

Leo Moulton v. J.P. Carrera, Inc.

(October 11, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Leo Moulton

Opinion No. 30-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

J.P. Carrera, Inc.

For: Anne M. Noonan
Commissioner

State File No. X-63476

OPINION AND ORDER

Hearing held in Montpelier, Vermont on April 25 and 26, 2011

Record closed on June 16, 2011

APPEARANCES:

James Dumont, Esq., for Claimant
James O'Sullivan, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant permanently and totally disabled as a consequence of his work activities on or about September 17, 2004?
2. If not, is Claimant entitled to vocational rehabilitation services as a consequence of his September 2004 work injury?
3. Is Defendant obligated to pay various medical bills incurred for treatment of Claimant's neck condition as causally related to his September 2004 work injury?

EXHIBITS:

Joint Exhibit I:	Medical records
Joint Exhibit II:	CD of x-rays, 4/14/11
Joint Exhibit III:	Supplemental medical records
Claimant's Exhibit 1:	Various photographs
Claimant's Exhibit 2:	Various correspondence
Claimant's Exhibit 3:	<i>Curriculum vitae</i> , Gregory LeRoy

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. §645

Medical benefits pursuant to 21 V.S.A. §640

Vocational rehabilitation benefits pursuant to 21 V.S.A. §641

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 and correspondence contained in the Department's file relating to this claim.

Claimant's Work as a Bridge Tensioner

3. Claimant began working for Defendant in June 2001. Defendant manufactures and installs precast concrete products, including bridge beams and planks.
4. Although initially Claimant was hired to do yard and janitorial work, within a few months' time he began doing bridge tensioning work as well. Bridge tensioning is the process by which the cables that hold a bridge beam in place are installed and tightened. In Claimant's case, the job entailed being suspended upside down from a harness attached to the bridge deck, pulling the cable through and using a heavy jack to adjust it to the appropriate tension. Each step in the process took two to five minutes of upside down harness work. Depending on the size of the bridge and the number of cables to be installed, Claimant might have to be suspended anywhere from 15 to 70 times in a day.
5. Between 2001 and 2004 Claimant estimated that he worked on 62 bridges. The work was somewhat sporadic; some weeks he might work on three bridges, some weeks none at all. When not assigned to tensioning work, Claimant continued with his regular janitorial duties.
6. Claimant often experienced neck pain while performing his bridge tensioning duties. On one occasion he worked on a job where instead of being suspended upside down in harnesses, the bridge tensioners knelt upright on temporary platforms. Claimant found this position to be much less stressful on his neck. Later he suggested that Defendant consider utilizing similar equipment, but it declined to do so.

Claimant's Work Injury, Medical Course and Current Condition

7. In mid-September 2004 Claimant was driving home from a bridge tensioning job in Maine when he began to experience neck pain and vertigo. As to the latter condition, Claimant's medical records document prior episodes of dizziness, with no cause ever ascribed. This time as well, neither specialist evaluations nor diagnostic testing revealed a clear etiology. Eventually the condition resolved on its own.

8. Claimant had experienced occasional bouts of neck stiffness in the past as well. These episodes had always resolved with little treatment. This time, however, his symptoms, consisting of left-sided neck pain, stiffness, swelling and spasms, continued. Diagnostic testing revealed some degenerative changes in his cervical spine, but no evidence of disc herniation or other neurological compromise. Ultimately, Claimant was diagnosed with a myofascial pain syndrome focused in his left lateral neck.
9. Because Claimant's neck pain was not radicular in nature, surgery was not an appropriate treatment option. Instead, he treated conservatively, first with physical therapy and later with botulism toxin (botox) injections. None of these treatments was effective at controlling his symptoms.
10. Having derived no benefit from botox injections, in July 2007 Claimant's treating neurologist, Dr. Orecchio, determined that he had reached an end medical result. On those grounds, the Department approved Defendant's discontinuance of temporary total disability benefits effective November 20, 2007. In April 2008 Dr. Bucksbaum, a physiatrist, rated Claimant with a 7% whole person permanent impairment referable to his cervical spine.
11. Currently Claimant suffers from extremely limited range of motion in his neck. He holds his left shoulder in an elevated position, as otherwise he experiences painful muscle spasms. Virtually any movement of his neck or left arm exacerbates his pain, as does any sustained posture, including sitting. When his neck is irritated it swells to the point where even swallowing hurts.
12. Claimant has not worked as a bridge tensioner since mid-September 2004. After a period of total disability, in late December 2005 he resumed his janitorial duties for Defendant. While performing these duties, in March 2006 he experienced an acute exacerbation of neck pain, as a result of which he was taken out of work again. Claimant has not returned to work since.
13. In a typical week now, Claimant might take one or two short walks in the meadowlands behind his home, often with a camera, which he uses to photograph wildlife. He is at least somewhat computer literate, and will spend up to 30 minutes at a time on his computer, though not daily. He is restricted physically in this activity by his inability to sit for extended periods of time as well as by his limited ability to use his left hand. He no longer drives, as he cannot turn his head enough to see cars approaching at intersections. Most nights he sleeps in a recliner rather than in bed. Other than extra-strength Tylenol, he does not use any pain control medications.

Medical Opinions as to Causation

14. Various doctors have given opinions as to the causal relationship, if any, between the bridge tensioning work that Claimant performed for Defendant in the months leading up to September 2004 and his current symptoms. Based on Claimant's description of his work activities, Dr. Klitzner, his primary care provider, Dr. Orecchio, his neurologist, and Dr. Bucksbaum, a physiatrist, found that such a relationship was likely. All three pointed specifically to the pressure that being suspended upside down from a harness would have put on the left side of Claimant's neck.
15. With training in both physiatry and biomechanical engineering, Dr. Bucksbaum's causation opinion is particularly insightful. Biomechanical engineering is the study of how the human body reacts to mechanical forces placed upon it. According to Dr. Bucksbaum, the harness that Claimant used for his bridge tensioning work was not designed with upside down suspension in mind. When used for that purpose, the harness' straps put significant force on the muscles, ligaments, tendons and supporting soft tissues in his neck. In an upside down position, the weight of Claimant's head, combined at times with that of a heavy jack, would have supplied a significant amount of pulling force, or traction, to those tissues. First they stretched, and then they tore. As the tissues failed, the cervical spine became distracted, resulting in muscle tightness and nerve irritation. Superimposed on Claimant's pre-existing degenerative disc disease, over time the damage became permanent and the condition chronic.
16. Defendant's medical expert, Dr. Glassman, disagreed with this analysis. In his opinion, Claimant's work activities in September 2004 likely caused a cervical and trapezius strain, but that injury has long since resolved. His current cervical symptoms are the product solely of his pre-existing degenerative disc disease.
17. Dr. Glassman did not address the possibility, as Dr. Bucksbaum did, that the traction forces applied to Claimant's neck in the course of his bridge tensioning work might have aggravated his underlying disc disease. Nor did he explain the basis for his opinion that Claimant's work-related cervical strain likely resolved within a matter of weeks, and that almost immediately thereafter his degenerative disease became the primary symptom generator. These gaps in Dr. Glassman's causation analysis are troubling.

Claimant's Current Work Capacity

18. Claimant has undergone two functional capacity evaluations, the first in October 2007 and the second in April 2008. For the most part, the results of both evaluations were consistent. The 2008 evaluation documents a full time capacity for light work, with some abilities extending into the medium range as well, but with the following functional restrictions:
 - Maintain neutral neck positions;
 - Avoid activities that require sustained cervical and upper extremity postures;
 - Limit forward reaching tasks to those that allow the elbows to be maintained within 4 to 6 inches from the body, so as to reduce stress on the cervical spine;
 - Limit stooping or overhead activities, and avoid any functional work tasks requiring sustained stooping (cervical stress in a forward flexed position) or cervical extension;
 - Avoid driving as a primary job function, due to safety concerns associated with limited cervical mobility; and
 - Avoid work activities at elevated surfaces requiring high levels of balance.
19. Both Dr. Orecchio and Dr. Bucksbaum endorsed the 2008 FCE as an accurate reflection of Claimant's work capacity. Defendant's expert, Dr. Glassman, generally endorsed the results as well, though he attributed Claimant's functional restrictions entirely to a combination of his subjective pain complaints and his underlying degenerative disc disease, and not at all to his work injury.
20. Dr. Klitzner questioned the FCE results, particularly as to Claimant's capacity for sustained sitting, standing or upper extremity use. For example, in the context of the 2008 FCE Claimant demonstrated the ability to sit for more than an hour without a stretch break, while Dr. Klitzner estimated his sitting tolerance as limited to only 15 or 20 minutes before his symptoms became exacerbated.
21. Upon close examination I find that Dr. Klitzner did not repudiate the FCE results entirely. To the contrary, at least with respect to Claimant's sitting tolerance her opinion comports with them. The FCE acknowledged that the primary limiting factor in that regard was associated with sustained postures, such as prolonged neck positioning with a combination of reaching and functional hand use. Dr. Klitzner's estimate was presented in the context of the possibility that Claimant might be retrained to work at a desk job in computer-related employment, an activity that presumably would involve some of those same postures. Beyond that, to the extent that Dr. Klitzner's opinion as to Claimant's work capacity is still somewhat inconsistent with the 2008 FCE, I find that the FCE more accurately reflects Claimant's current functional capacity.

Claimant's Work History and Vocational Rehabilitation Efforts

22. Claimant has a high school education, but no advanced coursework or training beyond that. Growing up, he worked on his family's dairy farm. After his father died he purchased the farm from his mother and ran it for some years. Claimant was responsible not just for the physical labor, but also for the associated paperwork – tracking production and breeding schedules, preparing budgets and paying bills, for example.
23. Declining milk prices forced Claimant to sell his farm in 1987. For a time thereafter he worked on a neighboring dairy farm. Later he suffered a knee injury, following which he decided to seek lighter work. From 1995 until 2000 Claimant worked as a groundskeeper at the Swift House Inn in Middlebury. His duties there included both interior work, such as painting and patching walls, and exterior work, such as snow shoveling and plowing in the winter and lawn mowing and garden maintenance in the summer. Claimant left the Inn after a falling out with his supervisor. In 2001 he began working for Defendant.
24. Claimant was found entitled to vocational rehabilitation services in June 2009. His functional limitations precluded him from returning to the type of medium and heavy work he had done before. Hoping to capitalize on Claimant's prior experience, his vocational rehabilitation counselor, Jay Spiegel, suggested CAD technician, project estimator or welding supervisor as possible alternative employment options.
25. As a first step to determining whether the tentative job goals he had identified were reasonable, Mr. Spiegel proposed that Claimant enroll in a computer class to enhance his skills in that area. When asked to approve the proposal, however, Claimant's treating physician, Dr. Klitzner declined to do so. Dr. Klitzner did not doubt Claimant's intellectual ability to perform the type of work for which Mr. Spiegel sought to prepare him. As noted above, however, she did question Claimant's physical capacity for either computer class work or subsequent employment given the amount of sustained sitting and keyboarding that would be required.
26. Without Dr. Klitzner's approval, Mr. Spiegel did not feel it appropriate to proceed. With the Department's consent, in December 2009 vocational rehabilitation services were suspended pending resolution of the factual and legal issues that Dr. Klitzner had raised as to Claimant's work capacity and employability potential.

Expert Opinions as to Employability

27. Both parties presented expert opinions from certified vocational rehabilitation counselors as to Claimant's ability to secure and maintain regular gainful employment. According to Claimant's expert, Gregory LeRoy, he is unemployable. According to Defendant's expert, Clayton Prinson, he has a work capacity, is employable and should be conducting his own self-directed job search.

(a) Mr. LeRoy's Analysis

28. To assist in his analysis of Claimant's vocational rehabilitation potential, Mr. LeRoy referred him for both psychological and vocational aptitude testing. Dr. Hedgepeth, a clinical and neuropsychologist, conducted the psychological evaluation. He determined that Claimant was of average intelligence, academic ability and learning and memory skills. His evaluation did not reveal any evidence of clinically significant psychopathology or other disabling psychological factors impacting Claimant's ability to work.
29. To assess Claimant's vocational aptitude, Mr. LeRoy referred him to Jack Bopp, a vocational evaluator. Through formal testing, Mr. Bopp analyzed Claimant's aptitudes, interests and transferable skills, and then applied them to various vocational scenarios assuming either a sedentary or a light work capacity. Among his findings:
- There are no sedentary or light occupations (as classified by the U.S. Department of Labor) to which Claimant could transfer his current vocational skills and knowledge.
 - There are a limited number of unskilled sedentary or light occupations for which Claimant possesses the worker traits¹ generally required for average successful performance and which likely exist in his labor market area. These include such occupations as janitors, security guards, couriers and general office clerks.
 - To be employed in these occupations, Claimant would have to be able to manage his pain effectively enough so as to maintain work quantity, quality and attendance standards. He also would require accommodation for his physical limitations.
 - Given his age (62 as of Mr. Bopp's evaluation), years since last in an educational setting (44) and low average verbal comprehension and processing speed abilities, Claimant is a poor candidate for acquiring new marketable skills through classroom retraining.
30. Mr. LeRoy also referred Claimant for a driving evaluation with Miriam Monahan, a certified driver rehabilitation specialist. Ms. Monahan determined that Claimant's ability to drive safely was limited by both pain and reduced range of motion in his neck and left arm. These issues could be addressed in part with adaptive equipment, such as a steering wheel knob and a wide-angle side view mirror. With these adaptations, Ms. Monahan expected that Claimant would be able to drive within the local Middlebury area, where he currently resides. She recommended that he avoid driving in complex traffic or for more than 20 to 30 minutes at a time.

¹ The "worker traits" referred to in Mr. Bopp's analysis are diverse and extensive. They include physical abilities, such as kneeling, stooping and reaching; intellectual aptitudes, such as for verbal, numerical and spatial reasoning; demonstrated aptitudes for manual dexterity and motor coordination; and temperaments, such as for decision-making, following instructions and performing repetitive work.

31. Based both on these specialist evaluations and on his own expertise in vocational rehabilitation, Mr. LeRoy concluded that Claimant has no reasonable prospect of securing and sustaining regular gainful employment. His age, education, transferable skills and time out of work, combined with his physical limitations and chronic pain, all present substantial barriers to employment, particularly in skilled occupations. As for unskilled occupations, his need for accommodations such as frequent stretch breaks and his inability to commute beyond his local area would make it difficult for him to compete successfully against a pool of less restricted applicants.
32. Mr. LeRoy acknowledged that there might be specific job openings in the Middlebury area for which Claimant might be hired – jobs in which taking a stretch break would not necessarily impact his productivity, for example. Mr. LeRoy's opinion is based on probabilities, however. From that perspective, the chances that Claimant will be able to find and keep a suitable job are slight. I find this testimony to be credible.
33. As for whether Claimant's employment prospects might improve with further vocational rehabilitation services, Mr. LeRoy asserted that this was unlikely. Medically, Claimant's condition is chronic and therefore the prognosis for further improvement is poor. Vocationally, Claimant's other employment barriers are unlikely to be overcome even with further assistance. With or without additional vocational rehabilitation services, in Mr. LeRoy's opinion Claimant is now permanently incapable of securing and maintaining regular gainful work.

(b) Mr. Prinson's Analysis

34. Mr. Prinson's analysis of Claimant's employability focused primarily on return to work alternatives he might consider given his interests, prior work experience and physical capacity. Mr. Prinson identified hardware, pet/pet supplies and nursery sales, automatic film developer, flagger or host as possibilities. Later, after considering the restrictions suggested by the 2008 FCE, Mr. Prinson added to the list such occupations as dairy farm manager, plant care worker, sheet metal worker, machinist, caretaker/overseer and exterminator.
35. Mr. Prinson also conducted a limited review of the Middlebury labor market area to search for currently existing employment opportunities for which he felt Claimant might qualify. Among the job openings being advertised were custodian, wholesale horticultural manager and laundry worker. Mr. Prinson did not contact any employers directly, and therefore had no information as to the specific job qualifications and duties required for any of the jobs he identified.
36. Mr. Prinson acknowledged Claimant's age, extended period of time out of work and limited driving tolerance as barriers to employment, but also noted his good worker traits, respectable work history and willingness to take on challenging work assignments as positive indicators. Considering both these and the alternative work options he had identified, Mr. Prinson concluded that Claimant has a viable work capacity, is not unemployable and therefore is not permanently and totally disabled. To the contrary, in Mr. Prinson's opinion Claimant is not even entitled to vocational rehabilitation services, and should be conducting his own self-directed search for suitable employment.

37. When questioned as to the return to work alternatives that Mr. Prinson had identified, Mr. LeRoy effectively discounted most of them. Many, such as hardware, pet supplies and nursery sales, horticultural manager and laundry worker, are classified as medium physical demand level occupations, and thus would exceed Claimant's work capacity as measured by the 2008 FCE. Others, such as sheet metal worker, caretaker and exterminator, typically require frequent stooping, forward reaching or sustained non-neutral neck positions, again in violation of the restrictions suggested by the 2008 FCE. Still others, such as automatic film developer and dairy farm manager (assuming no physical labor), likely do not exist in Vermont.

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).

Medical Causation

2. The first disputed issue in this claim is medical causation. Drs. Klitzner, Orecchio and Bucksbaum all concluded that Claimant's current condition is causally related to his work activities for Defendant. Dr. Glassman concluded that any work-related injury has long since resolved, and that Claimant's current condition is the result solely of his pre-existing degenerative disc disease.
3. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

4. I conclude here that the evidence provided by Claimant's experts is more credible than that provided by Dr. Glassman. In reaching this conclusion, I am particularly mindful of Dr. Bucksbaum's unique qualifications as both a physiatrist and a biomechanical engineer. With this training, he was better positioned than Dr. Glassman was to analyze the likely impact of Claimant's bridge tensioning work on the muscles, ligaments, tendons and supporting soft tissues in his neck. Dr. Bucksbaum adequately explained how the work-related stress to those structures likely aggravated Claimant's pre-existing degenerative disease to the point where symptoms that had been at best minor and episodic became chronic and disabling. Dr. Glassman's analysis fell far short in this regard.
5. I conclude that Claimant has sustained his burden of proving that the neck pain and associated symptoms from which he has suffered continuously since September 17, 2004 are causally related to his work activities for Defendant. In addition to paying indemnity benefits, Defendant is responsible for whatever reasonable and necessary medical treatment he has undergone as a consequence.

Permanent Total Disability

6. The second disputed issue is whether Claimant's work-related neck injury has rendered him permanently and totally disabled. 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.

7. 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.

8. As Professor Larson describes it, the essence of the odd lot test 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.).
9. I conclude that Mr. LeRoy's analysis of Claimant's employability more accurately reflects the fundamental nature of odd lot permanent total disability than Mr. Prinson's does. Mr. LeRoy focused on the probability that Claimant would be able to compete successfully for jobs within his physical capabilities, and concluded that for him to do so would be highly unlikely. In contrast, Mr. Prinson focused on a few specific jobs for which Claimant conceivably might apply, and disregarded how improbable it would be, given his age, education, limited transferable skills, chronic pain and physical restrictions, for him actually to be hired.

10. Vermont's workers' compensation statute "is remedial in nature and must be liberally construed to provide injured employees with benefits unless the law is clear to the contrary." *Cyr v. McDermott's, Inc.*, 2010 VT 19 at ¶7, citing *St. Paul Fire & Marine Insurance Co. v. Surdam*, 156 Vt. 585, 590 (1991). It would be a harsh result to deny an injured worker's claim for permanent total disability benefits solely because the possibility exists, however slight, that he or she might someday find a job. The standard required by Rule 11.3100 is what is reasonably to be expected, not what is remotely possible.
11. I conclude that Claimant has sustained his burden of proving that as a result of his work injury he is unable to successfully 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.
12. Having concluded that Claimant is permanently and totally disabled, the question whether he is entitled to continued vocational rehabilitation services is now moot.
13. 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. Medical benefits covering all reasonable and necessary treatment causally related to Claimant's compensable neck injury, in accordance with 21 V.S.A. §640;
2. Permanent total disability benefits in accordance with 21 V.S.A. §645, with interest from the date indemnity benefits were last paid as computed in accordance with 21 V.S.A. §664; and
3. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 11th day of October 2011.

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.