R. G. v. Verizon (June 5, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

R. G.

v.

Verizon

Opinion No. 22-08WC

By: Jane Gomez-Dimotsis
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. R-22786

OPINION AND ORDER

APPEARANCES:

Erin Gallivan, Esq. for Claimant
Keith Kasper, Esq. for Verizon (at hearing)
J. Christopher Callahan for Verizon/post-hearing

ISSUES:

1. Whether the Claimant is permanently totally disabled under the Odd Lot Doctrine.
2. Claimant is requesting Attorney's fees and costs.

EXHIBITS:

Joint Medical Exhibit
Vocational Rehabilitation Reports
LeRoy Report and CV
Dr. Stephen Mann CV
Dr. Bucksbaum CV
Louise Lynch CV
Scott Miller Deposition Transcript

STIPULATED FACTS:

1. In May 2001, Claimant was an employee of Defendant within the meaning of the Vermont Worker's Compensation Act.

2. In May 2001 Claimant suffered a personal injury by accident arising out of his employment with Defendant, where he fell off the back of his Verizon truck, injuring his left shoulder and neck.

3. In October, 2001, Claimant had surgery on his neck. Dr. Joseph Corbett performed an anterior cervical discectomy and interbody fusion at C5-6.

4. This surgery was unsuccessful.

5. In March of 2002, Dr. Corbett performed a second surgery to implant a BAK/C cage at C5-6.

6. The second surgery was also unsuccessful because the BAK/C cage was not placed correctly.

7. In September 2002, Claimant sought a second opinion from Dr. Robert J. Blanco at New England Baptist Hospital in Boston, Massachusetts.

8. Claimant had a third surgery on November 21, 2002, wherein Dr. Blanco removed the misplaced BAK/C cage and performed a corpectomy, placing a Pyramesh cage at C5-6 and C6-7 with autograft and Atlantis plate.

9. Claimant suffered ongoing pain, limitations of motion and complications as a result of the work injury and three surgeries.

10. Claimant has not been able to work at Verizon since September 2001 due to the work injury and complications.

11. Claimant began working at Verizon in 1999.

12. At Verizon, Claimant worked as a Splice Technician and in Special Services, two jobs which involved fixing phone and phone line problems out in the field. Both jobs are classified as heavy duty jobs.

13. Claimant's average weekly wage at the time of the injury was $576.04 per week.

14. Claimant graduated from high school in 1988.

15. Claimant was honorably discharged from the Marines in 1992.

16. Claimant attended four years of college but has no degree.

17. Claimant's prior work history is medium to heavy duty work.

18. Claimant is precluded from performing medium to heavy duty work.

FINDINGS OF FACT:

1. The Claimant is 36 years old and recently married. Due to his accepted work injury and his surgeries he credibly testified he experiences the following symptoms; dysphonia (hoarseness), dysphagia (difficulty swallowing), sensations of choking, difficulty breathing, difficulty eating, dizziness, myofascial pain, cervical pain, cervical stiffness and lack of movement, chronic muscle pain in his upper back and neck, depression, migraine headaches, occasional pain in both arms and hands, burning numbness in three fingers of his left hand, soreness and burning pain in his left arm, extreme difficulty sleeping, and difficulty lifting his arms above his chest.

2. The Claimant credibly testified about how the high levels of pain and symptoms he experiences each day frustrate his efforts to accomplish tasks.

3. The Claimant has undergone numerous treatment modalities which have had little success including: multiple surgeries; massage therapy; nerve ablation; Dr. Stephen Mann's ODMC program; numerous drug treatments; counseling for depression and various medications for depression. In September of 2007, the Claimant underwent ulnar decompression surgery to alleviate burning and numbness in some fingers on his left hand and upper left side.

4. This claim is for permanent total benefits. There are only a few issues disputed by the Defendant in this claim regarding the critical issues. The first concerns whether the Claimant can work on a part-time basis intermittently and whether this would meet the criteria for gainful employment. The second issue is whether vocational rehabilitation efforts have been exhausted and third, whether the Claimant is at medical end result for his latest surgery and his depression. All of these issues relate to whether or not the Claimant can be found to be permanently totally disabled.

5. Regarding the first issue of whether the Claimant can work on a part-time basis, Dr. Stephen Mann, a psychologist, performed an Independent Evaluation on the Claimant as well as treating him for approximately two years. His testimony was that the defendant may be able to do some work on a part-time basis if the employer is remarkably accommodating, the work is intermittent and the employer is benevolent and understanding.

6. Dr. Mark Bucksbaum, a certified independent medical examiner who has testified many times at workers' compensation hearings conducted two Independent Medical Evaluations on the Claimant as well as treating him for several years. He testified that the Claimant can only work in a highly structured environment where they don't care about the quality or reliability of the work. His other suggestion was for the Claimant to volunteer somewhere but only when he felt able to do so. Dr. Bucksbaum's opinion was based both on the fact that it is medically unsafe for the Claimant to engage in either sedentary or light work and that the Claimant is only able to work intermittently because of his pain. It is unsafe for the Claimant to work because the ulnar decompression surgery on his upper extremity left the nerve unprotected from further injury. Dr. Bucksbaum is found to have credibly determined that the Claimant was at medical end result for his injuries on June 15, 2005.

7. The Claimant testified regarding the incredible amount of pain he endures on a daily basis. He does try to do basic work around the home. However, this involves frequently stopping to rest or to lie down. The Claimant wants to work and his wife confirmed that fact in her credible testimony.

8. Ms. Louise Lynch, a physical therapist and functional capacity evaluator, conducted a three day Functional Capacity Evaluation (FCE) on the Claimant. She found he could work an eight hour day but that there might be entire months when he could not work at all. Louise Lynch concluded the Claimant could not work on consecutive days even on a part-time work schedule and that there would always be days when his symptoms would prevent him from having any work capacity. She did find, however, that the Claimant had a light work capacity with many restrictions when he was able to work.

9. The Claimant also attended a half day FCE with Ginny Woods, a physical therapist with Mount Ascutney's Ergo Science Division on May 1, 2007. The results were different than those of Louise Lynch's conclusions. Ms. Woods concluded that the Claimant had the capacity to perform light work for an eight hour day, forty hours per week. The major difference in these opinions is the length of time the functional capacity test lasted. Ginny Woods' evaluation was only for a half day. Louise Lynch tested the Claimant over a three day period and observed the Claimant's abilities decline each day. The testing was also much more comprehensive. There is no dispute that the Claimant is able to sustain some level of activity for a short number of hours. However, medical experts have opined that the Claimant could not sustain a work level for consecutive days even on a part-time basis.

10. Claimant worked with vocational rehabilitation counselor William O'Neil from early in 2004 through late 2005. An Individual Written Rehabilitation Plan was developed in September of 2004. The goal was to train the Claimant to be a property or estate manager. The Claimant complied with the requirements of the plan and took courses in both Master Composting and Master Gardening. However, he was unable to obtain or sustain suitable employment, despite the efforts of Mr. O'Neil and the benevolent employer for whom he worked. Even though the employer allowed the Claimant to work on his own schedule and do only what he was capable of doing, the employer concluded that the Claimant was too unreliable and inconsistent due to his work related injuries which resulted in severe limitations regarding his ability to function. Mr. O'Neil suspended vocational rehabilitation efforts because it was apparent that the Claimant was not going to find suitable work.

11. Claimant testified credibly about his inability to sustain any work, even sedentary work, due to his pain. Greg LeRoy, a vocational expert, testified that the Claimant would be unable to be sufficiently productive even in a home based environment. He found he was not capable of gainful employment.

12. The second issue concerns whether the Claimant is at medical end for his surgeries and depression. Defendant argues that Claimant is not at medical end result both for his latest surgery and depression. Claimant is still healing from his last surgery for the ulnar nerve decompression surgery. However, Dr. Bucksbaum credibly testified that the outcome of the ulnar decompression surgery will not change the Claimant's medical restrictions for his ability to function because the surgery moved the nerve from its naturally protected area and left it unprotected from further injury. It is not disputed that Claimant is at medical end result for his neck injury which is the source of most of his pain.

13. Claimant was found to be depressed by Dr. Stephen Mann and others. He is depressed and has considered suicide in the past. He is not currently treated for his depression. However, Dr. Mann treated the Claimant for over two years for depression and the Claimant has tried various anti-depressant medications without result. Both Dr. Mann and Dr. Bucksbaum have found that Claimant's depression is caused by his pain and that he will continue to have pain. Both doctors do advocate for continued treatment of Claimant's depression to prevent any future suicidal ideation. However, both Dr. Bucksbaum and Dr. Mann testified that although further medical treatment might improve the Claimant's depression, no significant improvement is expected.

14. Prior to Meub Associates, Inc. being involved in this case as the Claimant's attorneys, the law firm of Ryan, Smith and Carbine was handling the case. There is an agreement between these firms to split any attorney fees and costs if the Claimant prevails. The insurance adjuster should be aware of this agreement and not distribute fees without a full understanding of this agreement.

15. The Claimant's reasonable attorneys' fees were $90.00 per hour for a total of 427.15 attorney hours. The Claimant also expended 165.9 paralegal hours at $60.00 per hour. Costs were amended to $28,646.41 in response to objections from the Insurer's Counsel. The fees are to be divided between the firms of Meub Associates, Inc. and Ryan Smith and Carbine pro rata according to time spent by each firm. (Meub Associates, Inc. spent 370.55 hours of attorney time and all paralegal hours and Ryan, Smith and Carbine spent 56.6 hours of attorney time on the instant case.)

CONCLUSIONS OF LAW:

1. The Department finds the Claimant cannot presently work at gainful employment due to his work related injury based on the credible testimony of the Claimant and his witnesses. The Defendant did not present any defense witnesses but did lengthy cross-examinations on Claimant's witnesses including the Claimant, himself. 21 V.S.A. § 644(b). WC Rule 11.3100 (Odd Lot Doctrine.) The Odd Lot Doctrine recognizes that if Claimant's physical condition rises to the level where he or she cannot work at "gainful" employment but does not fit in one of the enumerated categories in the statute, then he or she may still be eligible for permanent total disability. Regular gainful employment shall refer to regular employment in any well-known branch of the labor market. This rule requires, inter alia, consideration of the Claimant's age, experience, training, education, occupation, and mental capacity, physical and mental limitations and/or pain.

2. The Odd Lot Doctrine applies if a worker cannot return to gainful employment without suffering substantial pain rendering him unable to perform any service for which a reasonably dependable market exists. To qualify as substantial, the pain accompanying routine tasks must be serious, intense and severe. *Hill v. L.J. Ernest, Inc.*, 568 So. 2nd 146, 152 (1990). The Department finds in the instant case, based on credible testimony presented, the Claimant's pain is so severe he cannot perform any gainful employment even on a part-time basis and his treating physician has credibly opined that such work may be injurious to his future health.

3. The Department finds credible experts agree the Claimant is unable to do work that is not casual, sporadic or charitable which means that he cannot engage in gainful and regular employment. *Rider v. Orange East Supervisory Union*, Op. No. 14-03WC (2003); *Larson's, Desk Edition §* 83.01 (2007). Regular, gainful employment shall not apply to work that is so limited in quality, dependability or quantity that a reasonably stable market for such work does not exist. *See* WC Rule 11.3100. Thus, the Department finds that the Claimant is unable to perform regular, gainful employment due to his pain and the fact that such work would be harmful to his condition since his ulnar decompression surgery left his nerve more exposed.

4. The Department finds the medical treating doctors to be more credible and knowledgeable about Claimant's condition than those persons who conducted the functional capacity examinations.

5. The Department also finds credible the experts who agree that vocational rehabilitation was unsuccessful and will not be successful until or unless something new is found to relieve the Claimant of his pain.

6. The Department finds the Claimant is, under the definitions under the Workers' Compensation statutes and rules, at medical end result for his psychological depression and his medical status based on expert testimony. Based on credible expert testimony, the Department finds any improvement to Claimant's upper extremity through the healing process will not alter the fact that Claimant is permanently and totally disabled. This is based on the credible testimony of Claimant's expert, Dr. Bucksbaum. The Claimant's depression is related to his pain and has not improved after treatment. *See* Worker's Compensation Rule 2.1200 (Claimant is at medical end result (MER) if significant improvement is not expected regardless of treatment.) The experts' credible testimony is that even though the Claimant could benefit from treating his depression, the pain he feels will prevent significant improvement.

7. Claimant has met his burden of establishing that he is permanently and totally disabled under Vermont case law. *Egbert v. Book Press,* 144 Vt. 367 (1984). Based on the credible testimony of Dr. Bucksbaum the Department finds that the Claimant was at medical end result as of June 15, 2005.

ORDER:

The claim should be adjusted as follows;

1. Claimant should receive permanent total disability benefits backdated to June 15, 2005 including statutory interest. The first 330 weeks plus interest will be awarded in a lump sum.

2. The Claimant's reasonable attorneys' fees should be paid and were $90.00 per hour for a total of 427.15 attorney hours. The Claimant also expended 165.9 paralegal hours at $60.00 per hour. Costs were amended to $28,646.41. The fees are to be divided between the firms of Meub Associates, Inc. and Ryan Smith and Carbine pro rata according to time spent by each firm. (Meub Associates, Inc. spent 370.55 hours of attorney time and had all paralegal fees and Ryan, Smith and Carbine spent 56.6 hours of attorney time on the instant case.)

DATED at Montpelier, Vermont this 5th day of June 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.