Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-427

SEPTEMBER TERM, 2009

Leslie Richardson	}	APPEALED FROM:
	}	
v.	}	Chittenden Superior Court
	}	
Regular Veteran's Association Post No. 514 and St. Paul's Travelers Insurance Company	}	DOCKET NO. S0904-06 CnC
	}	Trial Judge: Matthew I. Katz

In the above-entitled cause, the Clerk will enter:

Defendant insurer appeals from a superior court judgment awarding claimant worker's compensation benefits for a hip replacement surgery which a jury found to be causally related to a workplace injury. Insurer contends the court erred in: (1) denying a motion for judgment as a matter of law because the testimony of claimant's expert on the issue of causation was entirely speculative; and (2) ruling that claimant's compensation rate was not capped by her average weekly wage. We agree with the second claim, and therefore reverse that portion of the judgment.

Claimant suffered a work-related injury to her left leg in 1993, and was awarded temporary total disability worker's compensation benefits. Over the next several years, claimant suffered serious complications from the injury requiring multiple surgeries, including the installation and removal of metal plates, and a lumbar spine fusion for related back problems. Claimant has been forced to use crutches since the injury. In August 2005, claimant experienced pain in her left hip which x-rays revealed to be advanced avascular necrosis, requiring a total hip replacement. Insurer, the employer's worker's compensation carrier, denied responsibility for the surgery, claiming that it was unrelated to the original workplace injury. Following a hearing before the Department of Labor, the Commissioner ruled in favor of claimant, finding that the hip replacement surgery was causally related to the workplace injury, and that claimant was therefore entitled to benefits. The Commissioner also ruled that claimant's benefits must be capped at her average weekly wage, and therefore excluded cost of living adjustments that would have resulted in a compensation rate in excess of the average weekly wage.

Insurer appealed the Commissioner's causation ruling to the superior court, and claimant cross-appealed the compensation ruling. A two-day jury trial was held in July 2008. Plaintiff's expert, her treating orthopedic surgeon, testified that claimant's workplace injury and subsequent complications had contributed to her osteoporosis, and that the latter had likely resulted in bone fractures which led to the avascular necrosis. Accordingly, the expert testified that it was

reasonably probable that claimant's hip condition was causally related to the workplace injury. Insurer moved for judgment as a matter of law at the close of plaintiff's case, asserting that the expert's opinion was entirely speculative and insufficient to establish causation. The trial court denied the motion. Thereafter, insurer's medical expert testified that there was no evidence of a causal connection between claimant's workplace injury and her hip condition; there were no x-rays or other tangible evidence that claimant had actually suffered any bone fractures, and therefore the cause of the avascular necrosis could only be labeled idiopathic, or unknown.

Insurer renewed its motion for judgment as a matter of law at the close of the evidence, which the court again denied. The jury returned a special verdict in favor of claimant, finding that the hip replacement surgery was causally related to the workplace injury. The court subsequently ruled that there was no cap on claimant's benefits and that she was therefore entitled to full cost of living adjustments. A final judgment order issued in October 14, 2008. This appeal followed.

Insurer first contends the court erred in denying its motion for judgment as a matter of law, renewing its claim that the evidence of causation was entirely speculative and insufficient as a matter of law to support the verdict. Claimant argues, in response, that the issue was not properly preserved for review on appeal because insurer failed to renew the motion after the entry of judgment. We agree. Rule 50(b) of the Vermont Rules of Civil Procedure provides, in pertinent part, as follows:

> Whenever a motion for judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by filing not later than 10 days after entry of judgment. Renewal of the motion is necessary to appeal from a denial of or a failure to grant a motion for judgment as a matter of law.

V.R.C.P. 50(b) (emphasis added). As the emphasized language demonstrates, the Rule specifically requires the filing of a renewed motion for judgment as a matter of law, or what used to be called a motion for judgment notwithstanding the verdict (j.n.o.v), within ten days after the verdict in order to preserve the issue for review. The Reporter's Notes to the 1988 amendment to the Rule confirm this requirement, explaining: "A second requirement has been implicit in the rule but not widely recognized: a motion for judgment notwithstanding the verdict also must be made if denial of the directed verdict motion is to be appealed. . . . Rule 50(b) is amended to make explicit this requirement." Id., Reporter's Notes, 1988 Amendment; cf. Murphy v. Stowe Club Highlands, 171 Vt. 144, 154 (2000) (rejecting claim that defendants failed to preserve a claim relating to punitive damages where they "sought a judgment as a matter of law on the . . . issue in compliance with V.R.C.P. 50(a), and renewed their motion after entry of judgment as required by Rule 50(b)" and thus "preserved the issue for appellate review"). As the Reporter's Notes also indicate, the equivalent federal rule has been interpreted to contain the same requirement. See Unitherm Food Sys., Inc. v. Swift-Ekrich, Inc., 546 U.S. 394, 407 (2006) (where defendant neither renewed its motion for judgment as a matter of law nor moved for a new trial after the verdict, it was barred under F.R.C.P. 50(b) from challenging the court's denial

of its motion for judgment at the close of the evidence). The purpose of the rule, as the high court has explained, is to afford the trial court the opportunity to correct an erroneous verdict in the first instance: "A post verdict motion is necessary because determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance by the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." Unitherm, 546 U.S. at 401 (quotation omitted). Accordingly, we conclude that insurer's claim was not properly preserved, and we therefore decline to address it.

Insurer also contends the court erred in reversing the Commissioner's ruling that claimant was not entitled to cost of living adjustments that resulted in benefits in excess of her average weekly wage. We agree. Although 21 V.S.A. § 650(d) provides for annual cost-of-living adjustments to worker's compensation benefits, § 642 expressly limits temporary disability benefits to the employee's average weekly wage. While holding in Morin v. Essex Optical/The Harford, 2005 VT 15, 178 Vt. 29, that the Commissioner erred in ruling that the claimant was not entitled to receive a cost of living adjustment to permanent disability benefits in excess of her average weekly wage, we explicitly contrasted claimant's status from that of an employee receiving temporary benefits. While no statute or rule explicitly capped permanent benefits, we noted that § 642 expressly limited temporary benefits to the employee's average weekly wage, and that the worker's compensation rules "reiterate that 'in no event may a clamaint's compensation rate for temporary total disability exceed his or her weekly wage or his or her weekly net income.'" Id. ¶ 10. We thus concluded that the Legislature had "intended that the two types of compensation be treated differently," id. ¶ 12, and explained that "the distinction between temporary and permanent disability compensation" in this regard was a "rational" one; whereas "capping the cost of living adjustment for temporarily disabled workers provides an incentive for the worker to regain functionality and return to work as soon as possible," once a worker is determined to be permanently disabled "there is no expectation that the worker will return to work and no incentive for that purpose is appropriate." Id. ¶ 14.

Although Morin interpreted a 1994 amendment to § 642, the version in effect at the time of claimant's injury in 1993 similarly—and expressly—limited temporary disability benefits to the employee's average weekly wage. Claimant would avoid this limit by interpreting "average weekly wage" to automatically include cost-of-living adjustments, noting that average weekly wage is computed under the formula set forth in § 650, which provides for annual adjustments "so that such compensation continues to bear the same percentage relationship to the average weekly wage in the state as computed under this chapter as it did at the time of injury." 23 V.S.A. § 650(d). The argument overlooks the Department's consistent pre-1993 interpretation of § 642 as placing a limit on cost-of-living adjustments to temporary disability benefits that resulted in compensation in excess of the employee's average weekly wage, a policy that would have made no sense under claimant's interpretation. Claimant's interpretation would also render superfluous the 2003 amendment to § 642 that exempted cost-of-living adjustments from the average-weekly-wage limit on temporary disability benefits.

Accordingly, we conclude that the Commissioner correctly capped claimant's benefits at her average weekly wage. The trial court's conclusion to the contrary was based largely on a version of § 642 enacted subsequent to her injury, contrary to the longstanding rule that claims

for worker's compensation benefits are "governed by the law in force at the time of the occurrence of such injury." Montgomery v. Brinver Corp., 142 Vt. 461, 463 (1983).

That portion of the judgment overruling the Commissioner's decision concerning claimant's compensation rate is reversed. In all other respects, the judgment is affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice