

Bruce Russell v. Omega Electric

(11/10/03)

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

Bruce Russell)	State File No. S-18845
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
Omega Electric)	For: Michael S. Bertrand
)	Commissioner
)	
)	Opinion No. 42-03WC

Hearing held on an expedited basis on August 19 and August 21, 2003
Record closed on September 17, 2003

APPEARANCES:

Ronald A. Fox, Esq., for the Claimant
David R. McLean, Esq. for the Defendant, CNA and
Jason R. Ferreira, Esq. for the Defendant, Liberty Mutual

ISSUES:

Did Bruce Russell incur a compensable work-related injury in June of 2001 while working at Omega? Or did Mr. Russell's disc jockey work cause his current condition?

If Mr. Russell incurred a work related injury in June 2001, is his current condition a result of that injury, in which case it is an aggravation for which CNA is liable, or is it a result of a recurrence of the May 10, 2000 work-related injury, for which Liberty Mutual is liable?

If this claim is compensable, to what benefits is Mr. Russell entitled?

EXHIBITS:

Joint Exhibit I: Medical Records

Claimant's exhibits:

Deposition of Laurie McKee
Deposition of Warren Eastman

Defendant CNA exhibits:

- A 1: Omega Filed Reports
- A 2: Omega Material request Forms and Purchase Orders 1
- A 3: Omega 2000-2001 OSHA Injury Logs 2000-2001
- A 4: 2000 Log of OSHA recordable injuries by Ray Burns
- A 5: 2001 Log of all workplace injuries by Ray Burns
- A 6: Brandy Sickles 5/1/02 correspondence to Linda Large
- A 7: Voluntary Cessation of Practice Agreement

Defendant Liberty Mutual exhibits:

- B 1: Claimant's 12/01 contest of denial
- B 2: DJ Booking Log for 2000 and 2001
- B 3: Omega Purchase Orders for job 3805
- B 4: Omega Field Reports for job 3805
- B 5: Claimant's time cards for May and June 2001
- B 6: Omega Cost Reports for May and June 2001 for job 3805
- B 7: Omega Material Request Forms for May and June 2001

CLAIM:

1. Permanent partial disability benefits under 21 V.S.A. § 648
2. Medical and hospital benefits under § 640
3. Attorney fees and costs under § 678(a)

STIPULATIONS OF FACT:

1. Bruce Russell (claimant) began working for Omega Electric in November of 1999 as an electrician. He continued working at Omega through February 3, 2002.
2. At all relevant times while working for Omega Electric, claimant was an "employee" and Omega his "employer" under the meaning of the Workers' Compensation Act (Act).
3. Since approximately 1987, claimant has also worked part-time as a self-employed disc jockey (DJ) playing music at various functions. On average, he works 3 nights a month as a DJ. Claimant transports, sets up and packs up the equipment necessary for each show.
4. On or about May 10, 2000 while at Omega, claimant suffered a work-related injury to his lower back while pushing a cart filled with conduit piping.

5. Claimant returned to modified duty on or about May 30, 2000. He discontinued physical therapy in June 2000 because he could achieve the same relief from his symptoms with home exercise.

FINDINGS OF FACT:

1. Omega operates a commercial contracting business. One of its contracts was for electrical subcontracting work at the IBM plants in Williston and Essex. The general contractor was Fluor Daniel, also known as ADP Marshall.
2. Liberty Mutual provided workers compensation coverage to the employer before May 10, 2000 and through May 26, 2001. CNA provided coverage as of May 27, 2001.
3. Throughout the years before he worked for Omega, claimant had occasional back problems.
4. Before his 2000 work related injury, claimant was a runner, basketball player and golfer. At the time he was hired, he was not experiencing back problems.
5. Claimant's disc jockey work involved lifting equipment, the heaviest of which weighed approximately 90 pounds. At times he had help with lifting.
6. Omega hired claimant in 1999 as an apprentice. He intended to work toward becoming a certified electrician, a goal that required schooling and several thousand hours field experience.
7. Claimant's May 10, 2000 injury occurred when he was pushing a 200 to 300 pound cart with conduit piping. The wheel got stuck in metal grating causing the cart to stop abruptly. In the process, claimant strained his back.
8. Claimant immediately reported the incident to his foreman, Warren "Rocky" Eastman, and the same day met with Laurie McKee, Omega's safety officer for the IBM site. Claimant declined the need for medical treatment that day and went home.
9. The next day, May 11, 2003, claimant awoke in serious pain, then drove to work and met with McKee who referred him to Immediate Care & Occupational Health (ICOH) where acute low back pain with radiculopathy was diagnosed. He had back pain that radiated down his left leg, walked with an antalgic gait and had pain with straight leg raising on both sides.
10. Liberty Mutual accepted the claim as compensable.

11. Claimant treated for about a month. He drove from his home in St. Albans to physical therapy (PT) in Essex where he learned how to do the proper exercises. In time, he decided to do the exercises at home and avoid the long commute to PT.
12. Claimant had some degree of post void urgency after the 2000 injury.
13. After his discharge from PT claimant returned to work full-time. His foreman Eastman accommodated him by allowing him to do light duty work to the extent possible.
14. By May 23, 2000, as noted in an Immediate Care Health Center record, claimant's gait had improved; it was no longer antalgic.
15. Claimant missed an appointment with his physician, Dr. Mercia, on June 20, 2000. He next sought care in October 2000 when he saw his chiropractor, Dr. Leahy, twice and reported back pain that had waxed and waned over the summer.
16. After the May 2000 injury Eastman often observed that Claimant worked in pain.
17. In May and June 2001, Omega workers were working in temporary trailers at the IBM site. Late one workday Claimant was "pulling wire," a process that entailed pulling a ground wire and six cables, each about an inch in diameter, from a large spool, up to about shoulder height then forward and down to a co-worker who was feeding the cable through a conduit. Although a mechanical aid assisted with this process, the worker had to move through the motions of pulling up, forward and down to guide the cable. In this process, claimant felt a sharp, shooting back pain.
18. Claimant does not remember the exact date of the cable pulling incident, but is certain it was in June. Order forms for the wire and time cards demonstrate that the cable-pulling incident occurred either on May 21st or on June 8th. The June date is the more likely one because time records corroborate claimant's testimony that he took a personal day soon afterwards and medical records refer to a June injury.
19. Claimant reported the incident to Eastman who in turn called McKee. The "normal" paperwork for a work related injury was not filed because they considered it a part of the 2000 injury, for which a claim had already been filed.

20. Eastman recalls recording the event and what she learned from witnesses in a diary-like composition book she maintained. When she left Omega's employ she placed the composition book in a box with files and other paperwork and left it with Brandy Sickles in the main office. Sickles reviewed the notebook but does not recall any documentation of a June 2001 incident with this claimant. In the fall of 2001 Dave Cross, an Omega manager, asked Sickles for the notebook, and left the office with it. That book could not be located when requested during the discovery of this case.
21. Claimant saw Dr. Leahy on June 11, 2001 and took a day or two from work. He did not tell Dr. Leahy that he had injured himself pulling wire, but said he had pain when he bent over to tie his shoes. When questioned, claimant specifically denied a specific cause or trauma.
22. Claimant thought he would lose his job if he lost time from work for another injury. He returned to work as soon as he could, although he worked in pain.
23. Claimant sought treatment from Dr. Leahy three times in July 2001. On one of those occasions he reported that he had hurt his back doing DJ work. He did not mention having hurt his back pulling cable at any of the visits.
24. By August of 2001 Claimant went to see Dr. Mercia because he could no longer tolerate the pain. According to Dr. Mercia's note, claimant had been pulling cable in June of 2001 when he developed pain in his lower back and right outer thigh and groin. He noted that the pain had been constant over the previous two weeks. Claimant's post-void urgency worsened.
25. On October 11, 2001, Dr. Mercia treated Claimant with an epidural with steroids for pain relief, a procedure that provides relief for 3 to 12 weeks. A month later he discharged claimant from his care and told him he could work without accommodations.
26. Claimant has never returned to the level of activity he had before he was injured.
27. In February of 2002 claimant was laid off by Omega

Expert Medical Opinions

28. Jonathan Fenton, D.O. is an osteopathic physician Board Certified in Physical Medicine, and Rehabilitation, Osteopathy, and Independent Medical Examination. At the claimant's request, he conducted an independent medical examination of the claimant on June 30, 2003. Dr. Fenton reviewed treatment records and Claimant's deposition. From the candid history, he was aware of claimant's disc jockey work.

29. On examination, Dr. Fenton noted that claimant had pain with return from flexion, loss of motion in his hip and weakness in dorsiflexion of the foot, a neurological sign. He did not notice signs of pain amplification.
30. Dr. Fenton implicated the June 2001 injury as the causative agent. The mechanism of that injury, with pulling up, pulling forward and down, involved multiple planes of motion, which is highly risky.
31. In Dr. Fenton's opinion, the DJ work claimant performed was not of sufficient magnitude to constitute a new injury, although it caused an irritation.
32. Dr. Fenton opined that claimant's wire pulling incident in 2001 was an aggravation of a prior injury as evidenced by the mechanism of injury, which occurred in multiple planes, worsening of urinary symptoms, involuntary guarding on physical examination, weakness in dorsiflexion and an abnormal position of his foot. Further, he noted that claimant was able to return to normal activities after the 2000 injury, but was not able to do so after the 2001 injury. He had successfully returned to work and had received no medical care after October 2000 and before June 2001. Dr. Fenton opined that the 12 hours of DJ work reported to Dr. Leahy in July of 2001 was not of sufficient magnitude to constitute a new injury; rather it was a minor irritation or recurrence. However, he conceded that heavy lifting could have caused the back problems claimant has. It is unclear whether Dr. Fenton knew that some DJ equipment weighed 90 pounds.
33. On physical examination, Dr. Fenton noted back and hip pain that was consistent with complaints claimant made to his supervisor in May of 2000.
34. Dr. Fenton expressed concern that claimant had been released from care in November of 2001, within the time that the epidural block he had been given in October was still effective, making it difficult to know whether the epidural was masking pain or whether his condition had really stabilized. He opined that claimant should not have been placed at maximum medical improvement until steroids were out of his system, which is usually three months after an epidural.
35. Further, Dr. Fenton expressed concern about the urinary symptoms that became more troublesome after the second injury, suggesting the possibility of a serious neurological problem that should be evaluated.
36. At that time of his examination of the claimant, Dr. Fenton determined that he had reached medical end result with 8% whole person permanent partial impairment based on the AMA Guides.

37. Verne Backus, M.D. is an occupational health specialist. Dr. Backus reviewed claimant's medical records, issued a report and reviewed other physicians' reports. He opined that claimant's 2001 injury exacerbated a preexisting condition, an opinion based on his conclusions that claimant had reached medical end result after the May 2000 injury, was medically stable before the wire pulling incident, had returned to work full time and developed a more symptomatic presentation and worsening objective signs after the June 2001 incident.
38. Pulling cable generates higher forces on the low back than normal activities of daily living would. After the incident in June 2001 claimant had objective signs of radiculopathy that had not preexisted that incident, including weakness in the great toe. Dr. Backus concurred with Dr. Fenton's 8% whole person rating.
39. Dr. Backus agreed, and I find, that heavy lifting could have caused the back problems claimant now has.
40. John Johansson, D.O, who specializes in orthopedic medicine, examined the claimant on April 28, 2003, reviewed medical records, other experts' reports, witness affidavits and the claimant's deposition. After his deposition, Dr. Johansson issued an addendum to his report. In his initial report Dr. Johansson opined that claimant's condition had stabilized in June of 2000.
41. Later, Dr. Johansson opined that claimant had not reached medical end result before June of 2001, had not stabilized medically before that time and, although he had returned to work after the 2000 injury, continued to have problems.

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 (1963). 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. Claimant suffered an undisputed work related injury in May 2000 that Liberty Mutual accepted. Challenged is his allegation that he also suffered a work related injury at a wire pull in June of 2001. CNA challenges the claim on several grounds: it was not witnessed or documented; it was not reported to a health care provider in a timely way; and, claimant had intervening DJ work before he sought medical care.

4. As with other unwitnessed cases, this one highlights the difficulty of the claimant sustaining his burden of proof when a written report of injury was not filed for a period of time. “In such instances, the trier of fact must weigh carefully the credibility of witnesses, the initial medical reports, and explore any inconsistencies and hidden or not-so-hidden motivations.” *Fanger v. Village Inn* Opinion No. 5-95WC (1995)
5. As CNA strongly argues, claimant did not immediately seek medical attention, and when he did, failed to report the cable-pulling incident. Claimant maintains that he was afraid he would lose his job with a safety conscious employer concerned with rising workers’ compensation claims. Although such a concern does not fully explain his failure to report the incident to Dr. Leahy in July of 2001, I accept it as a naïve and misguided attempt to hold on to a good job by keeping his medical care out of the workers’ compensation system.
6. However, to accept that incident occurred does not mean that I accept that the incident caused his current condition. While it is true that the mechanism of the cable pulling incident is more likely to have caused back problems than would activities of daily living, that is not the case when cable pulling is compared to the heavy lifting involved in the DJ work, particularly when the DJ work was closer in time to the claimant’s visit to Dr. Machia in August 2001.
7. The symptoms on which Dr. Fenton relies in rendering an opinion regarding an aggravation, worsening of urinary symptoms, involuntary guarding on physical examination, weakness in dorsiflexion and an abnormal position of his foot, did not emerge for at least two months after the June 2001 incident. In the intervening months, claimant complained to a chiropractor of back pain after doing DJ work. Even for one afraid to lose his job if he made another claim, it strains credulity to accept his argument that a severe injury in June of 2001 was not reported to any health care provider for two months and resulted in no more than a day or two absence from work.
8. As such, claimant has failed to prove that his current condition is a result of a work related injury with Omega.
9. Because an intervening event broke the causal chain between the work-related events and claimant’s current condition, it is not necessary to reach the aggravation vs. recurrence claim.

ORDER:

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 10th day of November 2003.

Michael S. Bertrand
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.