STATE OF VERMONT
DEPARTMENT OF LABOR

Justin Danforth

v.

H.P. Hood, LLC

Opinion No. 11-10WC

By: Sal Spinosa, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. X-03849

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

ATTORNEYS:

Charles Powell, Esq., for Claimant
Patricia Orr, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant entitled as a matter of law to vehicle modifications under 21 V.S.A. §640(a)?

FINDINGS OF FACT:

The following facts are undisputed:

1. On December 24, 2005 Claimant was working in the course and scope of his employment for Defendant when a stack of milk containers fell on him. Claimant injured his neck, right shoulder and arm.

2. Claimant treated initially for this injury with Dr. Mercia, who diagnosed cervical radiculopathy. Dr. Mercia noted symptoms including decreased range of motion and weakness in Claimant's right upper extremity. In July 2007 Dr. Mercia determined that Claimant had reached an end medical result. Dr. Mercia anticipated at that time that Claimant's right upper extremity range of motion and pain likely would improve with time.

3. In February 2007 Claimant underwent a functional capacities evaluation (FCE). Although he had expressed an interest in returning to work as a truck driver or heavy equipment operator, the results of this testing suggested work at a light to sedentary physical demand level.

4. In the course of the February 2007 FCE Claimant reported that he was able to drive but that as much as possible he avoids using his right arm and hand to do so because of

discomfort in his right arm and shoulder. Thus, Claimant typically uses his left arm and hand to shift his manual transmission vehicle.

5. In May 2007 Claimant was tested for his ability to operate heavy equipment. The test revealed that he would be able to do so provided the equipment was outfitted with a lever, or "joystick," as much of today's generation of heavy equipment is, that would enable hydraulic operation with one hand. Claimant was determined to be an appropriate candidate for enrollment in a heavy equipment training program, but for reasons that are not entirely clear, he did not pursue this vocational option.

6. Claimant underwent additional vocational assessments in August and November 2008. Given his ongoing pain and physical limitations, both assessments recommended further education and training so as to broaden his available employment options. Both assessments also considered Claimant's ability to drive. In the context of the August assessment Claimant described driving distances that he felt would be a "reasonable commute." The November assessment recommended an assistive steering device to help him grasp and control his car's steering wheel.

7. In January 2009 Claimant underwent an assistive technology assessment at the Occupational Therapy-Driver Rehabilitation Program at Fletcher Allen Health Care. Claimant's driving was tested with the use of certain vehicle modifications. The assessment noted various limitations in Claimant's ability to operate a vehicle safely given the pain-limited use of his neck and right upper extremity. The assessment determined that the best solution to Claimant's driving limitations would be for him to purchase an automatic transmission vehicle in place of his current manual transmission model. The assessment recommended other vehicle modifications as well, including a left-handed steering knob and a larger side-view mirror. Upon reviewing these recommendations, Dr. Churchin, Claimant's treating physician, agreed that they were reasonable, necessary and injury-related.

8. At Defendant's request, Claimant underwent an independent medical evaluation with Dr. Johansson, an osteopath, on June 8, 2009. Dr. Johansson took Claimant's medical history, reviewed his medical records and conducted his own clinical examination. He concluded that Claimant had sustained a sprain or strain, with subjective findings that far outweighed his physical findings. In particular, Dr. Johansson noted that Claimant's pain complaints, as reflected in his medical records, were inconsistent over time. He also remarked that Claimant did not exhibit any active signs of radiculopathy. Dr. Johansson determined that Claimant had reached an end medical result with a whole person soft tissue cervical spine impairment of 8%.

9. On June 21, 2009 William Farrell, Ph.D. conducted an independent psychological evaluation of Claimant. In Dr. Farrell's opinion, Claimant suffers from depression causally related to the effects of chronic physical pain and the stress associated with his resulting lifestyle limitations, all causally related to his work injury. Dr. Farrell determined that Claimant had reached an end medical result for his psychological injury and assessed a permanent psychological impairment of 13-15%.

10. On October 6, 2009 Dr. Johansson submitted an addendum to his original independent medical evaluation in which he reviewed Dr. Churchin's treatment records and answered three questions put to him by Defendant's attorney as follows:

- Dr. Johansson disagreed that Claimant was permanently and totally disabled and stated instead that Claimant has a work capacity somewhere between sedentary and light.

- Dr. Johansson disagreed that Claimant was unable to perform basic life functions as a result of his work injury. In his opinion, if this were true it would have to be because Claimant was unable to use his right upper extremity. However, medical reports verify that Claimant's arms have normal bulk and tone, which suggests that he is in fact able to do so.

- Dr. Johansson disagreed that Claimant requires a vehicle modification. He maintained that Claimant is able to drive his current vehicle, a stick shift, unassisted.

11. On November 16, 2009 Dr. Churchin explained his support for the vehicle modifications recommended by the Fletcher Allen assessment. The assistive devices will allow Claimant to drive left-handed and thereby avoid the pain caused by using his right arm. Simply put, according to Dr. Churchin, less right-handed driving equals less pain.

12. In a November 24, 2009 letter, Claimant's treating psychologist, Laurence Thompson, expressed support for the vehicle modifications recommended by the Fletcher Allen assessment. Mr. Thompson stated that Claimant expresses distress and frustration at the pain he experiences currently when driving. In his opinion, eliminating Claimant's driving pain will improve his emotional state.

DISCUSSION:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank,* 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).

2. Here, Claimant contends that he is entitled to certain vehicle modifications[1] as a matter of law, citing 21 V.S.A. §640(a) in support. Citing the same statute, Defendant asserts that as a matter of law he is not so entitled.

[1] In addition to the left-handed steering knob and side-view mirror recommended by the Fletcher Allen driving assessment, Claimant also requests that Defendant compensate him for the difference in value between his current standard-shift vehicle and one equipped with an automatic transmission instead.

3. 21 V.S.A. §640(a) states in relevant part:

> The employer shall provide assistive devices and modifications to vehicles and residences reasonably necessary to permit an injured worker who is determined to have or expected to suffer a permanent disability, such as an ambulatory disability as defined in section 271[2] of this title or blindness as defined in section 271, that substantially and permanently prevents or limits the worker's ability to continue to live at home or perform basic life functions. In determining what devices and modifications are reasonably necessary, consideration shall be given to factors that include . . . the extent to which the devices or modifications shall enhance or improve the workers' independent functioning.

4. According to its plain language, the statute requires that before considering whether it is appropriate to include the cost of vehicle modifications as a covered workers' compensation expense, an injured worker first must meet a threshold requirement relating to the severity of his or her work-related injury. That is, the injury must result in a disability that:

   (a) is permanent; and

   (b) substantially and permanently prevents or limits the injured worker's ability to continue to live at home or perform basic life functions.

5. Balancing the interests of both the injured worker and the employer, the statute thus recognizes that while home or vehicle modifications may enhance many an injured worker's ability to function independently, it is only in those cases involving the most serious injuries, and the most significant resulting disabilities, that an employer can be required to bear the cost of such adaptive accommodations.

6. This statutory approach – establishing a threshold severity-of-disability requirement *before* considering whether a requested accommodation is appropriate – is not a novel one. Both Vermont's Fair Employment Practices Act, 21 V.S.A. §§495 *et seq*., and the federal Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq*., impose a similar threshold. Of note, however, rather than referencing an individual's ability to perform "basic life functions," the threshold imposed by these statutes is that the disability at issue substantially limits "one or more major life activities." 21 V.S.A. §495d(5)(A); 42 U.S.C. §12102(1)(A).

[2] Section 271, since repealed, related to definitions for accessibility standards for public buildings and parking.

7. Although both state statute and federal regulations define the term "major life activities," *see* 21 V.S.A. §495d(9); 45 C.F.R. §84.3(j)(2)(ii) and 28 C.F.R. §41.31(b)(2), the workers' compensation statute provides no such clarity as to the term "basic life functions." By its reference to 21 V.S.A. §271, it gives two examples of disabilities that would be severe enough to qualify for coverage – those that affect an injured worker's ability either to walk or to see. Case law in other states, admittedly in other contexts, provide additional examples of "basic life functions," including breathing, *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001), bathing, *People v. Layne*, 677 N.E.2d 469 (Ill. App. 1997), and eating, drinking, dressing and using the bathroom, *Zambrana v. Armenta*, 819 N.E.2d 881 (Ind. App. 2004).

8. Applying the statutory framework to the current claim, the question with which I am faced is whether Claimant's work injury has resulted in a permanent disability that substantially limits his ability to perform a basic life function. Claimant alleges that it has, by virtue of the fact that the right upper extremity pain and weakness from which he now suffers significantly limits his ability to drive. The ultimate issue, therefore, is whether driving constitutes a basic life function.

9. In considering this question, I return again to case law interpreting the term "major life activities" in the context of the Americans with Disabilities Act. The federal circuit courts that have addressed the issue now uniformly agree that driving, by itself, is not a major life activity. *See, e.g., Colwell v. Suffolk County Police Department*, 158 F.3d 635, 643 (2nd Cir. 1998), cited with approval in *Winsley v. Cook County*, 563 F.3d 598, 603 (7th Cir. 2009).

10. I conclude that if driving is not a "major life activity," nor can it be a "basic life function." By its plain meaning, the latter term encompasses a set of activities that is far more restrictive than the former one.

11. I acknowledge, as Claimant asserts, that the vehicle modifications he requests might indeed enhance his ability to function independently. Were the statutory threshold more expansive, therefore, I might well have found his request appropriate. It is not my place to rewrite the legislative balance struck between an injured worker's rights and an employer's responsibilities, however. The Workers' Compensation Act must be liberally construed to accomplish the humane purpose for which it was passed, *Herbert v. Layman*, 125 Vt. 481 (1966); *Workers' Compensation Rule 1.1100*, but a liberal construction does not mean an unreasonable or unwarranted construction. *Id.* Thus, however humane a particular outcome might be, I cannot broaden the plain language of the statute to include a benefit that the legislature did not intend.

12. Even taking the evidence in the light most favorable to Claimant, therefore, I cannot find that he has met the threshold imposed by §640(a). As a matter of law, the injury-related limitation upon which he bases his claim for vehicle modifications – his ability to drive – is not a basic life function, and does not qualify him for further consideration under the statute.

ORDER:

Claimant's Motion for Summary Judgment is **DENIED.** Defendant's motion for summary judgment is **GRANTED.** Claimant's claim for reimbursement for vehicle modifications is dismissed.

DATED at Montpelier, Vermont this 16th day of March 2010.

_____

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.