

Fadil Kuljancic v. Wal-Mart

(November 28, 2012)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Fadil Kuljancic

Opinion No. 28-12WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

Wal-Mart

For: Anne M. Noonan
Commissioner

State File No. X-57053

OPINION AND ORDER

Hearing held in Montpelier, Vermont on July 31 and August 1, 2012
Record closed on September 21, 2012

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Marion Ferguson, Esq. and Glenn Morgan Esq., for Defendant

ISSUE:

Is Claimant permanently and totally disabled as a result of his January 2006 compensable work injury?

EXHIBITS:

Joint Exhibit I:	Medical records
Joint Exhibit II:	Functional capacity evaluation, April 2011
Joint Exhibit III:	Functional capacity evaluation, September 2008
Joint Exhibit IV:	Additional medical records
Defendant's Exhibit A:	<i>Curriculum vitae</i> , George White, M.D.
Defendant's Exhibit B:	Photo of Claimant on gym equipment
Defendant's Exhibit C:	Photo of Claimant on gym equipment
Defendant's Exhibit D:	Photo of Claimant on gym equipment
Defendant's Exhibit E:	Photo of Claimant on gym equipment
Defendant's Exhibit F:	Tammy Parker's vocational rehabilitation file
Defendant's Exhibit G:	Deposition of Claimant, July 17, 2012
Defendant's Exhibit H:	Dr. White report, April 2010

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. §644

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.
3. Claimant is a 43-year-old immigrant from Bosnia. He and his family came to the United States in 1999. They initially settled in Idaho where other family members lived. Later they moved to Vermont, where Claimant obtained a job with Defendant as a shelf stocker.
4. Claimant does not speak English very well, and cannot read or write it at all. He was assisted by an interpreter at the formal hearing.
5. In January 2006, while working his normal shift, Claimant attempted to move a table loaded with books. He started to pick up the table with no success, so instead he tried to slide it out of the way. As he did so, he heard a crack in his back and immediately felt pain. Defendant accepted this injury as compensable and paid workers' compensation benefits accordingly.

Claimant's Course of Treatment

6. Claimant was diagnosed with lower back pain with radiculopathy and was initially referred to physical therapy. His doctors feared re-injury, so Defendant accommodated his work restrictions and assigned him to a sedentary job. At the same time, Claimant was referred to a work hardening program. He successfully completed the program in June 2006 and was released to return to work full time with no restrictions.
7. Over the course of the next several months, Claimant's back pain worsened. He underwent a lumbar epidural steroid injection in April 2007, following which he enjoyed complete pain relief for two to three months. A second injection in July 2007 did not result in any pain relief at all, however. Due to his unremitting pain, Claimant could not return to work in August 2007. He has been out of work ever since.
8. In September 2007 Claimant underwent a right L5-S1 minimally invasive microdiscectomy. Within days of that surgery, he experienced increasing pain in his right buttock that radiated down his right leg. Imaging studies revealed a possible disc herniation or accumulation of blood, so Claimant underwent a second surgery in October 2007. That procedure went well and disc fragments were removed.
9. Thereafter, Claimant underwent additional steroid injections to try to control his pain, but these provided no sustained relief. A March 2008 electromyogram revealed mild chronic S1 radiculopathy. Claimant's treatment team did not believe he was a candidate for any additional surgery.

10. More steroid injections were tried, to no avail. Claimant became frustrated with this course of treatment and declined to pursue it further. His physicians recommended physical therapy, but he elected to do his own home exercise program instead.
11. Having failed conservative treatment, in October 2009 Claimant underwent a spinal cord stimulator trial. Both this trial and a subsequent one in 2010 were unsuccessful. Since the second trial, Claimant's medical treatment has consisted solely of pharmacological pain management.

Claimant's Psychiatric History

12. As treatments were tried and failed, Claimant became increasingly depressed about his chronic pain. In March 2008 Ms. Mikula, a nurse practitioner and Claimant's primary care provider, recommended counseling with a pain group. This suggestion was ultimately abandoned, as Claimant had difficulty communicating in English. Ms. Mikula also recommended that Claimant take an antidepressant, but at that time he declined to do so.
13. Throughout 2009, Claimant reported that his chronic pain was getting much worse. As a consequence, his depression and anxiety deepened. By mid-2009 he was seeing a therapist for counseling and a psychiatrist for medication management.
14. Claimant's depression worsened in November 2009, after his first spinal cord stimulator trial proved unsuccessful. He became despondent and felt hopeless due to his pain level, his incapacitation and his inability to work. In mid-November he became suicidal, and his psychiatrist admitted him for in-patient psychiatric treatment. Claimant was released one week later. He has been taking both anti-depressants and anti-anxiety medications since that time. He also has continued to participate actively in psychological counseling.

Expert Medical Opinions

(a) Ms. Mikula

15. Ms. Mikula is a nurse practitioner specializing in family health. She has been Claimant's primary care provider since 2006. She is treating him for chronic low back pain with right lower extremity radiculopathy as well as depression and anxiety. She sees him on a regular basis.
16. Ms. Mikula credibly testified that Claimant's symptoms have waxed and waned over the six years she has treated him, but that this is normal for his condition. She also indicated that Claimant suffers from significant pain, ranging from six to ten on an analog scale. She does not question his reports of pain.
17. Ms. Mikula's treatment of Claimant currently consists of pain management through narcotic medications. A drug taper program was attempted once, but Claimant could not tolerate his pain and had to lie down all the time.

18. Ms. Mikula acknowledged that she is not qualified to assess Claimant's employability. However, she credibly opined that he faces significant obstacles to re-employment as a result of his physical and psychological limitations. These include:
- His need to change positions every ten minutes, including having to lie down;
 - His ongoing depression, which impairs both his ability to concentrate and his motivation level;
 - His variable mental status; and
 - His inability to sleep through the night, which impairs his ability to be rested and happy.
- (b) Dr. White
21. Dr. White is board certified in preventative and occupational medicine. At Defendant's request he performed an independent medical evaluation of Claimant in April 2010. Dr. White diagnosed Claimant with chronic low back pain with right lower extremity radiculopathy.
22. Dr. White acknowledged that while he physically examined Claimant, his purpose in doing so was to arrive at or support a diagnosis, not to measure his physical capacity. In that respect, he conceded that a formal functional capacity evaluation was likely to be more comprehensive than his physical examination.
23. In Dr. White's opinion, Claimant is capable of returning to light duty work, so long as he is restricted from repetitive bending, lifts no more than twenty pounds and is able to move about and change positions frequently. He also believes that Claimant should be tapered from his narcotic medications, as they lead to tolerance and studies have shown that over time patients do well without them. However, he did concede that with some patients, long term narcotics do control pain well. Dr. White did not address Claimant's psychological condition.
24. Dr. White placed Claimant at end medical result as of the date of his evaluation, April 1, 2010, and assessed him with a 13 percent whole person permanent impairment referable to his work injury. With that opinion as support, the Department approved Defendant's discontinuance of temporary disability benefits effective April 30, 2010.

Claimant's Current Work Capacity

25. Claimant has undergone two functional capacity evaluations, the first in September 2008 performed by Erica Galipeau and the second in April 2011 by Charles Alexander. Both Ms. Galipeau and Mr. Alexander work for Injury and Health Management Solutions.

26. In 2008, Ms. Galipeau reported that Claimant demonstrated some abilities within the light range for a three-hour shift. However, full light capacity was not achieved. Based on her observations, she concluded that Claimant's subjective reports of pain were not corroborated by the objective physiological changes attributable to exertion. In Ms. Galipeau's opinion, Claimant did not give full effort during the evaluation, and was capable physically of performing more tasks than those in which he engaged.
27. More recently, in 2011 Mr. Alexander concluded that Claimant had no work capacity at all. His lack of lower extremity strength, limited range of motion and back pain precluded him from lifting any weight from floor to waist, which disqualified him from anything other than a sedentary capacity. At the same time, during testing Claimant could not sit for more than 28 minutes before having to shift position, which does not meet the standard even for a sedentary work capacity.
28. As to the reliability and accuracy of his evaluation, Mr. Alexander credibly concluded that Claimant demonstrated full effort during his testing. He did exhibit signs of physical discomfort, such as shifting in his chair, grimacing and asking to stand rather than sit. Nevertheless, while his subjective reports of pain seemed high, they were consistent with Mr. Alexander's distraction-based objective findings.
29. After viewing photographs of Claimant purportedly using exercise equipment in a health club in 2010, Mr. Alexander's conclusions remained unchanged. The photographs were taken by Claimant's wife. Claimant was not dressed in work-out clothes, did not appear to be exerting any energy and was not engaging in any physical movements that were inconsistent with his reported limitations. In Mr. Alexander's opinion, the photographs appear to have been posed. I agree with this assessment.
30. Based on his evaluation, Mr. Alexander concluded that Claimant was not capable of regular employment. His functional capacity was limited to sedentary work for only two to three hours per day, with no material handling below waist level and with the need to change position every ten to twenty minutes. I find both Mr. Alexander's observations and his conclusion persuasive.
31. Because it is more recent, I conclude that Mr. Alexander's evaluation is the most compelling. I therefore find that Claimant's current functional abilities, which are limited to a maximum of two to three hours of sedentary work per day, with additional restrictions against lifting and frequent sitting, do not qualify him for even sedentary work.

Claimant's Work History

32. Claimant received a high school education in Bosnia, but was uncertain whether that was equivalent to a high school education in this country. He received no additional training or course work. In Bosnia, he worked on his family farm and then entered the Bosnian army, where he learned to be a baker.

33. After leaving the army, from 1989 to 1997 Claimant continued to work as a baker. This was a heavy capacity job. He lifted 100 pound bags of flour frequently and stood for long periods of time mixing and switching dough in a hot kitchen.
34. In 1999, Claimant moved with his family to Idaho, where he obtained work at Wal-Mart as a shelf stocker/custodian. After a year there, Claimant and his family moved to Vermont. He first secured work as a sandblaster, which again was a heavy capacity job. Thereafter he obtained a job at Wal-Mart as a shelf-stocker/custodian on the third shift. This was a full time, physically demanding job. Claimant enjoyed his work and often volunteered for overtime.

Expert Opinions as to Employability

35. Both parties presented opinions from certified vocational rehabilitation counselors as to Claimant's ability to secure and maintain regular gainful employment. According to Claimant's expert, Tammy Parker, he is not capable of regular gainful employment. According to Defendant's expert, John May, he will be capable of regular gainful employment if he continues with vocational rehabilitation services.

(a) Ms. Parker's Analysis

36. Ms. Parker first met with Claimant in November 2007, when he was determined eligible for vocational rehabilitation services. No services were initiated until they met again in July 2011, however, when Claimant finally exhausted all recommended courses of medical treatment. To develop a return to work plan, Ms. Parker interviewed Claimant, reviewed his medical records and functional capacity evaluations and conducted an employment survey with Claimant's physical capabilities in mind.
37. Following the hierarchy of vocational options mandated by Vermont's Workers' Compensation Rule 55.2000, Ms. Parker first determined that Claimant would not be able to return to work for Defendant in either the same or a modified capacity. Given his relatively high average weekly wage (a consequence of both his third-shift pay differential and his overtime hours), Ms. Parker also determined that he would be unlikely to secure similar work for a different employer.
38. Ms. Parker followed up with Claimant's English teacher to track his progress, and also performed labor market surveys to ascertain what vocational options might be available to him. She discovered that there "was not a lot out there" for a person with Claimant's vocational profile – someone with limited education and transferable skills, poor command of English, significant physical restrictions and a demonstrated capacity for only very part-time and restricted sedentary work. She thus concluded that Claimant was not capable of engaging in regular gainful employment. I find this analysis compelling and persuasive in all respects.

(b) Mr. May's Analysis

39. At Defendant's request, Mr. May reviewed Claimant's two functional capacity evaluations and Dr. White's independent medical evaluation to assess whether Claimant was capable of regular gainful employment. Mr. May did not review Claimant's rather lengthy medical records, nor did he personally interview Claimant.
40. In Mr. May's opinion, if Claimant continued to pursue vocational rehabilitation services, especially English classes and weekly psychological counseling, he would become capable of regular gainful employment. In addition, if he tapered off of his narcotics his functionality likely would improve. Mr. May thought that if Claimant pursued these vocational steps he could be employable as a parking attendant or cashier, but he did not perform any employment surveys in Claimant's area.
41. I find that Mr. May's opinion lacks credibility. First, he did not review Claimant's extensive medical records. Second, he was unaware that Claimant was already pursuing both English courses and psychotherapy. Third, he has no medical expertise to render an opinion regarding the effect of tapering narcotics use and any corresponding effect on Claimant's functionality. Finally, he did not identify any vocational rehabilitation services that were available to Claimant to pursue that had not been or were not being pursued.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she 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). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. The disputed issue in this case is whether Claimant is capable of regular, gainful employment for purposes of determining whether he is permanently totally disabled. Claimant argues he is not capable of regular gainful employment due to his age, education, depression, work history and his severe limitations on his capacity to work. Conversely, Defendant argues that if Claimant continued to pursue vocational rehabilitation services, he would be capable of regular gainful employment.
3. Under Vermont's workers' compensation statute, a claimant is entitled to permanent total disability benefits if he or she suffers one of the injuries enumerated in §644(a), such as total blindness or quadriplegia. In addition, §644(b) provides:

The enumeration in subsection (a) of this section is not exclusive, and, in order to determine disability under this section, the commissioner shall consider other specific characteristics of the claimant, including the claimant's age, experience, training, education and mental capacity.

4. The workers' compensation rules provide further guidance. Rule 11.3100 states:

Permanent Total Disability – Odd Lot Doctrine

A claimant shall be permanently and totally disabled if their work injury causes a physical or mental impairment, or both, the result of which renders them unable to perform regular, gainful work. In evaluating whether or not a claimant is permanently and totally disabled, the claimant's age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for permanent total disability under the Odd Lot Doctrine, a Functional Capacity Evaluation (FCE) should be performed to evaluate the claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.

A claimant shall not be permanently totally disabled if he or she is able to successfully perform regular, gainful work. Regular, gainful work shall refer to regular employment in any well-known branch of the labor market. Regular, gainful work shall not apply to work that is so limited in quality, dependability or quantity that a reasonably stable market for such work does not exist.

5. The parties presented somewhat conflicting medical evidence as to the barriers to employment posed by Claimant's injuries, both physical and psychological. Ms. Mikula determined that the combination of his chronic pain and resulting physical limitations, depression and anxiety would be difficult to overcome. Dr. White focused more on Claimant's physical capabilities, but even in that context recognized the need for significant return to work restrictions. Both experts deferred to the functional capacity evaluations as the most accurate indicator of Claimant's work capacity.
6. As to those, the differences between Ms. Galipeau's opinion and Mr. Alexander's were relatively minor. Ms. Galipeau concluded that Claimant had at least some capability for light work, while Mr. Alexander concluded that he had only a sedentary capacity. Both agreed that he was capable of only part time work, at best two to three hours daily. The employment ramifications of this restriction are significant, whether sedentary or light work is contemplated.

7. With this restriction in mind, I must consider whether, given his age, education, experience, training, occupation, physical and psychological limitations and functional capacities, it is reasonable to expect that Claimant will be able to return to regular gainful employment. As Professor Larson describes it, the essence of the test for permanent total disability in such “odd lot” cases is “the probable dependability with which [the] claimant can sell his or her services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck or the superhuman efforts of the claimant to rise above crippling handicaps.” 4 Lex K. Larson, *Larson’s Workers’ Compensation* §83.01 at p. 83-3 (Matthew Bender, Rev. Ed.). What matters is what is reasonably likely from a vocational perspective, not what is remotely possible. *Moulton v. J.P. Carrera, Inc.*, Opinion No. 30-11WC (October 11, 2011).
8. I conclude that Ms. Parker’s opinion on this issue is far more persuasive than Mr. May’s. Ms. Parker reviewed Claimant’s entire medical file and spent considerable time with him in an attempt to develop a viable return to work plan. She conducted labor market surveys and tracked the extent to which his English language skills were (or were not) progressing. Based on this background work, vocational research and analysis, she determined that Claimant could not reasonably be expected to return to regular gainful employment.
9. In contrast, Mr. May’s opinion was based on an incomplete understanding of Claimant’s medical history and current status. It relied instead on speculation and conjecture as to what Claimant’s vocational potential might be if he (a) weaned himself off of narcotic pain medications; (b) became more proficient at English; and (c) pursued further, though unspecified, vocational rehabilitation services. The credible evidence does not bear out any of these assumptions.
10. I conclude that Claimant has sustained his burden of proving that as a result of his work injury he is unable to perform regular, gainful work. This circumstance is unlikely to change even with the provision of further vocational rehabilitation services. Claimant is permanently and totally disabled.
11. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit his itemized claim.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Permanent total disability benefits in accordance with 21 V.S.A. §645, commencing on April 30, 2010 and with interest from that date forward in accordance with 21 V.S.A. §664; and
2. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 28th day of November 2012.

Anne M. Noonan
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.