Prevost v. Contractors Crane Service, Inc. (Apr. 29, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Timothy Prevost	*)*	*File #: E-6261*
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	*For: Mary S. Hooper*
Contractors Crane Service, Inc.	*)*	*Commissioner*
	)	
	)	*Opinion #: 26-96WC*

Hearing held at Montpelier, Vermont, on February 1, 1996, and April 11, 1996.
Record closed on April 18, 1996.

APPEARANCES

Patrick L. Biggam, Esq., for the claimant
John W. Valente, Esq., for the defendant

ISSUE

Whether the claimant is entitled to vocational rehabilitation in the form of tuition reimbursement.

THE CLAIM

1. Vocational rehabilitation pursuant to 21 V.S.A. §641(b).

2. Attorneys' fees and costs pursuant to 21 V.S.A. §678(a).

EXHIBITS

Joint Exhibit 1	*Michael F. Milne curriculum vitae*
Joint Exhibit 2	*Medical report of John R. Johansson, D.O.*
Joint Exhibit 3	*Records of Crawford and Company*
Joint Exhibit 4	*Medical records of William J. Spina, M.D.*

FINDINGS OF FACT

1. The claimant was injured on September 16, 1991, while employed with the
defendant. He suffered a serious injury to his left knee which resulted in a lengthy period of disability. He reached an end medical result on June 1,

1993, with a 55% permanent impairment to his left lower extremity.

2. In February of 1993, Eldon Carvey was assigned by Crawford and Company to perform an initial vocational evaluation of the claimant. At that time, he ascertained that the claimant had had a relatively stable and unbroken work history, both in the construction field and in law enforcement. Specifically, he had operated heavy machinery, worked as a plumber's helper, worked as a jailer in a local sheriff's office, and been a part-time police officer in Hardwick. The claimant reported to Mr. Carvey at the time of the evaluation that he was confident of being able to return to work at the defendant, and that he also planned to attend Champlain College in the fall. The claimant had already applied to the college.

3. Although the two men have differing recollections of the conversation about Champlain College, they agree that Mr. Prevost was advised of the hierarchy in supplying or acquiring vocational rehabilitation. Specifically, Mr. Prevost was advised that retraining in an educational program was the fifth step in a process, and that the prior four steps had to be exhausted prior to initiating the fifth step.

4. Mr. Carvey testified that he advised the claimant that the insurer would not pay for his college education. In spite of the claimant's denial of this, I find Mr. Carvey's testimony to be credible in this matter.

5. Mr. Carvey contacted the employer and the claimant's treating physician in order to arrange for his return to work at the employer. He believed he had found a suitable position for the claimant consistent with his physician's restrictions, only to find that the claimant was leaving the next day on an extended vacation to Florida. While not fatal to the claimant's prospects, this short notice was indicative of the communication problems Mr. Carvey experienced with the claimant.

6. On March 18, 1993, the claimant was seen by Dr. William J. Spina, his treating physician. On that date, Dr. Spina indicated that his long term goal was to finish the claimant's recovery from the surgery of the fall of 1992, and then return him to heavy equipment work. Dr. Spina confirmed that this was his goal on May 3, 1993. When he saw the claimant the following day, he found that the claimant was expressing an interest in law enforcement, which he considered to be a reasonable alternative to heavy equipment work.

7. Mr. Carvey discussed the possibility of heavy equipment work with the

claimant and his employer. He believed that the employer was going to make such work available to the claimant. Mr. Carvey understood that this was to be summer employment only, as the claimant had been accepted at Champlain College.

8. On June 1, 1993, the claimant returned to work at the defendant. Mr. Carvey discovered this by attempting to call the claimant, and reaching his mother instead. Although Mr. Carvey left many messages for the claimant both at home and at work, and wrote a letter to the claimant asking for him to contact Mr. Carvey, Mr. Carvey never heard from the claimant again. Consequently, in July, Mr. Carvey closed his file on the claimant.

9. On July 3, 1993, the claimant was seen by Dr. Spina, who found that the claimant was doing a little better, in spite of doing inappropriate work. He agreed however that the claimant was probably correct in seeking different employment in light of his continuing symptoms. The claimant ceased working for the defendant at that time. He did not, however, notify Mr. Carvey of his inability to work.

10. The claimant entered Champlain College in the fall as planned, completed the program, and has now been accepted at a police academy in Colorado. He anticipates that he will be eligible for jobs paying between $29,000 and $33,000 a year after completion of the program. He has passed the physical examination for the program.

11. Eldon Carvey testified that the claimant had transferable skills, which would have been identified in more detail as they worked their way through the vocational rehabilitation hierarchy. That hierarchy, according to the witness, was a five step process, providing first for the claimant to be returned to the same employer in a modified job; second, return to another employer at a modified or different job; third, on the job training at another job; fourth, new training or retraining; and fifth, an educational program. According to Mr. Carvey, they were still in the first stage of the hierarchy, and he was not even notified that the claimant had failed that stage. Had he been so notified, he would have examined the work the claimant had done for the employer, and in all likelihood would have discovered that he was not working within his restrictions.

12. Mr. Carvey believed that there would still have been the possibility of

placing the claimant with the employer. However, if that failed, he opined that the claimant had significant transferable skills, including elemental mechanical skills, driving skills, transferable law enforcement skills that would have allowed him to work in security positions, and in several forms of customer service. Off the top of his head in response to direct questioning, he produced a few options that would have allowed the claimant not only to reach his income goals but perhaps to exceed what he had been earning at the
defendant, with minimal retraining.

13. Mr. Carvey testified that he did not perform any aptitude or interest tests on the claimant, as they had not reached the hierarchical level at which such tests became significant. As they were still in the first stage of the hierarchy and the employer and the insurer were in full support of continuing investigations in that stage, it would have been premature to institute testing of the claimant. He had every reasonable expectation that the claimant could return to his original employer at a modified or different job.

14. The claimant presented the testimony of Michael F. Milne, a rehabilitation specialist. Mr. Milne saw the claimant for the first time in October of 1995, at the request of the claimant's counsel. He performed a number of tests to assess the claimant's aptitudes and interests. Based on the results of those tests, the claimant's education and physical abilities, and given the wage level of the claimant, he determined that the law enforcement course at Champlain College was the most appropriate course for
the claimant. In spite of the fact that the tests were administered more than two years after the claimant commenced a college course, Mr. Milne was
unprepared to say that the education would have changed the results of the scores from those the claimant may have had in 1993.

15. Mr. Milne conceded that he did not talk with any employers in the construction field to see if accommodations were possible to enable the claimant to remain in that field. He indicated that it would be important for a vocational rehabilitation counselor to talk with the claimant's treating physician and his employer when preparing a vocational rehabilitation plan. He indicated that he never performed a job evaluation for the claimant's original job, nor did he speak with the employer about the possibility of light duty or sedentary work. He indicated that the testing he performed was required under the rules whenever there was an anticipated
major career change. He finally stated that he had been hired in this case as an expert witness, not as a vocational rehabilitation counselor, and hence would not have performed many of the functions expected of a counselor.

16. The claimant has presented evidence of a contingency fee agreement with his attorney for 20% of the amount recovered in this proceeding. This is a reasonable agreement.

CONCLUSIONS

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse Co., 123 Vt. 161 (1963). The claimant 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).

2. Vocational rehabilitation is required for a claimant "[w]hen as a result of an injury covered by this chapter, an employee is unable to perform work for which he has previous training or experience...." 21 V.S.A. §641. The services to which such an employee would be entitled are "...retraining and job placement, as may be reasonably necessary to restore him to suitable employment." Ibid.

3. In this case, the claimant had already determined his future goal prior to the initiation of vocational rehabilitation. He had applied to the college for whose tuition and fees he seeks reimbursement. He made his interest and intent clear to the counselor assigned to him, and agreed that the sole goal of the process would be to find him summer employment. He elected, having been advised of the steps required to reach the level of the hierarchy that affords re-education, to skip those steps, and to deny the employer the option of finding a less costly method of rehabilitation. In so doing, he evaded efforts by the counselor to contact him, and failed to advise the counselor of his inability to perform the tasks assigned him upon his return to work.

4. In two prior cases, we have had the opportunity to examine cases where claimants, sua sponte, entered into educational programs without the sponsorship or prior approval of their counselors. In Beauregard v. Grand Union, Opinion No. 71-95WC, and in Main v. Nastech, 88-95WC, the claimants chose the laudable goal of advancing their education, but in each case did so outside the procedures established by the Workers' Compensation Act and the Workers' Compensation and Occupational Disease Rules. In each case, they were denied reimbursement. I see no basis for altering that result in this case, nor has the claimant addressed these decisions or supplied any authority mandating a contrary result.

5. The claimant cannot prevail, having failed to meet his burden of proof. Not having prevailed, he is not entitled to an award of attorney's fees.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, the claim for tuition reimbursement is denied.

DATED at Montpelier, Vermont, this ____ day of April 1996.

_____
Mary S. Hooper
Commissioner