

Kenneth Prescott v. Suburban Propane

(November 2, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Kenneth Prescott

Opinion No. 42-09WC

v.

By: Jane Dimotsis, Esq.
Hearing Officer

Suburban Propane

For: Patricia Moulton Powden
Commissioner

State File No. U-15176

OPINION AND ORDER

Hearing held in Montpelier on May 6, 2009

Record closed on June 17, 2009

APPEARANCES:

Michael Green, Esq., for Claimant
Glenn Morgan, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant permanently and totally disabled as a result of his April 2, 2004 compensable work injury?

EXHIBITS:

Joint Exhibit I: Medical records
Joint Exhibit II: Vocational rehabilitation records

Claimant's Exhibit 1: *Curriculum vitae*, Fran Plaisted, M.A.
Claimant's Exhibit 2: *Curriculum vitae*, Mark Bucksbaum, M.D.

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. §644
Costs and attorney fees pursuant to 21 V.S.A. §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 and correspondence contained in the Department's file relating to this claim.

Claimant's Work Injury and Current Status

3. Claimant worked for Defendant as a fuel delivery driver. On April 2, 2004 he injured his neck while pulling on a hose. Defendant accepted the injury as compensable and paid benefits accordingly.
4. As treatment for his work injury, on May 27, 2004 Claimant underwent cervical disc surgery. He awoke from the surgery with significant weakness in his legs, and was taken back to the operating room on an urgent basis for a second surgery. Unfortunately, Claimant's spinal cord had been damaged, and even following the second surgery he was left with significant neurological deficits. As a result, Claimant now suffers from the following symptoms:
 - Impaired sensation in all extremities;
 - Significant weakness in his lower extremities, left greater than right, resulting in a lack of control over the left leg, a left foot drop and very little ability to flex the left hip;
 - Bilateral upper extremity weakness;
 - Cramping and muscle spasms throughout his body;
 - Persistent belt-like tightness around his abdomen;
 - Constant lumbar and cervical pain;
 - Abnormal sensation in his pelvic region, resulting in bladder dysfunction;
 - Inconsistent bowel control, resulting in episodes of fecal incontinence;
 - Sexual dysfunction;
 - Disturbed sleep;
 - Depression.

5. Not surprisingly, these symptoms have severely impacted Claimant's life. He walks slowly and awkwardly, using a left ankle brace and either a cane or two crutches. He sleeps poorly and typically awakens in the midst of painful muscle spasms. He requires three hours each morning to complete his bowel, bladder and personal hygiene regimen. He lacks both strength and manual dexterity in his hands, and his fingers are constantly sore and achy. He suffers painful muscle cramps intermittently throughout the day. He has difficulty concentrating due to his prescribed pain medications. He spends most of his time in a recliner, as he cannot sit comfortably in a hard-backed chair, and often suffers muscle spasms when he stands up. On some afternoons he can leave the house for as much as three hours to do errands, but he fatigues easily and often has to return home to rest. Given the unpredictable nature of his symptoms, it is difficult for him to gauge his activity level from one day to the next.
6. Currently Claimant is treating with Dr. Bucksbaum for management of his injury-related issues. Dr. Bucksbaum's treatment plan consists primarily of "long-term surveillance" of Claimant's condition in order to head off potential complications. Unfortunately, Dr. Bucksbaum anticipates that these will increase over time. For example, because Claimant's left leg is weak, he has shifted his weight over time to his right side. Now he is experiencing instability in his right knee, which ultimately might require orthopedic intervention. There also might be long-term side effects from the chronic pain medications Claimant takes. Dr. Bucksbaum has prescribed both pool therapy and a home exercise program to help Claimant maximize what physical capabilities he still has, but expects nevertheless that Claimant's overall condition probably will continue to deteriorate.
7. Claimant has undergone two permanency evaluations, one by Dr. Kenosh, who oversaw his post-surgical rehabilitation, and one by Dr. McLellan, who performed an independent medical evaluation at Defendant's request. Dr. Kenosh placed Claimant at end medical result in May 2005 and rated him with a 78% whole person permanent impairment. Dr. McLellan determined that Claimant was at end medical result as of the date of his evaluation in August 2005, and rated him with a 68% whole person impairment.

Vocational Rehabilitation

8. Although Claimant has never been released to return to work, he has engaged in vocational rehabilitation efforts. Claimant was 35 years old at the time of his injury. He graduated from high school, and most of his work experience is in fuel delivery, a job for which he now lacks sufficient physical capacity. With this educational background and experience in mind, Claimant was found entitled to vocational rehabilitation services. He began working with Laurie Langelier, a vocational rehabilitation counselor assigned by Defendant, in November 2004.
9. In March 2005 Ms. Langelier proposed a return-to-work plan with a vocational goal of business management. To accomplish this goal, Ms. Langelier proposed that Claimant enroll in on-line college coursework towards an Associate's Degree. Taking courses at a rate of two per semester, Ms. Langelier anticipated that Claimant would achieve his vocational goal within two years.

10. Claimant completed one on-line course. Because of his many physical limitations, which affected his ability to sit and to use a keyboard, for example, he found it very demanding and did not believe he could manage two courses at a time.
11. In October 2005 Claimant changed vocational rehabilitation counselors and began working with Fran Plaisted in place of Ms. Langelier. Claimant indicated that he wished to proceed with vocational planning even though his treating physician, Dr. Bucksbaum, still had not released him to return to work in any capacity. To that end, Ms. Plaisted developed a return-to-work plan involving on-line computer training courses as a first step. Ms. Plaisted reasoned that such training would prepare Claimant for more intensive, focused training that he could undertake if and when he developed a work capacity. At that point, it might become possible to identify a suitable vocational goal.
12. Unfortunately, Claimant failed to make any vocational progress at all under Ms. Plaisted's plan. Again, his physical limitations interfered with his ability to sit or keyboard for any length of time. Beyond that, the unpredictable nature of his symptoms made it difficult for him to sustain his efforts with any consistency. Last, his financial situation deteriorated to the point where he was no longer able to afford internet access.
13. Ms. Plaisted acknowledged that adaptive equipment might have ameliorated at least some of Claimant's problems. An ergonomic chair might have allowed him to sit more comfortably, for example, and voice-activated software might have alleviated at least some of his keyboarding issues. In addition, Defendant might have been asked to fund Claimant's internet access as a vocational rehabilitation expense. Notably, however, Ms. Plaisted testified that even if all of these accommodations proved successful, in her opinion Claimant had no reasonable prospect of sustaining gainful employment.
14. Dr. Bucksbaum shares Ms. Plaisted's opinion. He testified that given Claimant's very limited tolerance for most activities, the unpredictable nature of his symptoms, his chronic pain and fatigue, it is unrealistic to expect that he could function productively in any work environment.
15. Claimant has never undergone a functional capacities evaluation. Dr. Bucksbaum testified that his physical limitations are very clear and obvious, and that formal testing is not necessary in order to gauge their severity. Ms. Plaisted testified as well that in her opinion a functional capacities evaluation would not have added any new information to her analysis.

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. Claimant asserts that as a result of his April 2, 2004 work injury he is now permanently and totally disabled under the "odd lot" provision of 21 V.S.A. §644(b). Defendant counters that Claimant has never undergone a functional capacities evaluation and that with the help of adaptive equipment and other accommodations his vocational potential might improve. Therefore, Defendant argues, it is premature to conclude that Claimant is permanently unemployable.
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. A finding of odd lot permanent total disability is not to be made lightly. In a system that embraces successful return to work as the ultimate goal, and vocational rehabilitation as a critical tool for achieving it, to conclude that an injured worker's employment barriers realistically cannot be overcome means admitting defeat, acknowledging that he or she probably will never work again. *Hill v. CV Oil Co., Inc.*, Opinion No. 15-09WC (May 26, 2009); *Hurley v. NSK Corporation*, Opinion No. 07-09WC (March 4, 2009); *Gaudette v. Norton Brothers, Inc.*, Opinion No. 49-08WC (December 3, 2008).
6. As Rule 11.3100 makes clear, typically a finding of odd lot permanent total disability should not be made until first, the injured worker's functional capabilities are accurately assessed and second, all corresponding vocational options are comprehensively considered and reasonably rejected. *Hill, supra; Hurley, supra; Gaudette, supra*. The language of the rule is suggestive, however, not mandatory. It leaves room, therefore, for a claim to be presented in which the extent to which the claimant's functional limitations preclude regular, gainful work is so obvious that a formal assessment is not necessary.
7. This is one of those relatively rare claims. Here, both Dr. Bucksbaum and Ms. Plaisted testified that Claimant's neurological deficits and disabling symptoms limited his function in such obvious ways that a functional capacities evaluation would have added nothing to their employability opinions. Defendant submitted no evidence of its own, and its attempts to undermine this testimony by cross-examination were unpersuasive.

8. Nor am I persuaded, as Defendant argues, that with additional adaptive equipment or accommodations Claimant's vocational rehabilitation plan might become viable. The credible evidence establishes that Claimant has never been determined to have a work capacity, and therefore a suitable vocational goal has never been identified. His physical limitations, chronic pain and other disabling symptoms have precluded him from engaging in even preliminary retraining efforts. There is no reason to expect that his vocational prospects will improve, either with or without adaptive equipment or accommodations. Defendant presented no evidence of its own on this issue and again, its attempts to undermine Ms. Plaisted's testimony fell short of the mark.
9. Notably, and in contrast to the cases cited above, here the extent of Claimant's whole person permanent impairment is quite substantial – 78% according to Dr. Kenosh, and 68% according to Dr. McLellan. This does not automatically put him in the category of permanent total disability, but it does establish that his physical deficits are severe. In this circumstance, it is not necessary to jump through hoops to establish the unfortunate truth of Claimant's situation. It is one thing to leave no vocational stone unturned where a reasonable prospect of rehabilitation still exists. It is quite another to do so where there simply is no chance of success.
10. I conclude that Claimant has sustained his burden of proving that he is permanently and totally disabled as a result of his April 2, 2004 work injury.
11. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$1,443.91 and attorney fees totaling \$5,364.00. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded. As for attorney's fees, these lie within the Commissioner's discretion. I find they are appropriate here, and therefore these are awarded as well.

ORDER:

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

1. Permanent total disability benefits commencing on June 29, 2005 and continuing in accordance with 21 V.S.A. §645 (with credit for any permanent partial disability benefits paid to date); and
2. Costs totaling \$1,443.91 and attorney fees totaling \$5,364.00.

DATED at Montpelier, Vermont this 2nd day of November 2009.

Patricia Moulton Powden
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.