

Richard Dagesse v. Ethan Allen, Inc.

(06/11/04)

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

Richard Dagesse

Opinion No. 20-04WC

v.

*By: Margaret A. Mangan
Hearing Officer*

Ethan Allen, Inc.

*For: Michael S. Bertrand
Commissioner*

State File No. H-19965 and H-04715

Hearing held in Montpelier on November 19 and 20, 2003

Record Closed on December 22, 2003

APPEARANCES:

*Robert Halpert, Esq. and Patricia Turley, Esq., for the Claimant
Andrew C. Boxer, Esq. and Jennifer K. Moore, Esq., for the Defendant*

ISSUES:

- 1. Is claimant permanently totally disabled as a result of his work related injuries?*
- 2. If not, to what degree of permanent partial disability is he entitled?*

EXHIBITS:

Joint 1: Medical Records

Claimant's 1: Form 27 (1/10/02)

Claimant's 2: Medical bills paid by the employer/insurance carrier

Defendant's A: Job description

FINDINGS OF FACT:

1. *Judicial notice is taken of all department forms filed in this case. The exhibits listed have been admitted into evidence.*
2. *Claimant is 59 years old and has a seventh grade education.*
3. *Claimant was an employee and Ethan Allen his employer within the Vermont Workers' Compensation Act at all times relevant to this action. Claimant began working as a maintenance carpenter for Ethan Allen in 1993.*
4. *Before the incidents at issue in this case, claimant's medical history was unremarkable. He rarely saw a physician and rarely missed time from work. He had no history of head, neck, back or knee problems and no history of chronic pain or psychological problems. However, claimant in all likelihood had non-symptomatic osteoarthritis.*
5. *On February 9, 1995 claimant caught his left foot in a railroad track while unloading a steel beam from a truck. He then twisted his body and began to fall. The beam fell across his legs and he landed in a sitting position. Both knees hurt, with the left knee pain worse than the right. He reported this "First Injury" to his supervisor but did not seek medical attention at that time.*
6. *A week later, on February 16, 1995, claimant had a "Second Injury" when a steel beam weighing approximately 150 pounds hit him on the head. He was taken to the Upper Connecticut Hospital where his 5-inch long head laceration was sutured and x-rays taken. A skull x-ray revealed a large scalp hematoma over the frontal bone. However, the neurologic examination was negative and there was no evidence of a skull fracture. The next day claimant complained of neck pain when he returned to the emergency department for a dressing change. A cervical spine x-ray was normal. His complaints of neck pain continued as emergency department records over the next few weeks and subsequent physical therapy notes clearly document. He was diagnosed with trapezius muscle and neck sprain.*
7. *Claimant missed about one month of work after the Second Injury. The employer/carrier filed a First Report of injury for this second injury.*

8. *On February 22, 1995, the carrier agreed to pay temporary total disability to the claimant for the February 16th injuries to his head and neck.*
9. *While recuperating from the Second Injury, claimant sought medical care for the left knee pain caused by the First Injury. In March of 1995, the employer filed a report for the First Injury.*
10. *Dr. Spina released claimant to full-time work on April 19, 1995 with the restriction that he not use ladders or scaffolding for the following six weeks.*
11. *In mid-August 1995 claimant was taken out of work again because his left knee pain returned after working on ladders. He was out of work until the end of November when he was released to work one hour a day.*
12. *On September 21, 1995 Dr. Spina operated on the claimant's left knee for a torn meniscus and osteoarthritis. In his report, Dr. Spina defined the problem as a significant weightbearing one. The meniscus was shredded. Most of it was removed and the surface smoothed, though small areas of bare bone were present.*
13. *In October 1995 claimant returned to Dr. Soucy with complaints of neck pain and difficulty sleeping due to the pain. Dr. Soucy related the neck pain to the Second Injury at work and treated it with medication and traction.*
14. *On December 20, 1995, claimant returned to Dr. Spina with the complaint of right knee pain. This is the first reference in the medical records to right knee symptoms. At the time of this visit, claimant was working four hours a day with a 15-minute break every hour. Dr. Spina diagnosed overuse syndrome right knee with pre-arthritis left knee. At the end of his note for that visit, Dr. Spina wrote: "it is very likely that a full-time mainly sedentary type job will be all that he is capable of in the long term."*
15. *A month later, on January 24, 1996, Dr. Spina released claimant to work five hours a day, but noted that the "more heavy aspects of carpentry will be impossible for him but if we can get him back to be able to work in the shop with a reasonable degree of comfort I think this will be a success."*

16. *April 1996 x-rays of both knees revealed degenerative arthritis in the left knee and a loose body and arthritis in the right knee.*
17. *In May of 1996, in answer to the claimant's questions about causation, Dr. Spina opined that claimant right knee problems were due to his age, work history and overuse relating to the left knee injury.*
18. *In June of 1996 Dr. Soucy noted "very, very tight musculature of the erector spine from the occiput to the sacrum" which he described as a common compensatory pattern.*
19. *Claimant continued to work at Ethan Allen until August 15, 1996 when Dr. Spina took him out of work completely because of persistent complaints of knee pain.*
20. *In 1997 claimant treated with Dr. Spina for right and left knee pain as well as left sided neck, shoulder and upper back pain.*
21. *On November 4, 1997 Dr. Spina wrote: "Richard Dagesse is considered unfit to work at this time. He has a very limited sedentary capacity which will require frequent changes in position and this work is not available."*
22. *Claimant has not worked since 1997.*
23. *In February of 1998 claimant saw Dr. Spina with complaints of left knee and right hip pain. In September of that year he had pain in his neck and upper back and right shoulder pain.*
24. *On October 19, 1998 Parker Towle, M.D. saw the claimant for a neurological consultation. Dr. Towle recorded claimant's history of having been struck two years earlier "on the head and neck by a steel beam...injuring his knees, neck and head requiring him to retire from his carpentry work."*
25. *Dr. Towle noted that claimant's neck pain was continuous and that he developed hip pain from favoring his left leg. Dr. Towle opined that claimant had a "muscle tension state with chronic cervical sprain and chronic pain syndrome." When he*

26. *On May 1, 2000, Dr. Spina performed a left total knee replacement for posttraumatic degenerative arthritis.*
27. *On June 7, 2000, Dr. Spina noted that claimant was under a lot of stress because of his wife's recently illness.*
28. *Claimant continued to treat for bilateral knee pain, right hip pain, high blood pressure and chronic neck pain.*
29. *On September 6, 2001, Dr. Spina noted that claimant's wife's condition had worsened.*
30. *Dr. Spina, in an office note of October 25, 2000, suggested mental health counseling because "his wife is dying and he's unable to work and he still has pain in his legs." He concluded with the addendum, "the patient is still considered unfit to work."*
31. *On June 20, 2001, Dr. Spina found that claimant's left knee was medically stationary with a permanent partial impairment of 50% lower extremity or 20% whole person under the 5th edition of the AMA Guides, table 17-35.*
32. *Claimant's wife passed away in March of 2003.*

Medical Opinions

33. *On June 10, 1996, Dr. Shoemaker examined the claimant for CIGNA Insurance. He opined that claimant had degenerative arthritis in his left knee, which was aggravated by the work incident in February 1995. He attributed the symptoms in the claimant's right knee to an aggravation "through the additional stress following the left knee problem...."*
34. *Dr. Shoemaker saw the claimant for a second evaluation on July 21, 1997 when he again opined that claimant had underlying degenerative arthritis accentuated by the 1995 incident. And, he again noted that the right knee was symptomatic from the stress of putting more weight on it.*

35. *On June 30, 1999, Jonathan Fenton, D.O. performed an evaluation of the claimant at CIGNA's request. His report focuses only on claimant's lower extremity problems. Dr. Fenton recommended a treatment with Syncisc that CIGNA had previously denied. Overall, he opined that claimant had been "extremely undermedicated for pain." On the question of causation, Dr. Fenton opined that claimant's right knee problems were work-related because of the extra stress placed on it by the "severe nature of the left knee injury." He described the claimant as "non-functional" and recommended more aggressive management with medication.*
36. *Finally, Dr. Fenton determined that, if surgery could be delayed, claimant was at maximum medical improvement with 20% impairment of both lower extremities.*
37. *In March of 2001 Virginia Rockhill, Ph.D., clinical psychologist, evaluated claimant with testing and interview. She diagnosed major depression, anxiety and a pain disorder associated with both psychological factors and a general medical condition, all of which she concluded were caused by claimant's work related injuries.*
38. *Dr. Rockhill determined that claimant could not work. Yet she also opined that working would probably improve his depression. In her opinion, claimant's psychological problems will not improve unless his physical condition improves.*
39. *On February 6, 2002, Sikhar Banerjee, M.D. examined the claimant to determine if had reached medical end result and, if so, what degree of permanent partial impairment resulted.*
40. *Dr. Banerjee opined that claimant sustained injuries to his left knee, right knee and lower back in the First Injury in the fall when a beam fell across his legs and that he had reached medical end result. Then, based on the Guides, Dr. Banerjee assessed a 75% impairment of the lower extremity for the left knee, 20% for the right knee, 9% for the cervical spine and 9% for the lumbar spine.*
41. *Dr. Banerjee also determined that claimant sustained an injury to his head and neck in the Second Injury with a resultant 9% cervical rating.*

42. *On May 25, 2002, Dr. Robert Soucy, claimant's primary care physician and Diplomate of the American Board of Family Practitioners, opined the claimant's "psychological conditions of anxiety and depression are directly related to his inability to work and provide for his family. These mental conditions arise from the patient's injuries which occurred at work, first to his knee, then to his head..."*
43. *On June 11, 2002, Melvyn Lurie, M.D., a psychiatrist, evaluated the claimant for the insurer in this case. Dr. Lurie diagnosed posttraumatic stress disorder (PTSD) and major depression. He opined that the cause of the PTSD was the injury of February 1995 when he was hit by a beam in the head and that the cause of the depression is the PTSD and "to some extent the actual injury of 2/16."*
44. *Dr. Lurie further opined that the treatment for the claimant's depression had been inadequate and predicted that his prognosis was good to fair with appropriate treatment. However, at the time of the evaluation, Dr. Lurie noted that claimant clearly could not return to his old job "due to his depression, its motivational component, fatigability and difficulty concentrating." Finally, he opined that claimant's symptoms would make it difficult to return to work in another occupation and that "cognitive deficits might impair him from any gainful employment." Dr. Lurie determined that claimant's work capacity was "nil," a state he suggested would change with proper psychiatric treatment.*
45. *Dr. Lurie was disclosed as an expert defense witness in this case but was never called to testify.*
46. *On December 30, 2002, Lewis Sussman, PsyD., clinical psychologist, interviewed claimant, administered psychometric testing and reviewed the medical records. He found that claimant had posttraumatic stress disorder related to the work related trauma of a beam falling on him. Dr. Sussman based that opinion on the claimant's report of nightmares, flashbacks, anxiety attacks and exaggerated startle response. In his judgment, those symptoms were a barrier to employment.*
47. *A functional capacity evaluation performed on January 6, 2003 by Bradford Shedd, PT at Dartmouth was inconclusive as to*

48. *Victor Gennaro, D.O., an orthopedic surgeon, evaluated the claimant twice for the insurer in this case. He was the insurer's third consultant and its fourth and fifth independent medical examinations. In his opinion, the ratings assessed by Dr. Banerjee are correct, but only the left knee is causally related to claimant's work related incidents. His subsequent attempt to retract the acceptance of Dr. Banerjee's rating was not persuasive.*
49. *On April 14, 2003, Gregory LeRoy, Vocational Rehabilitation Counselor, determined that claimant was entitled to vocational rehabilitation services. However, a month later he determined that no vocational rehabilitation services would enable claimant to return to work because of his orthopedic and psychological problems. Mr. LeRoy filed a VR Closure Report with the stated reason that the disability was too severe, a report this Department approved.*
50. *Claimant is at medical end result for his physical and psychological problems.*
51. *Claimant's attorney filed a request for fees and a copy of a contingency fee agreement. He requests fees of \$27,459, based on 305.10 hours of attorney time at \$90.00 per hour. The supporting invoice is billed in the required 0.10 hour increments, from June 18, 1999 until December 18, 2003. Also, claimant submitted a claim for costs totaling \$1,603.90.*

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*

A. COMPENSABILITY

Knees

3. *Conceded by both parties is the compensability of claimant's left knee condition. Contested at the hearing level, after years of apparent acquiescence on the part of the insurer, is the compensability of the right knee condition, with the carrier now arguing, with the support of Dr. Gennaro, that the right knee condition is unrelated to any work related injury.*
4. *The evidence as a whole supports the claimant's position that the right knee condition is work related. Specifically, Dr. Spina diagnosed an overuse syndrome in the right knee back in December of 1995, supporting claimant's contention that the right knee was overused because of the left knee injury. In 1996 Dr. Shoemaker, who examined the claimant for the insurer, attributed claimant's right knee problem to the additional stress on his left knee. In 1999 Dr. Fenton, who also performed an examination for the insurer, opined that the claimant's right knee problems were work-related because of the extra stress placed on it by the left knee injury. These opinions strongly outweigh the dissenting voice of Dr. Gennaro, obtained after all previous physicians failed to support the defense. Further, the opinions support the well established legal maxim that "[w]hen the primary injury is shown to have arisen out of an in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment..." A. Larson and L.K Larson, 1 Larson's Workers' Compensation Law, ch. 10. at 10-1.*

Neck and Low Back

5. *The records are clear that claimant had neck discomfort and the beginning of a pain condition in his neck and shoulders shortly after the Second Injury, complaints that were consistent with the mechanism of injury when the heavy beam fell on claimant's head. He sought medical care immediately for neck pain and needed physical therapy for some time. The adjuster accepted the compensability of the neck injury and, according to the*

6. *On balance, the evidence supports the claimant's contention that the pain condition that followed in his neck condition was caused, or minimally was aggravated, by the work injury. It is, therefore, compensable. See Stannard v. Stannard Co., Inc. 2002 VT 52 ¶ 10, citing Jackson v. True Temper Corp., 151 Vt. 592, 595, 563 A.2d 621, 623 (1989) ("Our law is clear that the aggravation or acceleration of a pre-existing condition by an employment accident is compensable under the workers' compensation law.")*
7. *After the work related injuries and the torque-effects involved, claimant developed an uneven gait and tight musculature in the back as a compensatory pattern. Dr. Soucy clearly documented such a pattern that accounts for his low back pain and establishes the chain of causation with the work related injuries.*

Psychological Condition

8. *Neck, claimant argues that his anxiety, depression and PTSD are work-related. Defendant attributes those problems to the loss of claimant's wife, not to his work-related injuries. Although it is true that claimant lost his wife some years after his work-related injuries, the medical evidence does not support the defense that her loss accounts for his current psychological condition. In fact, Dr. Lurie, who examined the claimant at the insurer's request before his wife's death, opined that claimant had PTSD as a result of the February 16, 1995 injury and major depression as a result of the PTSD and the injury.*
9. *Almost a year before the claimant's wife's death, Dr. Lurie noted that claimant clearly could not return to his old job "due to his depression, its motivational component, fatigability and difficulty concentrating." He opined that claimant's symptoms would make it difficult to return to work in another occupation and that "cognitive deficits might impair him from any gainful employment." Dr. Lurie determined that claimant's work capacity was "nil," a state he suggested would change with proper psychiatric treatment. But it has not been shown that claimant's condition ever actually improved. In fact, it has remained unchanged since Dr. Lurie's assessment.*

10. *Furthermore, Dr. Rockhill diagnosed claimant with major depression, generalized anxiety disorder and a pain disorder associated with both psychological factors and a general medical condition. She, too, opined that claimant's work related injury was the cause of his psychological problems.*
11. *In 2002, Drs. Sussman and Sevelle found that claimant continued to have PTSD symptoms that presented a barrier to his employment.*
12. *Therefore, the causal connection between claimant's psychological condition and his work related injury has been well established by the unanimous opinions of experts in this field.*

B. PERMANENCY

13. *Next are the questions related to the degree of permanent partial impairment related to the claimant's knees, neck and psychological conditions or whether those work-related condition combine to render him permanently and totally disabled. See *Fleury v. Kessel/Duff Constr. Co.*, 148 Vt. 415, 417 (1987) (permanency benefits may be partial or total).*
14. *As a result of his injuries, claimant seeks permanent and total disability (PTD) benefits pursuant to 21 V.S.A. § 644. Because the injuries at issue predate the odd lot amendment, he is entitled to a PTD award, with a minimum of 330 weeks of compensation, if his injury is within the enumerated list articulated in § 644 or if, without considering individual employability factors such as age and experience, the evidence indicates that he is totally disabled from gainful employment." *Fleury* He must have no reasonable prospect of finding regular, gainful employment.*
15. *Regular employment is "work that is not casual and sporadic." Gainful employment means that one earns wages; it is not charitable work. *Rider v. Orange East Supervisory Union, et. al.* Opinion No. 14-03WC (2003).*
16. *Defendant points to the opinion of Dr. Rockhill, that work would help the claimant's depression, to urge this Department to deny the claim. Indeed, walking might help a depressed person who cannot walk, but wishing does not make it so. Claimant sustained physical and psychological injuries in the course of his*

17. *Under § 640 (a), claimant is entitled to medical payment for the injuries sustained.*
18. *Under 21 V.S.A. § 678 (a), as a prevailing claimant, he is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law.*
19. *To allow for a thorough review of this aspect of the claim, a decision on the attorney fee and cost issue will be deferred for 30 days unless the parties resolve the issue in the interim.*

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to accept this permanent total disability claim.

Dated at Montpelier, Vermont this 11th day of June 2004.

*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.