

William Boyd v. Kennametal Inc.

(November 10, 2010)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

William Boyd

Opinion No. 33-10WC

v.

By: Sal Spinosa, Esq.  
Hearing Officer

Kennametal, Inc.

For: Valerie Rickert  
Acting Commissioner

State File No. S-14574

**OPINION AND ORDER**

Hearing held in Montpelier, Vermont on July 26, 2010

Record closed on September 1, 2010

**APPEARANCES:**

Ronald Fox, Esq., for Claimant

Glenn Morgan, Esq., for Defendant

**ISSUE PRESENTED:**

Is Claimant entitled to permanent total disability benefits as a consequence of his compensable work-related injury?

**EXHIBITS:**

Joint Exhibit I: Medical and vocational rehabilitation records

Joint Exhibit II: Deposition of Peter Upton, M.D., June 10, 2009

**CLAIM:**

Permanent total disability benefits pursuant to 21 V.S.A. §644

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

**FINDINGS OF FACT:**

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

### Claimant's Work Injury

3. Claimant, who is now 42 years old, worked for Defendant as an industrial electrician. On January 31, 2002 he slipped off a ladder. Initially he experienced pain in the right shoulder region. He treated with Dr. Lichtenstein, a family practitioner, and returned to work a week later.
4. Soon thereafter the pain shifted to his lower back and sacrum region. Claimant subsequently was diagnosed with a disc herniation at L4-5 requiring surgery.
5. Defendant accepted Claimant's injury as compensable and paid workers' compensation benefits accordingly.

### Claimant's Surgeries

6. On March 20, 2003 Dr. Lon Howard, an orthopedic surgeon, performed an L4-5 fusion. The surgery was performed posteriorly and included the use of metal hardware secured by screws and a bone graft. Claimant was in good post-operative condition and felt relief for six to eight weeks after his surgery.
7. As his activity level increased, however, so did Claimant's back pain. He described an unbearable band of pain across his lower back, worse in the morning than at night. Claimant judged his back pain to be more intense after the surgery than it had been before, and getting worse. His pain was heightened by sitting, standing, walking and physical therapy. Lying down, massage, hot baths and the use of a back brace provided some pain relief.
8. In April 2004 Claimant consulted with Drs. Ames and Banco, both orthopedic surgeons, about further treatment. Both recommended a second surgery. According to Dr. Banco, Claimant's first surgery had resulted in a failed fusion. In addition, the hardware screws had loosened, and therefore the supporting hardware would have to be removed and replaced.
9. Orthopedic surgeon Robert Monsey performed Claimant's second surgery on May 3, 2004. This surgery involved both an anterior re-fusion at L4-5 and a posterior fusion at L5-S1.
10. Claimant saw Dr. Monsey post-operatively for pain around his incisions. Dr. Monsey found nothing abnormal about Claimant's complaints and prescribed medication and physical treatment.

11. On February 1, 2005 Claimant saw Dr. Monsey again, this time complaining of back and leg pain worse than prior to his first surgery. Dr. Monsey determined that the fusion was mending appropriately but that Claimant exhibited ongoing pain, psychosocial issues, narcotic pain-killer dependence and functional disability. He noted that Claimant had been out of work for three years and had a 10% chance of ever returning. He explained to Claimant that it was unlikely that he would ever be pain free and discussed further medical options.
12. On May 26, 2005 Dr. Borrazzo, a general surgeon, confirmed the presence of an eventration<sup>1</sup> of Claimant's abdominal wall at site of his anterior surgical incision, causing a protrusion of intra-abdominal contents. Dr. Borrazzo determined that nerve damage from Claimant's second surgery caused this condition.
13. Dr. Borrazzo performed surgery to repair this condition on June 1, 2005. The surgery, similar to a hernia repair, was followed by ten months of continual draining from four drainage tracts. On December 13, 2006 Dr. Borrazzo performed a further abdominal surgery to debride the wound and promote healing. He followed this with a similar procedure in 2007, as Claimant's abdominal wound continued to require further surgical attention.

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<sup>1</sup> An eventration is an abnormal displacement of part or all of an otherwise intact diaphragm into the chest cavity.

End Medical Result and Permanency Ratings

14. At Defendant's request, in June 2005 Claimant underwent an independent medical evaluation with Dr. Upton, a neurosurgeon. Dr. Upton reviewed Claimant's medical records, conducted a physical examination and made the following observations:
  - Dr. Upton confirmed that after two back surgeries Claimant was reporting low back pain that was far more severe than what he had reported prior to his first surgery. Virtually any movement, including walking, exercise or physical therapy, exacerbated the pain. Claimant reported that he was able to help out a little around the house, but felt better when lying down. He reported that at times his back pain would shoot into his abdomen and cause pain spasms.
  - Dr. Upton noted that due to Claimant's severe pain and significant use of narcotic medications, he had been referred to the Pain Center at Dartmouth Hitchcock Medical Center to consider the implantation of a morphine pump. The Center was reluctant to perform the procedure and doubted that use of the device would significantly improve Claimant's pain.
  - Dr. Upton reported that Claimant exhibited markedly limited range of motion in his lumbar spine. Attempts to increase Claimant's range of lumbar flexion produced pain.
  - Dr. Upton reported that Claimant was taking a variety of medications, including large dosages of both methadone and dilaudid for pain relief, an anti-inflammatory and a muscle relaxant. Claimant also was taking Cymbalta for anxiety and depression.
15. Noting that Claimant's pain had not improved despite two fusion surgeries and the use of "enormous" amounts of narcotic medications, and also that it limited him even from participating in physical therapy, Dr. Upton concluded that Claimant had reached an end medical result.
16. At Defendant's request Dr. Upton saw Claimant again on March 12, 2008. Dr. Upton reconfirmed that Claimant had reached an end medical result. He observed that despite the fact that Claimant's second surgery had produced an excellent fusion, his back pain still was not relieved. With reference to the *AMA Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed.), Dr. Upton assessed Claimant with a 23% whole person impairment referable to his lumbar spine.
17. At his own referral, in April 2010 Claimant underwent a second permanency evaluation, this time with Dr. Gennaro, an orthopedic surgeon. Dr. Gennaro concurred with Dr. Upton's assessment of a 23% permanent impairment referable to Claimant's lumbar spine injury. In addition, however, Dr. Gennaro assessed a 10% whole person impairment referable to Claimant's abdominal condition, which was a consequence of the complications he had suffered following his second fusion surgery. According to Dr. Gennaro, therefore, the combined whole person impairment causally related to Claimant's work injury was 31%.

18. With Dr. Upton's end medical result opinion as support, Defendant terminated Claimant's temporary disability benefits effective May 18, 2008 and began advancing permanency benefits instead.

#### Vocational Rehabilitation Efforts

19. Claimant was referred for a vocational rehabilitation entitlement assessment in July 2008. Ken Yeates, a licensed vocational rehabilitation counselor, was assigned to determine whether he might benefit from vocational rehabilitation services.
20. Claimant has a tenth grade education. He was employed as an industrial electrician at the time of his injury, and in that capacity he was capable of evaluating and fixing complicated electrical problems. He is currently unlicensed for failing to maintain the ongoing educational units required.
21. Claimant possesses entry level computer skills. However, due to his pain levels he has difficulty sitting at a computer without leaning on his right arm and elbow. While leaning in this position he is unable to operate a computer with any efficiency. Claimant's level of functioning also makes it difficult for him to remain active for more than fifteen minutes. His medications impact his ability to concentrate for significant periods of time.
22. After evaluating Claimant's current function and transferable skills, Mr. Yeates determined that he is not employable in even a part-time position. In support of this conclusion, Mr. Yeates cited numerous factors. Claimant lacks a high school or technical degree and has neither customer service nor office related experience. He has only entry level computer skills. He cannot stand or sit for more than twenty minutes at a time, and takes high dosages of narcotic pain medications. Taken in combination, these factors render Claimant unable to participate in productive training or competitive employment at this time. According to Mr. Yeates, Claimant is incapable of sustaining even home-based employment. I find this conclusion to be credible in all respects.
23. On the basis of Mr. Yeates' determination that Claimant was unemployable, his vocational rehabilitation file was closed in March 2009.

#### Claimant's Work Capacity

24. But for a short period subsequent to his work injury, Claimant has not worked since January 2002.
25. In January 2010 Claimant underwent a functional capacity examination (FCE). The examination lasted five hours, three of which Claimant used to take breaks, lie down and take his medications. After taking his medications, Claimant exhibited difficulty focusing and maintaining his balance. In the end Claimant was crying and could proceed no further. The testing was terminated.

26. Based on Claimant's testing, the evaluator concluded that he does not fit into a work capacity category by current standards and does not have sufficient work capacity to engage in gainful employment. Among the evaluator's specific observations:
- Claimant does have some sedentary abilities, but lacks the ability to sit, handle or endure sedentary work. He could not sit upright for more than one minute and leaned heavily onto his right arm to unweight his back. Claimant's significant use of narcotics and their consequent effect on decision-making and memory further limited his ability to function safely.
  - Claimant fatigued easily. His use of narcotic medications exacerbated his fatigue and reduced his ability to sustain work to no more than a few hours a day, and not every day. This is incompatible with full time work.
  - Claimant lacked the core strength or overall endurance to perform material handling for full time work. He had to lie down after the lifting test.
  - Claimant's abdominal scar tissue, combined with his postural adjustments, caused him to twist his trunk. He stood with his trunk shifted to the right but rotated to the left. This made standing difficult. It also impacted Claimant's balance, which diminished his ability to perform activities while standing.
  - Claimant's preferred positions were sitting, leaning on his right arm or lying down. He could stoop only with his side bent forward and could support his own weight only by using his hands on a support object.
27. In both his 2005 and 2008 examination reports, Dr. Upton also concluded that Claimant had no foreseeable work capacity. He reaffirmed this opinion in his 2009 deposition. Dr. Upton acknowledged that the extent of the pain and associated disability Claimant reported seemed "pretty excessive." He remarked that the fact that Claimant continued to complain of a wide distribution of pain despite both an apparently solid fusion and "enormous" dosages of narcotic pain medications "didn't seem to add up very well." Nevertheless, Dr. Upton testified that he did not necessarily distrust Claimant's reports of pain. By its very nature, a medical assessment of pain relies principally on the accuracy of what the patient reports, and in that respect it is unavoidably subjective. With that in mind, Dr. Upton maintained his belief that Claimant was permanently and totally disabled.
28. Dr. Gennaro likewise determined that Claimant was permanently incapable of gainful employment.
29. Dr. Lichtenstein, Claimant's family practitioner, also believed Claimant to be permanently and totally disabled. He reported that Claimant's life is consumed by pain, that he has only limited ability to exercise and no energy for rehabilitation. Dr. Lichtenstein described Claimant as exhibiting chronic but stable depression and a defeated attitude.

Claimant's Current Condition

30. Both Claimant and his wife testified at the formal hearing in this matter as to Claimant's current symptoms and functional limitations. Their testimony was consistent and credible throughout.
31. Claimant is no longer the active outdoorsman or the household handyman that he once was. Now he either seeks his children's assistance or proceeds slowly, if at all. Where he once exhibited strength within the home, he is now emotional and prone to crying.
32. Claimant now sleeps fitfully and for long periods. He often awakens feeling like he needs a nap. His memory is poor, his personal hygiene has diminished and he avoids social settings. While he continues to four-wheel, his son often drives and does so carefully and slowly. Claimant's degree of back pain will determine whether, and for what period of time, he can perform this activity.
33. Claimant used his swimming pool rarely this summer. He only floats and with the aid of a buoying device.
34. Claimant can stand for no more than ten minutes and can sit for hours if positioned in his recliner. He has difficulty walking, often uses a cane and struggles on stairs. When traveling in a car he needs to stop after twenty to forty minutes. He now does little of the driving. He can mow his lawn but does so slowly.
35. Claimant continues to take numerous medications though he is unsure what they are or their dosage. Dr. Lichtenstein, who manages his medications, has reduced his methadone dosage, but increased the dosage of other pain medications due to an increase in shooting pains. Thus, in addition to most of the medications listed in Finding of Fact No. 14 above, Claimant also takes gabapentin for seizures and pain. He also uses medical marijuana and ketamine cream for pain.
36. Claimant continues to draw fluid from his abdominal wound.
37. Claimant described his average day. Shortly after arising he takes his medications and sits in his recliner. The medications "kick in" in the early afternoon. He spends approximately a half an hour daily tending to his outdoor and indoor gardens. He lets his dog out and in. Claimant spends most of his day sitting in his recliner. He performs no heavy work. He is able to manage alone at home when his wife is out.
38. Claimant tries to service his own vehicles, as he did prior to his injury. Occasionally he will use a creeper to get underneath his vehicles, but for the most part he supervises the work of others. Claimant estimates that he works on vehicles for a couple of hours a month.
39. Claimant described his day-to-day pain as "horrific." It continues to be in his lower spine/pelvic region. He is never pain free. He experiences tight, cramping pain that only his medications can relieve.

40. During his testimony Claimant leaned noticeably on his right elbow, frequently grimaced in apparent pain and displayed confusion or a lack of memory in response to some questions.
41. Claimant admitted that he had testified before a legislative committee investigating workers' compensation cases. His testimony did not involve his current claim.

#### **CONCLUSIONS OF LAW:**

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the 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. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).
3. The dispute here centers on whether Claimant's January 2002 work injury has rendered him permanently and totally disabled. Claimant points to all of the medical evidence, which presents largely uniform support for his claim. Claimant finds additional support for his claim in the 2009 vocational rehabilitation workup and the 2010 functional capacity examination, both of which determined that he was unable to sustain gainful employment.
4. Defendant counters with evidence that Claimant is able to perform a variety of household, recreational and maintenance functions that it contends are inconsistent with a claim of permanent total disability. Defendant also asserts that Claimant's claim relies almost exclusively on his subjective reports of pain, which it argues are not credible.



5. Under Vermont's workers' compensation statute, a claimant is entitled to permanent total disability benefits if he or she suffers one of the injuries enumerated in §644(a), such as total blindness or quadriplegia. In addition, §644(b) provides:

The enumeration in subsection (a) of this section is not exclusive, and, in order to determine disability under this section, the commissioner shall consider other specific characteristics of the claimant, including the claimant's age, experience, training, education and mental capacity.

6. The workers' compensation rules provide further guidance. Rule 11.3100 states:

Permanent Total Disability – Odd Lot Doctrine

A claimant shall be permanently and totally disabled if their work injury causes a physical or mental impairment, or both, the result of which renders them unable to perform regular, gainful work. In evaluating whether or not a claimant is permanently and totally disabled, the claimant's age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for permanent total disability under the Odd Lot Doctrine, a Functional Capacities Evaluation (FCE) should be performed to evaluate the claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.

7. A finding of odd-lot permanent total disability is not to be made lightly. *Gaudette v. Norton Brothers, Inc.*, Opinion No. 49-08WC (December 3, 2008). For that reason, and as Rule 11.3100 makes clear, typically there must be evidence to establish first, what the injured worker's functional capabilities are, and second, that no viable vocational options exist within those capabilities. *Id.*; *Prescott v. Suburban Propane*, Opinion No. 42-09WC (November 2, 2009).
8. Here, I conclude that Claimant is permanently and totally disabled as a consequence of his 2002 work injury. Each component of the record in this case supports that conclusion. Defendant's arguments to the contrary are unconvincing.
9. The functional capacity examination established that Claimant has a low tolerance for standing and sitting, the latter of which is incompatible with even a sedentary work capacity. His heavy reliance on narcotic pain medications and his pain-focused behaviors further preclude any type of work, sedentary or otherwise. Add to that the contorted manner in which Claimant now carries himself and the positional adjustments he requires to reduce his pain and the conclusion that he lacks a work capacity of any sort is as compelling as it is obvious.

10. The vocational rehabilitation assessment, which was more focused on Claimant's education, work experience and related aptitudes in the context of his current occupational options, leads to the same conclusion. Rather than promoting alternatives, Claimant's educational and work experience are limiting factors. What options exist, even at the entry level, require a level of physical means and focus that Claimant's condition precludes. Thus, the vocational rehabilitation assessment amplifies Claimant's unsuitability for regular, gainful employment.
11. Both Drs. Gennaro and Lichtenstein confirmed that Claimant is permanently incapable of re-entering the work force. While Dr. Upton questioned the correlation between Claimant's subjective reports of pain and limited function and his physical condition, nonetheless he consistently maintained that Claimant has no current work capacity and none for the foreseeable future.
12. Defendant urges that Claimant's ability to perform a variety of household tasks and recreational activities precludes a finding that he is permanently and totally disabled. I conclude that Claimant's activities are not inconsistent with a finding of permanent total disability. As reflected both in the functional capacity examination and in Mr. Yeate's vocational rehabilitation assessment, they do not translate into a viable, sustainable work capacity at any level.
13. I conclude that Claimant has sustained his burden of proving that he is permanently and totally disabled as a consequence of his January 2002 work injury.
14. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling \$4,370.84 and attorney fees totaling \$18,313.50. An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded.
15. Claimant's claim for attorney fees must be reduced. The amendment to Workers' Compensation Rule 10.0000, which raised the hourly rate at which attorney fees can be assessed to \$145.00, became effective on June 15, 2010. Of the total fees charged, 90 hours were incurred prior to that date, and therefore must be charged at the rate previously in effect, or \$90.00 per hour. The remaining 36.3 hours were incurred after June 15, 2010 and properly can be charged at the rate of \$145.00 per hour. With that adjustment, the total amount allowable is \$13,363.50. I find it appropriate to award Claimant attorney fees in that amount.

**ORDER:**

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Permanent total disability benefits commencing on May 18, 2008 in accordance with 21 V.S.A. §645 (with credit for any permanent partial disability benefits paid to date); and
2. Costs totaling \$4,370.84 and attorney fees totaling \$13,363.50.

**DATED** at Montpelier, Vermont this 10<sup>th</sup> day of November 2010.

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Valerie Rickert  
Acting 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.