

G. H. v. Ethan Allen

(April 21, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

G. H.

Opinion No. 01R-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Ethan Allen and
The Travelers

For: Patricia A. McDonald
Commissioner

State File No. M-22405

RULING ON MOTION TO RECONSIDER DENIAL OF ATTORNEY FEES

Claimant asks for reconsideration of the denial of attorney fees and costs in Opinion No. 01-06WC (Jan. 19, 2006). He correctly argues that although he did not prevail on his claim for permanent total disability benefits, he did prevail on his claim for compensability of his shoulder injury and for the physical mental injury.

Expert medical testimony was essential to the partial success in this claim. Necessary costs were incurred. And the success was due to the work of skilled counsel. Accordingly an award of costs and fees under 21 V.S.A. § 678(a) is appropriate.

Claimant is awarded costs related to the successful aspect of this claim and to attorney fees of 20% of the total award, not to exceed \$9,000. 21 V.S.A. § 678(a); WC Rule 10.000; *Lyons v. American Flatbread*, Op. No. 36A-03WC (2003).

Dated at Montpelier, Vermont this 21st day of April 2006.

Patricia A. McDonald
Commissioner

G. H. v. Ethan Allen

(February 28, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

G. H.)	Opinion No. 01A-06WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Ethan Allen and)	For: Patricia A. McDonald
The Travelers)	Commissioner
)	
)	State File No. M-22405

Amended Decision

Paragraph 11 in the conclusions of law in the opinion dated January 19, 2006 is hereby amended to read as follows:

Overall, the permanency ratings awarded are those assessed by Dr. Gennaro whose assessment is the most objective: 10% whole person for the spine. However, since he did not consider the shoulder impairment, the 3% rating from Dr. Bucksbaum must also be included.

Dated at Montpelier, Vermont this 28th day of February 2006.

Patricia A. McDonald
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.

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The Travelers)	Commissioner
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Pretrial Conference held on March 14, 2005
Hearing held in Montpelier on September 19, 20, 21, 2005
Record closed on November 14, 2005

APPEARANCES:

Robert Halpert, Esq., for the Claimant
Andrew C. Boxer, Esq., for the Defendant

ISSUES:

1. Is the claimant's shoulder condition work-related?
2. Does claimant suffer from a work-related physical-mental condition?
3. Is claimant permanently and totally disabled as a result of his work related injury?

EXHIBITS:

Joint I: Medical Records

Claimant:

1. CV Mark Bucksbaum, M.D.
2. CV Philip Kinsler, Ph.D.
3. 2/15/02 letter from Yeates
4. 06/24/02 letter from Yeates
5. 06/26/02 Letter from Turley

Defendant

- A. Sawdust Sign off sheet
- B. File from Ken Yeates

FINDINGS OF FACT:

1. Before his work at Ethan Allen, claimant had worked driving trucks and school buses, logging and running a business with his wife, who did most of the paperwork.
2. Claimant began working for Ethan Allen in October of 1997.
3. On April 14, 1999, while working as a furniture sprayer at Ethan Allen, he stood on the rails supporting a conveyor belt, lost his balance and fell backward, landing on his heels and twisting his body.
4. In October 2000, claimant reported to his physicians that he had “re-injured his shoulder at work.”
5. After the injury, claimant returned to work, but was soon placed on light duty. He worked until November 2000 when his treating physician, John Fothergill, M.D., suggested that he work another week, then take some time out of work to see if rest would lessen the pain. He also suggested that he visit the pain clinic.
6. Since the injury, claimant has had chiropractic treatment, osteopathic manipulation, consultations with orthopedists and neurologists, physical therapy, steroid injections, medications for pain and depression, counseling, massage therapy, and pain management. His chronic pain persists.
7. On December 29, 2000 a functional assessment was done at the Spine Center at Dartmouth. Dr. Salem then diagnosed claimant with myofascial pain syndrome and recommended a return to light duty work when his shoulder became stable.
8. Since 2003, claimant has driven a dump truck for a local farmer for a few hours at a time during hay and corn harvests in June and August. He also occasionally runs errands for the farmer. To get into the truck, claimant climbs on the steps and pulls himself up using a handle on the door. He then reaches and pulls himself up with his left arm. To lift the body of the dump truck, he reaches down and flips a switch with his right hand.
9. Claimant competently taught a young man to drive the dump truck.
10. At home, claimant mows the lawn, drives his wife to work, snowblows his driveway, walks his dogs, and makes himself breakfast and lunch.
11. There is no reason why claimant could not participate in a functional restoration program.

Vocational Rehabilitation

12. In January 2001, Kenneth Yeates of Intracorp determined that claimant was entitled to vocational rehabilitation services. He set as a goal to return claimant to work as a sprayer at Ethan Allen or to undertake vocational exploration if a return to Ethan Allen were not possible.
13. In September of 2001, Mr. Yeates suspended VR in response to a note from Dr. Fothergill expressing doubts about whether claimant could ever return to work.
14. Over time, the vocational plan was amended. Mr. Yeates noted his commitment to work with the claimant and his wife and, in doing so, to work with claimant in the area of literacy if his job was to be sedentary since claimant was more proficient in French than in English. He suggested that a vocational assessment be done.
15. In May of 2002, Mr. Yeates closed his file after reviewing medical reports stating that Claimant could not return to work.
16. Fran Plaisted of Solutions Comprehensive, based on her review of vocational rehabilitation and medical records, concluded that claimant would be employable today if he obtained additional vocational rehabilitation services. She based her opinion on claimant's job history, including running a business, and his work for his neighbor.

Other Expert Opinion

Virginia Reeves

17. Virginia Reeves is the Clinical Supervisor of the Functional Restoration Program at the Spine Center at DHMC. She explained that the two functional assessments performed in 2000 and 2002 were never intended to determine work capacity and should not have been used for that purpose. It is an hour-long exam and less comprehensive than the longer, more detailed functional assessment.
18. Ms. Reeves questioned why claimant had not been returned to work when an assessment supported light duty work.
19. Ms. Reeves conducted a Functional Capacity Evaluation that indicated the following: claimant was working an hour or two a day driving a dump truck. She noted that claimant did not appear depressed; he was talkative and had a good sense of humor. Based on the testing, she would not have expected that claimant could drive a truck and affix its tarp, but he clearly was able to do so, suggesting to her that he liked doing that work.
20. Ms. Reeves concluded that claimant has a sedentary work capacity for lifting, but a light duty job would be more appropriate so that he can vary activities during the day to include walking, sitting and standing, as long as the job did not require lifting.

Dr. John Fothergill

21. Dr. Fothergill has been Claimant's treating physician. Although he opined that Claimant is incapable of returning to work, he acknowledged that no physical impairment prevents him from working. He does not understand why Claimant has the pain he complains of, pain that is inconsistent with physical findings. He also acknowledged that from a psychological perspective, work would help the Claimant.

Dr. Bucksbaum

22. Dr. Mark Bucksbaum is a rehabilitation physician in clinical practice. He is board certified in rehabilitation, pain management and independent examinations. His examination of the claimant revealed restricted range of motion in the cervical spine as well as some crepitus and impingement in the left shoulder. Dr. Bucksbaum's diagnoses included cervical and thoracic strain, impingement syndrome and rotator cuff injury to the left shoulder, chronic pain syndrome, insomnia and depression.
23. Dr. Bucksbaum assigned permanency percentages of 5% each to the cervical and thoracic injuries and 8% to the left shoulder, which he reduced at hearing to 3% due to an arithmetical error. He combined the functional effects of the chronic pain syndrome, depression and insomnia under the *Guides*, which yielded a moderate impairment equal to 25% whole person. Had he rated each of these impairments separately, the percentages would have been "unrealistically" high to him. Finally, Dr. Bucksbaum combined all impairments using Chapters 13, 14 and 18 of the *Guides* to arrive at a combined whole person impairment of 37%.
24. Dr. Bucksbaum concluded that Claimant could not sustain gainful employment because of the combination of his depression, chronic pain syndrome and injuries to his neck, arms and spine. Specifically he opined that claimant could not return to uninterrupted vocational work on a consistent and reliable basis.

Philip J. Kinsler, Ph.D.

25. Dr. Kinsler conducted an Independent Medical Examination of the claimant on October 21, 2004. He administered testing by personally reading the questions to the claimant. He also met with the Claimant's wife.
26. Dr. Kinsler diagnosed claimant with: 1) Somatoform Pain Disorder; Major Depressive Disorder; and Generalized Anxiety Disorder.
27. Finally, Dr. Kinsler evaluated claimant's psychological condition by first referencing the AMA Guides Chapter for Mental Impairments, which uses classes of impairments but no numerical rating; then comparable ratings in the Chapter on the Nervous System to obtain a numerical rating; and finally, a Colorado worksheet, for a Class II impairment rating of 39%. This Class II rating is the highest possible rating in the range assigned to the claimant and reflects claimant's worst possible day. It does not consider days when claimant can drive a dump truck during a harvest.

28. In examples provided in the Guides, a 17% rating is assigned to a 60-year-old man suffering from traumatic encephalopathy.
29. Dr. Kinlser concluded that any future treatment for Claimant would be palliative and supportive in nature, but will not restore him to the workforce.

Steven Mann, Ph.D.

30. Although his testing revealed that claimant was depressed, Dr. Mann's observations led him to conclude otherwise. In fact, he concluded that claimant has adjusted to a "disability lifestyle." Dr. Mann diagnosed a mild psychological impairment causally related to claimant's work related injury with a whole person impairment of 3% that does not prevent him from working.
31. Dr. Mann noted that the activities Claimant performs daily defy the suggestion that he is severely depressed.

Dr. Victor Gennaro

32. Dr. Gennaro, an orthopedic surgeon, examined the claimant on March 21, 2001. He concluded that the Claimant has 1) mild cervical and thoracic degenerative disease; and 2) chronic cervical and thoracic pain. His examination of the Claimant's shoulder was negative. He assessed Claimant with a DRE Cervical Category II impairment with 5% rating and a Thoracic Category II impairment of 5% for a total 10% whole person impairment.
33. Dr. Gennaro found all other aspects of the physical examination to be normal. He concluded that Claimant is "probably capable of functioning in a sedentary to light-work capacity full-time.

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 (1962). 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).

Claimed shoulder injury

4. Claimant correctly points to three theories in support of compensability of the shoulder injury: 1) Claimant may have injured the shoulder in the April 14th accident, but was too focused on the more painful neck and upper back pain to pay it much attention; 2) He may have injured the shoulder at work in October 2000 when he reported such an injury to his doctor; or 3) shoulder symptoms may have been caused by the cervical and thoracic injuries, which are clearly work related. It is not necessary to choose among these three theories to conclude that the shoulder injury is compensable. Dr. Bucksbaum's rating of 5% for the shoulder impairment is, therefore, accepted.

Physical-mental injury claim

5. Next, claimant seeks benefits for a physical mental injury. To prevail on this claim he must establish a causal connection between the work-related physical injury and the mental condition. *Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99W (1999); *L.G. v. Harbour Industries, Inc* Opinion No. 35-05WC (2005).
6. I am convinced that claimant has met the necessary standard for causation with the testimony of both psychologists, Dr. Kinsler and Dr. Mann, who tested him. Although they reached different conclusions, the testing consistently revealed depression and anxiety related to the work-related physical injury. Neither psychologist detected malingering.
7. Dr. Kinsler diagnosed major depression. Dr. Mann diagnosed mild depression.
8. Claimant's activities convince me that Dr. Mann's diagnosis of mild depression is the more accurate assessment in this case, supporting a permanency rating of 3%. Dr. Kinsler's rating, which does not consider examples in the Guides, assigns impairment to this Claimant comparable to traumatic encephalopathy, which is not persuasive on the facts in this case.

Permanent Total Disability Claim

9. The claimant argues that he is entitled to permanent total disability pursuant to 21 V.S.A. § 644. Because the injury in this case predates the 2000 statutory amendments, claimant is entitled to permanent total disability if his injury is within the enumerated list articulated in 21 V.S.A. § 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 v. Kessel/Duff Constr. Co.* 148 Vt. 415 (1987). The standard is further articulated in § 645(a), which specifies that one must have "no reasonable prospect of finding regular employment."
10. This claimant has had experience working in various capacities. He has proven himself to be a competent teacher to a person learning to drive a dump truck and he has driven the truck during harvests. Although he has pain, no physical impairment prevents him from working. In fact, his treating physician acknowledged that work could well help him. On such a record, claimant has not proven he is incapable of gainful employment.

11. Overall, the permanency rating awarded are those assessed by Dr. Gennaro whose assessment is the most objective: 10% whole person. However, since He did not consider the shoulder impairment, the 5% rating from Dr. Bucksbaum must be added. Under the combined values chart, the total is 15%.

12. Because claimant has not prevailed on the major part of this case, his claim for fees and costs is denied.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim for mild depression and a shoulder injury are GRANTED.

The claim for permanent total disability benefits is DENIED.

Dated at Montpelier, Vermont this 19th day of January 2006.

Patricia A. McDonald
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.