

Preston v. Cumberland Farms

(September 2, 2004)

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

Mary Preston

Opinion No. 29-04WC

v.

*By: Margaret A. Mangan
Hearing Officer*

*Gallagher Bassett
as Insurer for
Cumberland Farms, Inc.*

*For: Michael S. Bertrand
Commissioner*

State File No. R-02125

*Hearing held in Montpelier on February 26 and April 5, 2004
Record closed on May 3, 2004*

APPEARANCES:

*Joseph C. Galanes, Esq., for the Claimant
John W. Valente, Esq., for the Defendant*

ISSUES:

- 1. Did claimant sustain a psychological injury as a result of the physical injuries she sustained while employed by Cumberland Farms?*
- 2. Is the claimant permanently totally disabled?*
- 3. If not permanently and totally disabled, what degree of work-related permanent partial disability does she have?*

EXHIBITS:

Joint: Medical Records

Claimant: Curriculum Vitae of Rodger Kessler, Ph.D.

Defendant: Independent Vocational Evaluation

CLAIM:

1. *Permanent Total Disability benefits beginning on July 19, 2001 at the rate of \$642.87 per week plus interest at the statutory rate on all unpaid benefits, totaling \$113,323.61.*
2. *In the alternative, Permanent Partial Disability benefits for a psychological injury including interest, totaling \$61,516.71.*
3. *Attorney fees and costs under 21 V.S.A. § 678(a).*

FINDINGS OF FACT:

1. *At all times relevant to this action, claimant was an employee and Cumberland Farms her employer within the meaning of the Workers' Compensation Act.*
2. *Claimant managed the Cumberland Farms store in Morrisville for fourteen years. Before her injury, she often worked 70-hour weeks. She was an energetic, committed and successful manager. Her work included ordering supplies, hiring staff, scheduling, interacting with customers, operating a cash register, balancing receipts, managing staff and generally overseeing the operation. Under her management, the store grew from eight to fifteen employees.*
3. *Claimant experienced several depressing events in her personal life for which she sought counseling.*
4. *On July 4, 1998, a day claimant was scheduled to be off, she went to work. The store was busy and the employees needed help stocking coolers. While claimant was restocking milk coolers, a stack of milk crates began to tip over. In the process of keeping the stack from falling, she hurt her back. The onset of pain was immediate.*
5. *Dr. Philip Kiely, claimant's primary care physician, referred her to physical therapy and to Dr. Vitaletti-Coughlin, a pain specialist. Claimant responded positively to the treatment. Nevertheless, Dr. Vitaletti-Coughlin anticipated behavioral health issues and referred her to specialists at Copley.*

6. *During the fall of 1998, Dr. Vitaletti-Coughlin coordinated claimant's treatment, by administering epidural injections for pain relief and monitoring the physical therapy and behavioral medicine treatment claimant was also receiving.*
7. *During the course of her therapy, it was clear that claimant's pre-existing depression that had followed several traumatic events, resurfaced.*
8. *Gradually, claimant's pain receded and work hours increased, although she had episodes of pain when she overexerted herself.*
9. *Dr. Vitaletti-Coughlin continued to treat the claimant when she had episodes of pain. On March 26, 1999, for example, she examined the claimant after an epidural injection and released claimant to work "two to four hours a day in managerial capacity with no bending, lifting . . . requirements."*
10. *By June of 1999 claimant was working as many as 60 hours a week, by July she was up to 70 hours in some weeks.*
11. *In November of 1999 Dr. Kenneth Ciongoli assessed claimant's permanent partial impairment at 5% whole person for lumbar soft tissue intervertebral disc injury.*
12. *On July 22, 2000 claimant was lifting and moving ice cream containers. As she was turning to move a stack of cartons, the edge of a container caught on a doorjamb, causing an abrupt stop and the onset of extreme back pain.*
13. *Claimant went to an emergency room that day. Since then, she has received treatment for lower back and hip pain and has not worked.*
14. *Claimant returned to Dr. Vitaletti-Coughlin for treatment.*
15. *Over the course of three and a half years, Dr. Vitaletti-Coughlin, administered thirteen epidural injections to treat the Claimant's pain. Claimant received eight courses of physical therapy totaling 200 treatment sessions. She had more than fifty therapy sessions. During that time, she tried numerous medications and has maintained frequent and consistent contact with her primary care physician as well as with Dr. Vitaletti-Coughlin.*

16. *In April of 2001, Dr. George White assessed claimant's impairment at 8% whole person for chronic back pain with lumbar degenerative disc disease.*
17. *Vocational testing showed claimant to have strong verbal, math, basic computer and clerical/administrative skills, strengths in customer service, interest in advocacy, and a general enjoyment of work.*
18. *A functional capacity evaluation of claimant that began in August of 2002 was suspended due to her pain, and then resumed in October of that year. The evaluator determined that claimant gave full effort during the evaluation and concluded that she had a physical work capacity of sedentary. She demonstrated a low tolerance for prolonged sitting, walking or standing. And she was not able to lift a 10-pound box from the floor.*

19. *At defendant's functional capacity test performed on November 20, 2003, claimant was able to lift four pounds and could not exert any force in pushing or pulling activities. She was unable to sit for more than a few minutes and was unable to stand for more than a few minutes. She could not walk safely in a workplace because she frequently lost her balance.*

Vocational Rehabilitation Efforts and Opinions

20. *Vocational Rehabilitation counselor, Paul Langevin, suspended V.R. efforts in January 2003 because of claimant's pain.*
21. *Fran Plaisted, V.R. expert for the defense, opined that if claimant's work capacity increased to six to eight hours per day, she could become gainfully employed, that is she could perform work that is not casual or sporadic and for which she would earn wages. Ms. Plaisted observed that workers who participated in work hardening and multi-disciplinary programs have been able to build up work tolerance safely. However, she could not say that claimant has a work capacity today.*
22. *Ginny Reeves, defendant's expert physical therapist, concluded that claimant lacked sufficient functional capacity to engage in sustained gainful activity.*

Expert Medical Opinions

23. *Dr. Vitaletti-Couglin, who has treated claimant since 1998, described the care claimant received at Copley Hospital in Morrisville for psychological care and physical therapy. In her opinion, requiring claimant to travel to a new rehabilitation program "would off-set any limited, short-lived benefit" because her pain is provoked by sitting.*
24. *In Dr. Vitaletti-Couglin's opinion, claimant has already, unsuccessfully, undergone a multi-disciplinary program and is unlikely to sustain any long lasting benefits from more rehabilitation efforts.*
25. *Rodger Kessler, Ph.D. clinical psychologist, described how dependent claimant had become on work for self worth and how devastated she became when she lost her job. He concluded*

26. *Combining the methodology of the AMA Guides and the workers' compensation disability measurement system adopted in Colorado, Dr. Kessler concluded that claimant suffered a 21% whole person impairment as a result of her depression. Further, he opined that her depression prevented her from engaging in sustained gainful employment. He then added additional percentages for pain.*
27. *George White, M.D. evaluated the claimant twice for the defendant, once on April 10, 2001 and again on February 4, 2004. Dr. White is board certified and trained in the area of occupational medicine and chronic pain. After reviewing this claimant's medical records and examining her, he concluded that claimant could increase her capabilities to a six-hour workday if she participated in rehabilitation program that included a pain program and a strong psychological component.*
28. *Specifically, Dr. White recommended a three-week, multi-disciplinary program of work hardening to advance claimant's work capacity. After such a program, he predicted that she would be able to work in a sedentary capacity six hour per day, five days per week.*
29. *Albert Drukteinis, M.D., a psychiatrist, assessed the psychological impairment as minimal, between 1% to 5%. He found no evidence that psychological factors play a major role in the persistent pain complaints and physical limitations because the FCE showed full physical effort and reasonable and reliable reports of pain and disability. Although he agreed that claimant has evidence of a major depressive disorder with anxiety features, he opined that those problems preceded the work related injuries.*
30. *In Dr. Drukteinis's opinion, claimant's impairment is due to physical, not psychological, factors. With physical whole person impairment of 5% to 8%, he found it counterintuitive that a secondary psychiatric impairment could be 3 to 4 times greater, as assessed by Dr. Kessler. Based on the testing performed, he concluded that claimant does not have a significant*

31. *Dr. Drukteinis determined that claimant's depression does not significantly impair her activities, of daily living, social functioning, concentration, persistence or social adaptation.*

Attorney Fees and Costs

32. *Claimant submitted her contingency fee agreement with her attorney and evidence of costs incurred of \$4,213.03.*

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. Claimant contends that she is entitled to permanent total disability (PTD) benefits under 21 V.S.A. § 644. She argues that she has no reasonable prospect of finding regular, gainful employment because of her work related injuries. See § 645(a).*
- 5. Clearly, claimant has proven that she injured her back in the course of her employment with Cumberland Farms and that the injuries caused back pain.*
- 6. However, she has not proven that her work related injuries caused her to be permanently and totally disabled. The crux of this permanent total disability claim is claimant's depression. However, that depression predated her work related injury, as Dr. Drukteinis cogently explained. Furthermore, because that depression does not significantly impair her activities, of daily living, social functioning, concentration, persistence or social adaptation, Dr. Kessler's 21% rating cannot be accepted.*
- 7. The most reliable and objective opinion on this issue is from Dr. Drukteinis, who opined that claimant's depression predated her work related injury and that it does not totally disable her. The most appropriate psychological rating, as Dr. Drukteinis assessed, is 5% whole person impairment. In addition, she is*

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law,

- *Claimant is awarded an 8% whole person rating for her back injuries and 5% for her psychological injuries.*
- *Her claim for permanent total disability benefits is denied.*

Dated at Montpelier, Vermont this 2nd day of September 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.