

Kellum v. F.W. Webb (Nov. 2, 1995)

STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY

Fred Kellum	)	File No. E-8750
	)	
	)	By: Jill Broderick
	)	Hearing Officer
v.	)	
	)	For: Mary S. Hooper
	)	Commissioner
F.W. Webb	)	
	)	Opinion No. 18-95WC

Heard in Montpelier, Vermont on January 17, 1995  
Record Closed: March 1, 1995

APPEARANCES

Attorney for Claimant - Sam W. Mason, Esq.  
Attorney for Defendant - Christopher J. McVeigh, Esq.

ISSUES

1. Is the claimant entitled to temporary partial compensation?
2. Is the claimant entitled to additional temporary total compensation?
3. Is the claimant entitled to additional permanent partial compensation?
4. Is the claimant entitled to additional vocational rehabilitation services?

THE CLAIMANT SEEKS

1. Additional temporary total disability compensation based on a higher average weekly wage for the period of time in 1991 and 1992 during which he received such compensation;
2. Temporary partial disability compensation for the period of time in 1989-1992 during which he worked for the defendant after his injury;
3. Additional permanent partial disability compensation;
4. Vocational rehabilitation; and

5. Attorney's fees and costs.

#### STIPULATIONS

The parties have entered into the following stipulations:

1. The claimant was an employee of the defendant on November 1, 1989.
2. The defendant was an employer within the meaning of the Workers' Compensation Act on such date.
3. CNA was the workers' compensation carrier for the defendant on such date.
4. The claimant's injury arose out of and in the course of his employment with the defendant.
5. The parties have stipulated to the admission of the following exhibits:

Claimant's Exhibit #1 Medical records

Claimant's Exhibit #2 Statement of the claimant's wages in 1989, 1990, and 1991 with W-2 forms.

Claimant's Exhibit #3 Vocation rehabilitation records.

Claimant's Exhibit #4 Statement of attorney's fees

Defendant's Exhibit #1 Deposition transcript of Dr. Chard

Defendant's Exhibit #2 Deposition transcript of Dr. Robbins.

Defendant's Exhibit #3 Forms 21, 22, 27, and memorandum.

Defendant's Exhibit #4 Letter of Ms. Phelps dated February 14, 1995

Defendant's Exhibit #5 Defendant's last, best offer for settlement.

#### FINDINGS

Based on the evidence and testimony presented at the hearing, I find:

1. The exhibits listed above are admitted into evidence.
2. The stipulations set forth above are true.

3. On November 1, 1989 the claimant injured his back in the course of his employment for the defendant as he and two other employees were moving a boiler down a set of stairs.

4. At that time he was also working for the Bennington County Sheriff's Department.

4. After his injury the claimant continued working at both jobs until November 13, 1991 when he began a period of temporary total disability. He has not worked since that date.

5. Between November 1, 1989 and November 13, 1991, the claimant worked fewer hours for the defendant due to his back pain caused by the injury. His wages from the sheriff's job increased during 1990 and decreased in 1991.

6. The claimant was a full time student at Russell Sage College in Albany, New York between 1991 and 1993. He drove from Bennington to Albany four to five days a week and attended classes.

7. The claimant received temporary total compensation for the period beginning November 13, 1991 and ending June 8, 1992, and payment for a 15% permanent partial disability to his spine.

8. The claimant's first 26 weeks of temporary total compensation were at the weekly rate of \$410.11, based on his average weekly wage during the twelve weeks preceding his injury in 1989.

9. The department recalculated the claimant's average weekly wage in May, 1992, decreasing his compensation rate to \$360.23. The department based the calculation on the claimant's wages during the twelve weeks prior to his period of temporary total disability in November, 1991 rather than on the twelve weeks preceding his injury. The remaining temporary total compensation and the permanent partial compensation for the claimant's spine were paid at this reduced compensation rate. I find that the claimant's work injury required him to modify his work schedule and diminished his earning capacity. The claimant worked fewer hours for the defendant after his injury, and, although the wage information submitted into evidence is somewhat unclear, it

appears that the claimant's wages from the defendant decreased between the November 1, 1989, injury and the beginning of temporary total disability on November 13, 1991. It also appears from the record that the claimant's wages from his job with the sheriff's department may have increased for part of that two year period.

10. Neither of the compensation rates included a \$10.00 dependent's benefit for the claimant's daughter to which claimant was entitled.

11. Dr. Robbins, an orthopedic surgeon, treated the claimant for his injury beginning in January, 1990 through February, 1993. Dr. Robbins determined that the claimant reached an end medical result on May 19, 1992, and I find this to be credible.

12. Dr. Robbins diagnosed the claimant as having "mechanical low back pain probably secondary to an annular tear" and opined that the claimant has a 15% impairment of his lumbar spine due to the 1989 injury. In addition, he believed the claimant has a 15% impairment of his left lower extremity due to such injury.

13. Dr. Chard, an orthopedic surgeon, examined the claimant on July 7, 1993. Dr. Chard was unable to complete his examination because the claimant was experiencing too much pain. He testified that he was unable to "verify the accuracy" of his range of motion tests since the claimant could not repeat the test motions. He acknowledged that technically some of the measurements upon which he relied were invalid and "used them because they were the only numbers that I could get." Dr. Chard also testified: "This is certainly an imperfect examination because he was unable to complete the testing, that's right." When asked if it would have been better to have the claimant return for another examination he stated "That would have been probably a good thing to do."

14. Dr. Chard stated that the claimant had a 40% impairment of his spine, a 5% impairment of his left knee and a 10% impairment of his left ankle.

15. According to Dr. Robbins the 15% left lower extremity impairment is due

to the fact that the claimant's back pain from the injury caused a "decompensation in gait" which produced leg problems.

16. Dr. Robbins did not believe that claimant's spine impairment was as high as 40%. He testified that the indications for such a high rating in a nonsurgical candidate would be "cord abnormalities that involve loss of bowel and bladder functions and inability to walk that are nonoperable." The claimant does not have these symptoms.

17. William Schick of Rehabilitation Consultants prepared an IWRP for the claimant. The Department approved a modified version of the plan pursuant to which the defendant would reimburse the claimant for the cost of his computer and printer in the amount of \$2588.80.

#### CONCLUSIONS

Based on the foregoing findings of fact, I conclude the following:

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 (1984). The claimant must establish by sufficient, competent evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. Lapan v. Berno's Inc., 137 Vt. 393 (1979).

2. The claimant received temporary total compensation from November 13, 1991, until June 8, 1992, based on two different wage rates. 21 V.S.A. §650(a) provides "Average weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the twelve weeks preceding an injury . . . ." It is not disputed that the date of injury in this case was November 1, 1989, thus it was error for the department to direct that claimant's compensation be reduced based on the twelve weeks preceding his temporary total disability rather than on the date of injury. The statutory language is clear. In this case, although neither claimant nor his attorney have requested it, and the claimant has not presented evidence necessary to justify an award, there is some evidence that

claimant's reduced earning power between the date of injury and the date of temporarily total disability was caused by his work injury. Had he established this connection he would have been entitled to temporarily partial disability from the date of the injury until he was temporary totally disabled. Unfortunately he failed to raise and preserve this claim, or present sufficient evidence to support it. His compensation rate for temporary total disability compensation must be based on the twelve weeks preceding November 1, 1989.

3. 21 V.S.A §642 provides that an injured employee "shall receive \$10.00 a week for each dependent child who is unmarried and under the age of 21 years . . ." The claimant is entitled to such dependent benefit for each week of temporary total disability he received.

4. Drs. Robbins and Chard both opined that the claimant has a 15% permanent partial disability of his left lower extremity. It appears from the testimony that the doctors disagree somewhat regarding the allocation of that percentage between the claimant's knee and ankle. However, I find the ratings to be credible and conclude that the claimant has a left lower extremity impairment of 15%.

6. I find Dr. Robbins rating of a 15% spine impairment more credible than Dr. Chard's 40% rating for several reasons. First, as the claimant's treating physician since January 31, 1990, Dr. Robbins is in a better position to determine the extent of the claimant's disability. Second, as Dr. Robbins' testimony indicates, a 40% spine impairment is indicated in a nonsurgical candidate like the claimant only in certain circumstances, none of which apply to the claimant. Third, as Dr. Chard's testimony amply indicates, the rating is based on an examination that is unreliable. Therefore, I conclude that the claimant has a 15% impairment to his spine. Since his compensation rate was improperly reduced, he is entitled to additional permanent partial disability compensation for the difference between the amount paid and the amount owed had the compensation rate been computed correctly.

5. The claimant is entitled to reimbursement in the amount of \$2588.80 for vocational rehabilitation pursuant to the IWRP approved by the department.

6. The defendant submitted into evidence the terms of its last best offer for settlement made to the claimant. The claimant's attorney submitted a petition, which provides an estimate of a "portion of the work performed" and requests "an appropriate percentage" of any award over the defendant's settlement offer. It is not clear whether the agreement between the claimant and his lawyer is based on an hourly fee or a contingency arrangement. The record, therefore, does not justify an award of attorney's fees.

ORDER

Therefore, based on these Findings and Conclusions the CNA Insurance Company, or in the event of its default, the defendant, is hereby ORDERED to:

1. Pay the claimant the \$10.00 dependent's benefit for each week of temporary total disability he received.
2. Pay the claimant the additional temporary total compensation to which he is entitled based on a recalculation of his average weekly wage as set forth in this decision.
3. Pay the claimant for the 15% permanent partial disability of his left lower extremity at the appropriate compensation rate. Any amount already paid as permanent partial disability compensation is credited toward this amount.
4. Pay the claimant the amount of \$2488.80 for his vocational rehabilitation costs.

Dated at Montpelier, Vermont this \_\_\_\_\_ day of November, 1995.

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Mary S. Hooper  
Commissioner

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