Lowell v. Rutland Area Visiting Nurses Assoc. (99-500)

[Filed May 2, 2000]

ENTRY ORDER

SUPREME COURT DOCKET NO. 99-500

APRIL TERM, 2000

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| Judith Lowell | } | APPEALED FROM |
| | } | |
| | } | |
| v. | } | Department of Labor & Industry |
| | } | |
| Rutland Area Visiting Nurses | } | |
| | } | DOCKET NO. L-04140 |

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

Appellant's motion to dismiss the appeal and vacate the decision below is granted.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Lowell v. Rutland Area Visiting Nurses Assoc. (Oct. 12, 1999)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

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| | ) | State File No. L-04140 |
| Judith Lowell | ) | |
| | ) | By: Amy Reichard |
| v. | ) | Staff Attorney |
| | ) | |
| | ) | For: Steve Janson |
| Rutland Area Visiting Nurses | ) | Commissioner |
| Association | ) | |
| | ) | Opinion No. 42-99WC |

Heard in Middlebury, Vermont, on August 10, 1999.
Record Closed: September 7, 1999

APPEARANCES:

Beth Robinson, Esquire for claimant Judith Lowell
Christopher J. McVeigh, Esquire for employer Rutland Area Visiting Nurses Association

ISSUES:

Whether the claimant is barred from receiving workers' compensation benefits pursuant to 21 V.S.A. § 656.

EXHIBITS:

Claimant's Exhibit A: Medical Records
Defendant's Exhibit 1: Employee Daily Attendance Record

FINDINGS OF FACT:

1. Notice is taken of all forms filed with the Department in this matter. The exhibits are admitted into evidence.

2. At all relevant times in this case, claimant was an employee and defendant an employer, within the meaning of the Vermont Workers' Compensation Act.

3. Defendant has employed claimant as a licensed nursing assistant since March 1993. Serving in this capacity, claimant routinely traveled to the homes of clients in order to provide them with the necessary care.

4. On February 3, 1995, while claimant was en route between the homes of two clients, she was involved in a motor vehicle accident. Specifically, when she was stopped at a stop sign, claimant's vehicle was rear-ended by another automobile.

5. After the accident, claimant proceeded with her scheduled care visits. At the conclusion of her work shift, claimant returned to defendant's office. At that time, she informed Jo Short, an office scheduler, about the automobile accident that occurred earlier in the day when she was travelling between client's homes. Ms. Short is not claimant's supervisor. It is not clear from the record in this case if scheduler duties, during February 1995, included officially accepting, on behalf of the defendant, notice of workers' compensation injuries.

6. Ann Colvin, who is actually claimant's supervisor, was also present in the office at this time. However, she was on the telephone when claimant told Ms. Short about the accident. Claimant did not specifically inform Ms. Colvin about the accident and the circumstances surrounding it.

7. Claimant was aware that work injuries should be reported to a supervisor. Yet, she did not file a report with Ms. Colvin. As explained by claimant, she was simply unaware that an automobile accident injury, which was sustained while travelling between clients' homes on company time, qualified as a workers' compensation injury.

8. Following the accident, claimant's back began to feel sore. As such, she sought medical care on February 22, 1995 and she was prescribed pain medication. Thereafter, claimant continued to periodically seek medical treatment, including chiropractic manipulations in July 1995. Claimant also eventually began receiving physical therapy treatments in January and February of 1997.

9. Prior to late January or early February 1997, on the numerous occasions when claimant was examined and treated by her primary caregivers, Dr. Peter Diercksen and Dr. Michael Bell, a conservative course of medical treatment was continually recommended and pursued.

10. In late January or early February of 1997, while attempting to rearrange her work schedule in an effort to attend physical therapy sessions, the claimant conversed with Ms. Colvin, her supervisor, about the automobile accident. During the course of this conversation, claimant informed Ms. Colvin that her back injury was sustained while travelling between the homes of clients.

11. Acting upon this information, Ms. Colvin directed claimant to complete an incident report and file a workers' compensation claim. In the ensuing days, claimant followed Ms. Colvin's instructions and a First Report of Injury was filed with the Department in February 1997. This was the first time claimant learned that her automobile accident injury was covered under workers' compensation.

12. Claimant's medical treatment continued. Specifically, she received additional chiropractic treatment in April, May, and August of 1997. In addition, claimant's primary caregiver recommended, in June 1998, that a diagnostic study be performed on claimant's back. This study, an MRI, was eventually performed in May 1999. As stipulated by the parties, the diagnostic study was not performed until May 1999, approximately a year after it was recommended, because no insurance carrier agreed to pay for the cost of such a study.

13. Presently, after interpreting the results of the MRI, one of the claimant's treating physicians determined that claimant is not an appropriate candidate for surgery. A conservative course of care was recommended as treatment for claimant's back pain. In particular, the doctor prescribed Medrol Dose Packs and he suggested a course of steroid injections.

14. Claimant testified that, in comparison to her back condition six months to a year after the automobile accident, her back pain is actually worse now.

15. Following the automobile accident, claimant filed a civil action against the driver who struck her automobile from behind. This matter is presently scheduled for trial in the fall of this year.

CONCLUSIONS OF LAW:

1. In this case, defendant maintains that the instant workers' compensation claim should be dismissed for lack of timely notice, based upon 21 V.S.A. § 656, which mandates a specific time period for providing notice of an injury and for filing a claim for compensation.

TIMELY NOTICE AND FILING

2. Specifically, the timely notice statute provides, in part:

A proceeding under this chapter for compensation shall not be maintained unless a notice of the injury has been given to the employer as soon as reasonably practicable after the injury occurred, and unless a claim for compensation with respect to an injury has been made within six months after the date of injury. 21 V.S.A. § 656.

3. The statute defines the date of injury as "the point in time when the injury and its relationship to the employment is reasonably discoverable and apparent." Id.

4. In resolving this case, it is necessary to properly interpret the phrase "discovery of the injury and its relationship to the employment." Particularly at issue in the present case is whether this provision encompasses not only a claimant's discovery of an actual physical and/or emotional injury and its cause, but also the discovery of the existence of a workers' compensation claim.

5. The Lillicrap v. Martin, 156 Vt. 165 (July 14, 1989) decision, being closely analogous to the instant case, provides the guidance necessary for evaluating the pertinent statutory language. In Lillicrap, the Vermont Supreme Court interpreted the language of a statute of limitations, which provides, in part, that an action to recover damages in a medical malpractice case should be brought within two years "from the date the injury is or reasonably should have been discovered." See 12 V.S.A. § 521. The court held that this provision includes not only discovery of the injury itself, but also discovery of the cause of the injury, as well as the existence of a cause of action. Id. at 176.

6. In reaching its ultimate conclusion, the court reasoned that "a point arises at which a reasonable person should be able to ascertain that her legal rights have been violated. At that point the statute of limitations should commence." Lillicrap, 156 Vt. at 174 (citing Ware v. Gifford Memorial Hospital, 664 F. Supp. 169, 171 (D. Vt. 1987)). "[T]he law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right." Id. (quoting Foil v. Ballinger, 601 P.2d 144, 147 (Utah 1979). "Put more succinctly, courts ought not to declare the bread stale before it is baked." Id. at 174-75 (quoting Fleishman v. Eli Lilly & Co., 96 A.D.2d 825, 826 (1983) (Gibbons, J., concurring and dissenting)). Therefore, the court concluded that the applicable statute of limitations does not commence to run until a plaintiff has discovered her "legal injury." Id. at 176.

7. Similarly, in The University of Vermont v. W.R. Grace & Co., 152 Vt. 287 (Aug. 4, 1989), the Vermont Supreme Court further provided that a statute of limitations should not be utilized as an unjust and inflexible tool. Id. at 291. To allow a cause of action to accrue before a party "has or can reasonably be expected to have knowledge of any wrong inflicted is patently inconsistent and unrealistic. One cannot maintain an action before one knows there is one." (quoting South Burlington School District v. Goodrich, 135 Vt.601, 609 (Billings, J. dissenting)).

8. Taking into consideration the Lillicrap and W.R. Grace rulings, it is evident, that for purposes of determining the accrual date for commencing the six-month limitations period of 21 V.S.A. § 656, notice of a work injury and a claim for workers' compensation must be made within six months after a claimant discovers or reasonably should discover her injury, its cause, and the existence of a workers' compensation claim.

9. In this case, claimant did not provide notice with her supervisor until late January or early February 1997, or file a workers' compensation claim until February 1997, approximately two years after the automobile accident, which occurred in February 1995. However, claimant credibly and reliably explained that she was simply unaware that injuries sustained in an automobile accident that occurred en route between clients' homes qualified as a workers' compensation claim. She did not discover the existence of her workers' compensation claim prior to the discussion with her supervisor. Once she did learn this fact, claimant acted immediately and filed a claim with this Department, well within the six-month confines of 21 V.S.A. § 656.

10. Furthermore, since claimant's injury occurred while travelling in an automobile to provide care to her clients, rather than on her actual employment premises, it is entirely reasonable that claimant was unaware, until informed by her supervisor, that her resulting injuries were covered by workers' compensation. Defendant disputes this contention, maintaining that claimant, who capably acquired an attorney to represent her in a civil action related to the automobile accident, should have made an attempt or an effort to determine the relationship between her injuries and her employment. However, taking into account the entire context of this case, claimant's credible testimony, as well as the remedial nature of the Workers' Compensation Act, which must be liberally construed to provide injured workers with benefits, defendant's argument is rejected. See St. Paul Fire & Marine Insurance Co. v. Surdam, 156 Vt. 585 (1991).

11. Accordingly, based upon an analysis of the specific facts and relevant law in this case, claimant was without a basis to make a claim for workers' compensation until February 1997, when she first learned from her supervisor that the injuries she sustained in the automobile accident were related to her employment. It was at this point when the six- month limitation period commenced. Since claimant filed a claim with the Department almost immediately thereafter, she has clearly satisfied the requirements of 21 V.S.A. § 656 and, therefore, her claim for workers' compensation is not barred.

12. As a final note, the conclusion in this case in not meant to allow claimants to defeat the requirements of section 656 with blanket assertions that they didn't know their injury qualified as a workers' compensation claim. Rather, it requires a specific analysis of the factual circumstances, as well as the credibility of the witnesses, to determine

when, in fact, a claimant reasonably should have been aware of the existence of a workers' compensation claim. See W.R. Grace, 152 Vt. at 291-92; Hartman v. Ouellette Plumbing & Heating, 146 Vt. 443, 447 (Dec. 20, 1985).

PREJUDICE

13. Notwithstanding the preceding conclusion as to claimant's compliance with 21 V.S.A. § 656, this claim would still be allowed to proceed, since claimant satisfactorily demonstrated that the delay of notice did not prejudice the defendant.

14. Pursuant to the Vermont Workers' Compensation Act, failure or delay in providing notice or in making a claim shall not preclude a workers' compensation proceeding "if it is shown that the employer, the employer's agent or representative, had knowledge of the accident or that the employer has not been prejudiced by the delay or want of notice." 21 V.S.A. § 660.

15. The claimant has the burden of showing either the employer's knowledge of the accident, or the lack of prejudice. See Workers' Compensation Rule 3(a)(3).

16. As to the lack of prejudice, it is demonstrated (1) by showing that the employer was not hampered in making its factual investigation and preparing its case and (2) by showing that the claimant's injury was not aggravated by reason of the employer's inability to provide early medical diagnosis and treatment. See 7 Larson, Workers' Compensation Law, 78.32(c) at 194.

17. First, the ability to investigate the claim has not been prejudiced. In this case, the defendant does not dispute the underlying circumstances of the automobile accident and the resulting back injury. As such, the issue of whether defendant was prejudiced by an inability to conduct a factual investigation is not relevant to this matter.

18. Additionally, after conducting a thorough review of the medical records and the testimony in this case, it is clear that the defendant also did not suffer any prejudice as a result of the inability to provide earlier medical diagnosis and treatment.

19. First, as revealed by the medical records, there was not a significant delay in receiving medical care following the injury, claimant having sought treatment approximately three weeks after the automobile accident. Furthermore, the absence of prejudice is also demonstrated by evidence that the claimant did indeed receive adequate and sufficient medical care. This conclusion is bolstered by the fact that the current course of treatment, based upon the MRI findings, is for conservative measures, which was the same type of medical care provided to claimant at the recommendation of Dr. Diercksen and Dr. Bell prior to 1997.

20. Challenging the adequacy of the medical care, defendant cites to the fact that claimant did not receive a diagnostic study, specifically a MRI, until recently. However, this challenge must fail. The relevant time period for determining prejudice is measured from the date claimant should have provided notice to her employer until the time when the notice was actually received. Since the diagnostic study was not recommended until June 1998, well after defendant was placed on notice of the injury and claim, the fact that the claimant actually did not undergo the MRI until a year later plays no part in determining whether defendant suffered prejudice due to delayed

reporting. Moreover, since the MRI actually confirmed that the prior conservative treatment measures were the more appropriate treatment plan, as opposed to surgical intervention, an earlier diagnostic study would not have altered claimant's overall medical care.

21. In addition, defendant also challenges the sufficiency of claimant's evidence, maintaining that claimant has failed to prove an essential element on this case. Specifically, relying upon the Lapan standard, defendant insists that expert evidence must be proffered to establish that the employer was not prejudiced by the delay in notice. However, expert testimony is only required when "a layman could have no well-grounded opinion" as to the ultimate contested issue. See Lapan v. Berno's Inc., 137 Vt. 393, 395 (1979). Based upon the record in this case, it is clearly within the purview of the "layman" to determine if the claimant received reasonable medical care between the date of her injury and the time when she provided notice to her employer. Therefore, expert evidence is neither necessary nor required.

22. Accordingly, as evidenced by the preceding conclusions of law, the claimant has sufficiently demonstrated that the defendant did not suffer any prejudice as a result of the two-year delay in reporting her work-related injury. Even if claimant had provided notice to defendant at an earlier date, the resulting treatment would have remained the same. As such, having satisfied the requirements of 21 V.S.A. § 660, claimant may proceed with her workers' compensation claim.

ATTORNEY FEES

23. In regards to an award of attorney fees and costs, claimant submitted evidence of her one- third contingency fee agreement with her attorney. In addition, claimant has also submitted an itemized accounting of her attorney's 31.25 hours of representation in this workers' compensation case.(FN1) Finally, claimant has also submitted as evidence an itemized list of necessary expenses, which totaled $98.24.

24. Upon reviewing claimant's fee request, defendant objected to portions of the itemized billing. Specifically, defendant described multiple .25 hour charges, which were allocated to correspondence preparation and review, as excessive, unreasonable and indiscriminate. In response, claimant's counsel specifically explained the process she utilizes in reviewing and sending correspondence. In addition, claimant's counsel unequivocally stated that she was entirely comfortable in characterizing the billing as reasonable and appropriate.

25. As evidenced by the language contained within 21 V.S.A. § 678(a), an award for necessary costs is mandatory, as a matter of law, if the claimant prevails in a workers' compensation proceeding. Pederzani v. The Putney School, Opinion No. 57-98WC (Oct. 6, 1998); Fredriksen v. Georgia-Pacific Corp., Opinion No. 28-97WC (Oct. 17, 1997). Whereas, when a claimant prevails, an award for reasonable attorney fees is a matter of the Commissioner's discretion. Aker v. ALIIC, Opinion No. 53A-98WC (Nov. 5, 1998); Pederzani, supra; Fredriksen, supra.

26. In this matter, the claimant has indeed prevailed in this case. Therefore, an award for necessary costs, in the amount of $98.24, based upon the claimant's Affidavit as to Attorney Fees and Costs, is proper.

27. Furthermore, having reviewed the submitted charges and the parties' respective arguments on the issue of attorney fees, I also find that claimant is entitled to her requested attorney fees, including the .25 hour charges, which I conclude are reasonable attorney billing. As such, claimant is entitled to $1875, for 31.25 hours at a rate of $60 per hour. See Workers' Compensation Rule 10 (update effective 9/13/99).

ORDER:

Based upon the foregoing Findings of Fact and Conclusions of Law, defendant is ORDERED to:

1. Adjust this claim in accordance with the Vermont Workers' Compensation Act;

2. Pay claimant's requested attorney's fees, in the amount of $1,875 for 31.25 hours at a rate of $60 per hour, as well as $98.24 for her necessary expenses, pursuant to 21 V.S.A. § 678.

Dated in Montpelier, Vermont, this 12th day of October 1999.

_____
Steve Janson
Commissioner

FN1. Originally, claimant's request for attorney fees was based upon a calculation of 32.25 hours of representation. However, after defense counsel objected to an hour of time included in the calculation, which was actually time spent handling the third party action in Superior Court, claimant conceded she incorrectly allocated that hour and it was withdrawn from the attorney fee request. As such, the request for fees was reduced by one hours time, making it 31.25 total hours.