

A. M. v. Newmont Slate Co.

(January 4, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

A. M.

Opinion No. 59-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Newmont Slate Co.

For: Patricia Moulton Powden
Commissioner

State File No. U-09157

Hearing held in Montpelier on September 26, 27 and 28, 2006
Record closed on December 4, 2006

APPEARANCES:

Steven J. Howard, Esq., for the Claimant
David R. McLean, Esq., for the Defendant

ISSUES:

1. Whether Mr. McFarren is permanently and totally disabled as a result of the November 5, 2003 injury.
2. Whether Mr. McFarren has committed fraud such that he is not entitled to any further workers' compensation benefits.

EXHIBITS:

Joint: Miscellaneous correspondence

Claimant:

- A. Whitehall Health Center Records
- B. Physical Therapy Records
- C. Vermont Orthopaedic Clinic records
- D. Rutland Regional Medical Center records
- E. Vermont Neurosurgery Associates records
- F. Dr. Kirbach's FCE Report
- G. CNA letter March 19, 2004
- H. Photographs (1-3)
- I. Report of Ken Sutton March 31, 2005
- J. Paul Langevin's Report and attachments June 15, 2005

Defendant

1. Dr. McLellan IME Report
2. Dr. McLellan correspondence
3. John May's Vocational Assessment
4. Vocational Rehabilitation Closure Report
5. Surveillance Video and report October 3, 2005
6. Paul Langevin's notes
7. Supervisory Knowledge Test
8. Dr. Vargas deposition transcript
9. Correspondence Howard to Langevin May 31, 2005
10. Vargas to Howard letter December 13, 2004
11. New York State Disability Examination Report September 27, 2004
12. Documents from Kirbach FCE
13. VR Progress report
14. Entitlement Assessment
15. Report #1 January 27, 2004
16. Report #2 February 19, 2004

FINDINGS OF FACT:

1. At all times relevant to this action, Claimant was an employee and Newmont Slate his employer within the meaning of the Employer's Liability and Workers' Compensation Act (Act).
2. CNA Insurance, the carrier, was the workers' compensation insurer for Newmont Slate at all times relevant to this action.
3. Claimant is 57 years old. He has worked in the quarry industry his entire adult life, doing hard work as a laborer and slate trimmer, work that suited him with his physical strength, limited education and below average intellectual abilities.
4. On November 5, 2003, Claimant injured his lower back in the course of his employment with Defendant.
5. Since the date of injury, except for a brief return to work, Claimant has not worked. His physical activities are limited to household chores and walking short distances. Otherwise, he sits and watches television.

Medical treatment

6. Dr. Arvin Aranda, Claimant's primary care physician, diagnosed low back strain after the injury in November of 2003. He prescribed Vicodin, a week out of work and physical therapy.
7. By January 2004 Claimant was referred to the Vermont Orthopaedic Clinic and an MRI was performed. A disc protrusion and bulges were revealed from L3 to S-1.

8. Next, Claimant was treated with epidural steroid injections and more physical therapy. Because he failed to receive pain relief, Claimant was referred to a neurosurgeon, Dr. Joseph Corbett. However, Dr. Corbett determined that Claimant was not a surgical candidate.
9. Claimant remained symptomatic.
10. In November 2004 Dr. Vargas placed Claimant at medical end result with a 7% whole person impairment, based on range of motion deficits.

Vocational Rehabilitation Services

11. In January 2004 Claimant was referred to Patricia Carr of Concentra Integrated Services who determined that Claimant was entitled to VR services.
12. VR services were discontinued in June 2004 based on a determination by Claimant that he was permanently and totally disabled under the odd lot doctrine.

Functional Capacity

13. Claimant was released to work with the restriction that he not lift more than ten pounds, have no prolonged sitting or standing, and no bending or twisting at the waist. Claimant tried to return to his old job with those restrictions, but worked less than a full workday.
14. Dr. Corbett expressed doubt that Claimant would ever be able to return to work.
15. Dr. Vargas opined that Claimant would not be able to perform any heavy work.
16. A formal FCE with a J-Tech system led to the conclusion that Claimant could lift 18 pounds at waist level and 13 pounds at shoulder and overhead, but that he was not able to carry weights over significant distances. Based on the FCE, the examiner, Dr. Arnold Kirbach, determined that Claimant had no functional capacity conducive to employment. He later explained further that Claimant would need to change positions frequently, would be unable to drive long distances or ride for more than 30 minutes without having back pain.
17. Dr. Robert McLellan then examined claimant at the carrier's request. Dr. McLellan determined that pain behaviors were not consistent or reliable. On examination, he noted that Claimant's range of motion was limited by pain. Dr. McLellan first determined that Claimant had a part-time, sedentary capacity.
18. In October 2005, Claimant helped his brother hang lights on the outside of his home, an activity that was captured on videotape. Based on an investigator's report, Dr. McLellan modified his opinion, giving Claimant a light to moderate level work capacity.

19. The videotape, work of a private investigator, shows Claimant lifting a flag, stringing lights around the house, bending to pick up objects, carrying yard debris, and lifting a fiberglass and aluminum ladder. None of the objects lifted were heavy. The tape did not show what Claimant was doing when he took breaks.

Vocational Opinions

20. Paul Langevin and Ken Sutton support this claim for permanent total disability benefits based on their evaluations. Mr. Sutton performed the vocational assessment. He determined that Claimant had a sixth grade math level, fifth grade level for spelling and ninth grade level for reading. He showed an interest, but little aptitude, for technical work. Mr. Sutton determined that Claimant's temperament was not well suited for an educational setting. In sum, Mr. Sutton determined that Claimant was "vocationally limited to unskilled manual labor," and that there are substantial barriers to his ability to return to work.
21. Mr. Langevin conducted a forensic vocational rehabilitation evaluation for the Claimant. In conducting his assessment, Mr. Langevin did not consider part-time work as regular gainful employment. In fact, Mr. Langevin did not address part-time employment in any regard in his assessment.
22. Mr. Langevin agreed that the work injury tracking forms from Vermont Orthopedic Clinic indicated that Mr. McFarren was not totally disabled but rather that he was not able at that time to return to his former occupation.
23. Mr. Langevin conceded that the likelihood of the Claimant returning to regular gainful employment if he did obtain his GED is as yet unresolved. It is not something that Mr. Langevin assessed or analyzed in his forensic report.
24. John May conducted an independent forensic vocational evaluation for the employer. Mr. May has extensive experience conducting forensic vocational rehabilitation evaluations and is certified by the American Board of Vocational Experts. Mr. May had available to him the reports prepared by Mr. Langevin and Mr. Sutton, records from Ms. Carr, and the Claimant's medical records. Mr. May did not meet with the Claimant individually, however he felt that the reports of the three other vocational rehabilitation counselors was sufficient for him to develop his opinions.
25. Based upon Mr. May's review of the vocational rehabilitation records, he opined that rehabilitation services had been seriously underutilized and further that the Claimant voluntarily withdrew from the vocational rehabilitation services such that the Claimant never fully engaged the process such that it can be reasonably concluded he is permanently and totally disabled from all regular gainful employment.
26. Even if Dr. Kirbach's FCE report was a valid indicator of the Claimant's overall work capacity, Mr. May felt that there were options available to return the Claimant to regular gainful employment.

27. Mr. May opined that the abilities demonstrated by Mr. McFarren in the surveillance video would give him at least a light duty work capacity.
28. Further, Mr. May concluded that the Claimant's age, experience and work history would be beneficial to him in an attempt to find regular gainful employment. With respect to his education, Mr. May testified that vocational rehabilitation exists for the very purpose of assisting people in overcoming such issues. However, given the surveillance video it appeared to Mr. May that there would be employment opportunities at his current education level.

CONCLUSIONS OF LAW:

Permanent and Total Disability

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).
2. Claimant alleges he is permanently totally disabled pursuant to 21 V.S.A. § 644 (b), the odd lot doctrine, defined as following in WC Rule 11.3100:

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 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.

3. Claimant must have "no reasonable prospect for finding regular employment." 21 V.S.A. §645. Regular and gainful work means work that is not casual or sporadic, work that is not charitable, where one earns wages. See, *Rider v. Orange East Supervisory Union*, et. al. Op No. 14-03 (2003). Claimant has a long history of reliable work performance. While there is conflicting testimony on his mental and social abilities, his ability to communicate, interact with others, and learn new skills, as demonstrated before this hearing officer and in his long employment, demonstrates that he could greatly benefit from vocational rehabilitation services. To date, the Claimant has not used vocational rehabilitation at all in an attempt to return to suitable employment. Without such an effort, permanent total disability benefits will not be awarded.

4. Furthermore, the medical evidence support the defense position that he is capable of much more than that reflected in the FCE report. Section 644 does not require that one have a full time work capacity to be capable of regular gainful employment. In sum, Claimant has not proven permanent total disability.

Defense of fraud

5. Finally, Defendant alleges that Claimant misrepresented his actual physical capacity to health care provider to obtain workers' compensation benefits.
6. The Act vests discretion in the Commissioner to require forfeiture of "all or a portion" of workers' compensation benefits if an employee "wilfully makes a false statement or representation, for the purpose of obtaining any benefit or payment under the provisions of this chapter..." 21 V.S.A. § 708(a).
7. The defense argues "Claimant has repeatedly misrepresented his condition to his healthcare providers, the vocational rehabilitation specialists hired to pursue his claim for permanent total disability benefits, the employer's independent medical examiner and this hearing officer." It contends that the Claimant is not entitled to any further worker's compensation benefits, including temporary and permanent impairment benefits and medical benefits.
8. The allegation of fraud is based on the assumption that Claimant is not in the pain he says he has. I cannot agree. With the subjectivity of pain, one's belief that he is unable to perform certain actions, while not necessarily true, is not necessarily a false statement. The videotape provides information that helps the defense defeat this permanent total claim. But standing alone, with the limited actions seen on the tape, I do not find that Claimant willfully misrepresented his condition to obtain benefits.

ORDER:

Therefore, based on foregoing findings of fact and conclusions of law:

- The Claim for Permanent Total Disability benefits is DENIED;
- The defense of fraud is also DENIED.

Dated at Montpelier, Vermont this 4th day of January 2007.

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.