R. G. v. Norton Brothers, Inc. (December 3, 2009)

**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

R. G.

v.

Norton Brothers, Inc.

Opinion No. 49-08WC

By: Jane Gomez-Dimotsis, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. T-10646

## OPINION AND ORDER

Hearing held in Montpelier on November 26, 2007
Record closed on January 18, 2008

**APPEARANCES**:

Ron Fox, Esq., for Claimant
John Valente, Esq., for Defendant

**ISSUE PRESENTED**:

Is Claimant permanently and totally disabled as a result of his December 13, 2002 work injury?

**EXHIBITS**:

Claimant's Exhibit 1: Medical records
Claimant's Exhibit 2: Vocational rehabilitation records
Claimant's Exhibit 3: *Curriculum vitae,* Mary Flimlin, M.D.
Claimant's Exhibit 4: *Curriculum vitae,* George Fotinopoulos

Defendant's Exhibit A: George Fotinopoulos time sheets
Defendant's Exhibit B: Independent Vocational Evaluation, March 1, 2007
Defendant's Exhibit C: Letter from Philip Davignon, MD, October 31, 2007

**CLAIM**:

Permanent total disability benefits pursuant to 21 V.S.A. §644(b)
Interest, attorney's fees and costs pursuant to 21 V.S.A. §§664 and 678(a)

**FINDINGS OF FACT**:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Claimant began working for Defendant as a long haul tractor-trailer driver in 2000. On December 13, 2002 he slipped on an icy bumper while exiting the back of his trailer and fell to the ground. He felt the immediate onset of severe pain in his lower back and pelvis. Later the pain radiated down his right leg and into his groin.

Claimant's Medical Treatment

3. Initially Claimant treated conservatively. In May 2003 he returned to work full time, full duty. He continued to experience low back and right leg pain, which he treated with ibuprofen. Unfortunately, Claimant needed so many pills to control his pain that it caused him gastrointestinal distress.

4. In February 2005 Claimant's primary care provider, Dr. Marco, recommended that he stop work due to his unrelenting low back and leg pain. Dr. Marco prescribed narcotic pain medications and referred Claimant to Dr. Ames, an orthopedic surgeon who had first examined Claimant in 2003, for consideration of possible surgical treatment options.

5. After a trial of lumbar epidural steroid injections proved ineffective at controlling Claimant's symptoms, Dr. Ames determined that his non-operative options had been exhausted. In July 2005 she performed surgery at the right L4-5 disc level, the purpose of which was to relieve the pressure on the L5 nerve root. Dr. Ames anticipated that the surgery would alleviate the radicular pain in Claimant's leg, but doubted that it would afford much relief of his lower back pain.

6. Claimant's leg pain abated for a time post-surgery, but later recurred. He continued to experience intense low back pain as well. As in the past, he treated these symptoms primarily with narcotic pain medications and muscle relaxants.

7. In December 2005 Claimant underwent a functional capacities evaluation. He was found not to meet the physical demand requirements of his pre-injury long-haul trucker job. Instead he was determined to be capable of full-time light work. In addition, it was suggested that he might improve his functional capacities if he participated in a multidisciplinary rehabilitation program.

8. At Defendant's request, on January 18, 2006 Claimant underwent an independent medical evaluation with Dr. Philip Davignon, an occupational medicine provider. Dr. Davignon concluded that Claimant had reached an end medical result, and rated him with a 12% whole person permanent impairment referable to his spine injury. In previous independent medical evaluations, Dr. Davignon had concluded that the medical treatment Claimant had received was both reasonably necessary and causally related to his work injury. Dr. Davignon also had concluded that Claimant could not return to work at his previous occupation.

9. In June 2006 Claimant underwent another functional capacities evaluation. As with the prior FCE, once again Claimant was determined not to meet the physical capacities of his pre-injury long-haul trucker job. This time, his work capacity was rated at the sedentary to light level, indicating that his physical capacities had diminished somewhat from the December 2005 FCE. As with the prior FCE, it was suggested that Claimant's work capacity might increase with participation in a multidisciplinary pain management program.

10. Claimant entered a multidisciplinary pain management and rehabilitation program in June 2006, under the supervision of Dr. Mary Flimlin, a board certified specialist in physical medicine and rehabilitation. Unfortunately, he did not tolerate it well. All efforts at physical therapy caused his pain to flare acutely. Ultimately, in July 2006 Dr. Flimlin determined that Claimant would not benefit from further participation in the program. She recommended instead that he concentrate on his home exercise program.

11. As for work capacity, Dr. Flimlin recommended that at best Claimant should attempt a graduated return to part-time sedentary work, beginning with a maximum of four hours per day three days per week and hopefully increasing from there. This recommendation represented a further decline in Claimant's work capacity from the June 2006 FCE.

12. In March 2007 Dr. Ames reevaluated Claimant. Dr. Ames reiterated her prior conclusion that Claimant had no surgical treatment options. She encouraged him to engage in more aggressive physical activity and weight loss as the treatment options most likely to improve his symptoms.

13. In correspondence with Defendant's attorney dated October 31, 2007 Dr. Davignon stated that he concurred with the findings of the June 2006 FCE, specifically that Claimant had at least a sedentary to light work capacity, and that it would be reasonable to consider a trial return to work within those parameters.

14. As of the formal hearing, Claimant's symptoms continue. In his experience, the pain is debilitating, and precludes most activities. Claimant cannot walk more than a hundred yards or climb more than a few stairs without having to stop because of low back and leg pain. He cannot sit or stand for more than brief stretches without alternating positions and can tolerate only short car rides. Claimant's primary pain management regimen consists of narcotic medications and muscle relaxants. There is no evidence whatsoever that he uses his medications inappropriately, and in fact, he tries whenever possible to "stretch them out" over the course of his day. Unfortunately, Claimant often finds that if he endeavors anything more than the most minimal activity, he will be not be able to get out of bed for 2 or 3 days thereafter.

Claimant's Vocational History

15. Claimant was born in 1950 and has been married for 38 years. He characterized himself as a "country boy," a "people person" and a "real Vermonter." His vocational history demonstrates a commitment to hard work and an unassailable work ethic. Although Claimant has a limited formal education, having left school in the sixth grade to help raise his siblings, he has augmented his life learning skills in impressive ways. He reads the newspaper daily, and is well spoken and personable.

16. In 1975 Claimant joined the National Guard. During his four-month basic training, he took general education courses, including math and reading, and was, in his words, "primed" to sit for the GED exam. Unfortunately, he was called home due to a family emergency, and by the time he returned there was insufficient time to take the exam prior to graduating from basic training. Claimant never resumed his studies and never actually sat for his GED.

17. Claimant was trained as a heavy equipment operator and truck driver in the National Guard, and from 1975 until his honorable discharge in 1981 he worked two weekends each month and two weeks each summer performing these jobs. Despite his lack of formal education Claimant was a good teacher, and was tapped to become an instructor for others learning how to operate heavy equipment.

18. Since leaving the National Guard, Claimant's primary work experience has been as a tractor-trailer truck driver. In that capacity, he has had to complete driving logs, which he described as relatively simple forms for him to fill out. In order to obtain his commercial driver's license, Claimant also had to take both a driving test and a written exam, which he stated he passed without difficulty.

19. In addition to his truck driving experience, Claimant also worked for seven years managing his own logging business. Initially he worked by himself, and later hired two employees to assist him. In the course of this business, Claimant had to bid on jobs, negotiate contracts with foresters, manage his staff and maintain his equipment. His wife did most of the bookkeeping. Claimant testified that he became quite proficient at assessing the value of woodlots based on the type, quality and quantity of the trees growing there. At one point he took a one-day timber management course sponsored by the state, at the end of which he had to pass a written test. Claimant did so without difficulty.

Vocational Rehabilitation Efforts and Expert Opinions

20. Defendant first assigned a vocational rehabilitation counselor, Donna Curtin, to Claimant's claim in July 2005. In February 2006 Ms. Curtin determined that Claimant was entitled to vocational rehabilitation services and began working with him accordingly.

21. From February until mid-May 2006 Ms. Curtin communicated regularly with Claimant. She assisted him in drafting a resume, explained various job search tools and methods, conducted a labor market survey and provided him with job leads. Among the transferable vocational skills Ms. Curtin identified that might prove useful in his return-to-work efforts were his aptitude for following schedules with deadlines, his ability to work independently, his familiarity with hand and power tools, his capacity to supervise and train staff and his experience at marketing customers. As job search challenges Ms. Curtin identified Claimant's limited formal education, light work capacity and physical restrictions.

22. On June 6, 2006 Claimant filed a VR-8 to transfer his vocational rehabilitation file from Ms. Curtin to George Fotinopoulos. Mr. Fotinopoulos holds a master's degree in clinical psychology and is certified to provide vocational rehabilitation services in Vermont. He testified on Claimant's behalf at the formal hearing.

23. Mr. Fotinopoulos testified that from June 2006 until October 2006 he spent between five and six hours meeting directly with Claimant. During that time, he did not provide Claimant with any job leads or take any steps towards developing an individualized written rehabilitation plan. Instead, Mr. Fotinopoulos determined that given the many barriers to employment with which Claimant presented – his advanced age, his limited residual functional abilities, his use of narcotic pain medications, his restricted driving ability, his computer illiteracy, his limited formal education, his lack of marketable transferable skills and his "general lack of placeability at suitable wages in the current labor market" – his disability was "too severe" to overcome even with vocational rehabilitation assistance. For that reason, Mr. Fotinopoulos closed his file.

24. Mr. Fotinopoulos admitted that he did not conduct any formal aptitude testing or transferable skills analysis prior to concluding that Claimant was unemployable. He performed only limited labor market or wage research specific to Claimant's file. Mr. Fotinopoulos testified that he is familiar with these vocational rehabilitation and assessment tools and has used them in other cases. In his professional judgment, however, Claimant's barriers to employment were so severe that such exercises were not warranted, as they would not have furthered the process of devising a viable vocational rehabilitation plan in any way.

25. Both Mr. Fotinopoulos' methods and his conclusions were disputed by Fran Plaisted, a vocational rehabilitation counselor hired by Defendant to conduct an independent vocational evaluation of Claimant. Ms. Plaisted holds a master's degree in rehabilitation counseling, as well as a variety of professional certifications in the vocational rehabilitation field. In conducting her evaluation and preparing her opinions, she reviewed Claimant's medical records and deposition, but did not interview Claimant directly.

26. In Ms. Plaisted's opinion, Mr. Fotinopoulos provided Claimant with inadequate vocational rehabilitation services, and then terminated them prematurely. In particular, Ms. Plaisted noted that Mr. Fotinopoulos did not refer Claimant for a vocational assessment conducted by a certified evaluator. Such a formal assessment of an injured worker's aptitudes, interests, achievement levels and transferable skills is critical in cases where, as here, retraining is likely to be necessary. According to Ms. Plaisted, lacking such a formal assessment Mr. Fotinopoulos failed to consider adequately the hierarchy of vocational options mandated by Workers' Compensation Rule 33.2000 – whether Claimant might have been able to return to work for a different employer in a modified job, whether he might have qualified for an on-the-job training placement or whether he might have been able to devise a suitable self-employment plan.

27. Ms. Plaisted also identified specific actions Mr. Fotinopoulos could have taken, but didn't, in order to devise a workable plan for overcoming the many barriers to employment he had identified in Claimant's case. He did not contact employers in Claimant's area, some of whom were engaged in businesses compatible with Claimant's employment experience, to see what it might take for Claimant to work for any of them. He did not investigate how difficult – or easy – it might have been for Claimant to obtain his GED or develop computer skills. He did not consider whether there might be jobs Claimant could perform safely even notwithstanding his use of narcotic pain medications and his physical limitations. Ms. Plaisted testified that in her opinion Mr. Fotinopoulos identified the many barriers to employment with which Claimant presented, but then took no steps to devise a plan for overcoming them.

28. Ms. Plaisted admitted that she had not identified any specific suitable job openings in Claimant's area, and could not guarantee that Claimant would in fact find suitable work. Nevertheless, she stated that to a reasonable degree of certainty, with further vocational rehabilitation services Claimant would be capable of returning to regular gainful employment.

**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 December 13, 2002 work injury he is now permanently and totally disabled under the "odd lot" provision of 21 V.S.A. §644(b). Defendant counters that because Claimant has not received adequate vocational rehabilitation services to date, it would be premature to conclude that he is permanently unemployable. In fact, Defendant argues, with additional vocational rehabilitation services Claimant will be able to return to suitable 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. 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. As Rule 11.3100 makes clear, such a finding should not be made until a comprehensive assessment of both the injured worker's physical capacities and his vocational options establish that there is no other alternative. It would be a disservice to throw in the towel any sooner.

6. With that standard in mind, I find that Claimant has not yet had the benefit of the full range of vocational rehabilitation services that should have been offered him. Certainly he has significant barriers to employment, but he has valuable skills to offer as well. Overcoming employment barriers is at the very heart of a vocational rehabilitation counselor's responsibilities. In this case, I find that Mr. Fotinopoulos gave in too soon. Greater effort must be made to return Claimant to work before concluding that he is permanently unable to do so. *R.C. v. Mack Molding, Inc.*, Opinion No. 16-07WC (July 3, 2007); *C.D. v. Grand Union*, Opinion No. 34-06WC (August 4, 2006); *Kreuzer v. Ben & Jerry's Homemade, Inc.*, Opinion No. 15-03WC (March 21, 2003).

7. I conclude, therefore, that Claimant has failed to sustain his burden of proving that he is permanently unable to perform regular, gainful work. Having reached this conclusion, the responsibility reverts to Defendant to provide Claimant with vocational rehabilitation services broad enough in scope either to assist him in returning to suitable employment or to lay the proper foundation for determining that he cannot do so.[1] *R.C. v. Mack Molding, supra; Kreuzer, supra*.

8. Having failed to prevail on his claim for permanent total disability, Claimant is not entitled to an award of costs or attorney's fees.

**ORDER:**

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

1. Claimant's claim for permanent total disability benefits is hereby **DENIED**.

2. Defendant shall continue to provide vocational rehabilitation services in accordance with Conclusion of Law 7 above.

**DATED** at Montpelier, Vermont this 3rd day of December 2008.

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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.

[1] Defendant asserts in its proposed findings that it already has done so, with a vocational rehabilitation counselor agreed upon by both parties.