defendant's E:	Dr. Gennaro's C.V.

CLAIM:

Claimant seeks temporary total disability benefits from May 5, 2001 through July 29, 2001, administrative penalties against Acadia, interest at the statutory rate on the unpaid balance and an adjustment to the temporary total disability benefits already paid and those to be paid to include concurrent employment.

FINDINGS OF FACT:

1. Claimant was an employee and S.T. Griswold her employer within the meaning of the Workers' Compensation Act.

2. Claimant lives in Lowell, Vermont and worked for S.T. Griswold in Colchester.

3. Claimant owns three horses she cares for and rides.

4. Claimant began working for S.T. Griswold on July 3, 2000 as a tractor-trailer driver. At the time, she held a commercial driver's license (CDL). She operated an 18-wheel dump trailer and a 10-wheel dump truck.

5. The 18-wheeler had a lever for rolling the tarp that occasionally got stuck. When that happened, Claimant climbed the side of the truck to release it. On the 10-wheeler, she climbed the side of the truck to reach the crank to roll the tarp. She placed one foot in the open window, hung on with her left hand and cranked with her right.

6. Claimant was hired to drive the 18-wheeler, but drove the smaller truck when the regular driver was out.

7. Claimant worked at Jay Peak as a lift operator. She earned $110.67 in the week ending December 17, 2000, $121.38 in the week of December 24, 2000 and $103.53 in the week of January 7, 2001.

8. On January 2, 2001, Claimant was plowing snow using a bucket loader in the main yard of S.T. Griswold. As she was getting into the loader, her foot slipped and she started to fall. To break that fall she grabbed a rung of the ladder with her left hand, which then became caught in the grate of the rung of the ladder.

9. After she hit the ground, Claimant observed blood on the back of her left hand and noticed that the hand felt numb. She reported the incident to her supervisor who directed her to see the human resource manager, Christina Gonillo.

10. On January 9, 2001, Dr. Soucy saw the Claimant for complaints of left hand, wrist, shoulder and neck pain. She also complained of pain and numbness in the 3rd and 4th digits of her left hand. There is no mention of a left thumb complaint.

11. On January 18, 2001, Claimant caught her right thumb in the locking gears of the tailgate on the dump truck. Then, on January 19, 2001, she saw Dr. Baska at Copley Hospital Emergency Room with complaints of injuries to her right thumb and to her left wrist and left middle and index fingers. Dr. Baska splinted her left wrist.

12. According to the Form 21, Agreement for Temporary Total Disability Compensation, Claimant's disability began on January 19, 2001.

13. Dr. Mogan examined the claimant for a fractured right thumb and numbness in her left hand on January 29, 2001. He suspected left hand carpal tunnel syndrome or ulnar neuritis. He took her out of work. Ultimately the carpal tunnel diagnosis was confirmed by EMG and surgery performed by Dr. Baska on March 31, 2001. The surgery revealed no evidence of tendon damage.

14. Postoperatively, Claimant had occupational therapy for her left hand with Corbet Mercer at Copley Hospital, although there is no mention in his therapy notes of a left thumb complaint. The plan Mr. Mercer recorded on April 4, 2001 set a goal of pain free movement and full duty work in 2 to 4 weeks.

15. On April 20, 2001, Claimant expressed her intent to return to work the following week, but did not do so, reporting instead that she still felt weakness in her hand. Her left hand grip was 56 pounds at that time.

16. On May 7, 2001, Dr. Baska, who had performed the carpal tunnel surgery, placed the Claimant at medical end result and released her to full work and activity without limitation. At an occupational therapy session, Claimant's left hand grip strength was measured at 66 pounds and her right hand grip strength at 87 pounds.

17. According to the AMA Guides to the Evaluation of Permanent Impairment, 5th edition, at 509, the average unsupported grip strength for a woman engaged in a manual labor occupation is 24.2 kg (53.24 pounds) for the dominant hand (claimant's right hand) and 22.0 kg (48.4 pounds) for the nondominant hand (claimant's left). For a 40-year-old woman, the average grip strengths are 23.4 kg (51.48 pounds) for the dominant hand and 21.5 kg (47.3 pounds) for the non-dominant hand.

18. Claimant claims that she did not return to work after Dr. Baska released her to full duty because her hand was too weak to drive a truck and she was required under the law to obtain a special certificate in addition to her CDL license. However, she produced no objective evidence to show that her particular grip strength measurements were inconsistent with the federal CDL safety requirements.

19. In the opinion of Corbett Mercer, the occupational therapist who provided therapy to the Claimant following her carpal tunnel release, she had completed her prescribed course of therapy and was ready to return to work on May 7, 2002, although he did not agree with Dr. Baska's determination that she could have returned to work without restrictions. He was concerned that her job involved using her left hand to secure tarps on trucks she drove, a concern based on the disparity between her left (60 pound) and right (86 pound) grip strengths, a disparity he characterizes as a 30% deficit.

20. In the Spring of 2001 claimant returned to horseback riding and performing in shows.

21. Also in the Spring or Summer of 2001, Claimant spoke with Robert Guyette, a motor vehicle inspector with the Department of Motor Vehicles. She told Mr. Guyette that she had been released to work, but that her hand was still "30% impaired." Guyette responded by suggesting that she might have to apply for a special certificate, with a waiver for her physical limitation, to continue operating trucks with her CDL. Later in the summer he gave her an application for the certificate.

22. While Guyette offered general information to the Claimant, he did not know what, if any, grip strength is required for a CDL license under federal regulations. And he anticipated that a physician would need to make the determination whether a driver met the physical requirements for a CDL license.

23. On July 6, 2001, Claimant reported to John Halpin, her vocational counselor, that she declined S.T. Griswold's offer to return to pre-injury employment because she "wanted to do something else." Ultimately, Claimant rejected vocational rehabilitation services because she was unsure of her future plans and wished to take the summer off.

24. At the hearing, Claimant insisted that in the Spring of 2001, she sought light duty work from S.T. Griswold after Dr. Baska released her to work full time. Although she quit her job, she testified that she did so only after Ms. Gonillo asked her to resume her pre-injury truck driving position.

25. The most logical inference from the evidence presented, however, is that the Claimant quit her job for reasons unrelated to her injury. She had already said she would take the summer off and, if she had plans to work, undoubtedly those plans were to work for a different employer as she was looking for other work at the time she quit her job at S.T. Griswold.

26. During the Summer of 2001, Claimant swam, painted the trim on her barn, threw bales of hay, watered, fed and brushed her horses, shoveled manure, used a wheelbarrow and rode a horse. Also during that summer, she participated in 12-barrel races, where she rode a horse between strategically placed barrels and picked up objects with her left hand.

27. On July 30, 2001 this Department approved defendant's Form 27 on the bases that claimant had reached medical end result and had refused further employment.

28. The first mention in the medical records of left thumb pain or triggering is in Dr. Mogan's August 8, 2001 note. At that time, Claimant attributed the left thumb problem to the therapy she had been doing.

29. In September of 2001, claimant reported to Dr. Neale that her left thumb problem resulted from her wearing a splint following the carpal tunnel surgery. The following month, Dr. Neale performed a trigger thumb release. Dr. Neale concurs with the Claimant's assessment, based on the Claimant's history, that the trigger thumb originated with work or therapy related to it. After reading a section from the Federal Motor Carrier Safety Regulation Handbook, he concluded that she was not capable of driving a tractor-trailer.

30. Dr. Neale placed the Claimant at medical end result on January 3, 2002 with 8% whole person impairment, although whether that impairment is attributable to the thumb, carpal tunnel or both is not clear.

31. At the request of the insurance carrier, Dr. Victor Gennaro evaluated the Claimant in March 2002 and, based on the claimant's history and physical examination, rendered opinions in four areas. First, he determined that surgery had corrected her carpal tunnel syndrome. Second, he agreed with Dr. Baska's opinion that she had reached medical end result in May 2001. Third, he concluded that her trigger thumb was not causally related to her work injury and finally, he opined that she has no permanent impairment as a result of her injury.

32. Dr. Gennaro based his opinions on medical evidence demonstrating full and successful recovery from her surgery. By the end of March 2002, she was not complaining of numbness or pain and had normal strength and normal range of motion. Even the sensory disturbance on which Dr. Neale had based the 8% permanency rating in January 2002 was absent.

33. Claimant's trigger thumb, in Dr. Gennaro's opinion, was due to her summer of 2001 horseback riding activities, and not to therapy related to her carpal tunnel surgery. He based that opinion on the usual development if trigger thumb in response to repetitive overuse, not to single trauma, and to the likelihood that it would have developed before August 8, 2001 had it been related to physical therapy.

34. Dr. S. Glen Neale, who performed the Claimant's trigger thumb release in October 2001, opined that the trigger thumb was caused by her carpal tunnel release surgery and rehabilitation, including wearing a splint, although he conceded that he had never before seen trigger thumb develop from wearing a splint. Dr. Neale based his opinion on information Claimant provided to him and without knowledge of her past medical history and horseback riding activities. Further, he agreed that heavy manual labor was more likely to cause trigger thumb than splinting. At his deposition, Dr. Neale explained that trauma induced trigger thumb evidences itself soon after the trauma or within two or three months.

35. Dr. James V. Mogan, a hand specialist, diagnosed the Claimant's trigger thumb and recommended a surgical release to treat it. He opined that the trigger thumb was causally related to her occupational therapy and treatment following the carpal tunnel release. However, Dr. Mogan was unaware of Claimant's horseback riding activities during the summer of 2001 and found it unusual that therapy would cause trigger thumb. In fact, he had never seen such a case in the past. He conceded that his opinion was based on what the Claimant had told him and experience indicating that driving a truck eight hours a day is more a causative mechanism than this patient's horseback riding. Nevertheless, he concluded that her horseback riding during the summer of 2001 definitely contributed to her trigger thumb.

36. Claimant submitted evidence of her attorney's hourly billing statement reflecting her claim for $9,000.00 in attorney fees based on $90.00 per hour for her attorney, $55.00 per hour for administrative assistant and a total of $1,576.64 in costs.

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 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

2. 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 inference form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc*., 137 Vt. 393 (1979).

Left trigger thumb

4. In the present case, Claimant has not met her burden of establishing as the more probable hypothesis that her left trigger thumb condition is causally related to the January 2001 work related injury. By May of 2001 her treating surgeon placed her at medical end result for that work-related injury, with a well-supported determination that is accepted as fact. By that time, she was clearly engaged in substantial physical activities and had begun to participate in barrel races. Although released to work, she decided not to work and therefore did not experience the work-related stressors to her thumb. The first objective evidence of left thumb problems was in August of 2001 after a summer of competitive riding and other physical activities. When considered as a whole, the evidence supports Dr. Gennaro's conclusion that the thumb condition is not work-related. Even if we accept the Claimant's theory that the problem began with work, such a causal connection was broken with her riding activities as shown by claimant's experts who opined that the riding activities aggravated the condition.

Temporary total disability

5. A claimant is entitled to temporary total disability benefits under 21 V.S.A. § 642, while she is either: (1) in the healing period and not yet at a maximum medical improvement, *Orvis v. Hutchins*, 123 Vt 18 (1962), or (2) unable as a result of the injury either to resume her former occupation or to procure remunerative employment at a different occupation suited to his or her impaired capacity, *Roller v. Warren*, 98 Vt 514 (1925). It is only when maximum earning power has been restored or the recovery process has ended that the temporary aspects of the workers' compensation are concluded. See, *Moody v. Humphrey*, 127 Vt. 52, 57 (1968); *Orvis v. Hutchins*, 123 Vt. 18, 24 (1962); *Sivret v. Knight*, 118 Vt. 343 (1954).

6. The general rule, in regards to an employee who claims temporary total disability after leaving an employer, is that a claimant who voluntarily quits his job for reasons unrelated to the injury is not entitled to temporary total disability. See, *Andrew v. Johnson Controls*, Opinion No. 3-93WC (1993) citing, *Pearl v. Builders Iron Foundry*, 73 R.I. 304, 55 A.2d 282 (1947); *Powers v. District of Columbia Dept. of Employment Serv.*, 566 A.2d 1068 (1989); *Coon v. Rycenga Homes*, 146 Mich. App. 262, 379 N.W. 2d 480 (1985).

7. To avoid harsh results, there is an exception to the general rule for a claimant who can demonstrate: 1) a work injury; 2) a reasonably diligent attempt to return to the work force; and 3) the inability to return to the work force or that a return at a reduced wage is related to her work injury and not to other factors. See *Andrew* at conclusion 6.

8. Because the claimant had reached medical end result for her work-related injury in May of 2001, under well-accepted precedent cited above, she was not entitled to temporary total disability benefits afterwards. However, even assuming arguendo that she had not yet reached medical end result, there are two other reasons justifying termination of temporary total disability benefits. Claimant had been released to work. Although that release was partial at first, it was the Claimant, not the employer, who kept her from working part-time. Once released to full-duty, it was she, not any medical expert or transportation authority, who determined that her hand weakness prevented her from maintaining a CDL license. Because such a determination is beyond the ken of a layperson, expert testimony was necessary under *Lapan*, supra. Second, after reporting to work on May 7, 2001, Claimant quit for reasons unrelated to her work-related injury, namely to pursue a career change and to have the summer off. Since she had not demonstrated the applicability of the exceptions to the general *Andrew* rule, she is not entitled to TTD after she quit her job voluntarily.

Concurrent employment

9. "If the injured employee is employed in the concurrent service of more than one insured employer or self-insurer the total earnings from the several insured employers and self-insurers shall be combined in determining the employee's average weekly wages, but insurance liability shall be exclusively upon the employer in whose employ the injury occurred…." 21 V.S.A.§ 650.

10. It is undisputed that Claimant worked for Jay Peak in the weeks preceding her January 2001 injury. Calculation of the correct average weekly wage, therefore, must include those wages. An accounting must be made within 30 days of this order, with interest on the unpaid portion of the benefits computed from January 19, 2001, the date disability began.

Permanency

11. It is not clear from the record, particularly Dr. Neale's opinion, what permanency Claimant contends is due to the carpal tunnel condition, the compensable portion of this claim. Defendant argues that she suffered no permanency. Because the opinion from Dr. Neale may have included both compensable and noncompensable portions of this claim, Claimant is granted 30 days to obtain clarification as to the permanency attributable to the carpal tunnel condition.

Medical Benefits

12. Pursuant to § 640, Claimant is entitled to medical benefits associated with the compensable portion of this claim, specifically treatment for carpal tunnel syndrome. Because the trigger thumb problem arose after she ended her employment with S.T. Griswold and is not compensable, Claimant is not entitled to surgery performed by Dr. Neale for its repair.

ORDER:

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law,

1. Claimant's claim for temporary total disability benefits after May 7, 2001 is DENIED.

2. Claimant's claim for a supplement to temporary total benefits already paid based on concurrent employment is GRANTED.

3. Claimant is granted leave to obtain clarification on permanency due.

4. All other claims are DENIED.

Dated at Montpelier, Vermont this 5th day of February 2003.

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Michael S. Bertrand
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.