

**STATE OF VERMONT
DEPARTMENT OF LABOR**

George Granai)	Opinion No. 67-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Spates Construction)	For: Patricia A. McDonald
)	Commissioner
)	
)	State File No. J-01490

Pretrial conference held on May 24, 2004
Hearing held on September 6 and 7, 2005
Record closed on September 27, 2005

APPEARANCES:

Heidi S. Groff, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUES:

1. Is claimant permanently and totally disabled as a result of his work related injury?
2. If so, to what benefits is he entitled?

EXHIBITS:

Joint:

- I Complete Medical Records
- II Important Medical Records
- III Vocational Rehabilitation Records
- IV Department of Labor Forms
- V Deposition testimony and C.V. of Dr. Bourgeois

Claimant:

1. Curriculum vitae of Dr. Heffelestein
2. Dr. Heffelestein's Neurological Evaluation Graph and Neuropsychological Deficit Scale
3. Curriculum vitae of Dr. Bucksbaum

Defendant:

Curriculum vitae of Dr. Peyser

STIPULATIONS:

1. On July 19, 1995 claimant was an employee of defendant within the meaning of the Workers' Compensation Act (Act).
2. On July 19, 1995, defendant was the employer of claimant within the meaning of the Act.
3. On July 19, 1995 claimant suffered a personal injury by accident arising out of and in the course of his employment with defendant.
4. On July 19, 1995 claimant's average weekly wage was \$298.50 resulting in an initial compensation rate of \$219.

FINDINGS OF FACT:

1. Claimant worked in construction most of his adult life. That work for him included carpentry, concrete work and supervising a crew as foreman. He laid out plans, did time sheets and orders and assisted in building.
2. Not long before the work related injury at issue here, claimant recalls having been diagnosed with fibromyalgia, something he later relayed to physicians. No written record of a fibromyalgia diagnosis appears in the voluminous records. In any event, his ability to work was not compromised.
3. On June 19, 1995, claimant was running a jackhammer cutting concrete for Spates Construction in a small room at the Northeast Correctional Facility. Windows and doors were covered with plastic. A fan was in place by an opening to vent fumes from the room, but a coworker turned it, allowing fumes to be blown back into the room. Claimant recalls this mistake vividly. His anger about it persists.
4. After about two and half hours of jackhammer work claimant felt "fuzzy-minded" and fell. He had a severe headache and nausea. He lay on a table nearby for a few hours.
5. After work, claimant's wife, then home with their weeks old daughter, took him to a hospital where he was diagnosed with carbon monoxide (CO) poisoning. His carboxyhemoglobin level was tested at 15.4% four hours and twenty minutes after the exposure. This means that it was likely more than 30% at the time of exposure, within the range found to result in neurological and cognitive deficits. Testing in the area demonstrated potentially lethal CO levels.

6. Defendant accepted claimant's work related carbon monoxide exposure and paid him temporary total disability benefits from the date of injury in 1995 until June 27, 2002. After that, defendant paid claimant permanent partial disability benefits for 40.5 weeks based on Dr. Mann's 10% whole person permanency rating.
7. In the weeks following the accident, claimant had migraine headaches once or twice a week.
8. Claimant has not worked since his work-related carbon monoxide exposure.
9. Claimant reports headaches of three classes: 1) mild almost daily; 2) the beginning of a migraine that lasts a couple of days and is treated with medication; and 3) a full migraines requiring a dark room that last from a day to three days. He also has fatigue, cognitive deficits, personality changes, reduced coping and stress management abilities, and irritability, temper outbursts, confusion, depression, sleep apnea and some hearing loss. These conditions are all related to the carbon monoxide exposure.
10. Claimant had neuropsychological evaluations at Dartmouth on October 20, 1995 and January 22, 1996. At the first of these visits, testing placed claimant's intellectual functioning in the average range although he had mildly impaired abilities in spelling and math. Testing results also indicated that claimant had mild to moderated frontal-subcortical system dysfunction, suggested by slow reaction time, poor visual scanning, errors, slow cognitive flexibility and susceptibility to auditory distraction. Depression and anxiety were also present. At the second of these visits, it was noted that claimant's performance was "remarkably stable," although he had an increase in psychiatric symptoms. The evaluator cautioned that claimant was at risk for worsening depression and recommended close monitoring.
11. On two separate occasions, claimant attacked strangers for no apparent reason. Afterwards, he was remorseful and apologized. He never acted that way before the accident. Such outbursts are no longer a problem for claimant.
12. Dr. Bourgeois has followed claimant medically for years. Claimant also receives weekly counseling from Dr. Griffes.
13. In June of 2003, Dr. David Bourgeois, wrote, "George is unemployable secondary to his chronic headaches and unpredictable function. This is unchangeable and permanent."
14. Claimant was followed at Dartmouth for therapy, including anger management.

15. On August 14, 2003 claimant had a third neuropsychological evaluation that showed a decline in functioning. However, the evaluators expressed concern that the claimant's effort was "highly variable." They suggested that the findings "must therefore be interpreted cautiously and likely underestimate his maximal level of functioning." They also reiterated the previous assessment that the cause of claimant's "continued areas of cognitive difficulty likely include his history of CO poisoning and severe emotional distress."
16. To control his sleep apnea, claimant uses a Bi-Pap machine, which he finds uncomfortable.

Activities

17. About a year after the injury, claimant's wife returned to work full time. He then was left alone to care for their infant daughter, although the child's grandmother also helped.
18. Now that his daughter is in school, claimant makes her breakfast on school days.
19. On the day of the hearing, though his wife accompanied him, claimant drove from Newport to Montpelier in time to arrive at 9:00 a.m.
20. Claimant represented himself at a family court custody proceeding.
21. Claimant enjoys hunting and fishing, activities he continues, although not as efficiently as he did before the injury. He also works in a repair shop at home, cooks meals and cares for his daughter.
22. Claimant has adapted to forgetfulness by using a palm pilot that beeps when he has an appointment. He uses a GPS in the woods.
23. At the hearing, claimant's single pain complaint was in his right wrist.
24. Claimant was able to travel to Colorado for three days of testing without disabling symptoms.

Expert Testimony for claimant

25. In November 2003, Dr. Bourgeois wrote to the VR counselor with a strong opinion regarding claimant's inability to work, an opinion based on the August 2003 Dartmouth neuropsychological testing and his treatment of claimant over the years. He attributed claimant's disability to the CO poisoning. Specifically, he noted that claimant had no "sustainable predictable working capabilities" and would likely worsen if pushed. Claimant's condition, in Dr. Bourgeois's opinion, is permanent.

26. Dr. Dennis Helffenstein is a clinical psychologist who operates a forensic neuropsychological testing facility in Colorado, where claimant was tested over a three-day period: February 7, 8, and 9, 2005.
27. Dr. Helffenstein has had forensic experience with carbon monoxide poisoning. He also is a licensed vocational rehabilitation counselor and has worked in that area, although not since 1994.
28. According to Dr. Helffenstein, test results from claimant were valid. Testing revealed no impairment in concentration and attention capabilities. His visual skills were average and auditory skills average. Neither depression nor pain interfered with the three-day testing.
29. Dr. Helffenstein opined—from extrapolation—that claimant's IQ dropped 15 points after the CO exposure. However, problem-solving skills were average to above average.
30. Overall, Dr. Helffenstein concluded that the CO exposure caused organic based mood disturbances, personality changes, cognitive dysfunction and visual perceptual deficits as well as depression. Based on his testing and records documenting physical symptoms, Dr. Helffenstein concluded that claimant is totally and permanently disabled from competitive employment. From his experience in VR, he added that forcing this claimant into a vocational rehabilitation program would inevitably lead to failure and would exacerbate his personal sense of failure.
31. Dr. Mark Bucksbaum also evaluated the claimant by taking a history and performing a physical examination. With the exception of limited range of motion in the neck, claimant's physical examination was normal.
32. Dr. Bucksbaum's overall impairment assessment was based in large part on the assessment of a psychologist whose test results were in part invalid.

Expert Testimony for Defendant

33. Dr. Steven Mann, psychologist, tested and met with the claimant twice. He determined that claimant has an amplified disability perception and has adopted a sick role that his treating clinicians enable. Testing revealed that claimant's perception of his own disability is higher than that experienced by patients with severe injuries. He noted that claimant has a desire to work in some capacity, yet realized that he might have some tiredness and headache. He opined that claimant is not disabled psychologically from vocationally relevant work.

34. Dr. Janis Peyser, neuropsychologist, reviewed the records in this case for the defense. She observed that the neuropsychological testing performed at Dartmouth in 1995 could have been used in rehabilitation efforts, but could not be used for prognosis because it was too close in time to the injury and because there was no validity testing. As time went on, claimant reported more symptoms than he had originally. By the time of the 2003 neuropsychological testing, he had to have been stable since it was eight years since the injury. The declines noted on that testing were not expected. Since validity testing showed that claimant had not made adequate effort, results cannot be used to show deficits. The test would have been valid only if he had used full effort.

Attorney fees and costs

35. Claimant presented evidence that his attorney worked 147.5 hours on this case and incurred reasonable expenses of \$17,924.90.

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 (1962). 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). Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).
3. The claimant argues that he is entitled to permanent total disability pursuant to 21 V.S.A. § 644. Because this case predates the 2000 statutory amendments, he is entitled to permanent total disability if his injury is within the enumerated list articulated in 21 V.S.A. § 644, or if, without considering individual employability factors such as age and experience, the evidence indicates that he is totally disabled from gainful employment. *Fleury v. Kessel/Duff Constr. Co.* 148 Vt. 415 (1987). The standard is further articulated in § 645(a), which specifies that one must have "no reasonable prospect of finding regular employment."

4. Because CO exposure is not one of the enumerated factors, the question is whether, due to the CO exposure, claimant has no reasonable prospect of regular, gainful employment. Regular employment means work that is not casual and sporadic. Gainful employment means that the hiring is not charitable and the person earns wages. See *Rider v. Orange East Supervisory Union, et. al.* Opinion No. 14-03WC (2003).
5. The ultimate decision depends on a careful examination of the underlying facts and the expert evidence. The following factors are considered in evaluating expert testimony: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (Aug. 4, 1997); *Gardner v. Grand Union* Op. No. 24-97WC (Aug. 22, 1997).
6. Dr. Bourgeois has the strongest advantage with the first criterion because he has cared for this claimant for many years and has seen his reaction to various treatments. With the second criterion, although all experts have strong credentials, Dr. Helffenstein is the only one with forensic experience with CO exposure. He also has the added advantage of vocational rehabilitation experience. All experts based their opinions on objective testing and observations, although more subjective criteria necessarily factored into the treating physician's evaluations and stark objectivity was present in Dr. Peyser's opinion. All performed comprehensive evaluations.
7. The balance tilts in favor of the defense based on the combined opinions and clear evidence of claimant's abilities. Although the CO poisoning caused subtle changes in the claimant's brain, he is capable of performing meaningful activities that could be translated into work, particularly caring for his daughter, representing himself in a custody dispute, hunting and fishing. If he were to decide to expend the effort, he could be restored to the level necessary for regular gainful employment.

ORDER:

Therefore, this claim for permanent total disability benefits is DENIED.

Dated at Montpelier, Vermont this 9th day of December 2005.

Patricia A. McDonald
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.