

Joanne Hurley v. NSK Corporation

(March 4, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Joanne Hurley

Opinion No. 07-09WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

NSK Corporation

For: Patricia Moulton Powden
Commissioner

State File No. W-03503

OPINION AND ORDER

Hearing held in Montpelier on June 30, 2008 and October 20, 2008
Record closed on December 10, 2008

APPEARANCES:

Jonathan Cohen, Esq., for Claimant
Kaveh Shahi, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant permanently and totally disabled as a result of her October 2004 work-related injury?
2. If Claimant is not permanently and totally disabled, what is the extent of her permanent partial disability?
3. If Claimant is not permanently and totally disabled, is she entitled to vocational rehabilitation services?

EXHIBITS:

Joint Exhibit I: Medical records
Joint Exhibit II: Vocational rehabilitation records

Claimant's Exhibit 1: Report of Accident, 10/27/04 (2 pages)
Claimant's Exhibit 2: Job search record

Defendant's Exhibit A: Surveillance video (CD)

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. §644; or
Permanent partial disability benefits pursuant to 21 V.S.A. §648; and
Vocational rehabilitation benefits pursuant to 21 V.S.A. §641;
Attorney's fees and costs pursuant to 21 V.S.A. §678(a)

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.
3. Claimant is high-school educated. Prior to working for Defendant, she was a licensed nursing assistant for more than fourteen years. Claimant has no other relevant training or work experience.
4. Claimant began working for Defendant, an automobile steering component manufacturer, in 1993. During her tenure there, Claimant worked in various positions on different assembly lines.

Claimant's Injury and Initial Medical Treatment

5. In October 2004 Claimant was working on the "Mazda" line. As part of the assembly process she often had to hammer the steering columns either to the right or to the left in order to position them appropriately. As a result of this activity, Claimant began to experience pain and numbness in her hands. Claimant reported her symptoms to Defendant. Defendant accepted Claimant's injury as compensable.
6. Claimant was diagnosed with bilateral carpal tunnel syndrome. In December 2004 Dr. Wheeler performed surgical releases bilaterally. Following the surgeries, Claimant returned to work full time, modified-duty in January 2005. By May 2005 she had been released to full duty work without restrictions.

Claimant's Post-Surgical Course

7. Some of Claimant's symptoms resolved with surgery, but over time she began to experience pain and pressure in her palms and shooting pains into her fingers. In January 2006 Defendant referred her to Dr. Lefkoe, a physiatrist, for evaluation and treatment. Claimant reported that her hands felt like "hoofs" and that her palms hurt all the time, particularly with direct pressure or percussion. Dr. Lefkoe noted that despite these symptoms Claimant was able to continue working full time and full duty.

8. As treatment for Claimant's ongoing symptoms Dr. Lefkoe prescribed Lyrica, a medication used to address neuropathic pain. Neuropathic pain is a burning pain caused by trauma to a peripheral nerve. It is different from the "typical" pain associated with carpal tunnel syndrome.
9. By June 2006 Dr. Lefkoe reported that while Claimant's palms continued to ache most of the time, she had had no further episodes of sharp pain and was tolerating work on her regular assembly line well. Dr. Lefkoe advised Claimant to continue with Lyrica and to follow up with him as needed.
10. In July 2006 Dr. Wheeler determined that Claimant had reached an end medical result with 0% permanency. He reported that Claimant wished to build strength in her hands, but otherwise had full range of motion bilaterally and appeared "very alert and healthy and has good spirit."
11. Unfortunately, by September 2006 Claimant again was reporting ongoing hand pain, a constant dull ache even at rest, and sharp shooting pains into her fingers with job tasks involving pushing, torquing and heavy lifting. At the referral of Defendant's company physician, Dr. Timura, Claimant underwent a course of physical therapy to decrease her hand pain and increase her strength, but to no avail. The physical therapist reported that Claimant's hands were so hypersensitive that she could not tolerate ice, massage or other desensitization therapies.
12. In October 2006 Claimant stopped working, as Defendant was unable to provide work within the modified-duty restrictions that Dr. Timura had imposed. In January 2007 Defendant terminated Claimant's employment. Claimant has not worked since.
13. After physical therapy failed to alleviate Claimant's symptoms, Dr. Timura next referred her to Dr. Mann, a psychologist, for evaluation. Dr. Mann is the director of the Occupational Disability Management Center (ODMC), a multidisciplinary rehabilitation program. In his initial evaluation, Dr. Mann observed that Claimant was "extremely focused on her hands" and maintained them in an unusual claw-like position throughout her interview, a sign that he interpreted as evidence of both physical and emotional decompensation. Dr. Mann attributed this behavior to Claimant's ongoing hand pain and what she perceived to be a poor response to her prior carpal tunnel release surgeries. As he described it,

It is more than likely that Ms. Hurley feels intensely anxious, disappointed, angry and fearful towards her postoperative experiences. These feelings are not acceptable and remain suppressed. As a result physical symptoms increase and present dramatically. This is not a conscious amplification or symptom magnification mechanism. Ms. Hurley is a hardworking, loyal and conscientious employee. This clinician can find no evidence of overt secondary gain.

14. Dr. Mann recommended Claimant's entry into the four-week ODMC multidisciplinary program, to include both occupational therapy and behavioral medicine. At the conclusion of the program, in February 2007, Claimant's occupational therapist reported that she had made significant functional progress. She did not maintain her hands in the protective cupped position as frequently as she had previously, she made significant progress in desensitization protocols and she exhibited a marked increase in her ability to use her hands for independent functioning. Despite these objectively observed gains, however, subjectively Claimant reported that she had made little progress. Dr. Mann attributed this discrepancy to Claimant's "intense pain-oriented somatic focus."
15. Also in February 2007, at her attorney's referral Claimant was evaluated by Dr. Whittum, an orthopedist. Dr. Whittum observed various signs of complex regional pain syndrome (CRPS), including redness in the fingers and an abnormal sweating response. He noted that Claimant maintained her hands in a claw-like position and was exquisitely tender to any light touch in her palms, to the point where she held a Kleenex between her two wrists rather than with her fingers. Dr. Whittum diagnosed CRPS and concluded that Claimant was permanently and totally disabled.
16. Dr. Lefkoe reevaluated Claimant in April 2007. In contrast to his observations in June 2006, when he noted that Claimant was in no apparent distress and generally tolerating her residual symptoms well, this time Dr. Lefkoe reported marked dysfunction. Claimant held her hands in a guarded, cupped fashion and avoided even the lightest touch to her palms. In keeping with Dr. Whittum's observations, Dr. Lefkoe noted that she used the backs of her hands to hold things, as she reported that any pressure to her palms resulted in shooting pains. Contrary to Dr. Whittum's diagnosis, however, Dr. Lefkoe specifically noted the *absence* of various objective signs of CRPS. He observed no edema, no changes in color or temperature, no trophic changes in either hair or nails and no focal atrophy.

Activities of Daily Living

17. Claimant, her husband and her mother all testified as to the impact Claimant's injury has had on her ability to perform activities of daily living. According to this testimony, Claimant's hand function is severely restricted. She cannot manipulate small objects. She requires assistance washing her hair and bathing, and cannot manipulate buttons, tie her shoes or fasten her bra. She can use a fork, albeit with an altered grip, but not a knife. Family members leave bottle caps undone and jar lids unscrewed, because Claimant cannot twist or untwist them herself. She cannot lift anything heavier than a gallon of milk and she cannot close her hands to a full grip. She can drive, but only short distances. When she does so, she steers with her small fingers and the outsides of her wrists so as to avoid any pressure whatsoever on her palms. Any such touch causes her to experience shooting pains and pressure in her hands.

18. Claimant presented at the formal hearing with her hands in a claw-like position, presumably to avoid touching anything with her palms. She used the outer surfaces of her wrists to hold a Kleenex and wrote with a large pen gripped between her thumb and small finger. Her appearance was in all respects consistent with both her own testimony and that of her family.

Permanent Partial Impairment

19. In his April 2007 reevaluation Dr. Lefkoe concluded that Claimant had reached an end medical result with a 6% whole person permanent impairment. In reaching this determination, Dr. Lefkoe testified that he rated only for the anatomical impairment attributable to residual carpal tunnel syndrome, not for any functional impairment attributable to Claimant's other symptoms. As to those, in Dr. Lefkoe's opinion Claimant's inappropriate illness behavior and behavioral overlay obscured any objective findings.
20. Dr. Lefkoe also did not rate for CRPS. Referencing the specific diagnostic criteria required by Section 16.5(e) of the *AMA Guides*, he concluded that such a rating was not justified in Claimant's case because she did not exhibit the requisite number of clinical and/or radiographic signs to support the diagnosis.
21. At her attorney's referral, in May 2007 Claimant presented to Dr. Bucksbaum for a permanent impairment evaluation. Dr. Bucksbaum is board-certified in physical medicine, rehabilitation and pain management.
22. Dr. Bucksbaum diagnosed Claimant with a sympathetic mediated pain syndrome, essentially a type of CRPS, and rated her whole person permanent impairment at 57%. In rendering this impairment rating, Dr. Bucksbaum referenced Section 13.8 of the *AMA Guides*, the criteria for rating impairments related to chronic pain, rather than Section 16.5(e), the section specific to CRPS. The rating mechanism provided by Section 13.8 allows for consideration of a claimant's functional impairment, for example, the extent to which he or she can use the involved extremity for self-care activities. In contrast, Section 16.5(e) focuses on loss of joint motion, sensory deficits and pain to determine the appropriate impairment value. Dr. Bucksbaum did not explain why the former criteria were more appropriate in Claimant's case than the latter. Clearly in this regard his approach differed significantly from that taken by Dr. Lefkoe.

Vocational Rehabilitation

23. Claimant was found entitled to vocational rehabilitation services in May 2007. Thereafter, she worked with Paul Langevin, a certified vocational rehabilitation counselor. Mr. Langevin developed a Return to Work Plan with a stated goal of Medical Social Worker, a sedentary work capacity job. As a step towards achieving that goal, Mr. Langevin recommended investigating adaptive technology equipment, such as voice-activated computer systems. He also recommended that Claimant undergo a thorough vocational assessment with a Certified Vocational Evaluator. Both Claimant and Defendant agreed to this plan.
24. In August 2007 Claimant underwent a vocational assessment with Iris Banks, a Certified Vocational Evaluator. Ms. Banks identified numerous vocational strengths that Claimant had demonstrated, including significant aptitude on measures of supervision, inspection, reasoning ability and customer service. Ms. Banks suggested that Claimant consider exploring vocational opportunities in such fields as health technology, quality control, retail supervision and medical records. In that context, Ms. Banks recommended that Claimant continue to explore assistive technologies such as voice-activated computer software and modified keyboards, as well as adaptive equipment to enhance her ability to drive.
25. In keeping with Ms. Banks' recommendations, in November 2007 Mr. Langevin proposed an Amended Return to Work Plan, with added vocational goals of Medical Billing and Coding Specialist and Human Resources Assistant. To achieve these goals, Mr. Langevin proposed an assessment with a licensed speech therapist to evaluate whether Claimant would benefit from a voice-activated computer system, job shadow placements to determine if the stated vocational goals were viable and an occupational therapy evaluation to identify appropriate adaptive equipment for driving.
26. Defendant objected to Mr. Langevin's proposed amended plan. It argued that the proposed plan amounted to nothing more than "a request for funding another round of assessments." In Defendant's view, the plan addressed only generic concerns, such as the ability to operate a vehicle or use a computer, without addressing any of the specific training Claimant likely would need to be able to work in the jobs identified for her.
27. In March 2008 Claimant changed vocational rehabilitation counselors, replacing Mr. Langevin with George Fotinopoulos. Shortly thereafter, in April 2008 Claimant underwent a Functional Capacities Evaluation with Charles Alexander, an occupational therapist. Mr. Alexander determined that Claimant had a sedentary work capacity, but that in terms of both quantity and quality of production she could not sustain the pace necessary for competitive employment. As to Claimant's ability to participate in job retraining or education, furthermore, Mr. Alexander noted that Claimant's ability to use her hands was so limited that she could not take notes, work on a keyboard or even carry books. In Mr. Alexander's opinion Claimant would require significant accommodations to participate in any of these activities.

28. In May 2008 Mr. Fotinopoulos discontinued vocational rehabilitation services to Claimant and closed her file. In his opinion, Claimant's disability was too severe and her prognosis for successful return to work was highly unlikely. He believed her to be permanently and totally disabled.
29. That Mr. Langevin and Mr. Fotinopoulos approached Claimant's vocational rehabilitation differently was evident from their testimony at formal hearing. Mr. Langevin testified that although his plan never progressed to the point of identifying specific employment offers, he anticipated that investigating assistive technologies and adaptive equipment would give Claimant a level of "hope, motivation and inspiration," from which she could identify realistic job opportunities. He noted that Claimant had many vocational strengths – she was intellectually capable, a seasoned employee with a strong work ethic and supervisory experience – and that therefore such opportunities certainly might exist. Mr. Langevin felt that Claimant was "shortchanged" as a result of Defendant's refusal to fund his proposed amended plan, and that in the end he had "no real opportunity" to work with her.
30. In contrast, Mr. Fotinopoulos testified that providing Claimant with "a carload of assistive devices" without identifying a particular job in which to use them was not likely to lead to successful vocational rehabilitation. The better course, according to Mr. Fotinopoulos, would have been to identify a particular job or employer first, and then determine if assistive technologies or adaptive equipment might work to fill in the gaps between Claimant's functional abilities and the requirements of the job. Notably, however, Mr. Fotinopoulos testified that he conducted no such search for particular jobs prior to closing Claimant's vocational rehabilitation file and concluding that she was permanently and totally disabled.
31. Dr. Bucksbaum also weighed in on the issue of vocational rehabilitation at the formal hearing. He testified that he was unwilling yet to conclude that Claimant was permanently and totally disabled, but characterized the possibility of her returning to work as "remote." Doing so would require both vocational retraining and the appropriate job match.

Surveillance Video

32. Defendant presented a videotape at the formal hearing depicting surveillance taken of Claimant in February 2007. In the video, Claimant is observed at a local gas station pumping fuel into a 5-gallon container. She carries the container with what appears to be a normal grip, she manipulates the nozzle and then screws the cap back on when she is done. Next she is clearly observed to push the container into the truck bed using the palmar surface of her right hand. Perhaps most significantly, she then uses both hands to lift the tailgate and push it closed, palms visibly flat against it. There is no evidence of any claw-like position, no obvious pain behavior and no apparent avoidance of direct touch or pressure. In short, Claimant's actions appear in every respect to be those of a person with normal hand function.

33. Occupational therapist Alexander, Dr. Lefkoe and Dr. Mann all commented on the surveillance video; Dr. Bucksbaum was not asked to do so. Mr. Alexander acknowledged that Claimant appeared to have normal hand function in the video, but stated that nothing he viewed there affected the findings stated in his functional capacities evaluation in any way. Dr. Lefkoe testified that Claimant's apparent ability to use her hands in the surveillance video was "significantly different" from her presentation in his office and inconsistent with a diagnosis of CRPS. Similarly, Dr. Mann testified that the video was "totally discordant" with his observations of Claimant over the course of her 4-week ODMC program. In his opinion, the video "clouded the picture" and caused him to rethink the possibility of symptom magnification and secondary gain.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. Claimant asserts that as a result of her work injury she is now permanently totally disabled under the "odd lot" provision of 21 V.S.A. §644(b). Alternatively, she asserts that she is entitled to permanent partial disability benefits in accordance with Dr. Bucksbaum's 57% impairment rating and further vocational rehabilitation services as well. As to the last, Defendant does not dispute Claimant's entitlement to further vocational rehabilitation services, but claims that the last plan submitted did not comply with the applicable rules and therefore was unacceptable.

Permanent Total Disability

3. Under Vermont's workers' compensation statute, a claimant is entitled to permanent total disability benefits if he or she suffers one of the injuries enumerated in §644(a), such as total blindness or quadriplegia. In addition, §644(b) provides:

The enumeration in subsection (a) of this section is not exclusive, and, in order to determine disability under this section, the commissioner shall consider other specific characteristics of the claimant, including the claimant's age, experience, training, education and mental capacity.

4. The workers' compensation rules provide further guidance. Rule 11.3100 states:

Permanent Total Disability – Odd Lot Doctrine

A claimant shall be permanently and totally disabled if their work injury causes a physical or mental impairment, or both, the result of which renders them unable to perform regular, gainful work. In evaluating whether or not a claimant is permanently and totally disabled, the claimant's age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for permanent total disability under the Odd Lot Doctrine, a Functional Capacity Evaluation (FCE) should be performed to evaluate the claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.

A claimant shall not be permanently totally disabled if he or she is able to successfully perform regular, gainful work. Regular, gainful work shall refer to regular employment in any well-known branch of the labor market. Regular, gainful work 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.

5. A finding of odd lot permanent total disability is not to be made lightly. In a system that embraces successful return to work as the ultimate goal, and vocational rehabilitation as a critical tool for achieving it, to conclude that an injured worker's employment barriers realistically cannot be overcome means admitting defeat, acknowledging that he or she probably will never work again. *Gaudette v. Norton Brothers, Inc.*, Opinion No. 49-08WC (December 3, 2009). As Rule 11.3100 makes clear, such a finding should not be made until first, the injured worker's physical capabilities are accurately assessed and second, all corresponding vocational options are comprehensively considered and reasonably rejected.
6. I find that Claimant has not met that standard here, for two reasons. First, in light of Claimant's ability to use her hands as documented on the surveillance video I cannot help but question whether the true extent of her physical capabilities have been assessed accurately. Granted, the video represents only a brief snapshot in time. It depicts only actions, not symptoms such as pain or soreness, and therefore it very well may not tell the whole story. But there can be no doubt that Claimant's presentation on that day was wholly different from what she subjectively reported, what her treatment providers noted and even what the hearing officer observed. As Dr. Mann remarked, the video "clouds the picture," to the point where Claimant's actual functional capacities and tolerance for activity is now ambiguous. This ambiguity precludes a finding of permanent total disability.

7. Second, I am not convinced that Claimant has yet had the benefit of the full range of vocational rehabilitation services that, if provided, reasonably might lead to her successful return to work. Claimant has valuable job skills to offer, and with the appropriate adaptive equipment still might be able to translate those skills into regular, gainful work. It would be wrong to conclude that she is permanently and totally disabled until this avenue has been pursued more thoroughly. *Gaudette, supra; R.C. v. Mack Molding, Inc.*, Opinion No. 16-07WC (July 3, 2007).
8. I conclude, therefore, that Claimant has not sustained her burden of proving permanent total disability.

Vocational Rehabilitation

9. Having determined that Claimant is not permanently and totally disabled, I must agree with Mr. Langevin's assessment that she has been "shortchanged" in the vocational rehabilitation process to date. Defendant is correct, however, that under our system vocational rehabilitation planning must delineate the specific assistance required to meet a specific vocational objective. *Workers' Compensation Rule 33.1000*. To the extent that Mr. Langevin's plan fell short of this standard, it should be reworked accordingly.
10. As for Mr. Fotinopoulos, he proposed no vocational rehabilitation plan at all, instead concluding summarily that the barriers to Claimant's re-employment were too significant to overcome. Yet overcoming employment barriers is at the very heart of a vocational rehabilitation counselor's responsibilities. *Gaudette, supra*. Both Claimant and Defendant deserve a vocational rehabilitation counselor who is committed strongly to this ideal. Given the position he already has taken in this claim, it is questionable whether Mr. Fotinopoulos can provide that level of commitment.

Permanent Partial Impairment

11. As to the extent of Claimant's permanent partial impairment, Drs. Lefkoe and Bucksbaum approached the issue from widely divergent perspectives. Dr. Lefkoe's 6% whole person rating included only the impairment referable to Claimant's residual carpal tunnel syndrome, with no accommodation for any other reduced hand function. In contrast, Dr. Bucksbaum's 57% rating was based primarily on Claimant's chronic pain and resulting functional inability to use her hands.
12. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).

13. Although Dr. Bucksbaum diagnosed CRPS, he did not rate in accordance with the section of the *AMA Guides* specific to that diagnosis, instead referring to the section on chronic pain. There is nothing in the record to explain why he did so. For that reason his rating lacks clarity. This is especially true given that the medical record fails to document sufficient clinical signs to meet the diagnostic criteria for CRPS. Beyond that, Claimant's presentation on the surveillance video further compounds the problem. As noted above, in the video Claimant demonstrates an apparent ability to use her hands that is far beyond what Dr. Bucksbaum assumed in rendering his rating. I am left with a rating that may not fit either the facts or the *Guides*.
14. I find Dr. Lefkoe's rating to be more credible. It is based solely on objective criteria and therefore is not affected by any uncertainty raised by Claimant's presentation on the surveillance video.

Costs and Attorney's Fees

15. As Claimant has not substantially prevailed, she is not entitled to an award of costs or attorney's fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED:**

1. Claimant's claim for permanent total disability benefits is **DENIED**;
2. Claimant's entitlement to vocational rehabilitation services having been established, the parties shall resume efforts to develop a suitable Return to Work Plan in accordance with Workers' Compensation Rule 33.0000;
3. Defendant shall pay permanent partial impairment benefits in accordance with Dr. Lefkoe's 6% whole person impairment rating, with interest from April 2, 2007.

DATED at Montpelier, Vermont this 4th day of March 2009.

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.