STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Martin Ellis	)	State File No. L-5086
	)	
	)	By: Margaret A. Mangan Hearing Officer
v.	)	
	)	
	)	For: Steve Janson Commissioner
GIV of Vermont	)	
	)	
	)	Opinion No. 03-00WC

Hearing held in Montpelier on July 23, 1999
Record closed on September 15, 1999

APPEARANCES:

L. Brooke Dingledine, Esq., and Gary D. McQuesten, Esq., for the claimant
Christopher J. McVeigh, Esq., for the defendant.

EXHIBITS:

Joint Exhibit	:	Medical Records
Claimant's Exhibit	:	Request for attorney fees with supporting documentation

ISSUES:

1. Is claimant is entitled to temporary total disability benefits from December 15, 1998 through January 18, 1999?

2. Is claimant entitled to vocational rehabilitation benefits?

FINDINGS OF FACT:

1. Granite Industries of Vermont, Inc. (GIV), a company where raw stone is transferred into a finished product, employs about 56 employees. At the time of his injury, claimant had worked there for three and a half to four years as a stonecutter, a heavy-duty job. Responsibilities of the job included cutting stone by hand, finish work, slab polishing, boxing stone, pulling rubber, operating a diamond saw, and hand polishing.

2. On or about September 23, 1997, claimant reported the gradual onset of back pain with increased severity related to his work. Specifically he complained of low back pain while leaning over a piece of stone polishing it.

3. At the time of his injury, claimant was 40 years old. He has a high school education and a work history of employment only within the granite industry. His work has involved strenuous, heavy-duty work that has required lifting and carrying.

4. Claimant underwent a 17-month period of medical intervention to treat the back injury that resulted from his work-related accident. On January 5, 1999, Dr. Libman, a rheumatologist, determined that he did not have an underlying rheumatoid condition or other condition that would lend itself to any type of medical intervention other than what had been previously attempted.

5. No firm, working diagnosis of what ails this claimant has been reached.

6. Based on Dr. Libman's assessment, the parties agree that claimant reached a medical end result on January 18, 1999. The parties also accept the 5% whole person permanency impairment derived from the assessments of Doctors Callan and White.

7. Jeffrey Martell, President of Granite Industries of Vermont, testified that he has the ability to shuffle jobs in order to get someone back to work light duty.

8. Claimant's first attempt to return to work was in a stone polisher job, which both parties agree, did not work out. Claimant described the job as "too physical."

9. Approximately one year after claimant's injury, on September 14, 1998, Theresa Bouchard, a vocational rehabilitation counselor with Catamount Case Management, performed a job analysis on the auto slab polisher machine at GIV. It was at the request of Jeffrey Martell, the company president, that she only evaluated the auto slab polisher job. He told her before her evaluation that it was the most appropriate job for the claimant. Bouchard prepared the analysis after meeting with Martell, and although she saw the machine, it was not in operation at the time. Bouchard understood that a lumper, not the machine operator, would actually put the stone in the machine. Therefore, she assumed for purposes of her report that the machine operator neither leveled the granite nor used a crowbar. Mr. Martell signed off on what she wrote. At the hearing, Bouchard conceded that she had no idea how large the stone was. After she completed her report, Bouchard sent it to the claimant for his review and input on September 15, 1998. Claimant commented on how he performed the operations of the machine, particularly that the job entailed more twisting and squatting than what Bouchard had originally noted. His comments were incorporated in the report.

10. Bouchard testified that the auto slab polisher job was a light duty position. However, she conceded that no physician released claimant to do the job.

11. Bouchard also testified that there was clear tension between the claimant and his employer.

12. In October of 1998 claimant was released to light-duty work. GIV offered him a job in the stencil department, which Dr. Callan agreed he could do. The position claimant held in that department did not exist immediately before or after claimant had it. Beaudin testified that Martell had told her that the stencil job was not a permanent full-time job.

13. Linda Beaudin is also a GIV employee, a member of the same union as the claimant, and the person who instructed claimant on the stenciling work. From 1994 to December 1997, Beaudin had what Martell described as a full-time "assistant" in the stenciling room, where she was the "lead person." Martell testified that at the time claimant

returned to work, Beaudin was working overtime in order to get the stenciling work done and needed help.

14. Beaudin testified about the duties involved in working in the stencil room where government markers are made. She explained that "pulling rubber" was a light duty activity that did not require lifting more than two pounds of weight which was what the lettering tray weighed. That tray was used in setting the markers on the stone for marking. Beaudin described the room in which the stencil work was done as fair sized air-conditioned room with a worktable and radio. At his request, claimant had a stool he could use while working.

15. Beaudin testified that the stencil work did not require any significant bending, lifting or twisting. Claimant could work at his own pace in the job that took some time to learn. Claimant told the vocational rehabilitation counselor that the job required bending and twisting. Little or no exertion was required to etch the rubber matting for the stone markers.

16. Claimant began working in the stencil room on October 9, 1998 when he worked four hours. After that he worked eight hours per day. Beaudin testified that claimant expressed considerable frustration with the stenciling job he was having difficulty learning. At times he had to redo some work, something that Beaudin described as a normal occurrence when one is learning the job, but something that claimant found to be unacceptable. He admitted to Beaudin that he disliked the work.

17. Beaudin further testified that between October 9 and October 21, 1998, claimant gave her no indication from his facial expressions, movements or comments that he was physically uncomfortable. He never complained of back pain to her. Conversely, the claimant testified that he experienced difficulty and increased pain over the course of time he was doing the stencil work. In support of his testimony, he points to an October 20, 1998 note from Theresa Bouchard, vocational rehabilitation specialist, which documented claimant's wife's report that he had been having pain.

18. On October 21, 1998 claimant told Beaudin that he had had enough, then abruptly walked off the job. At 10:00 a.m., he punched out. He testified that his pain, coupled with his frustrations with the job, forced him to leave. Nevertheless, he conceded that he never complained to Beaudin about the pain.

19. Claimant went directly to his union office where he reported to Matthew Peake that he had increased back pain. Mr. Peake testified that claimant was hunched over, had back problems, and had trouble catching on to the job. At 11:00 a.m. claimant called Martell to say that he would be unable to return to work.

20. After being told to see a doctor, claimant made an appointment with Dr. Callan whom he saw that day. Dr. Callan wrote a note on a prescription pad directing that claimant should be out of work due to increased symptoms.

21. Although Matthew Peake, the business agent for the Granite Workers' Association in Barre, attempted to suggest that Beaudin was a management figure, he conceded that she was not claimant's supervisor nor was she a member of the management structure. In the stencil room, however, she was the lead person and instructed claimant on his new job.

22. Later that day, claimant was fired for violating a company policy that required employees to report to a supervisor before leaving a work site. Jeffrey Martell, the employer's president, characterized claimant's leaving the job site as a voluntary quit. Claimant accepted the dismissal without grieving it.

23. Claimant conceded that he did not notify any management personnel, including plant manager Leon Perry, that he was leaving the premises.

24. Beaudin testified that claimant's work in the stencil department freed her up to perform more work on the production line, completing the orders for markers, and then having them shipped to customers. She further testified that after claimant's departure, she returned to doing more stenciling work, which resulted in delays in production.

25. Another employee, Harvey Amil, helped her with her overall duties. Claimant insinuated that the stenciling job he was given was a make-work position fabricated solely for him. Beaudin testified that the need for the position existed at the time claimant held it and still exists, although it has not been filled.

26. On November 20, 1998 Bouchard completed her vocational rehabilitation assessment for the claimant, with the conclusion that claimant was not entitled to vocational rehabilitation services. She assumed that he would return to work with a medium work capacity and, therefore, had the ability to return to the granite industry where he had long term experience. She testified that when an individual was still undergoing treatment, the rehabilitation counselor assumed a level of recovery in order to perform a vocational assessment.

27. The insurer stopped making temporary total disability payments to claimant on December 15, 1998. His medical end result date was January 18, 1999.

28. After Louise Lynch at Work Recovery, Inc., performed a functional capacity evaluation of claimant on June 10, 1999, she placed him at a light work capacity. She also determined that an auto polisher job required a medium work capacity. Bouchard justified the difference in the two evaluations of the auto polisher job by stating that Lynch, who ranked the job as medium capacity, most likely relied on the generic D.O.T. classification. Bouchard considers her assessment more accurate because it was specifically based on the GIV machine. However, because Bouchard arrived at her light duty conclusion without seeing the granite industry machine in operation and only after she assumed that a lumper would do part of the job, the more "generic" assessment that the auto polisher job required a medium work capacity is clearly the more credible assessment.

29. Matthew Peake held an elected position with the granite workers' union. He testified that he was familiar with all jobs in the granite industry. After claimant's injury, Peake explained claimant tried to do a medium duty job that did not work out. He agreed that the stenciling job, which he described as "plucking letters" was light duty, but opined that it was not a full-time position in the company except when there was a government contract. He never saw claimant doing the stenciling job.

30. Peake also testified that he was familiar with the polishing job and the stonecutter job. Stonecutter work is heavy duty with considerable lifting. The polishing job, he explained, required a medium work capacity. It involved the changing of bricks and polishing with concomitant bending and reaching. He explained that water is involved in the process, which results in a slippery floor surface for the polisher. In Peake's opinion, GIV of Vermont had no light duty jobs that claimant could perform without training. One example of such a job is drafting, a job for which claimant was not prepared. Similarly, claimant has had no experience in fork lift or crane operation, light duty non-union jobs. He conceded that in the granite industry generally, training is on the job.

31. The tension between Mr. Peake, the union representative, and Mr. Martell, company president, and between the claimant and Mr. Martell was palpable at the hearing. Peake and the claimant obviously mistrust Martell because of past dealings. Martell, in turn, seems to be suspicious of workers who claim workers' compensation benefits. In at least two incidents in the past, Martell received permission to accompany workers to doctors' appointments for what were alleged to have been work-related injuries. The entrenched positions of both sides exceeded the normal advocacy expected in this forum and seriously call into question the credibility of both parties.

32. At the time of the hearing, claimant had enrolled in a machine program at St. Johnsbury Academy.

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, Morse Co*., 123 Vt. 161 (1963). When an area of dispute is beyond the ken of a layperson, expert testimony is needed to prove entitlement. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17, 19-20 (1941).

2. Once a claimant has established entitlement to temporary total disability benefits, the burden is on the employer to demonstrate that he is no longer entitled to benefits. *Merrill v. University of Vermont*, 133 Vt. 101 (1974).

3. An employee is entitled to vocational rehabilitation services "when as a result of an injury covered by [the Act] he is unable to perform work for which the employee has previous training and experience…." 21 V.S.A. § 641.

4. The first issue for decision is whether claimant is entitled to temporary total disability benefits between December 15, 1998, the effective date of the Form 27 and January 18, 1999, the date he reached medical end result. The Form 27 was based on GIV's assertion that claimant had voluntarily left his employment and that he essentially refused the employer's offer of light duty work of which he was capable. See Rule 18(a)(3)(C).

5. Claimant mentioned nothing to his co-worker, Linda Beaudin, during the week of October 19, 1998, that he was having increasing low back difficulty. Nothing in his physical actions between October 9, 1998 when he first started working in the stencil room and October 21, 1998, when he abruptly left his work there, gave Beaudin any indication that he was physically uncomfortable doing the job. The stencil room work required very little bending or twisting and was, by any account, a light duty job.

6. The more probable inference from the credible evidence is that claimant simply became frustrated with the stencil work and no longer wanted to do it. Claimant's explanation, bolstered by a medical note, and Peake's testimony, that he had a medical reason to leave work was not credible. His wife's statement to the counselor to the effect that he had symptoms, without some objective evidence of discomfort on the job, does not convince me that it was pain that took him from work that day. In fact, claimant left his job in a fit of fury. Later attempts to characterize the departure as medically justified are not convincing. Claimant's voluntary action to walk off the job amounted to a refusal of an ongoing offer of light duty work, which justified termination of his temporary total disability benefits.

7. Whether claimant is entitled to vocational rehabilitation benefits is a separate question. The employer argues that claimant has not produced an expert in the area of vocational rehabilitation and, therefore, cannot prove entitlement. It also argues that claimant has transferable skills that preclude any right to vocational rehabilitation. The claimant argues that he is entitled to rehabilitation benefits because there is no evidence that he has any transferable skills.

8. The employer relies heavily on the assessment of Theresa Bouchard. Her determination that the stone polisher job is light duty is based on assumptions that cannot be verified and was influenced heavily by an employer who had already decided that the job was light duty before any assessment was made. As such, her determination that the stone polisher job was light duty cannot be accepted.

9. Next, Bouchard determined that in her professional opinion, claimant was not entitled to vocational rehabilitation benefits because there were suitable jobs in the granite industry which he could perform given his light duty capacity and expected improvements to a medium duty work capacity. Those jobs she considered suitable were sandblasting, stencil work, and nonunion crane lift operator and forklift operator jobs for which claimant had never applied.

10. Finally, the employer argues that the functional capacity evaluation noted that claimant "could benefit from more advanced physical therapy that included manual therapy techniques … combined with functional training for a safer movement pattern and work technique." The expected outcome of pursuing the physical therapy would be improvement of claimant's work potential to a medium work capacity. In that case, the employer argues, claimant would not need rehabilitation services because he has the necessary training in that level of work.

11. It is undisputed that claimant had a light duty work capacity. It is also undisputed that the stenciling job he left was a light duty job. Whether the job would have continued had claimant chosen to stay with it remains an unknown. But it is not contested that he was offered a job within his abilities with the necessary training, but rejected the offer by leaving work. Furthermore, it is undisputed that in general, workers in the granite industry learn on the job. Claimant had such an on-the-job training opportunity with the stenciling job, and could have had such an opportunity with jobs such as forklift operator, that even Peake conceded is light duty. There is no evidence that the training required in such a job exceeded claimant's abilities.

12. Claimant's own lack of cooperation in his own work recovery has prevented him from proving that he is unable to return to suitable employment using his previous training and experience. Consequently, his claim fails.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, the claim of Martin Ellis for additional temporary total disability and vocational rehabilitation benefits is DENIED.

Dated at Montpelier, Vermont, on this 14th day of February 2000.

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Steve Janson
Commissioner