M. D. v. F. R. Lafayette (May 21, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

M. D.

v.

F. R. Lafayette, Inc.

Opinion No. 21-08WC

By: Phyllis Phillips, Esq.
Contract Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. Y-04643

OPINION AND ORDER

Hearing held in Montpelier on February 28th and March 13th, 2008.

APPEARANCES:

Frank Talbott, Esq. for Claimant
James O'Sullivan, Esq. for Defendant

ISSUE PRESENTED:

Whether Claimant's June 29, 2007 injury arose out of and in the course of his employment, and if so, to what workers' compensation benefits is he entitled.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records
Joint Exhibit II: Nextel Phone Log
Joint Exhibit III: Daily Time Sheet
Joint Exhibit IV: Mike Wagner Statement
Joint Exhibit V: Doug Ford Memo

Claimant's Exhibits:

Claimant's Exhibit 2: Mapquest Map

Defendant's Exhibits:

Defendant's Exhibit A: Dr. Glassman Report, February 25, 2008

CLAIM:

Temporary total disability benefits under 21 V.S.A. §642
Medical benefits under 21 V.S.A. §640(a)
Additional workers' compensation benefits as proven
Attorney's fees, costs and interest under 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings Claimant was an employee of Defendant and Defendant was an employer as those terms are defined by Vermont's Workers' Compensation Act.

2. Claimant has worked as a laborer for Defendant off and on for six years, his most recent stint beginning in 2006. Defendant is in the business of installing roadside guardrails, fencing, curbing and highway signage.

3. In June 2007 Claimant became the working foreman of a small work crew. In accordance with Defendant's company policy, as foreman Claimant was assigned a company pickup truck to be used to carry tools, equipment and other crew members to and from the various job sites. Defendant performs roadwork throughout the state, and it often has its work crews assemble directly at a work site rather than report in to its Essex Junction home office, or "yard" first. Thus, it is not uncommon for a foreman to come to the yard at the end of one day, load up the pickup truck with materials for the following day's job, then travel directly to the job site on the next day, picking up his crew members along the way.

4. The truck Claimant was assigned was a Ford F-150 crew cab pickup. As was the case with all of the foremen's trucks, Claimant understood that it was a company vehicle and was not to be used for personal business. The truck was owned, serviced and maintained by Defendant.

5. Claimant testified that at some point after being assigned the pickup truck he began to smell exhaust fumes. He testified that Defendant's mechanic had diagnosed a cracked manifold and had ordered a new one. In the meantime, Claimant continued to drive the vehicle.

6. On the morning of Friday, June 27, 2007 Claimant drove the pickup truck from his home in Highgate to the yard, where he loaded it with material for a job. Tony Daniels, a member of Claimant's crew, then drove the truck to a job site to deliver the materials. Both men were back at the yard by 2:30 PM. Mr. Daniels left for the weekend at that point.

7. At 2:30 PM Claimant began loading his pickup with materials for a small job he had been assigned in Richford by Doug Ford, Defendant's president and co-owner. Claimant testified that he intended to go by himself to Richford that afternoon, work until dusk, and then return to finish the job on Saturday, when another employee, Mike Wagner, would be available to assist him. Mr. Ford contradicted this testimony, however. According to him, there would be no reason for Claimant to go to the Richford work site by himself on Friday evening, as it was a two-person job that would only take two hours to complete. Mr. Ford testified that it would have been "foolish" for him to pay for Claimant to drive to and from the Richford site on Friday evening, and then pay him again to return there on Saturday morning with Mr. Wagner. Rather, Mr. Ford intended for Claimant to load his truck with the Richford materials on Friday evening, drive home with them to Highgate and then travel directly to the job site on Saturday so that he and Mr. Wagner could take care of the job together.

8. In either event, on Friday afternoon Claimant and Mr. Wagner set about loading his pickup with the necessary materials for the Richford job. Claimant testified that after they had done so, he heard that Defendant's mechanic needed the truck as he was planning to replace its cracked manifold on Saturday. Claimant and Mr. Wagner unloaded the Richford materials and reloaded them onto another, smaller company truck, a Silverado. Having done so, however, Defendant's mechanic approached Claimant and advised that he would not be working on Claimant's truck on Saturday after all. Claimant needed his truck for a job he was starting in Morrisville on Monday, one to which he would be driving directly from home and picking up crew along the way and therefore one for which the smaller Silverado would not do. Claimant had no choice, therefore, but to unload the Silverado and reload the Richford materials back onto his pickup.

9. Claimant testified that he turned in his time card for the week at around 3:30 PM, after he and Mr. Wagner had unloaded the Richford materials from his pickup truck and loaded them into the Silverado, but before he decided to reload them back onto his pickup. According to Claimant, it was sometime after 3:30 PM, therefore, when he finally finished working for the day.

10. Mr. Wagner testified that while he and Claimant were loading, unloading and then reloading Claimant's pickup, Claimant received numerous cell phone calls. Claimant's cell phone records document that he received a number of brief telephone calls, many from the same number, between 2:59 PM and 5:05 PM. Mr. Wagner testified that during some of these calls Claimant was yelling at whomever he was talking to and kept hanging up on the caller. To Mr. Wagner's eye Claimant appeared to be arguing. Claimant had a more benign explanation, however. The caller was his civil union partner, Danny Wilson. Mr. Wilson was trying to keep Claimant abreast of arrangements he was making to pick up his aunt's car in Burlington, but the cell phone signal was poor and the calls kept getting cut off.

11. Mr. Wagner testified that he and Claimant had finished loading, unloading and reloading Claimant's pickup truck by about 3:30 PM. After that, Mr. Wagner recalled that Claimant left the yard and returned two or three times, the last time at about 4:45 PM.

12. Claimant testified that he left the yard and returned once after he and Mr. Wagner finished reloading his pickup. After leaving initially, his partner Danny called to say he had run out of gas. Claimant returned to the yard to get a gas can. When Danny called back to advise he had found a jug for gas himself, Claimant left the yard again.

13. Claimant testified that after leaving the yard he proceeded to Route 7, where he traveled north towards Chimney Corners in Milton, a distance of about ten miles. By the time he reached Chimney Corners, he was feeling dizzy and nauseous. He pulled into a parking lot and vomited. Feeling somewhat better, he got back into his truck and proceeded onto Interstate 89, heading north towards Exit 20. This would have been the appropriate exit either to Richford, where Claimant testified he intended to work for a couple of hours in preparation for Saturday's job, or to Highgate, where he lived.

14. Approximately three or four miles after entering the interstate from the Milton on-ramp, as he approached the bridge over the Lamoille River, Claimant drove his truck off the road, down a 100-foot embankment and into the river. Passing drivers immediately stopped and called for emergency assistance. By the time bystanders made their way down the embankment Claimant had extricated himself from the truck and was in the water.

15. Claimant testified that he has no recollection whatsoever of driving off the bridge. The last thing he recalls is driving on the interstate and approaching the knoll preceding the bridge, and then waking up in the water.

16. Claimant was transported by ambulance to Fletcher Allen Health Care, where he remained hospitalized for five days, until July 4, 2007. He sustained multiple left-sided rib fractures and a ligamentous cervical spine injury. As a result of these injuries Claimant was totally disabled from working at least until December 26, 2007. Claimant underwent a functional capacities evaluation on that date and was found to be capable of full-time work in the light to medium classification. This determination would not have allowed Claimant to return to work in his pre-injury job for Defendant, as that job is classified as involving heavy work.

17. As for current medical treatment, Claimant testified that he continues to attend physical therapy. He has been advised by his treating physician that he can return to work so long as he complies with the light- to medium-work restrictions recommended in the December 26, 2007 functional capacities evaluation. Claimant testified that he has been conducting a good faith search for suitable work since December 2007. He has submitted more than twenty job applications but has yet to be hired.

18. In August 2007 Danny Wilson began working at the McAllister goat farm in Highgate. Claimant admitted that he often accompanies Mr. Wilson to the farm, and either sits or walks around for exercise. More recently, Claimant has been assisting Mr. Wilson with feeding the baby goats. Claimant denied receiving any payment for helping Mr. Wilson with this chore and Defendant did not submit any evidence to establish that he did.

19. The circumstances surrounding Claimant's plunge off the interstate and into the Lamoille River remain unclear, and the parties each have posited a different explanation. Claimant's theory is that he suffered carbon monoxide poisoning as a result of the truck's cracked manifold and passed out from breathing exhaust fumes. This theory is undermined somewhat by the following facts:

- Both Claimant and Tony Daniels had driven Claimant's pickup truck for as much as an hour and a half earlier in the day with no ill effects;

- Carbon monoxide poisoning was never diagnosed during Claimant's hospitalization, nor did Claimant receive any treatment for it during his hospital course; and

- According to Defendant's medical expert, Dr. Glassman, blood tests taken little more than an hour after Claimant's accident showed his carboxyhemoglobin level to be within normal limits and well below the level required in order for carbon monoxide poisoning to be diagnosed.

20. Of note, Dr. Glassman's report does not address how quickly a person might be overcome by carbon monoxide poisoning after being exposed to exhaust fumes and how long it might take for the level of carboxyhemoglobin in the blood to return to acceptable limits thereafter.

21. Defendant's theory as to the cause of Claimant's accident looks to emotional rather than physical factors. Defendant believes that Claimant was attempting suicide when he drove off the interstate bridge.

22. Defendant's theory finds its primary support in two entries from Claimant's hospitalization records. First is a note from a hospital resident, E. Blackburn, dated July 4, 2007, Claimant's discharge date:

> "Spoke with patient. He feels that he is safe to go home this pm. Ride is arranged. He denies any suicidal thought or intent to hurt himself or others. I have discussed this with social worker on call and charge nurse on floor. We will proceed with [discharge] home."

23. Immediately following this note is an entry from another clinician, labeled "psychiatric consult contact note," dated July 5, 2007:

> "Called earlier (last eve) to eval patient for statements of a passive death wish nature. 'I wish they didn't rescue me from the water,' and patient admitted to driving car off bridge with unclear circumstances. Told on-call resident Blackburn that psychiatric eval would not be done quickly given extremely busy psychiatric service and to delay discharge. Patient did not receive psychiatric eval and psychiatric resident not informed of patient's discharge."

24. Defendant cites to a third record, a physical therapy database note stating that Claimant "lived with partner – now recently separated," as providing the presumed basis for Claimant's despondency – a breakup with Danny Wilson, his civil union partner. In that same context, Defendant points to Mr. Wagner's observations of Claimant in the hour before he left the yard on the day of his accident, during which he witnessed Claimant yelling into the phone and repeatedly hanging up on Mr. Wilson. Defendant contends that the most reasonable inference from all of these facts is that Claimant became depressed and suicidal after fighting with Mr. Wilson and intentionally drove himself off the interstate bridge.

25. Claimant denied both that he was depressed or suicidal at the time of the accident and that he and Mr. Wilson had fought or were in the process of separating. He testified that his "I wish they didn't rescue me from the water" comment was prompted by financial concerns. Claimant testified that a nurse had told him he would be laid up for six to twelve months. Pam Lafayette, one of Defendant's principals, already had advised him that his accident would not be covered by workers' compensation, and he did not understand that his group health insurance coverage would continue. Mr. Wilson was unemployed at the time, and Claimant was the sole source of income for the household. Claimant testified that he despaired at the prospect of a lengthy hospitalization with no insurance to cover his medical expenses and no income with which to pay the bills and support his family. He believed he was facing "financial ruin."

26. As for the physical therapy database reference to Claimant having recently separated from his partner, both Claimant and Mr. Wilson testified credibly that this was not the case, that they had not fought on the day of the accident and that neither was contemplating separation. Other hospital records corroborate this testimony, stating that Claimant lives "with his partner, Danny." Notably, as of the date of the formal hearing, nearly a year later Claimant and Mr. Wilson remain together.

CONCLUSIONS OF LAW:

1. Defendant alleges two barriers to compensability in this claim. First, Defendant argues that Claimant's injury did not occur in the course of his employment, either because it occurred during his regular commute home or because it included a personal deviation. Alternatively, Defendant argues that Claimant's accident resulted from his deliberate attempt to injure himself and therefore his claim is barred by 21 V.S.A. §649. Both of these arguments fail, the first one because it is not supported legally, the second because it is not supported factually.

2. As a general rule, an employee is not entitled to workers' compensation benefits if he or she is injured off the employer's premises while "coming and going" to work. *Brown v. S.D. Ireland Concrete Construction Corp.*, Opinion No. 02-04WC (January 21, 2004), citing 1 *Larson's Workers' Compensation Law* §13.01. There is an exception to this rule, however, if the employee performs some service for the employer while en route to or from work, thus providing a "dual purpose" for the journey. 1 *Larson's Workers' Compensation Law* §16.09. One instance in which such a dual purpose can arise is where the employee transports materials for the employer, thus saving the employer from having to make a special trip to do so. If the service thus provided by the employee is significant enough to benefit the employer, by facilitating the progress of the employer's work, then an injury suffered during the commute is compensable. *Id.* at §16.09[4][b]. If the practice is a repeated and regular one, such that the employer comes to rely on it routinely, the rationale for applying the exception is even further bolstered. *Id.* at §16.09[4][d].

3. There is no dispute here that Claimant was transporting materials for the Richford job at the time of his accident, that he was doing so at Defendant's direction and in accordance with its routine expectations and that Defendant directly benefited as a result. This is true whether Claimant was on his way directly to Richford to begin the job Friday evening, as he testified, or whether he was to go to Richford directly from his home in Highgate on Saturday morning, as Mr. Ford testified. In either event, Claimant furthered Defendant's business purpose by carrying the Richford materials with him on Friday evening. Had he not done so, Defendant would have had to make less efficient arrangements to get the materials to the job site, either by having another employee deliver them or by having Claimant make a special trip to Essex Junction to get them on Saturday morning. Defendant would be hard pressed to deny the benefit that inured to it by having Claimant transport the Richford materials directly from home to the job site. The dual purpose nature of Claimant's trip is thus clearly established. *See Brailsford v. Time Capsules*, Opinion No. 12-00WC (May 17, 2000) (citing the exception with approval but finding insufficient facts upon which to apply it).

4. Nor does it matter that Claimant may have not have started his commute home immediately after finishing work on Friday afternoon, but rather might have been delayed by personal phone calls or deviated to retrieve the gas can for his partner first. By the time the accident occurred, any personal deviation had ended and he had returned to the dual purpose nature of his commute. *Id*. at §14.07[4] and cases cited therein. The injuries he suffered as a result of that dual purpose trip occurred in the course of his employment.

5. As for Defendant's argument that Claimant's claim is barred under 21 V.S.A. §649 because he deliberately acted to injure himself, I find this defense factually unconvincing. It would be sheer conjecture to infer that Claimant was despondent and suicidal over a break-up with his partner on the basis of the meager evidence presented. Defendant had the burden of proof on this issue, and it failed to sustain it.

6. Having established the compensability of Claimant's injuries, it remains to determine the benefits to which he is entitled. The medical evidence as to Claimant's disability from working until at least December 26, 2007 was uncontradicted. Defendant has produced no evidence of end medical result and no evidence to contradict Claimant's assertion that he has been conducting a good faith search for suitable work since being released to do so by his doctor. Under 21 V.S.A. §642 Claimant is entitled to temporary total disability benefits from June 30, 2007 forward.

7. Claimant has submitted evidence of costs totaling $153.60 and attorney's fees totaling $7,901.50. An award of costs to a prevailing claimant is mandatory under 21 V.S.A. §678, and therefore these costs are awarded. As for attorney's fees, these lie within the Commissioner's discretion. I find that they are appropriate here and therefore these are awarded as well.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to pay:

1. Temporary total disability benefits from June 30, 2007 forward, such benefits to continue until Defendant produces sufficient evidence to justify their discontinuance or until Claimant returns to work;

2. Interest on the above in accordance with 21 V.S.A. §664;

3. Medical benefits in accordance with 21 V.S.A. §640(a) covering all reasonably necessary medical services and supplies causally related to treatment of Claimant's June 29, 2007 injury;

4. Permanent partial disability benefits as proven in accordance with 21 V.S.A. §648;

5. Vocational rehabilitation benefits as proven in accordance with 21 V.S.A. §641; and

6. Costs of $153.60 and attorney's fees of $7,901.50.

DATED at Montpelier, Vermont this 21st day of May 2008.

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Patricia Moulton Powden
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.