Lang v. Columbia Forest Products, Inc. (11/26/03)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Guy Lang	)	State File No. M-14005
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Colombia Forest Products, Inc.	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 46-03WC

Hearing Held in Montpelier on April 15, 2003
Records Closed on May 15, 2003

APPEARANCES:

Steven P. Robinson, Esq., for the Claimant
Keith J. Kasper, Esq. , for the Defendant

ISSUE:

Is the claimant permanently and totally disabled as a result of his work related injury?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's 1:	Photographs
Claimant's 2:	Greg LeRoy's report
Claimant's 3a:	Diane Aja's FCE
Claimant's 3b:	Diane Aja's curriculum vitae
Claimant's 4:	Greg LeRoy's curriculum vitae
Defendant's A:	Videotape
Defendant's B:	Employer's Job Description
Defendant's C:	Business reasons for proposed job
Defendant's D:	DOT Job Description
Defendant's E:	Ginny Reeves's curriculum vitae
Defendant's F:	Louise Lynch's curriculum vitae

STIPULATION OF FACTS:

1. On of about January 9, 1999 claimant suffered a personal injury to his spine arising out of and in the course of employment.

2. On January 9, 1999 claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act (Act).

3. On January 9, 1999 defendant was the employer of claimant within the meaning of the Act.

4. On January 9, 1999 claimant had an average weekly wage of $829.67.

5. Claimant was found to have been at medical end result with a Form 27 filed effective February 25, 2002.

6. A vocational rehabilitation counselor, John May, was hired by the employer to review the vocational issues, including Greg LeRoy's report. After review of Greg LeRoy's report, the employer has decided not to offer Mr. May as a witness.

FINDINGS OF FACT:

1. Claimant is 39 years old and has held a variety of jobs. In 1988 he began to work for defendant in this case, Columbia Forest Products. He did every job in the mill, working up from a piler to the highest paid job on the floor.

2. Before January of 1999, claimant was in good health and without any neck, shoulder or arm problems, except for those associated with two prior work injuries. The first of those occurred in 1990 when he got his hand caught in a chain and had to have surgery. The second was in 1996 when he was struck on the back of the neck with an air hose and had to work light duty for four months.

3. In January of 1999 claimant was working on a lathe and had a clamp resting on his knees. When he reached over for something, he felt a sharp pain in his neck and his left arm went numb. Despite the injury, he continued to work at the mill through April, albeit on light duty. His work after the injury was walking around and doing some paperwork.

4. By April of 1999 claimant felt his pain was too severe to do any work. He has not worked since.

5. At some point after the injury, however, claimant returned to his employer asking for any kind of work. He was told that he was too great a risk and that they had nothing for him.

6. At first, claimant sought treatment from Dr. Birge, who prescribed pain medications and physical therapy. When that treatment proved unsuccessful, he was referred to specialists and had various tests. An MRI showed a disc herniation at C5-6; the EMG revealed C6 radiculopathy. Next he was referred to a pain clinic.

7. Dr. Abdu at the Spine Clinic at Dartmouth Hitchcock Medical Center noted a failure of conservative medical treatment and diagnosed C6 radiculopathy with chronic symptoms. In July of 1999 he performed a cervical discectomy and fusion.

8. Postoperatively, claimant's left arm symptoms resolved, but his neck and scapular pain persisted.

9. Claimant continued to treat during 2000. Neither nerve blocks nor anti-inflammatory medications relieved his pain.

10. By October 2000, Dr. Ciongoli diagnosed "failed neck surgery" because claimant was unable to rotate his head to the left.

11. Consultations with different physicians continued with nerve blocks and trigger point injections. None of the treatment had lasting effects.

12. Mental health professionals who have worked with claimant determined that he experienced depression in response to a realization that he will not be able to regain his previous ability to work or previous active lifestyle. His pain frustrates him. He feels disempowered by physical limitations and controlled by anger and pain. Dr. Brian Erickson, a psychiatrist who has treated him, considers claimant's depression disabling.

13. Since his injury, claimant's sleep and appetite have been impaired. On an average day, he helps his wife around the house, takes care of his dogs, works in the garden in the summer, bending over and getting down on his knees to plant and weed. He drives a motor vehicle, but limits himself to two hours one-way or four hours total.

14. A brief videotape tape of the claimant shows him bending, standing, lifting and weeding. At most that tape suggests that claimant could engage in casual or sporadic employment.

15. It is clear that claimant has substantial limitation in range of motion in his neck and shoulder.

16. In April of 2002, Diane Aja, occupational therapist, conducted a functional capacity evaluation. She determined that claimant had a below sedentary physical demand level for activity above and below the waist. Overall, she concluded that claimant lacks the capacities to sustain work activities for vocationally relevant periods of time and should be considered disabled.

17. In November 2002, Louise Lynch, a physical therapist, performed an ERGOS Work Performance Evaluation, which produced results consistent with Ms. Aja's FCE. However, based on her observation of the claimant's tolerances, Ms. Lynch opined that he is within a sedentary work capacity, although he would have difficulty sustaining even sedentary work more than part-time because of his perceived pain and physical dysfunction. Ms. Lynch agreed that claimant is not physically capable of performing most of the requirements in the job proposed by Columbia Forest Products and that he lacked even a DOT (dictionary of occupational titles) sedentary work capacity.

18. Dr. Johansson evaluated claimant several times and treated him during an intensive pain management course in 2001. At his final evaluation on February 4, 2002 he assessed claimant with a cervicothoracic myofascial pain syndrome post C5-6 cervical discectomy/interbody fusion. He opined that claimant had reached medical end result with a 25% whole person impairment, DRE Category 4, and that he would continue to need pharmacological management.

19. As to work capacity, Dr. Johansson determined that claimant had a sedentary to light duty work capacity on a full-time basis, limited by no repetitious motion of the left arm. Work at this capacity, Dr. Johansson opined, would be safe for the claimant and would not worsen his condition.

20. Dr. Johansson did not consider the Functional Capacity Evaluations (FCEs) to have been as reliable as the observations he made over a period of time. He opined that the FCE was a less predictive tool than it might otherwise have been because it was self-limited by claimant's pain reactivity.

Vocational Rehabilitation

21. Three years after the injury, claimant was referred to Nori Mayhew, vocational rehabilitation counselor, for a determination of his entitlement to vocational rehabilitation services. By that time, claimant was spending most of his time at home and was limited in his ability to perform chores such as mowing the lawn, tilling his garden, splitting wood, lifting anything heavy and traveling long distances in his car.

22. Ms. Mayhew determined that claimant's work capacity limited him to below a sedentary level. She opined that he was limited to 1 to 2 hours of work per day, 2 to 3 days per week and that his employer was unable to accommodate his work restrictions. He was, therefore, found entitled to VR services.

23. Ms. Mayhew concluded that a successful return to work based on the FCE results was unlikely, particularly in light of his high average weekly wage. Therefore, she did not formulate a vocational rehabilitation plan because she considered his capacities to have been too limited. She explained that his long-term work release was extremely limited and that it would be impossible to place claimant into suitable employment.

24. A month before the hearing in this case, four years after the injury, the employer offered claimant a job, which under the DOT classification is a light duty job. On March 12, 2003, the defendant hired Ginny Reeves, an OTR from the FCE Center to analyze that job by comparing its requirements with claimant's physical abilities. At the time of her evaluation, only one of the functions in the job offered the claimant was actually being performed, and that was beyond claimant's abilities. Ms. Reeves expressed the hope that claimant might be able to do some of the tasks outlined in the job description part-time and with accommodations.

25. Gregory LeRoy, a vocational rehabilitation counselor and expert, was hired by the claimant to assess claimant's ability to perform regular, gainful employment. He reviewed the claimant's medical records, interviewed the claimant and consulted with Dr. Erickson. Mr. LeRoy determined that "claimant's physical limitations, chronic pain, pain disorder and depression impeded the physical, cognitive and behavioral requirements of any individual job and of employment in general."

26. Claimant submitted a claim for fees for his attorney, law clerk and paralegal totaling $13,299.00 and costs of $7,422.04.

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 the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

2. In this case, it is clear that claimant's physical limitations, including limited range of motion of the neck, pain and depression were caused by his work-related injury on January 9, 1999.

3. As a result of that injury, he claims that he is entitled to permanent and total disability benefits pursuant to 21 V.S.A. § 644. Therefore, he has the burden of proving something more than a possibility, suspicion or surmise. The "inference form the facts proved must be the more probable hypothesis." *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

4. Claimant is entitled to an award of permanent total disability benefits, with a minimum of 330 weeks of compensation, if his injury is within the enumerated list articulated in § 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). He 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. The relevant inquiry is whether claimant's physical and mental impairments foreclose him from being gainfully employed. I hold that they do.

7. With the exception of Dr. Johansson, all experts who have reviewed this case agree that claimant's physical limitations, pain and depression combine to disable him. Claimant gave full effort at the functional capacity evaluations. He has cooperated with treatment, yet his capacities remain impaired. The expert testimony as a whole and the credibility of this claimant combine to convince me that he is not likely to obtain regular, gainful employment.

8. This case underscores the research demonstrating that the longer an individual with chronic pain is out of work, the less likely that person is to return to work. See, Claimant's Exhibit 2, VOFORE Assessment at 16.

9. A decision on the attorney fee and cost portion of this claim is deferred for thirty days unless the parties can resolve the issue in the interim.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law:

1. Claimant is AWARDED permanent total disability benefits;

2. A decision on the attorney fee and cost issue is deferred.

Dated at Montpelier, Vermont this 26th day of November 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.