Britton v. Laidlaw Transit (12/03/03)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Anne Britton	)	Opinion No. 47-03WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Laidlaw Transit	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. R-08754

Hearing held in Brattleboro on May 22, 2003 and by phone on June 16, 2003
Record Closed on August 18, 2003

APPEARANCES:

Anne Britton, Claimant
Christopher J. McVeigh, Esq., for the Defendant

ISSUES:

1. Is claimant entitled to additional temporary total or temporary partial disability benefits pursuant to 21 V.S.A. § 642 and § 646?

2. Is claimant entitled to permanent partial disability benefits under § 648?

3. Pursuant to 21 V.S.A. § 640(a), is claimant entitled to a referral to a physiatrist?

4. Pursuant to Vermont Workers' Compensation Rule 12.2100, is claimant entitled to reimbursement for 2,832 miles she traveled to and from Dr. Cyr's office for chiropractic treatment?

EXHIBITS:

A. Medical Records
B. Documents from Laidlaw including attendance records

FINDINGS OF FACT:

1. The exhibits are introduced into evidence and notice is made of all forms filed with this Department.

2. In March of 1998 Claimant began working for Laidlaw Transit as a school bus driver as an on-call, substitute driver. Start-up meetings for school bus drivers were held in August of each year.

3. In August of 2000 claimant sustained an injury to her right shoulder while operating the manual door on a bus she was driving. As a result of her injury, she lost some time from work.

4. In November 2000 Dr. Denise Paasche released claimant to return to work if she could drive a bus with an air-powered door. Laidlaw provided such a bus to claimant who returned to work in January 2001.

5. Claimant's shoulder injury has not prevented her from doing work at other jobs she has held where she has operated a cash register and stocked shelves.

6. During the summer months, Laidlaw typically laid off school bus drivers, a practice claimant readily accepted. She and other drivers collected unemployment benefits during that time. However, the manager did not lay off claimant during the summer of 2001 because at that time she still had an active workers' compensation claim. He understood that she could not receive unemployment benefits and workers compensation benefits, and, therefore, offered her part time light duty work.

7. Claimant did not want to work during the summer months.

8. At first, claimant was scheduled for morning hours, and then was changed to afternoon hours to accommodate her schedule.

9. Claimant was assigned to work 2.5 hours per day in the office doing light cleaning and computer work. She may have waxed a bus on occasion.

10. In July and August of 2001, claimant worked four days for a total of eight hours. She called in or failed to show up would not be at work, the reason she gave was for legal action related to a for work on all other scheduled workdays. On five of the days she called to say she divorce. She was fired in August for poor performance.

11. On January 16, 2002, claimant was notified that she had an obligation to conduct a good faith effort to look for work and that she should make at least 15 contacts per week. She did not comply with that obligation.

12. Since her injury, claimant has treated with health care providers at the Sojourns clinic, at Wellness Services and with Dr. Denise Paasche, Dr. Blofman, Dr. Donald Kinley, Dr. Guirgus and physical therapists at the Brattleboro Memorial Hospital.

13. In December 2001, Crawford and Company referred the claimant to Dr. Maurice Cyr, a chiropractic physician in Rutland, Vermont, for an independent medical evaluation. He recommended chiropractic care for her. Claimant then elected to treat with Dr. Cyr, although doing so involved a commute from her home in Brattleboro to his office in Rutland, a distance of approximately 140 miles round trip.

14. In a letter dated February 25, 2002 defense counsel notified claimant that it would approve her request to treat with Dr. Cyr, provided she not seek reimbursement for mileage for travel to his office. Claimant did not object to the condition barring reimbursement for mileage.

15. There are several chiropractors in the Brattleboro area from whom claimant could have received treatment, but she preferred to see Dr. Cyr. Yet remaining unanswered is why the insurer sent her that distance for an IME, with so many other chiropractors available closer to her home.

16. On July 23, 2002 Dr. Cyr examined the claimant to determine if she had reached medical end result and, if so, whether she had a degree of permanent partial disability. He determined that she was at medical end result for her shoulder injury and, based on the AMA Guides, 5th Edition, determined that she had a 3% whole person impairment. Defendant filed a Form 27 based on Dr. Cyr's medical end result determination and offered to pay her the 3% impairment.

17. In mid-August, 2002 claimant asked that the defendant pay for her to be referred to a physiatrist for treatment of her shoulder. Defendant states that it denied that request on the basis of Dr. Cyr's medical end result determination.

18. On May 1, 2003 at the defendant's request, Dr. Victor Gennaro performed an examination of the claimant. He agreed with Dr. Cyr that claimant was at medical end result and opined that she had been at medical end since early 2002. In his opinion, claimant is not in need of any additional medical treatment of any kind, evaluative or palliative. His examination of the claimant's shoulder was completely normal. Her cervical spine had full range of motion; there was no spasm or tenderness. Lumbar range of motion was normal. Impingement test of her right shoulder was negative and range of motion of her shoulder was full.

CONCLUSIONS OF LAW:

Claim for temporary total disability benefits

1. When as a result of a work-related injury one is unable to work, she is entitled to temporary total disability benefits until she reaches medical end result or successfully returns to work. 21 V.S.A. § 643(a), 648(a); *Wroten v. Lamphere*, 147 Vt. 606 (1987).

2. Once an employee has adequately established the original injury and a subsequent disability, the burden is on the employer to justify the termination of temporary total disability compensation. *Merrill v. University of Vermont*, 133 Vt. 101 (1974). In this case the defendant has the burden of proving the propriety of terminating temporary disability benefits for an accepted work-related injury.

3. In those situations in which an employee voluntarily quits her job for reasons unrelated to the injury, she 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). To avoid harsh results, there is an exception to the general rule for a claimant when there was a work injury, a reasonably diligent attempt to return to the work force and 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; *Pfalzer v. Pollution Solutions of Vermont*, Opinion No. 23-01WC(2001).

4. Defendant has proven that it offered claimant a job within her restrictions during the summer of 2001 and that, for reasons unrelated to her work-related injury, she failed to work. On such facts, the same principles of the *Andrew* case, cited in ¶ 3 above, apply to this case. Claimant's departure from Laidlaw in August 2001 was tantamount to quitting. The departure was not related to the claimant's shoulder injury. She has not attempted to obtain another job to replace the Laidlaw job, and her failure to do so is not related to her shoulder. Accordingly, she is not entitled to additional temporary disability benefits.

Permanent Partial Disability Benefits

5. It was at the defendant's request that Dr. Cyr rendered an opinion regarding medical end result on July 3, 2002. It was on the basis of that opinion that defendant filed a Form 27. It is disingenuous at best for the defendant to now disavow Dr. Cyr's opinion that she had a 3% permanent partial impairment at that time, especially when defendant, through present counsel, offered claimant a Form 22 based on that rating in July 2002. Therefore, defendant is liable to the claimant for that 3% permanency.

Claim for a referral to a physiatrist

6. Under the Vermont Workers' Compensation Act, an injured worker is entitled to reasonable medical services. 21 V.S.A. § 640(a). "The decisive factor is not what the claimant desires or what she believes to be the most helpful. Rather, it is what is shown by competent expert evidence to be reasonable to relieve the claimant's back symptoms and maintain her functional abilities." *Quinn v. Emery Worldwide* Opinion, No. 29-00WC(2000). "[A] claimant may reach medical end result, relieving the employer of temporary disability benefits, but still require medical care associated with the injury for which the employer retains responsibility. *Pacher v. Fairdale Farms* 166 Vt. 626, 629 (1997); *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 532 (1996). The necessity of treatment such as physical therapy or medications is not inconsistent with finding medical end result. *Pacher*, 166 Vt. 626.

7. Claimant insists that she has the right to a referral to a physiatrist for an assessment of her shoulder symptoms that have persisted. She received a recommendation for such a referral from Thom Namaya, N.P. at Wellness Services on November 18, 2002. Mr. Namaya wrote that it would be "medically prudent."

8. After an examination on May 1, 2003, Dr. Victor Gennaro, an orthopedic surgeon, opined that no further care was needed, either evaluative or palliative, because his examination was completely normal.

9. I am convinced that Mr. Namaya's recommendation that claimant see a physiatrist was based more on the claimant's persistence than on an objective assessment that such a referral was reasonable. In fact, the objective evidence supports Dr. Gennaro's assessment that further care is not warranted. Accordingly, claimant's request that the carrier pay for a referral to a physiatrist is denied.

Mileage reimbursement to Dr. Cyr's office

10. Next, claimant seeks reimbursement for her travel to Dr. Cyr from Brattleboro to his office in Rutland, for a total of 2,832 miles. Because the defendant specified in a letter dated February 25, 2002 that it would pay for the treatment with Dr. Cyr, but not the mileage to this office, and because claimant continued to treat with him without challenging the defendant's position on this issue, defendant is not responsible for the mileage after February 28, 2002, based on the assumption that the letter sent February 25 took three days to be delivered. However, Defendant is responsible for mileage to Dr. Cyr's office before February 28. 2002.

Unlawful firing

11. Finally, claimant alleges that her firing from Laidlaw was unlawful. However, as the hearing officer told her at the hearing, this Department adjudicates the issues of compensability under the Workers' Compensation Act but has no jurisdiction to determine whether a firing was unlawful.

ORDER:

THEREFORE, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED:

1. To reimburse claimant for mileage to Dr. Cyr's office before February 28, 2002;
2. To pay claimant permanent partial disability benefits based on a 3% whole person impairment.

Claimant's claims for temporary disability benefits, for a referral to a physiatrist and for reimbursement for mileage to Dr. Cyr's office after February 28, 2002 are DENIED.

Dated at Montpelier, Vermont this 3rd day of December 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.