

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Douglas Gillock)	Opinion No. 74-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Harford Insurance as Insurer)	For: Patricia A. McDonald
for Package It Systems, Inc.)	Commissioner
)	
)	State File No. K-07480

Pretrial conference held on August 23, 2004
 Defense motion for summary judgment denied on October 12, 2004
 Hearing held in Montpelier on October 6 and 7, 2005
 Record closed on November 22, 2005

APPEARANCES:

Ronald A. Fox, Esq., for the Claimant
 Stephen D. Ellis, Esq., for the Defendant

ISSUES:

1. Is claimant permanently and totally disabled as a result of his work-related injury of October 8, 1996? If so, to what benefits is he entitled? If not, is he entitled to any additional permanent partial impairment benefits on account of the 1996 injury?
2. Is claimant entitled to ongoing medical care and pain relief medication as a consequence of his work related injury?
3. Is claimant entitled to attorney fees and costs? If so, how much?

EXHIBITS:

Joint I: Medical Records

Claimant:

1. Curriculum vitae of Daniel C. Wing, M.D.
2. Curriculum vitae of John Bopp
3. Bopp Report
4. Melanie Hamilton's affidavit

Defendant:

- A. Vocational rehabilitation file
- B. Geographical Data Technology, Inc. File

FINDINGS OF FACT:

Preexisting Condition

1. Claimant has Tourette's syndrome that predates the injury at issue here. The condition manifests itself in tics, with claimant jerking his head back. Claimant also has coprolalia, characterized by involuntary verbal outbursts, often with obscenities. Claimant has coped with that condition with medication and with jobs that allowed him some flexibility, usually outdoor work or work in warehouses.
2. Claimant's employers have had a favorable impression of him despite the Tourette's.

Work-related Injury

3. Claimant incurred a left tibial fracture at work on October 8, 1996 after catching his foot on the bumper pad of a loading dock when he was hopping off. The fracture was long ("ankle to knee") and complicated.
4. At the time of his injury, Package It Systems, Inc. was claimant's employer. Hartford Insurance was the employer's workers' compensation insurer.
5. Claimant gave notice to this Department of his election to proceed against Hartford Insurance pursuant to 21 V.S.A. § 693.
6. Dr. Dreisbach performed a surgical procedure to treat the fracture. Claimant made satisfactory progress postoperatively, although he began using a cane.
7. On October 19, 1997 claimant was involved in a motor vehicle accident when he fractured his left femur. During the operative procedure to repair the femur fracture, the orthopedist noted that there was drainage from claimant's knee.
8. By February of 1998, it was noted that claimant lost motion in both knees. Later records documented bilateral knee pain.

9. Hartford accepted this claim and paid temporary total disability benefits, medical benefits, vocational rehabilitation and permanent partial disability (PPD) benefits. This Department approved the PPD agreement on October 12, 1998 for a 29% whole person impairment based on Dr. Gagnon's rating. Claimant was released to work in a sedentary capacity.
10. On September 27, 1998, claimant fell out of a kitchen chair at home and felt "something pop."
11. In 1999 claimant was diagnosed with Chronic Regional Pain Syndrome (CRPS) for which he was prescribed Neurontin, Oxycontin and Methadone.
12. Also before the injury at issue here, claimant had dislocated his shoulders twice. Consequently, he could not work in jobs requiring heavy lifting.
13. On January 14, 1999 claimant began working part-time for Geographical Data Technology, Inc. (GDT) as a Remote Mapping Technician, a job he handled primarily from his home, although he went to the office occasionally. Claimant successfully completed on the job training. By his own admission, he worked more hours than anyone else in his position and never turned down work. Each year on that job he increased his hours.
14. On February 14, 2000 claimant was involved in a second motor vehicle accident. He required sutures for a cut over his eye.
15. On November 14, 2000 claimant fell at his home and dislocated his left shoulder.
16. On October 21, 2002, claimant was involved in a third motor vehicle accident, hurting his left knee.
17. Claimant lost the job at GDT in March 2003 when the position was cut. He declined the employer's offer to apply for a full time job with GDT because it required working in the facility, not from home.
18. This Department denied claimant's request to reinstate vocational rehabilitation benefits for the claimant in part because an economic downturn, not his inability to work, eliminated that job. Ruling on Defense Motion for Summary Judgment (*Gillock I*), December 31, 2003.
19. After *Gillock I*, claimant filed an application for hearing, claiming permanent total disability benefits. Defendant's motion for judgment based on collateral estoppel was denied because the issues are different and because in fairness, claimant was given an opportunity to prove this claim.
20. In October 2004, claimant fractured his left hip in a fall. He required a hospital stay and physical therapy.

21. At hearing, claimant agreed that he would still be working at GDT had he not been laid off. Nevertheless, he claims that he cannot find work with comparable flexibility.
22. Claimant has had jobs in the past that were not hampered by his Tourette's. In fact, claimant had jobs where he supervised others. The GDT job was the only one where he had worked at home. The vocational rehabilitation counselor who helped him secure the GDT job, Melanie Hamilton, testified that she had other options available for claimant, options that would have been pursued if he had not taken the job at GDT.
23. Claimant is an intelligent, resourceful man. He learned the computer skills needed for the GDT job. In the past when his Tourette's led to racial slurs, he was able to explained to coworkers what was going on, thereby diffusing any potential conflict.

Expert Opinions

24. Claimant's vocational rehabilitation expert Jack Bopp opined that even if there were jobs available to the claimant like the one he had at GDT, he would be considered permanently and totally disabled today because of his pain, inability to stand, his Tourette's syndrome, vocational aptitudes and work available in Vermont.
25. Daniel Wing, M.D., also supports this claim for PTD. He opined that claimant has not demonstrated the ability to do work that meets a "competitive work" standard. In addition, Dr. Wing assessed a 30% impairment for CRPS, due to a gait disorder that he conceded existed at the time of Dr. Gagnon's rating in 1998.
26. Neurologist Richard Levy, M.D. persuasively opined that it was not claimant's 1996 work-related injury, but the motor vehicle accident (MVA) in 1997 that aggravated his condition and caused a pain syndrome.

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).

CRPS and Pain Medication

3. Although the natural consequences of a work related injury are compensable, that is not true for the consequences of an independent intervening cause, which breaks the chain of causation. 1 Larson's Workers' Compensation Law, § 10 at 10-1. In this case, physicians prescribe pain medication for claimant because of the diagnosis of CRPS. However, that condition was not caused by his work-related incident, but because of the later MVA. Accordingly, treatment for the condition is not compensable.

Permanent Total Disability

4. Prior to July of 2000 a claimant was entitled to permanent total disability if his injury was among those enumerated in 21 V.S.A. § 644, or if, without considering individual employability factors such as education and experience, the medical evidence indicates that he is totally disabled from gainful employment. *Fleury v. Kessel/Duff Constr. Co.*, 148 Vt. 415 (1987); *Pelkey v. Chittenden County Sheriffs Dept.*, Opinion No. 24-02WC (2002). The standard is further articulated in § 645 (a), which specifies that one must have "no reasonable prospect of finding regular employment." *Pelkey*, supra. 3. Injuries enumerated in § 644 include: total and permanent loss of sight in both eyes; loss of both feet at or above the ankle; loss of both hands at or above the wrist; loss of one hand and one foot; spinal injury resulting in permanent and complete paralysis of both legs or both arms or of one leg and one arm; and skull injury resulting in incurable imbecility or insanity.
5. Because Claimant's injury predates the 2000 amendment to § 644, his injury must either fit into one of the categories enumerated in § 644 or have as severe an impact on his earning capacity as one of the scheduled injuries. See *Bishop v. Town of Barre*, 140 Vt. 565 (1982); *Liscinsky v. Temporary Payroll Incentives, Inc.* Opinion No. 9-01 WC (March 22, 2001). On this issue, Claimant bears the burden of proof.
6. Even if I were to accept the opinions of all claimant's experts that he is permanently and totally disabled, I would have to also accept that the pain condition is a part of that disability. Since the pain condition is not compensable, a crucial underpinning of the PTD claim is lost. Without it, causation cannot be proven.
7. Finally, even without the intervening causes in this case this claim is defeated by claimant's own intelligence and competence. Although the combination of factors, including Tourette's, might incapacitate others, this claimant has a proven track record of being able to work despite it. He was able to learn computer skills, work from his home, increase his hours and report to the office when needed when he worked for GDT. Claimant would prefer to have the precise work he had at GDT or none at all. But that is not the standard. This is a man capable of gainful employment. Accordingly his claim for PTD fails.

8. Given the conclusions in this case, it is not necessary to address the statute of limitation defense.

PPD

9. Because of the binding Form 22 for PPD in 1998 and the finding of lack of causation for the CRPS, claimant is not entitled to additional permanent partial disability compensation.

ORDER:

THEREFORE, this claim for PTD, Medications and Fees and Costs is DENIED.

Dated at Montpelier, Vermont this 30th 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.