

*Conger v. City Feed & Lumber Co., Inc.*

*(January 3, 2005)*

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

*Allen Conger*

*Opinion No. 57-04WC*

*v.*

*By: Margaret A. Mangan  
Hearing Officer*

*City Feed & Lumber Company, Inc.*

*For: Laura Kilmer Collins  
Commissioner*

*State File No. P-01742*

*Pretrial conference on January 8, 2004*

*Hearing held in Montpelier on June 17, 2004*

*Record closed on October 5, 2004*

**APPEARANCES:**

*Patrick L. Biggam, Esq., for the Claimant*

*Eric A. Johnson, Esq., for the Defendant*

**ISSUE:**

*Is the claimant permanently and totally disabled as a result of his  
workplace injuries?*

**EXHIBITS:**

*Joint Exhibit I: Medical Records*

*Claimant's 1: Photographs a through f*

*Claimant's 2: Surveillance videotape*

*Claimant's 3: Forms 25*

*Claimant's 4: Curriculum vitae of Rodger Kessler, Ph.D.*

*Claimant's 5: Curriculum vitae of Jonathan Fenton, D.O.*

*Defendant's A: Curriculum vitae of James Grubman, Ph. D.*

**STIPULATION:**

- 1. On or about September 9, 1996, claimant suffered a personal injury  
which arose out of and in the course of employment resulting from a  
motor vehicle accident.*

2. *On or about July 20, 1999, claimant suffered a personal injury to his spine arising out of and in the course of employment.*
3. *On both July 20, 1999 and September 9, 1996 claimant was an employee of City Feed & Lumber within the meaning of the Vermont Workers' Compensation Act (Act).*
4. *On both July 20, 1999 and September 9, 1996 Lumber Insurance was the workers' compensation insurance carrier.*
5. *On July 20, 1999 claimant had an average weekly wage of \$642.76.*
6. *Claimant was found to have been at medical end result with a Form 27 filed effective May 30, 2001.*

**FINDINGS OF FACT:**

1. *Claimant is a 61-year-old man who lost his left arm below the elbow in a work related accident when he was a young man. Despite that loss, he worked continually as a truck driver and laborer until events at issue here.*
2. *He began working for defendant in this matter, City Feed & Lumber, in 1983 when he drove a boom truck delivering construction materials. He worked long hours, averaging 50 to 60 hours per week.*
3. *On September 9, 1996 claimant was driving his truck with a sheetrock delivery when a driver of a car traveling in the opposite direction crossed the centerline and drove directly into his truck. Both occupants of that car died.*
4. *As a result of the injury, claimant had neck and shoulder pain and fear of driving. At first he did not drive at all, but worked up to it.*
5. *About a month after that collision, he was driving his family to New Hampshire when he witnessed a gruesome accident while at a tollbooth. On impact a car burst into flames, killing one occupant and injuring another. Claimant was not able to continue driving; his wife took over.*
6. *Claimant treated for pain and for psychological difficulties at the Center for Musculoskeletal Medicine (CMM). He exhibited signs of*

*posttraumatic stress disorder. Psychological factors, including depression and anxiety, were exacerbating his pain.*

- 7. After an intensive rehabilitation program, claimant regained a work capacity. In early March 1996 he returned to work part time and by April was working full time driving the boom truck.*
- 8. Claimant continued treating with CMM after he returned to work. In a final report of June 1997, Dr. Johansson noted that claimant had intermittent mid back and neck pain. At that time he had been working 50 hour weeks.*
- 9. Dr. Johansson assessed claimant's neck and back problems as permanent with a 4% permanent partial impairment.*

### Family Issues

- 10. In March of 1998 claimant's son died in an accident that was eerily similar to how claimant's sister had died years before.*
- 11. Shortly after claimant's son died, claimant's mother passed away.*

### Second Work-Related Injury

- 12. On or about July 20, 1999 claimant injured his back at work while carrying sheetrock. Tests revealed mild degenerative changes in his lumbar spine and a lumbar disc herniation.*
- 13. Initially claimant treated conservatively with a variety of physicians. He enrolled in the Green Mountain Physical and Occupational Medicine Program after which (on September 27, 1999) Dr. Fenton determined that he had a sedentary work capacity.*
- 14. At the end of August 1999, the employer offered claimant a job in guard shack where he could monitor the yard and handle paperwork.*
- 15. In November 1999 claimant was offered surgery that he was told would return him to no more than a medium duty work capacity.*
- 16. Claimant was found not to have been entitled to vocational rehabilitation services because the employer had agreed to accommodate claimant's limitations when he returned to work.*

17. *Claimant had the L4-5 back surgery on January 18, 2000 after which he regained strength but retained his preoperative sensitivity to light touch.*
18. *In the spring of 2000 claimant and his wife drove to Florida where they spent a month, then drove back to Vermont.*
19. *After his vacation, claimant was seen at Dartmouth-Hitchcock Medical Center (DHMC) where it was noted that he had no recurrent disc herniation. Because he still had pain, claimant was referred to a pain management program.*
20. *Psychological tests revealed, among other findings, that claimant was emotionally labile, depressed and had a preoccupation with his health.*
21. *In September 2000, Dr. Johansson predicted that claimant would be able to return to light duty work in four to six weeks.*
22. *In October 2000 claimant told his primary care physician, Dr. Zelazo, about his application for disability and that he would not be able to work his previous job.*
23. *Also in October 2000, claimant reported that he had walked for forty minutes.*
24. *Claimant participated in counseling to deal with his many losses.*
25. *In November of 2000, claimant expressed surprise when Ms. Giroux, a therapist he had been seeing, suggested that he might have a work capacity because he was convinced that he had none. This belief was based on his high standards calling for "giving 120%" if one were to work, which he felt he could not do.*
26. *Dr. Johansson gave claimant a full-time return to work release for sedentary to light capacity on November 13, 2000.*
27. *On November 16, 2000, claimant told Patricia Parrasch that he did not ever see himself returning to work.*
28. *Claimant became more active at home with household chores and carpentry work.*

29. *December 2000 Dr. Johansson assessed claimant with a lumbar disc syndrome that had reached medical end result with a 10% whole person impairment.*
30. *Claimant continued to treat for low back pain for which he was prescribed narcotic pain medication. He had four epidural injections for the pain, which did not help him.*
31. *On December 28, 2000, claimant told Ms. Parrasch that he was declining vocational rehabilitation services. In January 2001, a VR closure report was issued because claimant had elected to suspend VR efforts.*
32. *Claimant went to Florida for a month in the spring of 2001.*
33. *Claimant continued to treat for pain. He enrolled in another physical therapy program in September 2002 but did not make any gains.*
34. *Claimant's condition has remained stable. He now uses a TENS unit for pain, walks backwards up stairs each day for exercise, walks on a treadmill twice each day, uses his hot tub twice each day, does light housework, mows the lawn occasionally and sits in his recliner.*

#### Medical Expert Opinions

35. *Jonathon Fenton, D.O. opined that claimant had chronic nerve root radiculopathy and chronic back syndrome. Further, he opined that claimant cannot sustain any level of gainful employment based on his physical impairment and inability to perform many activities. In support he cited a 2002 functional capacity evaluation that demonstrated that he had a below sedentary work capacity.*
36. *Dr. Fenton's opinion is based in part on the claimant's history that he did not feel he could work, that he had a sitting and a driving tolerance of thirty minutes, facts inconsistent with several drives to Florida.*
37. *Dr. Fenton did not have many of claimant's medical records.*
38. *During an independent medical examination, Dr. Ensalada noted that claimant's lumbar range of motion was considerably greater when he did not know he was being observed than it was during the formal examination.*

39. *Dr. Ensalada assessed claimant's impairment at 10% whole person. Further, he opined that claimant was capable of performing light duty work. However, Dr. Ensalada also opined that claimant perceives himself as disabled and has no goal or plans to ever return to work.*
40. *In October 2003, claimant saw his own expert psychologist, Rodger Kessler, Ph.D., for a behavioral medicine evaluation. Dr. Kessler administered tests, reviewed records and interviewed the claimant.*
41. *Aspects of some testing were deemed invalid, suggesting that claimant's actual abilities were greater than what the tests showed.*
42. *Dr. Kessler minimized the effect of losses in the claimant's family when he placed the source of claimant's mental health problems on his work related injury.*
43. *Claimant's self report of activities of daily living fell below what objective evaluators observed.*
44. *Dr. Kessler found moderate impairment in claimant's "social functioning," mild impairment in "concentration," and mild impairment in "adaptation, work and work-related activities."*
45. *Dr. Kessler concluded that claimant has no work capacity.*
46. *When Dr. Zelazo examined the claimant on November 17, 2003 for purposes of a commercial driver's license, he noted that claimant had a normal curvature of the spine with no tenderness as well as full and symmetrical range of motion.*
47. *After a functional capacity evaluation, Louise Lynch noted "variable levels of physical effort on Mr. Conger's behalf." His actual abilities—more than an hour of driving each way and hours of testing—belied test results suggesting a low work capacity. Ms. Lynch determined that he could work at a sedentary level for a full eight hour day with lifting restrictions. Factors limiting a return to work, in her opinion, were his perception of disability and lack of vocational goals.*

48. *James Grubman, Ph.D., clinical psychologist, evaluated the claimant's medical records, including psychological tests, for the defense. He determined based on the record review, that claimant is not totally disabled from work from a psychological perspective.*
49. *Further, Dr. Grubman opined that claimant's personal losses, particularly his son's death, explain his depression.*
50. *Records support Dr. Grubman's observations that claimant had decided soon after the accident that he would not return to work. Receipt of social security benefits and a third party settlement removed any financial incentives to return to work.*
51. *In sum, Dr. Grubman attributed claimant's psychological problems to personal bereavement, not to the work-related injury.*
52. *Dr. Grubman attributed claimant's PTSD to the 1996 truck accident, but believes it was aggravated by the tollbooth incident and by his son's death.*
53. *The 1999 work related incident had no impact on claimant's PTSD.*
54. *Dr Grubman agrees with Dr. Kessler's "mild" rating of 9%.*

#### Vocational Expert

55. *Greg Leroy opined that claimant is incapable of gainful employment. In his report is a reference to research demonstrating that the longer one is out of work the less likely he or she is to return. Specifically, he wrote, "Washington Business Group on Health (WBGH) reported that of those employees experiencing a disabling accident or illness, only 50% of those who are out of work more than six (6) months ever return to work. Waddell (1987) reported survey data indicating that the probability of patients s out of work for two years (104 weeks) returning to work was virtually 0%." Joint Medical Exhibit I at 1040, citing Carbine, M.E et. al. "Disability Intervention and Cost Management Strategies for the 1990s." Washington Business Group on Health/Institute for Rehabilitation and Disability Management (1989); Waddell, G. "A New Clinical Model for the Treatment of Low-Back Pain," Spine, 12: 7 (September 1997).*

## **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 (1962). 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 from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).*
3. *This claimant is entitled to permanent total disability if his injury is within the enumerated list articulated in 21 V.S.A. § 644<sup>1</sup> or, without considering individual employability factors such as age and experience (because this injury predates the 2000 odd lot amendment to the statute) the medical evidence indicates that his injury has as severe an impact on earning capacity as one of the scheduled injuries, see Bishop v. Town of Barre, 140 Vt. 565 (1982), that he is totally disabled from gainful employment. Fleury v. Kessel/Duff Constr. Co. 148 Vt. 415 (1987).*
4. *The standard is further articulated in § 645(a), which specifies that one must have "no reasonable prospect of finding regular employment."*
5. *Importantly, accepting that one is less likely to return to work is not an acceptance that the inability is due to a work-related injury, as this case demonstrates, because the crucial element of causation must be proven. Burton 112 Vt. 17.*

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<sup>1</sup> Under the non exclusive list of injuries in § 644 (a) the following shall be deemed total and permanent: 1) the total and permanent loss of sight in both eyes; 2) the loss of both feet at or above the ankle; 3) The loss of both hands at or above the wrists; 4) The loss of one hand and one foot; 5) An injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg and of one arm; and 6) An injury to the skull resulting in incurable imbecility or insanity.

6. *I accept, without deciding, that claimant at this time has no work capacity. However, a little over a year after his 1999 injury, claimant was offered a vocational rehabilitation plan with the goal of light duty work. It is expected that a claimant and employer cooperate in the development and implementation of such a plan. Wroten v. Lamphere, 147 Vt. 606, 612 (1987). Such cooperation did not happen here. Claimant, not a physician or therapist, determined that he would not pursue such a vocational plan. Social security benefits and a tort award removed a financial incentive to work. This claimant could have participated in the plan offered in 2000 but chose not to. Without a bona fide effort on the part of a capable claimant to participate in VR, I will not find permanent total disability.*
7. *However, the failure to pursue VR is not the sole basis for the denial of this claim, one based in large part on a psychological injury. Claimant had recovered from his first injury physically and psychologically, and had made a successful return to work. The second injury did not cause a psychological injury. Factors that intervened that clearly worsened claimant's psychological condition were indeed tragic, but purely personal—the most dramatic the death of a son.*

**ORDER:**

*Therefore, based on the foregoing findings of fact and conclusions of law, this claim for permanent total disability benefits is DENIED.*

*Dated at Montpelier, Vermont this 3<sup>rd</sup> day of January 2005.*

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*Laura Kilmer Collins  
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.*