

Kreuzer v. Ben & Jerry's Homemade & Royal and Sun Insurance (March 21, 2003)

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

)	State File No. P-07607
)	
Charles Kreuzer)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: Michael S. Bertrand
Ben & Jerry's Homemade, Inc. and)	Commissioner
Royal and Sun Insurance)	
)	Opinion No. 15-03WC

Hearing Held in Montpelier on September 19, 2002
Record Closed on October 22, 2002

APPEARANCES:

Ron A. Fox, Esq. for the Claimant
Keith J. Kasper, Esq. (hearing) and Nicole Reuschel-Vincent, Esq. (prehearing) for the Defendant

ISSUES:

1. Is the Claimant permanently totally disabled?
2. If so, to what benefits is the Claimant entitled?

EXHIBITS:

Joint Exhibit I: Medical Records

Claimant's Exhibit 1: Letter from Attorney Fox dated July 12, 2001

FINDINGS OF FACT:

1. At all times relevant to this action, Claimant was an "employee" and Ben & Jerry's his "employer" within the meaning of the Workers' Compensation Act and Rules. Royal and Sun Alliance was the workers' compensation insurer for Ben and Jerry's.
2. From about 1976 until 1999, claimant worked in manufacturing jobs, almost always on the night shift where he could earn more, where he thought supervisors weren't supervisors, rules weren't rules and production was highest. He did not

like the people or the rules that come with a day shift. In 1990 he began working for Ben & Jerry's on the night shift.

3. On February 4, 1998 Claimant suffered an injury by accident arising out of and in the course of his employment. He strained his right arm while attempting to fit a pipe together. He and another worker were each pushing on the pipe; when the other worker let go, Claimant absorbed additional pressure and felt a tear in his right elbow. He finished his shift. The next morning he went to see a doctor and returned to work. In fact, he continued to work until his arm swelled to a point where his supervisor, Tom Burroughs, sent him home.
4. At the time of his injury, Claimant was living in Marshfield and maintained animals at his homestead. He had up to 60 sheep and cows, 250 meat birds, 200-400 egg layers, 60-75 turkeys as well as geese, ducks and pigs. At that time he did the heavy farm work and his wife did the lighter work. The animals were kept for food for the family.
5. Claimant pursued a course of medical care following his injury and underwent several diagnostic tests. In that process, carpal tunnel syndrome was diagnosed in both hands, with the right worse than the left. He had carpal tunnel surgery on the left on July 31, 1998.
6. When Ben & Jerry's stopped production on the third shift Claimant elected to move to the Clean in Place (CIP) crew rather than to switch to a day or evening shift. CIP involved tearing apart the equipment in the production room and cleaning a space that was 200 square feet. The work involved a great deal of scrubbing, with extensive use of the arms. Claimant's performance evaluations noted that while his work was always on time and acceptable, he was considered "rude, crude and obnoxious." As a result he never received the maximum pay raise.
7. Due to his arm difficulties, Claimant was placed on light duty in a job he found difficult because it was too idle for him.
8. In September of 1998 Claimant moved from Marshfield to Barton, Vermont. From Marshfield, his commute to Ben & Jerry's in Waterbury was 32 to 35 miles each way. From Barton it was 65 miles.
9. In September 1998 Claimant had carpal tunnel surgery on the right hand. Then, on October 26, 1998 Dr. Mogan expressed his satisfaction with the bilateral carpal tunnel surgery and released Claimant to return to work as a trainer.
10. However, Claimant's elbow condition did not improve. By the fall of 1998 he was referred to Dr. Benoit for an evaluation after which diagnosed tests confirmed the need for more surgery. On February 12, 1999 he had surgery on his right elbow. Since then the pain and swelling were relieved.

11. Claimant last worked prior to his February 1999 surgery.
12. Claimant testified that his hands turn into “little balloons” when he tries to use them.
13. In an April 2000 note, Dr. Benoit wrote that Claimant was no longer working at Ben & Jerry’s, but was running his own farm. Claimant testified that it was not he, but his stepchildren, who were actually running the farm and his pride kept him from telling his doctor the truth.
14. At the time of the hearing, Claimant had 3 cows, 18 ewes and a ram and a few egg layers. He no longer does heavy work.
15. At a Functional Capacity Evaluation (FCE) on April 24, 2000 it was noted that Claimant’s hands were swollen from driving that morning and became more swollen after performing assigned tasks. Claimant did everything asked of him, although he was quite uncomfortable for days afterwards. The therapist who conducted the FCE concluded that Claimant had a full-time sedentary work capacity.
16. Claimant’s treatment included physical therapy paid for by the workers’ compensation insurer. However, Claimant stopped the therapy because by the time he returned home from the treatments he felt no better than he did before he left, leading him to conclude that to continue would be tantamount to stealing from the insurer.
17. Claimant met with Jane Shaw, vocational rehabilitation counselor, in developing a plan to operate a dairy farm. Claimant signed the IWRP (Individual Written Rehabilitation Plan), and while waiting for the carrier to accept the plan began to implement it on his own. He began milking cows a friend lent to him. He had a milking machine, but no pipeline or bulk tank. After three days, he found that he could not do the work because of the physical demand, which caused his arms to go numb. Through counsel, he then withdrew his approval of the IWRP.
18. Claimant can no longer maintain a garden, butcher or lift a two-gallon can he milks into. Although he can milk a cow, someone else has to empty the can.

Expert opinions: for the Claimant

19. Gregory LeRoy is a certified vocational rehabilitation counselor. He has a master’s degree in vocational counseling and has been involved in this work for 26 years. In the past five years has performed 25 to 40 individual assessments per year. In fewer than 10 of those cases has he concluded that vocational services should be suspended or terminated because the injured worker had no rehabilitation potential.

20. Vocational rehabilitation in this case started in 1999 with Jane Shaw prepared an entitlement assessment. When Mr. LeRoy received a referral in this case in January 2002 he reviewed the medical and vocational records and recommended another FCE because the one on file was not current.
21. On April 14, 2002, Diane Aja, an occupational therapist experienced in assessing people with upper extremity injuries, performed the FCE. She concluded that Claimant's work capacity falls below a sedentary physical demand level, that he has no ability to use his right (dominant) hand functionally, that his driving a car is difficult without pain escalation with a projected driving tolerance of 20 minutes, that he has limited left arm strength with swelling after use, that he may not possess the capacity to sustain work activities for vocationally relevant periods of time. She further determined that he is at significant risk for developing overuse problems with the left arm such that any job match should be limited to light use of the left arm.
22. Mr. LeRoy met with the Claimant at his home in Barton on April 12, 2002 and reviewed his medical, educational and employment history. The history included findings that Claimant is largely illiterate and rarely attended class when in high school. He worked primarily in industrial settings on the third shift because he had difficulties with interpersonal relationships. His lifestyle is simple and non-materialistic, which in the past relied on subsistence farming. The relevant medical history included bilateral carpal tunnel surgery and surgery on the interosseous nerve in his right arm for the elbow injury.
23. The initial IWRP, which called for an agricultural self-employment plan, was never approved by the carrier and was ultimately withdrawn by the Claimant. It was intended to make the Claimant's property economically viable so he would not need other employment. However, in Mr. LeRoy's opinion, the plan was developed in an atypical fashion, as the return to work hierarchy in WC Rule 33.2000 was not followed.
24. Mr. LeRoy found that Claimant was entitled to VR services as he met the criteria for direct services, although direct services had never been undertaken. However, he eventually also determined, based in part on Diane Aja's FCE, that vocational services could serve no useful purpose because of the extent of the Claimant's disability. Therefore, he filed a discontinuance report to that effect dated May 23, 2002 stating that Claimant's disability was too severe.
25. A comparison between the 2000 and 2002 FCE's reveals the following: Claimant's grip strength, prehension strength and static pushing and pulling improved, although his lifting capacity weakened. Lifting capacity was reduced from sedentary in 2000 to below sedentary in 2002. Ms Aja concluded that Claimant could sit for an hour in the course of a day.

26. Mr. LeRoy accepted the 2002 FCE conclusion that Claimant's work capacity was below sedentary and concluded that there are no jobs in the national economy for which he is qualified. In reaching that conclusion, he had to eliminate any transferable work skills as Claimant's past was limited to hands-on industrial employment.
27. On April 30, 2002, Dr. Fenton performed an independent medical evaluation for the defense. He noted worsening range of motion in the right hand and sensory deficits from the first to the second IME, with significant hand swelling. Dr. Fenton opined that it was unlikely that Claimant could be employed, not only because of his below sedentary work capacity but also because of his "premorbid personality type, which probably would limit his ability to work in jobs involving significant contact with the public."
28. Based on the 2002 FCE and the IME opinion from Dr. Fenton, Mr. LeRoy concluded that: 1) retraining was not a viable option as Claimant did not have a sedentary work capacity and there was a progression of symptoms; 2) Claimant lacked the temperament to work in vocational settings requiring contact with others, as demonstrated by his history of third shift work.
29. Mr. LeRoy rejected the defense suggestion that vocational testing be done because such testing would not lead to development of a vocational goal. He concluded, based on all the records, that there are no jobs which Claimant can do on a sustained and regular basis.

Expert Opinions for the Defense

30. In June and July 2000, Dr. George White examined the Claimant and rendered opinions regarding medical end result and permanency. He determined that Claimant had reached medical end result for carpal tunnel syndrome and right posterior interosseous nerve syndrome, "with improvement of symptoms but persistent discomfort and weakness." It was this opinion that formed the basis for the Form 27 Notice of Intention to Discontinue Payments, effective July 22, 2002 and approved by this Department. Based on his examination of the Claimant and the 4th Edition of the AMA Guides, Dr. White determined that Claimant had no ratable permanency on the left, which had undergone surgery for carpal tunnel syndrome. However, he assesses a total combined rating for the right posterior interosseous nerve problem and right carpal tunnel syndrome at 13%.
31. After examining the Claimant on August 8, 2000 Dr. Fenton also concluded that Claimant had reached medical end result. He found that Claimant had a 16% whole person impairment.

32. John May is a certified rehabilitation counselor who has practiced in Vermont since 1993. He recommended that further vocational exploration be performed with the Claimant to explore additional avenues which might bring about gainful employment for him. Specifically he suggested vocational testing and exploring the use of adaptive equipment for Claimant to see if any would make him more functional and hence more employable. Although Mr. May could not identify any jobs Claimant would be capable of performing at this juncture, he emphasized that vocational options should be further explored.
33. Dr. Fenton questioned the validity of the 2002 FCE, which likely was adversely affected by the Claimant's two hours of driving immediately before the examination. Further, he opined that there is no evidence that Claimant's mental health condition was adversely affected by his work-related injury, although his pre-existing personality negatively affects his ability to work.
34. On the day of the hearing, which lasted more than four hours, Claimant drove himself to Montpelier from his home in Barton, a distance of more than 45 minutes each way. He sat through the hearing.
35. Claimant submitted evidence of his fee agreement with his attorney, evidence of attorney time totaling 71.6 hours and necessary costs of \$567.41.

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. 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).
3. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).

4. The Claimant argues that he is entitled to permanent total disability pursuant to 21 V.S.A. § 644. The parties agree that Claimant is entitled to permanent total disability if his injury is within the enumerated list articulated in 21 V.S.A. § 644¹, 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).
5. The standard is further articulated in § 645(a), which specifies that one must have “no reasonable prospect of finding regular employment.” Regular employment means work that is not casual and sporadic. Gainful employment means that the hiring is not charitable and the person earns wages.
6. This case has been complicated in ways that make a determination of permanent total disability impossible at this juncture. Vocational testing was not done. A self-employment plan was offered without ever progressing through the vocational rehabilitation hierarchy. Claimant has years of work with the accumulation of skills in both factory and farming work. The maximum permanent partial disability rating is 18%. All these factors suggest that greater effort must be made to return this Claimant to work.
7. Whether this Claimant is capable of gainful employment is a question dependent on vocational testing, which has yet to be performed, and on the exploration of adaptive equipment as recommended by Mr. May. If those efforts prove unsuccessful, this Department will revisit the question of permanent total disability.

¹ The non-exclusive list of injuries enumerated in § 644 includes total and permanent loss of sight in both eyes, the loss of both feet at or above the ankle, the loss of both hands at or above the wrist, the loss of one hand and one foot, a spinal injury resulting in permanent and complete paralysis of both legs or both arms or of one leg and one arm, and a skull injury resulting in incurable imbecility or insanity.

ORDER:

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law, Defendant is ordered to provide and Claimant is ordered to undergo vocational testing and to explore the use of adaptive equipment.

Dated at Montpelier, Vermont this 21st day of March 2003.

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.