Phillipe Courchaine v. Dubois Construction (09/05/03)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Phillipe Courchaine	)	State File No. L-01975
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Dubois Construction	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 38-03WC

Hearing held at Montpelier, Vermont, on March 20-21, 2003
Record closed on May 1, 2003

APPEARANCES:

Robert R. Bent, Esq., for the Claimant
Nicole Rueschel-Vincent, Esq., for the Defendant

ISSUES:

1. Is Claimant permanently and totally disabled as a result of his work-related injury?

2. Is Claimant's current medical condition causally related to the July 11, 1997 injury?

EXHIBITS:

Joint Exhibits:	Medical Records, with supplemental report from Steven B. Mann, Ph.D.
Claimant's Exhibits:	Curriculum Vitae of Stuart E. Williams, M.D.
Defendant's Exhibits:	A. Curriculum Vitae of Mark Bucksbaum, M.D. B. Deposition transcript of John J. Johansson, D.O. C. Curriculum Vitae of Steven B. Mann, PhD.

CLAIM:

1. Permanent total disability benefits under 21 V.S.A. § 644;
2. Interest under 21 V.S.A. § 664; and
3. Attorney fees and costs under 21 V.S.A. § 678.

STIPULATED FACTS:

1. At all relevant times, Claimant was an employee of Dubois Construction Company within the meaning of the Vermont Workers' Compensation Act (Act). Claimant worked as a seasonal heavy machine operator for Dubois for 12 years prior to his injury.

2. Claimant's prior employment history included work as a mechanic, heavy equipment operator, tool grinder, and grocery store owner.

3. On July 11, 1997, Claimant sustained a work-related injury to his shoulders, neck, back, and arm. This injury arose out of and in the course of Claimant's employment at Dubois.

4. At all relevant times, Defendant was an employer within the meaning of the Vermont Workers' Compensation Act (Act).

5. Defendant accepted and paid the claim for temporary total disability until July 9, 1998.

6. Defendant also accepted and paid claim for permanent partial disability, based on an impairment rating of 14.5%.

FINDINGS OF FACT:

1. Claimant attended seminars on grooming machines and attended heavy equipment school where he learned skills necessary to perform his work.

2. Claimant's annual pattern at Dubois was to work from April to November, then to collect unemployment from November to April.

3. After the July 11, 1997 incident, Claimant left work for three days, July 14, 15, and 16, 1997. On July 17 he retuned, operating a bulldozer and continued to do that work until August 29, 1997. He has not worked since, nor has he made any attempts to work.

4. During his employment at Dubois, Claimant had been operating a bucket loader with a defective seat, which he had to continually push against the frame of the machine, and which created a strain for Claimant. The strain had been worsening for about a month prior to the date of injury. On July 11, 1997, he complained of pain in his neck, back, shoulder and arm from the seat. Later he said that the seat fell out of the loader completely while Claimant was on it. Still later, he told doctors that he passed out when the seat fell. Records indicate that by August 29, 1997, the pain had moved down his back and into the lower back region.

5. On July 11, 1997, Claimant saw Dr. Williams, his treating physician since 1991, to whom he complained of right-sided neck stiffness, right forearm and wrist pain, and right thumb pain with tingling. Dr. Williams diagnosed Claimant with trapezius and shoulder strain related to the work injury.

6. Prior to the work-related injury, Claimant experienced pain and swelling in his left hip, and sustained leg and hip injuries from accidents in 1960 and 1977. Claimant also has a history of heart disease, weight problems, and smokes two packs of cigarettes per day.

7. An x-ray taken in September 1997 revealed degenerative changes in the spine with a narrowing of the cervical disc spaces. On September 8, 1997, Dr. Williams diagnosed Claimant with degenerative cervical disc disease exacerbated by the work injury.

8. An MRI performed in December 1997 revealed posterior bulging disc material impinging on the spinal cord. A CAT scan performed in March 1998 revealed degenerative bulging disc material and osteophyte formations.

9. Claimant completed the pain management program at the Center for Musculoskeletal Medicine in May and June 1998. During the program, Dr. Johansson diagnosed Claimant with a ligamental problem, and SI joint and cervical degenerative disc disease. Dr. Mann diagnosed Claimant with pain disorder associated with both psychological factors and a general medical condition, and chronic neck and back pain. Both doctors noted that Claimant was severely pain amplified and had an extreme focus on his pain, was non-compliant, and was unable to progress in the program. They also noted that he had a light duty work capacity.

10. Dr. Mann observed that Claimant was extremely reluctant to be retrained vocationally, or even to discuss the possibility of returning to work. Psychological testing conducted by Dr. Mann revealed symptom magnification and very high levels of work fear-avoidance beliefs. Dr. Mann also observed that Claimant was not open to new ideas or strategies for pain reduction, he had virtually no inclination to return to work, and he considers himself retired.

11. In September 1999 Dr. Williams suggested that Claimant might have been disabled permanently from his usual occupation, but said nothing about his ability to do other work.

12. Dr. Mann determined that Claimant had a moderate level of depression, a low level of anxiety, and a high level of somatization. Dr. Mann found that there is vocationally relevant work for Claimant from a psychological perspective, and that Claimant's moderate levels of depression and anxiety are not vocationally disabling.

13. Dr. Bucksbaum indicated in his independent medical examination performed on August 13, 2001, that Claimant has a very high level of anxiety and mild to no depression. Dr. Bucksbaum also opined that Claimant's pain behaviors indicate that he is maintaining his pain as part of a pain amplification syndrome, and that issues of secondary gain are apparent. He concluded that because Claimant did not sustain any direct trauma to his body at the time of injury, and he continued to work and was not taken out of work immediately following the injury, his current condition is not causally related to his work injury.

14. Dr. Johansson determined that Claimant was at a medical end result on June 29, 1998, and released him to light duty work. Dr. Johansson gave Claimant a permanent impairment rating of 5% for the cervical spine and 5% for the lumbar spine, for a total permanent impairment rating of 10%. No rating was given for any psychological injury. He based his medical end result opinion on Claimant's lack of improvement in the pain program, indicating that it was unlikely that much improvement or deterioration would later occur; the length of time since the injury, the nature of the injury and the nature of his physical findings.

15. On September 29, 1998, Rex G. Carr, M.D. determined that Claimant was totally disabled, should not attempt to participate in gainful employment, and would not be well for at least another year. Dr. Carr also opined that Claimant had a depression or anxiety disorder that seemed to stem from the work injury. Dr. Carr noted at the time Claimant was not receiving any medical treatment, and had not taken his pain medications for a while.

16. On July 20, 1999, John H. Milhorat, M.D. placed Claimant at medical end result with a permanent impairment rating of 19% based on the 4th edition of the AMA *Guides.* Before that time, Dr. Milhorat had noted Claimant's lack of improvement, that his symptoms were hard to decipher, that his effort on muscle testing was "less than 100%" and that sometimes he used the "wrong" muscles when specific muscles were tested. He mentioned, too, that it was "by history at least" that he had more problems in July 1998. However, in May 1998 Dr. Milhorat noted that Claimant was probably approaching a medical end point, and that the time was probably approaching to give some serious thought to a permanent impairment rating.

17. The permanent partial benefits paid by the Defendant were based on a permanent partial impairment of 14.5%, a compromise between the ratings given by Drs. Johansson and Milhorat. This payment was for injuries to the shoulder, back, arm, and neck.

18. On April 2, 2001, Dr. Williams concluded that Claimant is completely disabled from gainful employment due to cervical and lumbar disc disease. On April 23, 2001, Dr. Williams concluded that Claimant's complete disability is permanent.

19. Claimant became eligible for vocational rehabilitation services in 1998, but refused to take advantage of those services.

20. According to a functional capacity evaluation performed by Ben McCormack on October 17, 2001, Claimant has a sedentary-light work capacity, and could work eight hours per day. Dr. Bucksbaum concluded in his second independent medical examination on March 3, 2003, that the results of the functional capacity evaluation are consistent with the medical records and examination findings.

21. Mr. McCormack noted that the claimant exhibited self-limiting behaviors, and gave less than maximum voluntary effort. He also noted that Claimant laughed when asked about vocational goals, stated that he is unable to do anything, and that he has no specific goals about returning to work.

22. Claimant is 62 years old. He was going through a divorce in 2001. He is currently able to perform most activities of daily living, although he receives help with yard work. He currently limits his driving to necessary short trips of four miles or less, and does not drive long distances.

23. In a vocational assessment performed on August 15, 2002, Iris Banks agreed with Dr. Bucksbaum in concluding that Claimant's current condition is not causally related to his work injury. Ms. Banks's assessment also indicates that although Claimant is not capable of doing the same type of work he did prior to his injury, he is capable of performing work as an inspector, capacitor or component processor, belt repairer, or salesperson.

24. Claimant did not finish high school because he did not excel in or enjoy the learning environment, although he did receive his GED. He also completed courses at a machinists' school. According to his own account, he is not capable of learning new job skills because he does not do well in a classroom setting.

25. A psychological evaluation performed by Dr. Charles F. Bethell on October 12, 2001, indicates that although Claimant encounters some difficulty in shifting mental states and does not adapt well to stress, he does possess sufficient cognitive resources to be retrained.

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 a causal connection between the injury and the employment. *Egbert v. Book Pre*ss, 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. Medical end result "means the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." *Sargent v. Randolph Fire Dep*t., et al. Opinion No. 37-02WC (2002) concl. ¶ 11, citing Vermont Workers' Compensation (WC) Rule 2.1200. "The persistence of pain may not of itself prevent a finding that the healing period is over, even if the intensity of the pain fluctuates from time to time, provided that the underlying condition is stable." *Moulton v. Ethan Allen, Inc.*, Opinion No. 09-99 WC (1999) at 4, citing 4 A. Larson & L. Larson, Larson Workers' Compensation Law § 57.12[c] 10-46 (2001). Claimant in this case has reached a medical end result, even though he still experiences pain.

4. Dr. Johansson determined Claimant's medical end result to have been June 29, 1998. Dr. Milhorat on the other hand, determined that Claimant reached medical end result on July 20, 1999. Dr. Milhorat stated in May 1998 however, that Claimant was approaching medical end result.

5. When evaluating and choosing between conflicting medical opinions, the Department has considered several factors: (1) the nature of treatment and length of time there has been a patient-provider relationship; (2) whether accident, medical, and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination, and (5) the qualifications of the experts, including professional training and experience. *Miller v. Cornwall Orchards,* Op. No. 20-97 WC (1997) ¶ 9.

6. Both physicians are well qualified by relevant professional training and experience; both reviewed relevant medical records; both treated the Claimant, Dr. Milhorat on referral for his expertise in neurology, Dr. Johansson as part of a team in a pain management program. The choice between the two opinions, therefore, must be based on the clarity, logic, comprehensiveness and objectivity of the opinions. It is difficult to believe that Claimant did not actually reach medical end result until over a year after the time at which Dr. Milhorat suggested he was already approaching medical end result. Claimant's symptoms were excessive and inconsistent with physical findings. He resisted all suggestions that he return to work.

7. Dr. Johansson observed the Claimant over time, noted the lack of improvement in the pain program, and considered the nature of the injury, length of time since the injury, paucity of objective signs and lack of motivation. His opinion that Claimant had reached medical end result by June 25, 1998 is well supported by records leading up to that date, including those from Dr. Milhorat, that show Claimant had reached a plateau in his recovery process. See WC Rule 2.1200. Therefore, Dr. Johansson's determination of medical end result is more reliable, and Claimant reached a medical end result on June 29, 1998.

8. Next is the issue of the degree of permanent impairment, which Claimant argues is total. A claimant is entitled to permanent total disability if his injury is within the enumerated list articulated in 21 V.S.A. § 644, or if it has as severe an impact on earning capacity as one of the scheduled injures. *Drinkwater v. Norton Brothers, Inc*., Op. No. 21-98 WC (1998) ¶ 4. Under the non exclusive list of injuries in § 644 (a) the following shall be deemed total and permanent: 1) the total and permanent loss of sight in both eyes; 2) the loss of both feet at or above the ankle; 3) The loss of both hands at or above the wrists; 4) The loss of one hand and one foot; 5) An injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg and of one arm; and 6) An injury to the skull resulting in incurable imbecility or insanity. Claimant's injuries in this case are not enumerated in § 644, and do not have as severe an impact on his earning capacity as those enumerated.

9. Claimant must show through medical evidence that he is totally disabled for gainful employment. *Fleury v. Kessel/Duff Construction Co.*, 148 Vt. 415, 419 (1987); *Gravel v. Cabot Creamery*, Op. No. 15-90 WC (1991) ¶ 9. This assessment is to be based on physical impairment rather than individual employability factors like age or experience, and without regard to work available in the community. *Fleury*, 148 Vt. at 419. Without considering employability factors like age or experience, Claimant in this case is not totally disabled for gainful employment.

10. In *Sargent v. Town of Randolph*, Op. No. 37-02 WC (2002) ¶ 6, the claim for permanent total disability was denied because the claimant demonstrated a full-time sedentary-light work capacity. Similarly in this case, the functional capacity evaluation indicates that Claimant has a full-time, sedentary-light work capacity. In his independent medical examination, Dr. Bucksbaum concluded that the results of the functional capacity evaluation are consistent with the medical records and examination findings, and those results are not refuted by any other experts.

11. The claimant must prove that he is disabled for gainful employment and that he is not able to "uninterruptedly do even light work due to physical limitations." *Gravel* at 14, citing *Butler's Dairy v. Honeycutt*, 452 So.2d. 120, 122 (Fla. App.1984). Given the results of the functional capacity evaluation in this case, Claimant can perform light work for eight hours a day. He has therefore failed to prove that he is disabled for gainful employment.

12. Claimant argues that the odd-lot doctrine applies in this case as the standard for permanent total disability, and that, under this doctrine he is permanently and totally disabled. The doctrine is codified in the amendment to § 644 that became effective on July 1, 2000 (1999 Adj. session). That amendment states that specific characteristics of the claimant, including age, experience, training, education and mental capacity, shall be considered in determination of permanent total disability. 21 V.S.A. § 644(b).

13. Under Department precedent, the odd lot doctrine would not apply because both Claimant's injury and his medical end result predated the amendment to § 644. See *Sargent v. Town of Randolph*, Op. No. 37-02WC (2002); *Bostwick v. Mt. Anthony Union High School*, Op. No. 5-02 WC (2002) ¶ 10.

14. However, if *Longe* v. *Boise Cascade Corp*.171 Vt. 214 (2000) were interpreted to mean that a claim for permanent total disability is separate and distinct from all prior claims, the operative date would be May 7, 2001, the date the permanent total claim was made, well within the statute of limitation for an odd lot claim. The question then would be whether, when considering, experience, training, education and mental capacity, the Claimant is permanently and totally disabled. § 644(b).

15. However, even under the odd-lot doctrine, Claimant is not permanently and totally disabled. Although most of Claimant's previous jobs involved heavy-duty physical labor, he has held other types of jobs, and has had other training, which give him options other than heavy-duty physical labor. Although Claimant's mental capacity may preclude him from some opportunities, it has been shown that he is capable of being retrained. Therefore, even though Claimant is 62 years old, some employers may still hire him, and he has not shown that he is permanently and totally disabled under any standard.

16. Subjective complaints of pain, when coupled with deficient objective physical evidence, cannot serve as a foundation for a permanent, total disability compensation award. *Severy v. The Brattleboro Retreat*, Op. No. 37-99 WC (1999) ¶ 6. Although there is objective physical evidence in this case to show that the Claimant has been injured, the evidence is not sufficient to show that the injury is permanently and totally disabling. Claimant's degenerative condition may be painful, but that pain alone is not sufficient to render him permanently and totally disabled. The evidence indicates that Claimant is capable of performing work.

17. While Dr. Carr concluded that Claimant is totally disabled, his opinion did not include objective support, and his examination of the Claimant was not comprehensive. Furthermore, Dr. Carr saw the claimant only once. Therefore, his opinion as to the disabling nature of Claimant's condition is less reliable than that of the other experts.

18. Claimant argues that when both his physical and psychological injuries are considered together, he is permanently and totally disabled. In order to prevail on a physical-mental claim, Claimant must prove that his mental condition disables him from performing work activities, and that his resulting mental condition is substantially causally connected to his work-related injury. *Severy* ¶ 9, citing *Miller* ¶ 26. It is insufficient that the claimant honestly believes that his injury is totally disabling to him; rather, there must be medical evidence substantiating the disabling nature of the claimant's psychological injury. *Id*. Although experts in this case recognize that Claimant has some amount of depression and/or anxiety, there is no evidence to indicate that his psychological condition is disabling, or that it is causally related to the work injury.

19. In *Gimbert v. United Parcel Service*, Op. No. 22-88 WC (1991), the Claimant, who had a 9% permanent partial impairment of her back and a psychogenic pain disorder, was permanently and totally disabled. The commissioner concluded that the claimant's "mental disorder, especially her preoccupation with pain, and conversion of stresses into pain symptoms, coupled with her complete lack of insight in to her condition rendered her totally disabled." *Drinkwater v. Norton Brothers, Inc.*, Op. No. 21-98 WC (1998) at 5, citing *Gimbert*. Unlike that case, however, there is no expert opinion in this case showing that Claimant actually has a psychological disability. Claimant was never treated for his depression, and there is no evidence showing that his mild to moderate level of depression was actually disabling. Dr. Mann specifically stated that claimant was not permanently totally disabled from a psychological perspective. Furthermore, Claimant never received a permanency rating from any doctor for a psychological condition. Without the support of experts in psychiatry and psychology, claimant cannot prevail under the *Gimbert* theory. *Drinkwater* ¶ 6. Therefore, the *Gimbert* theory is no more applicable in the present case than it was in *Drinkwater*.

20. In *Sargent*, the claimant had a sedentary work capacity even after the psychological condition was taken into account. *Sargent* ¶ 6. In this case, even Claimant's own psychological expert does not conclude that Claimant is permanently and totally disabled. Although Dr. Bethell states that Claimant has difficulty adapting to stress and has some level of underlying depression, he does not state that these traits prevent him from working, or that they are causally related to the work injury. Instead, he concludes that Claimant is capable of retraining, and encourages him to use vocational rehabilitation. While the functional capacity evaluation did not take any psychological factors into account, Dr. Bucksbaum considered psychological factors when he concluded that Claimant is not permanently and totally disabled. Dr. Bucksbaum states that Claimant's depression is a growing concern, but he does not conclude that it is a disabling concern. Therefore, Claimant is not permanently and totally disabled, even when considering his psychological condition.

21. Dr. Bucksbaum found no causal link because Claimant did not sustain any direct trauma at the time of injury, and was not taken out of work immediately after the injury. However, Claimant has already established entitlement to workers' compensation benefits, including a sufficient causal link for the periods of temporary total and permanent partial disability. Because the carrier accepted and paid those claims, Dr. Bucksbaum's opinion about a complete lack of causation is not relevant to whether causation has been established on the permanent total claim.

22. A personal injury need not be instantaneous to be compensable as a work-related injury in Vermont. *Campbell v. Savelberg*, 139 Vt. 31 (1980). Cumulative micro-trauma arising out of and in the course of employment is compensable. *Petit* at 3. Neither the fact that Claimant's injury was gradual, nor that the onset of his back pain was gradual, precludes a finding of causation.

23. A claim is compensable as long as the work injury accelerates or exacerbates an underlying condition, even if the condition would inevitably lead to the same result. *Liscinsky*, citing *Marsigli Estate v. Granite City Sales*, 124. Vt. 95, 103 (1964). An employer takes each employee as is, and is thus responsible for an accident or trauma which disables one person, but which might not disable another. *Liscinsky*, citing *Petit v. No. Country Union High Sch.*, Op. No. 20-98 WC (1998). Dr. Williams diagnosed Claimant with degenerative disc disease exacerbated by the work injury, and that diagnosis was not refuted. Therefore, the degenerative and pre-existing nature of Claimant's cervical condition does not preclude a finding of causation. Causation has been established for Claimant's shoulder, back, arm, and neck injuries, at the time of the permanency determination.

24. After that point however, the only ongoing condition for which Claimant sought treatment was pain, and Claimant has not shown that his chronic pain disables him. Claimant also argues that the work injury caused his divorce, but there is no evidence of that aside from his testimony. The fact that something comes into existence after a work-related injury does not in itself justify a conclusion that it came into existence because of the work-related injury. *Norse v. Melsur Corp.*, 143 Vt. 241, 244 (1983).

25. In *Cady v. Vermont Tap & Die*, Op. No. 2-97 WC (1997), the Department found causation for the Claimant's permanent disability after causation for the period of temporary disability had already been established. One of the factors considered in finding causation included Claimant's reasonable explanation for the absence of medical treatment during the period in question. *Cady* ¶ 9. Claimant's entitlement to permanency benefits was further supported by the fact that he had not reached his medical end result. *Cady* ¶ 10, citing Workers' Compensation Rule 2(h). In this case, Dr. Carr stated that Claimant was not receiving any treatment on Sept. 29, 1998. Furthermore, Claimant had clearly reached medical end result by the time the claim for permanent total disability was made.

26. When a claimant's symptoms have been stable for years, he has the burden of producing medical evidence that not only confirms the connection with the original injury, but also establishes the lack of causal connection with any intervening event. *Drown v. Cabot Farmers Cooperative Creamery*, Op. No. 13-95 WC (1995). A possible cause cannot be accepted as the operating cause unless the evidence excludes all other causes or shows something in direct connection with the occurrence. *Burton v. Holden & Martin*, 112 Vt. 17, 20 (1941). Dr. Carr states that Claimant's condition "seems to stem" from the work injury, but does not include any objective evidence to support his opinion. Without further evidence showing how Claimant's chronic pain and psychological injuries were caused by the original injury and not by some intervening and superseding event, causation for this later period has not been established.

27. Finally, rehabilitation services pursuant to an approved rehabilitation plan are mandatory for eligible employees. WC Rule 36. Refusal to accept vocational rehabilitation pursuant to an order of the commissioner may result in loss of compensation for each week of the refusal, if the commissioner so directs. 21 V.S.A. § 641(a). It is difficult to determine whether a claimant is permanently and totally disabled when he has not shown through participation that vocational rehabilitation services have not succeeded in helping him return to work.

28. As Claimant has not prevailed, Claimant is not entitled to an award of attorney fees under 21 V.S.A. § 678.

ORDER:

THEREFORE, based on the foregoing findings of fact and conclusions of law, these claims are DENIED.

Dated at Montpelier, Vermont this 5th day of September 2003.

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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.