

C. F. v. S. D. Ireland Concrete

(September 17, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

C. F.

Opinion No. 35-08WC

v.

By: Jane Dimotsis
Hearing Officer

S.D. Ireland Concrete

For: Patricia Moulton Powden
Commissioner

State File No. U-52496

Formal Hearings held in Montpelier on August 28, 2007 and October 31, 2007
Record Closed December 2007

APPEARANCES:

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

ISSUES:

1. When did Claimant reach end medical result?
2. Is Claimant permanently and totally disabled under 21 V.S.A. §644(b)?
3. If not, what is extent of claimant's permanent partial impairment?

EXHIBITS:

Joint Exhibit I: Joint Medical Exhibit
Joint Exhibit II: Supplemental Medical Exhibit
Joint Exhibit III: Louise Lynch Deposition Transcript

Claimant's Exhibit 1: Bushey Letter
Claimant's Exhibit 2: Gregory LeRoy's CV

Defendant's Exhibit A: Fran Plaisted's CV

CLAIM:

Temporary total disability benefits through July 24, 2006 pursuant to 21 V.S.A. § 642;
Permanent total disability benefits under 21 V.S.A. § 644(b) or alternatively,
permanent partial disability benefits under 21 V.S.A. 648;
attorney's fees and costs under 21 V.S.A. § 678.

FINDINGS OF FACT:

1. Claimant was an employee within the meaning of the Workers' Compensation Act and S.D. Ireland was an employer under the Act on the date of Claimant's injury.
2. Judicial notice is taken of all forms contained in the Department's file relating to this claim.
3. Claimant's injury occurred on April 14, 2004 and caused chronic left shoulder pain and other limitations. Claimant underwent a shoulder arthroscopy subacromial distal clavicle excision and open rotator cuff repair by Dr. Bryan Huber on July 27, 2004. The surgery was not successful. Claimant was left with a significant amount of pain and little to no use of his left arm. This injury was determined compensable by the Department in a decision and order dated July 19, 2005.
4. After Claimant suffered his shoulder injury he was unable to continue working for the Defendant as an equipment operator. Defendant assigned him to work as a flagger for two weeks, and later terminated his employment in June of 2004.
5. The insurer paid benefits in the form of Temporary Total Disability Benefits (TTD) from November 5, 2005 until December 22, 2005. At that time, the Claimant had an average weekly wage of \$704.49 resulting in an initial compensation rate of \$469.33. Claimant had returned to work for a former employer on a less than full time basis from December 11, 2004 until approximately October 31, 2005 due to financial necessity. This former employer also terminated him due to his inability to use his left arm.
6. Claimant is a 67-year-old male. He had formal schooling through the eighth grade and can read and write. He has the reading ability of a fifth grader and math abilities on a sixth grade level. Claimant rarely reads and relies on his wife to fill out paper work for him. Claimant has had experience in logging, construction, operating heavy equipment and driving trucks. At the time of his injury Claimant was working as an equipment operator for Defendant.
7. Claimant wants to go back to work. He has worked all of his life beginning with farming. He had planned on working until he was 70 years old. However, his left arm is painful and he has loss of sensation in his left hand. He feels numbness from his fingers up his arm into his neck. Most of the time he keeps his arm in his pocket. He has no grip with his left hand. He drives by keeping his left arm under the steering wheel. He can't drive more than a distance of 10 miles due to the inability to use his left arm. He does not take prescription drugs because he does not want to become addicted to them. He does take Ibuprofen for pain.

8. Claimant has received physical therapy and chiropractic care for his injury, but continues to have constant pain and numbness in his left arm, hand and shoulder. In order to alleviate the weight of his arm pulling on his shoulder, he must keep his left hand in his pocket while walking or standing. He has poor tolerance to cold weather, and has difficulty sleeping at night. Additionally, he is unable to do most household chores. He is able to walk eight miles a day.
9. Since the time of the injury, Claimant's physician, Dr. Huber, has treated Claimant's condition. This treatment included physical therapy, an EMG, an MRI, cervical x-rays, medications, surgical consults, and injection therapy. Because Dr. Huber believed surgery would only have a 20% chance of being successful, Claimant declined this treatment option.
10. In several of the examinations, Dr. Huber noted a modest improvement in Claimant's condition, and in other examinations, he did not find any improvement to have occurred. On November 19, 2005 Dr. Huber filled out a form stating that the Claimant could return to work with the following restrictions:
 - a) no repetitive motion
 - b) no lifting greater than 10 pounds
 - c) no overhead use of upper extremity
 - d) no overhead lifting
 - e) may need periodic rest
 - f) may return to desk work only/ no truck driving.
11. On April 4, 2006 Dr. Huber wrote that he believed that Claimant had "basically met maximal medical improvement." On May 5, 2006 Dr. Huber answered "no" when asked if Claimant could return to the traditional labor force at the present time. Barely a month later, on May 23, 2006, Dr. Huber gave Claimant an injection to help his arm move better. This injection was not effective, and Dr. Huber told Claimant that there was nothing else he could do to treat his condition. On July 24, 2006 Dr. Huber placed Claimant at end medical result with a 13% permanent impairment. In doing so, Dr. Huber recognized that Claimant's underlying condition would not have changed even if his pain level decreased.
12. Dr. Johansson performed an independent medical examination on October 11, 2005, and reviewed his subsequent medical records. He held that Claimant reached end medical result on December 9, 2005 because his condition did not improve after that date.
13. George Fotinopoulos, a vocational rehabilitation counselor, provided an assessment of whether vocational rehabilitation services would benefit Claimant. He found that due to Claimant's advanced age, limited residual functional abilities, restricted driving ability, extended time out of work, and computer illiteracy he would not be able to return to the work force with vocational rehabilitation services within a reasonable length of time. He did initially explore limited work options for Claimant, primarily making bird houses. Claimant could not do this work due to his shoulder injury. Mr. Fotinopoulos then recommended closure of vocational rehabilitation services, which the Department approved.

14. Iris Banks also performed a vocational assessment on Claimant. She found that vocational rehabilitation could be beneficial for placement in several different occupations. However, she also found that Claimant faced several significant barriers preventing him from returning to work, including his high level of pain and limited stamina and the lack of a high school diploma or GED. She found that if he was to work in a stationary situation, he would require an adjustable workstation that would allow for positional adjustment of his hands and arms. She also noted that a vehicle would have to be modified to allow him to drive with his right hand and provide support for his left hand. Also, Claimant most likely would have to be retrained to do sedentary work. She noted he has no computer skills and no GED.
15. Louise Lynch, a physical therapist and certified work capacity evaluator, performed two functional capacity evaluations on Claimant. In the first evaluation on February 26, 2006, she found that Claimant did not have the ability to return to work as an equipment operator or work as a laborer or tandem driver, but did have a LIGHT work capacity for full time work with occasional use of the left upper extremity below chest level. In the second evaluation, eighteen months later, she found that he did not have a sustainable full time work capacity based upon the Dictionary of Occupational Titles. This referred only to his ability to go to work on a day-to-day basis with the use of both of his hands. She found that he had some positional abilities for sitting, standing, and walking for both SEDENTARY and LIGHT work, and that he could use his right dominate hand on a frequent basis at a LIGHT level. She believed that he could have a full time work capacity if accommodations were made for his left arm and hand.
16. Fran Plaisted, a vocational expert, performed an independent vocational evaluation ("IVE") on Claimant in July 2006 which she updated on October 19, 2007. She found that the Claimant could return to regular gainful employment in the labor market with further vocational rehabilitative services. She noted that his barriers to employment were not unlike those barriers faced by other individuals with disabilities returning to work. She believed that a plan could have been provided to Claimant including a vocational assessment, adult tutoring for his GED, a driving evaluation, tutoring for computer skills, and vocational exploration to determine occupations that existed in his area that can be performed one-handed or could be modified to be done with one hand.
17. Greg LeRoy, also a vocational expert, performed a vocational rehabilitation assessment on Claimant. He found that vocational rehabilitation would not result in the Claimant being able to return to regular gainful work. He disagreed with the suggestions made for employment by some of the other experts, holding that Claimant does not meet the qualifications for the jobs suggested. Mr. LeRoy also noted that in addition to Claimant's limited type of work experience, skills, education, and difficulty driving, his age and time out of work also would make it too difficult for him to return to work. He determined that the amount of time needed to bring Claimant's skills up to the necessary level for sedentary work were unrealistic when considering his age of 67. The fact that the Claimant lives in a very rural area of Hyde Park, Vermont also played a small part in his decision.

18. Attorney's fees in the amount of \$17,514.00 and costs of \$6,332.81 were requested by Claimant's attorney.

CONCLUSIONS OF LAW

1. The main issue in this case is whether further vocational rehabilitation services are available that would make Claimant employable, or whether he is permanently totaled disabled. There is also a disagreement regarding when end medical result occurred.

End Medical Result

2. When evaluating and choosing between conflicting medical opinions, the Department has traditionally considered several factors: (1) the nature of treatment and length of time there has been a patient-provider relationship; (2) whether accident, medical and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination; and (5) the qualifications of the experts, including professional training and experience. *Morrow v. VT Financial Services Corp.*, Opinion No. 50-98WC (Aug. 25, 1998); *Durand v. Okemo Mountain*, Opinion No. 41S-98WC (Sept. 1 & July 20, 1998); *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (Aug. 4, 1997).
3. The parties each rely on the opinion of one doctor: Dr. Huber, Claimant's treating physician, an orthopedic surgeon, and Dr. John Johansson, Defendant's independent medical evaluator, an osteopath.
4. Of the factors used in choosing between the conflicting medical opinions, I find several to be equally persuasive. Each doctor had an opportunity to review Claimant's medical records and each doctor undertook a comprehensive physical examination of Claimant. However, Dr. Huber his treating physician operated on him.
5. Under Workers' Compensation Rule 2.1200, end medical result is the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment. The proper test to determine end medical result is whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529, 533 (1996). Here, the doctors disagree about the appropriate date on which Claimant reached end medical result.
6. First, as to the nature of treatment and length of time there has been a patient-provider relationship, it appears that Dr. Huber treated Claimant since the date of his injury, including performing his surgery and treatment. Dr. Johansson has examined Claimant only for the IME. However, Dr. Johansson is much more familiar with the Guides and the IME process. He found the date of end medical result to be December 9, 2005.

7. Although Dr. Huber noted in his reports that he continued to speak with Claimant regarding different treatment options, there only existed a small percentage of hope that doing another surgery would be helpful. Claimant did not choose to go forward with the surgery due to the low odds of it being helpful. Dr. Huber originally stated that he felt that Claimant may have reached maximal medical improvement on April 4, 2006. As a final alternative Dr. Huber gave Claimant an injection in May 2006. The injection was the type used for palliative care or relief of pain. It did not result in any significant further improvement in his condition.
8. As was the case in *Coburn*, Dr. Huber's treatment caused Claimant's injury to be more stable, but did not improve his underlying condition. With that in mind, I find Claimant reached end medical result on December 9, 2005 as Dr. Johansson determined.

Permanent and Total Disability

9. Under 21 V.S.A. § 644(b) and Workers' Compensation Rule 11.3100:

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 Capacity Evaluation (FCE) should be performed to evaluate 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. A claimant shall not be permanently totally disabled if he or she is able to successfully perform regular, gainful work. Regular, gainful work shall refer to regular employment in any well-known branch of the labor market. Regular, gainful work shall not apply to work that is so limited in quality, dependability or quantity that a reasonably stable market for such work does not exist.

10. Regular employment means work that is not casual and sporadic. Gainful employment means that the hiring is not charitable and the person earns wages. *Rider v. Orange East Supervisory Union, et. al.*, Opinion No. 14-03WC (2003).
11. Based on Louise Lynch's FCE, it appears at best that Claimant can only perform a LIGHT level job that requires the use of only one-hand. The remaining experts disagree on whether Claimant can find regular gainful employment given his barriers to employment. Even if it is possible for Claimant to find employment, it is not likely.

12. Here, both Iris Banks and Fran Plaisted have suggested possible jobs for Claimant that would accommodate his injury and other employment barriers. However, in his vocational rehabilitation assessment, Greg LeRoy disagreed that Claimant could meet the qualifications for these jobs. Mr. LeRoy offered objective support for his opinion that many of the jobs suggested were not feasible for Claimant and I find his reasoning convincing as to the jobs not discussed in his assessment as well.
13. As Workers' Compensation Rule 11.3100 establishes, the Odd Lot Doctrine does not require that a Claimant establish his inability to perform any work whatsoever in order to qualify for permanent total disability. The focus is on his or her ability to perform "gainful work" in which a reasonably stable market can be presumed to exist.
14. The expert testimony establishes that Claimant may in fact be able to be retrained so as to perform some work at a LIGHT level and using only his right hand. However, given Claimant's age, his experience and training in only physical jobs requiring both arms, his limited education, his restricted driving ability and his residual pain, I find that the opportunities for gainful work in the rural area in which he lives are most likely non-existent. To the contrary, Claimant appears to present the very picture of the permanently disabled worker for which the old lot doctrine was enacted.
15. Defendant argues that because of the similarity of this case to *Kreuzer v. Ben & Jerry's Homemade and Royal Sun Insurance*, Opinion No. 15-03WC, the Department should require that Claimant exhaust all vocational rehabilitation services before finding permanent total disability. While I agree there are similarities to *Kreuzer*, I do not find the holding there to be binding here. Odd lot cases are extremely fact-specific by nature, and to generalize from one to another usually ill-advised.
16. Consequently, because the evidence supports that Claimant would not find gainful work even through vocational rehabilitation, I find him to be permanently and totally disabled.
17. The parties stipulated that Claimant's average weekly wage was \$704.49 resulting in an initial compensation rate of \$469.33 at the time of the injury. He had no dependents.
18. Claimant has submitted a request for attorney's fees totaling \$17,514.00 and costs totaling \$6,332.81. Defendant raises various issues as to both amounts. Defendant is correct that attorney's fees should only be awarded for the time spent litigating the issues in the current claim, and not for time spent on Claimant's tort action against the insurer. Nor can Claimant seek attorney's fees for time spent on the prior litigation of this claim before this Department. Last, Defendant is correct that paralegal time spent should be billed at the appropriate paralegal rate, \$60.00 per hour, rather than at the attorney's rate. Claimant shall have 30 days from the date of this decision to submit an amended bill reflecting only time spent on the current litigation and billed at the appropriate hourly rate.

19. As for costs, I find that all of the charges submitted are properly connected to litigation of the current claim. However, Mr. LeRoy's charges are not documented with sufficient capacity to determine their compliance with Workers' Compensation Rule 40. Claimant shall have 30 days from the date of this decision to submit an amended bill from Mr. LeRoy, showing time spent and rates charged.

ORDER:

Based on the foregoing findings and conclusions, Defendant is hereby ordered to pay:

1. Permanent total disability commencing on December 9, 2005, the date Claimant reached end medical result;
2. Interest at the statutory rate commencing on December 22, 2005;
3. Attorney's fees and costs in an amount to be determined based on Claimant's supplemental filing in accordance with Conclusions of Law #s 17 & 18 above.

DATED at Montpelier, Vermont this 17th day of September 2008.

Patricia Moulton Powden
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.