

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

Donald Spaulding

Opinion No. 38-04WC

v.

*By: Margaret A. Mangan
Hearing Officer*

Unique Landscaping

*For: Michael S. Bertrand
Commissioner*

State File No. K-04169

*Hearing held in Montpelier on June 9 and June 10, 2004
Record closed on July 8, 2004*

APPEARANCES:

*Mark H. Kolter, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant*

ISSUES:

- 1. Is the claimant permanently and totally disabled?*
- 2. If not permanently and totally disabled, what degree of permanent partial impairment does claimant have for a physical mental injury?*
- 3. Should Liberty Mutual be ordered to pay for ongoing psychiatric treatment of the claimant by Dr. Nepveu and for psychotropic medications?*
- 4. Should Liberty Mutual be ordered to pay for treatment provided by Dr. Nepveu to date that has not been paid?*

EXHIBITS:

Joint Exhibit's: Medical Records (3 volumes)

Claimants Exhibit's:

1. *Curriculum Vitae of Mark Bucksbaum, M.D.*
2. *Functional Capacity Evaluation by Diane Aja, January 22, 2003*
3. *Curriculum Vitae of Judith Nepveu, M.D.*
4. *Summary of medical records of Dr. Nepveu*
5. *Copley Hospital Report on Liberty Mutual Payments, May 13, 2004*
6. *Diagnostic Criteria for Adjustment Disorder (DSM-IV)*
7. *GAF Scale (DSM IV)*
8. *Curriculum Vitae of Joel Silverstein, M.D.*
9. *Letter by Dr. Silverstein, July 20, 1999*
10. *Brooks Pharmacy's Record of Prescription, July 2002 to May 2004.*
11. *Dorothy Spaulding's summary of trips*
12. *Curriculum Vitae of Rodger Kessler, M.D.*
13. *Criteria of Major Depressive Episode (DSM IV)*
14. *Cochiarella, Master the AMA Guides, Fifth Ed., 167—168*
15. *Curriculum Vitae of Gregory LeRoy, M.Ed., CRC, ABVE*
16. *Mr. LeRoy's Vocational Rehabilitation Assessment with Addendum*
17. *VR Records, Joel Lowry, CRC, Cascade Rehabilitation Counseling, Inc.*
18. *Dr. Mann's Interpretive Report P-3, pg. 4.*
19. *Iris Bank's Vocational Assessment, October 2, 2003*
20. *Curriculum Vitae of Dr. Peterson.*

Defendants Exhibits:

A: Wagner Rehabilitation Assessment, John May

FINDINGS OF FACT:

1. *Claimant suffered a chainsaw injury to his left leg on August 6, 1996 in an accident that arose out of and in the course of his employment. The laceration from that injury was contaminated, measured seven inches in length, and went to the level of bone.*

2. *Before his work related injury, claimant was an active man who used physical exercise and work as a way to relieve anxiety and stress.*

3. *The injury to the left leg set in motion a cascade of events that ultimately led to bilateral knee replacements, a shoulder injury and aggravation of an underlying back condition. The right knee injury was from overuse. The shoulder injury occurred when his left leg gave out and he fell into a post. The back injury resulted from gait and postural changes that aggravated an underlying back condition.*
4. *It is anticipated that claimant will need an additional surgical procedure on this left knee.*
5. *As a result of his physical injuries, claimant also sustained a psychological injury, diagnosed as an adjustment disorder.*
6. *As a result of his work related injuries, claimant has an antalgic gait, altered sensation and tenderness in the left knee, decreased range of motion in his left leg and atrophy in the muscles in that leg. Claimant's right leg has also lost range of motion. It is weak and fatigues easily. He also lost more than half of the range of motion in his right shoulder and has pain and weakness in that extremity. For his back, he has received a series of epidural injections.*
7. *Joel Silverstein, M.D., had been claimant's primary care physician for more than a decade before his injury and has treated him since.*
8. *Dr. Silverstein prescribed antidepressant therapy and recommended a psychiatric evaluation after he observed signs of depression from the multiple injuries and inability to work. He opined that claimant is unable to work.*
9. *Based on a functional capacity evaluation, claimant's work capacity is in the lowest category of sedentary.*
10. *Greg LeRoy, Vocational Rehabilitation Counselor, opined that claimant lacks a marketable work capacity from a vocational rehabilitation perspective.*

Medical Opinions

11. *John Peterson, D.O., a physician whose opinion the carrier solicited, assessed claimant's permanent partial disability rating*

12. *Judith Nepveu, M.D., a psychiatrist with 45 years of experience, has worked with the claimant since 1999 at more than 180 sessions. Her therapy has and continues to help claimant deal with the many stressors created from his multiple injuries. She opined that claimant is unable to work.*
13. *Mark Bucksbaum, M.D., opined that claimant's physical injuries alone render claimant incapable of working.*
14. *Rodger Kessler, Ph.D. is a clinical psychologist who diagnosed claimant with major depression and assessed him with a 17% whole person impairment for the psychological injuries that followed the series of physical injuries.*
15. *Stephen Mann, Ph.D. evaluated claimant for the defense in this case. He diagnosed claimant with an adjustment disorder and opined that continued treatment with Dr. Nepveu is not reasonable or necessary. He assessed claimant's psychological impairment at 3% and opined that the impairment does not prevent him from working.*
16. *John Johansson, D.O., expert for the defense, opined that claimant had a sedentary work capacity, although he would need modifications in any work setting. Dr. Johansson recommended another functional capacity evaluation.*

Attorney fees and costs

17. *Claimant submitted evidence of 313.4 hours of attorney work on this case and 2.2 hours of paralegal time. He claims a total of \$25,649.00 in fees, \$90.00 per hour for the lawyer's time and \$65.00 per hour for the paralegal time. He also claims \$27,497.75 in expenses.*

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). He must establish by sufficient credible evidence the character and extent of the injury and*

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).*

Permanent Total Disability

3. *This claimant is entitled to permanent total disability if his injury is within the enumerated list articulated in 21 V.S.A. § 644¹ or, without considering individual employability factors such as age and experience (because this injury predates the 2000 odd lot amendment to the statute) the medical evidence indicates that his injury has as severe an impact on earning capacity as one of the scheduled injuries, see Bishop v. Town of Barre, 140 Vt. 565 (1982), that he is totally disabled from gainful employment. Fleury v. Kessel/Duff Constr. Co. 148 Vt. 415 (1987).*
4. *The standard is further articulated in § 645(a), which specifies that one must have “no reasonable prospect of finding regular employment.”*
5. *Regular employment is “work that is not casual and sporadic.” Gainful employment means that one earns wages; it is not charitable work. Rider v. Orange East Supervisory Union, et. al. Opinion No. 14-03WC (2003).*
6. *On this issue, the department must choose among conflicting medical opinions, a familiar process that involves consideration of the following factors: 1) the nature of treatment and 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. See Geiger v. Hawk Mountain Inn, Op. No. 27-99WC (1999).*

¹ 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.

7. *For the claimant, Dr. Silverstein and Dr. Bucksbaum offered opinions that claimant has no capacity for gainful employment. Dr. Johansson, for the defense, has suggested that he has a limited, sedentary work capacity. As the treating physician, Dr. Silverstein's has the greater weight under the first criterion compared to Dr. Johansson who evaluated the claimant only once. All experts seem to be on even footing regarding the second factor, as they examined relevant records. Dr. Johansson's opinion fails under the third criterion because he lacked accurate, objective facts regarding claimant's home activities. Dr. Silverstein's objectivity may be colored by strong advocacy. In contrast, Dr. Bucksbaum provided clear and objectively supported opinions. Next, Dr. Bucksbaum provided a comprehensive review of all records and Dr. Silverstein had comprehensive first hand knowledge of this claimant's progress. Both, therefore, exceeded Dr. Johansson's opinion on the fourth criterion. On the final criterion, all experts are well qualified to provide opinions in this matter.*
8. *On balance, the factors support the claimant's medical opinions regarding work capacity.*
9. *The myriad injuries or aggravations to the claimant's legs, shoulder and back from the cascading events following the chain saw incident created an overall condition in this claimant incompatible with gainful employment, even without considering any psychological injury. He has, therefore, proven permanent total disability.*

Psychiatric Treatment

10. *Nevertheless, psychological factors must be considered in determining whether continued treatment with Dr. Nepveu is compensable. That treatment is for counseling as well as for monitoring psychotropic medications.*
11. *Claimant is not one to have sought psychiatric care easily and building the trust necessary for adequate treatment has taken time. Doctors Mann and Nepveu agree that claimant suffers from an adjustment disorder. As Dr. Nepveu has gained the necessary trust, I defer to her clinical judgment that continued*

Attorney Fees and Costs

12. *As a prevailing claimant, he is entitled to reasonable attorney fees as a matter of discretion and necessary costs. A decision on this issue is deferred to allow for examination of the documentation submitted.*

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim for permanent total disability benefits is GRANTED.

Dated at Montpelier, Vermont this 3rd day of September 2004.

*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.