STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-11829
	)	
	)	By: Margaret A. Mangan
Anthony Dubuque	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Grand Union Company	)	
	)	Opinion No. 34S-02WC

RULING GRANTING A PARTIAL STAY

Following the decision in this matter in which the Claimant partially prevailed and was awarded attorney fees, Claimant appealed to the Chittenden Superior Court on questions of fact and defendant cross-appealed on questions of fact and law. In its post hearing motion, defendant asks this Department to stay the order to pay Claimant temporary total disability benefits, medical benefits and attorney fees.

Pursuant to 21 V.S.A.§ 675(b), there is no automatic stay of a Commissioner's order on appeal, unless specifically granted. The request for a stay may be granted, denied or modified. Id.; *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (May 29, 1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (Sept. 20, 1988)).

To prevail on its request for stay, Defendant must demonstrate: (1) it is likely to succeed on the merits; (2) it would suffer irreparable harm if the stay were not granted; (3) a stay would not substantially harm the other party; and (4) the best interests of the public would be served by the issuance of the stay. *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987). The granting of a stay should be the exception, not the rule. *Bodwell v. Webster Corporation*, Opinion No. 62S-96WC (Dec. 10, 1996). This case provides one such rare exception.

On the issue of temporary total disability benefits, it is possible that a jury will view the evidence regarding claimant's work capacity differently than this Department did, especially considering the activities he was videotaped performing. With this unusual determination that the defendant is likely to succeed on the merits of the appeal, it follows that payment of a large award that a court later determines is not justified and which cannot be recouped, is substantial harm to the defendant. Next, the stay will not substantially harm the claimant whose income on disability has been higher than what it was when he was working. Finally, the grant of stay in this instance, given the claimant's income, serves the best interest of the public because immediate wage replacement benefits are for those who have lost income they were earning while working. Cf. *Orvis v. Hutchins*, 123 Vt. 18 (1962).

Accordingly, the defense Motion for a Stay is GRANTED.

Dated at Montpelier, Vermont this 29th day of October 2002.

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R. Tasha Wallis
Commissioner

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Grand Union Company	)	
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Hearing held in Montpelier on June 20, 21 and August 22, 2001
Record Closed on May 13, 2002

APPEARANCES:

James J. Dunn, Esq. for the Claimant
Christopher McVeigh, Esq. for the Defendant

After the hearing in 2001, the parties requested several months to explore settlement options, an effort that proved unsuccessful. Hence, the record was not complete with their written arguments and claim for fees and costs until almost a year later, in May of 2002.

ISSUES:

1. Is the Defendant liable for physical injuries Claimant suffered in the fall down stairs at work on December 3, 1999?

2. Did the Claimant suffer compensable psychological injures causally connected to his physical injuries suffered in the fall at work on December 3, 1999?

3. Was the Claimant suffering from compensable work-related stress when he suffered a panic attack on December 3, 1999 while descending stairs at his place of employment?

4. Is the Claimant entitled to temporary total or partial disability benefits?

EXHIBITS:

Joint I:	Medical Records
Joint II:	Steven B. Mann, Ph.D., deposition transcript, June 4, 2001
Claimant's 1:	Claimant's Employment History
Claimant's 2:	Memoranda Claimant sent to his supervisor, Mr. Eddy
Claimant's 3:	Letter from Attorney Dunn to Attorney McVeigh, March 20, 2001
Claimant's 4:	Curriculum vitae of William Nash, Ph.D.
Claimant's 5:	MMPI Raw Data
Claimant's 6:	Kimlee Butterfield, LICSW, deposition transcript, April 30, 2001
Claimant's 7a:	Mark Bucksbaum, M.D., deposition transcript, June 14, 2001 (a) and June 18, 2001 (b)
Claimant's 8:	Diane Aja, deposition transcript, June 8, 2001
Defendant's A:	Videotape
Defendant's B:	Rowland Hazard, M.D., deposition transcript April 13, 2001
Defendant's C:	MMPI-2 3/13/2001
Defendant's D:	Letter from Dr. Binter's Office, August 14, 2001
Defendant's E:	Letter from Dr. F.B. Dibble, to Dr. Evans, February 6, 2001
Defendant's X:	Todd Keyworth, deposition transcript September 13, 2001

FINDINGS OF FACT:

1. Claimant, who lives in South Burlington, Vermont, is a graduate of the University of Vermont. He began working for Grand Union as a part-time clerk when he was in high school and worked for that company for twenty-five years.

2. After he graduated from college, Claimant entered a management-training program. He worked his way up to the position as store manager as one of the youngest employees ever to attain that position.

3. Between 1980 and December of 1999 Claimant managed several stores in Vermont, including so-called showcase "Food Mart" stores, which were large, visible stores with many specialized departments.

4. In 1994 Claimant was promoted to an Associate Relations Specialist position in the Human Resource Relations Department at the Company's regional office. That job involved management responsibility for human relations throughout the region.

5. When Claimant's human resource job was eliminated in 1997 due to financial instability of the company, he was offered his choice of stores to manage. He chose the large, high profile store in South Burlington, which was close to his home. In so doing, he replaced Todd Keyworth who opted for reassignment to the store at North Avenue in Burlington.

6. On December 2, 1999 Claimant was passed over for a promotion to a district manager position.

7. On Friday December 3, 1999 Claimant fell down stairs at Grand Union. He had already worked 44 hours that week and was working on payroll figures in his office on the second floor of the store. He realized how few employees he had on his staff and how little help he had managing the store. He began to feel dizzy and sensed his heart rate increasing. He also felt chest pain and was hyperventilating. He got up to walk the symptoms off.

8. On the stairs from the second floor, where his office was, to the sales area on the first floor, Claimant fell. He landed on a cement floor with his head against an elevated base of cement. He tried unsuccessfully to get up, and then was found by a co-worker who called for assistance.

9. Claimant was taken by ambulance to a hospital emergency department where he was treated and released with a prescription for Ibuprofen and instructions to follow-up with his primary care physician. According to the note from that visit, the Claimant had become light headed and nauseous and collapsed.

10. In April of 2000, Todd Keyworth returned to the South Burlington store as manager when Claimant lost his job. Keyworth was given more flexibility than was given Claimant to increase the pay of the store employees. Some of those who had left under Claimant's leadership returned, a phenomenon Keyworth attributes to the Claimant's rigid managerial style and Claimant attributes to an increase in pay.

Back Injury

11. When he was seen at his primary care physician's office on December 7, 1999 Claimant was given prescriptions for back pain and instructions to remain out of work for one week. Dr. Evans recommended the continuation of Paxil at the same dose Claimant had been taking. On a return visit to that office on December 10th, Dr. Evans told the Claimant to remain out of work through December 27th. And he referred Claimant to the New England Spine Institute.

12. A January 28, 2000 MRI revealed a combination of disc bulge and osteophyte formation at the L5-S1 level, which Dr. Stanley Gryzb, orthopedist at the Spine Institute identified as the cause of the Claimant's radiculating leg pain. On January 31st, Dr. Rathmell at the Pain Management Center at Fletcher Allen Heath Care performed an epidural corticosteroid injection.

13. Claimant was concerned that if he did not return to work, he would lose his job. After inquiring about a return to work he learned that he would need a complete release from his physicians before he would be permitted to return.

14. In early February 2000 Claimant began physical therapy. Then, on a return visit to the Spine Clinic, Dr. Gryzb told him he could attempt a return to work and that he should continue with physical therapy if symptoms persisted. Dr. Gryzb later deferred to physical therapists on the question of work capacity.

15. On January 14, 2000 Claimant saw Dr. Gryzb, who examined him and recommended an MRI that showed degenerative disc disease. When he saw the Claimant again on January 28th, Dr. Gryzb released him to work with a lifting restriction of five pounds, four hours per day of a month. Claimant did not return to work at that time.

16. On May 16, 2000 Claimant returned to Dr. Gryzb complaining of low back pain with occasional radiating pain to his leg. Dr. Grzyb referred him to Dr. Rowland Hazard for consideration of an intensive multi-disciplinary program. When he saw the Claimant in July, Dr. Hazard discussed various surgical and non-surgical options available to him.

17. Physical therapy notes for July 5, 2000 indicate that the Claimant had a bad weekend and questioned whether it was due to golf or basketball.

18. Claimant ended his physical therapy with Nancy Phalen in August 2000 with the intent of exploring surgical options.

19. That Claimant had a light work capacity in August of 2000 is shown physicians' interpretations of therapy notes from that time.

20. After viewing an August 2000 CT scan, which revealed a global bulge with a disc fragment impinging on the neural foramen, Dr. Nancy Binter, neurosurgeon, recommended surgery.

21. In a November 2000 note, Dr. Hazard opined that Claimant's fall down the stairs at Grand Union likely caused some jarring in the lower lumbar region such that Claimant began to have back and left leg symptoms, in contrast to his asymptomatic condition before the fall.

22. By January of 2001, Claimant decided to undergo recommended surgery, but erroneously believed that the insurance company required a second opinion before it would approve payment.

23. On January 5, 2001, the defendant provided Claimant with specific notice that he had an obligation to conduct a good faith effort to look for work within his physical capabilities.

24. In the summer of 2001, Claimant drove to Long Island with his family.

25. In a letter Dr. Binter sent to Dr. Evans on September 5, 2001, she recounted an August 31, 2001 visit with Claimant and her diagnosis of lumbar spondylosis, which she determined is not surgical. She found "absolutely no disc herniation."

General Activities and Demeanor

26. Since December 3, 1999 Claimant has filed and shepherded multiple claims for disability benefits, including this workers' compensation claim. At the time of the hearing, he was receiving disability benefits from two sources and social security disability benefits with payments totaling $7,300 per months or $87,600 per year. His annual salary at Grand Union was $58,000.

27. Since December 1999 Claimant has managed his family's finances, has bought and sold stocks, has served as an officer on a corporate board, has taken care of his children while his wife had been away, has engaged and supervised contractors involved in refurbishing an apartment he owns, has taken computer classes and uses the internet for research.

28. At the hearing, Claimant presented as an intelligent, articulate individual who had a firm grasp of questions asked and of the process in general.

Work-related Stress

29. Claimant viewed his return to a store manager position in 1997 as a setback in career goals. Furthermore, the financial stress of Grand Union and particular challenges in the South Burlington store frustrated his efforts to excel.

30. The South Burlington store was a particularly competitive one with several other similar stores in the area. As a result, hiring necessary personnel became difficult.

31. Most Grand Union stores had a general manager, an assistant manager and one called a "third person" to manage the store. In addition, each section of the store, e.g. grocery, produce, meat, deli, and bakery, had its own manager.

32. When the assistant manager retired in November of 1998, Claimant requested, but was denied, permission to fill that position.

33. In the spring of 1999 when the "third person" quit, he was denied permission to fill that position. Claimant then began working 60 to 70 hours per week, including weekends and holidays and neglecting his own needs. He began experiencing symptoms he attributed to anxiety—an increase in heart rate, sweating and hyperventilation. To relieve the symptoms, he got up and walked around the store.

34. In September of 1999 claimant wrote to his supervisor asking for permission to give merit increases to particularly valuable employees. The request was denied. He repeated the request in October. Again the request was denied. In December he made another request indicating that some employees had already left and that he wanted to increase the pay of others in order to keep them. His memo stated in part, " We are down to about 45 people and I don't know how much longer we can survive."

35. As noted above, Claimant fell at work on December 3, 1999.

36. In a note dated April 7, 2000, Ms. Butterfield, Claimant's mental health provider, wrote that his psychological symptoms had subsided to the point where he could return to work on a half-day basis, although she deferred to his physicians on the determination of his physical abilities. On April 10, 2000 Nancy Phalen, his physical therapist, wrote that Claimant could return to work on a part-time basis, with no more than four hours a day and lifting limited to 20 pounds at any height. Claimant submitted both reports to his superiors at Grand Union.

37. In late April 2000, Grand Unions officials told Claimant that he could not return to work with the restrictions he had, and advised him to apply for long-term disability. Shortly thereafter, Claimant learned that he had been replaced and lost his job. He was instructed to clean out his desk.

Post-Fall Psychological Condition

38. After his December 1999 fall down the stairs at Grand Union, Claimant was referred to Dr. Paul Foxman, a psychologist at Otter Creek Associates, who in turn referred him to Kim Butterfield, a mental health therapist in his practice.

39. Ten days after the fall, Claimant met with Ms. Butterfield who diagnosed panic disorder without agoraphobia, with characteristics of Post Traumatic Stress Disorder (PTSD) and major depression. Claimant exhibited an acute level of anxiety, was agitated and teary and reported nightmares, sleeplessness and panic. She concluded that the panic symptoms resulted from "dealing with an extremely stressful, very difficult work situation." Specifically, that stress at work was due to excessive number of hours worked, short staffing and the inability to hire necessary personnel due to noncompetitive wages. On December 22, 1999 Ms. Butterfield wrote to Claimant's employer recommending that he remain out of work for an indefinite period and explaining that he was in treatment for symptoms of anxiety and depression.

40. Ms. Butterfield has continued to treat the Claimant. She has noted that his symptoms tend to fluctuate and that at times he was totally disabled from a psychological perspective. Those symptoms he has had consistently have been difficulty sleeping, palpitations, and shortness of breath, fear of dying, sweating, stomach distress, headaches and depressed mood.

41. In February 2000 when Claimant learned that he had been replaced at Grand Union, Ms. Butterfield noted that his symptoms increased, yet his desire to return to work also increased. In April 2000 Ms Butterfield wrote to Grand Union explaining that from a psychological perspective, Claimant could return to work on a half-day basis.

42. After his efforts to return to work at Grand Union failed, Ms. Butterfield noted that his depression worsened, self esteem "plummeted," and affect became flat.

43. By November of 2000 Ms. Butterfield opined that Claimant's psychiatric condition prohibited any employment. Six months later, she opined that Claimant's psychological condition was worse than it had been right after the fall.

44. On March 1, 2001 Claimant underwent a six to seven hour behavioral medicine and pain experience evaluation at the Occupational Management Center by Dr. Steven Mann, a psychologist. The evaluation included interviews and a battery of behavioral tests. Those tests indicated that the Claimant suffered from severe depression, anxiety and somatic distress.

45. The Millon Behavioral Health Inventory reflected an individual with sadness and anger, surrounded by responsibilities and pressures, with serious depression and persistent pain. Claimant had consistent elevations on scales designed to measure anxiety, depression, and pain.

46. Dr. Mann opined that one aspect of chronic pain is the spread of the pain response, particularly in those with depression and anxiety. Tests showed that Claimant's high levels of pain adversely affected virtually all activities of daily living. Claimant's responses on both non-verbal and verbal subtests indicated valid, compliant responses with no malingering.

47. In Dr. Mann's opinion, Grand Union's rejection of Claimant's attempts to return to the company significantly exacerbated his psychiatric problems.

48. From his review of Claimant's history, Dr. Mann noted that Mr. Dubuque's work-related stress was from his position of responsibility in a store where he felt as though things were slipping out of control. With increased anxiety, he fell down the stairs, which exacerbated his back pain. The loss of his job increased his psychological problems, which in turn made the pain worse and the cycle continued.

49. By May 1, 2001 Claimant had reached a medical end result for his psychological condition.

Pre-Existing Health Condition

Back

50. On October 6, 1978, Dr. Twitchell at University Health Center evaluated the Claimant and determined that he was in excellent health with no active medical problem.

51. Claimant first injured his back in 1980 while lifting grocery freight at a store in Fairhaven, Vermont. He received chiropractic care for that injury and continued to work without much lost time.

52. In 1989 when Claimant was the General Manager at the Grand Union in Milton, he again injured his back lifting bags. Dr. Binter, evaluated him and ordered a CT scan that showed a left L5-S1 foraminal stenosis and disc herniation. He was treated with physical therapy and an epidural block. He then successfully returned to work.

53. Between 1990 and his fall in December 1999, Claimant's back condition was asymptomatic. He lost no time from work because of his back.

Mental Health

54. In late 1993 during a yearly physical, Claimant reported to his primary care physician, James Evans, M.D., that he was feeling depressed. He described symptoms of irritability, fatigue, poor concentration, memory loss and feelings of hopelessness. Dr. Evans prescribed medication for the Claimant and referred him to Susan Legacy, M.D. for psychotherapy.

55. After evaluating the Claimant in July 1994 Dr. Legacy diagnosed a major depressive disorder and changed his medication to Paxil. At that time, Claimant reported symptoms including short-term memory, decreased sleep, irritability, anxiety, problems with concentration, and diminished motivation. By 1996 Dr. Legacy noted that the Claimant had maintained the 60 mg dose of Paxil for some time and had "good resolution of his depressive symptoms." She referred Claimant back to his primary care physician with the recommendation that he reduce the Paxil dosage. The dosage was tapered to 30 mg then to 20 mg, a dose Claimant remained on for the next three years as he managed Grand Union stores.

Expert Medical Opinions

56. On May 21, 2001, Dr. Mark Bucksbaum, a physiatrist, confirmed that surgery was appropriate for the Claimant. Dr. Bucksbaum opined that when Claimant fell, he sustained a worsening of his underlying pre-existing low back pain. He also confirmed that at the time of the visit, the Claimant could not go back to work due to his combined physical and psychological condition.

57. To determine the impact of his injury on his functional abilities, Claimant underwent a Functional Capacity Evaluation (FCE) at Fletcher Allen Health Care, performed by Diane Aja, an occupational therapist. Ms. Aja holds a masters degree in occupational therapy, and is licensed and board certified in that discipline. Her specialty is working with injured workers.

58. Ms. Aja spent 3 to 3.5 hours conducing the FCE, the usual time for such an examination, although there are no professional standards on the time required. Based on the results of that examination, Ms. Aja concluded that Claimant had limitation in all functional positions. Although he had tolerances for some functional positions for brief periods of time, he could not sustain them for vocationally relevant periods of time. Ms. Aja concluded that Claimant's evaluation was a valid and reliable measurement of the Claimant's best effort, based on computer-generated reliability functions, as well as her own professional observations and experience.

59. The defendant insurer made a videotape of the Claimant over a two day period of May 29 and 30, 2001. The tape contains approximately 45 minutes of the Claimant 1) removing a rubber garden how from a storage container; 2) entering and exiting his vehicle; and 3) entering and exiting a rental unit he owns.

60. Ms. Aja viewed the videotape and testified that it revealed nothing inconsistent with her findings and conclusions. Removing the garden hose from the container involved limited pushing and pulling and very limited lifting of light weights over a relatively short period of time with intervals between tape segments when one could assume he was resting. Furthermore, he was shown bracing himself when he bent over or and kneeled and changed positions frequently, signs consistent with her conclusion that he could not sustain work for vocationally relevant periods of time.

61. Louise Lynch, also a therapist who performs and interprets FCEs, testified on behalf of the employer. Ms. Lynch had not met or tested the Claimant personally; her opinions were based on her analysis of medical records and interpretation of the videotape. She interpreted the videotape as revealing greater abilities than were documented on the FCE Ms. Aja conducted.

62. Ms. Lynch acknowledged that the tape was limited in time and contained gaps during which it is impossible to know if the Claimant was resting.

63. Dr. Mark Bucksbaum also reviewed the videotape. He noted not only that it is too short to draw any conclusions as to work capacity, but also that it showed Claimant moving "in manner I would expect somebody who has radiculopathy to move … He's got very protected and guarded movements; the rate of movement is deliberate; he moves like somebody who had ten-plus years of low back experience and knows exactly which movements are going to hurt him and not hurt him. I did not see him violate any of that." Furthermore, Dr. Bucksbaum commented that "He bent over mechanically correct, as somebody who has been trained to bend when you've got a back injury."

64. Between March 13, 2001 and May 11, 2001 Claimant underwent a psychological evaluation with Dr. William Nash who later opined that the Claimant was suffering from acute anxiety at the time of his fall, which caused a heart rate response. In his opinion, Dr. Nash noted Claimant's meteoric rise through the management ranks at Grand Union and a 25-year successful career where Claimant demonstrated an ability to handle stressful workplace situations, although at a point in 1993 he did seek treatment for anxiety after taking over a newly renovated store.

65. Dr. Nash also noted that Claimant had new stressors when he returned from a human relations position to manage a store in 1997. In the new position he faced new stressors with the loss of full-time positions and the need to work with inexperienced employees. He lost flexibility as a manager and felt he had been set up for failure. With an identity closely linked to work, Claimant responded to the stress by working harder. His anxiety then increased.

66. In Dr. Nash's opinion, Claimant was experiencing a high level of anxiety on December 3, 1999 when he got up from his desk and attempted to walk it off. A concomitant autonomic heart rate response then caused him to faint as he was descending the stairs.

67. The MMPI Dr. Nash administered revealed significant depression and anxiety. He concluded that Claimant's pre-injury functioning was at a global function score of 84 with minimal symptoms and no impairment of vocational activities, compared to a current score of 45 with serious symptoms, affecting all aspects of his life. At his point, Claimant's mental status is intertwined with the level of chronic physical pain with the likelihood that amelioration of the physical pain will have a positive restorative effect on his anxiety and depression.

68. Dr. James Rosen is a psychologist who evaluated the Claimant for the defense. He observed that Claimant sat for several hours during the evaluation with no signs of discomfort. Dr. Rosen noted, "there was no unusual behaviors or problems with thought processes. His attention and concentration were very good. Memory was excellent. Intellectual functioning is estimated to be high average to superior."

69. Dr. Rosen noted that in 1999 Claimant experienced an anxiety episode in connection with a variety of stressors at work, including long hours, inadequate budget and personnel resources and a negative and threatening environment from his district manager. In his opinion, it was the build-up of anxiety at work that led to the fall down the stairs on December 3, 1999. Since then, his mental health symptoms continued in response to stressful circumstances caused by low back pain, disability from work, financial losses, a decrease in daily function and lowered self-esteem.

70. Based on the MMPI he administered, Dr. Rosen diagnosed Claimant with an adjustment disorder with mixed anxiety and depressed mood. Although this diagnosis differs from that of Dr. Nash, it also reflects symptoms that resulted from identifiable stressors.

71. In Dr. Rosen's opinion, Claimant's psychological condition does not incapacitate him from work, although he continues to require counseling.

72. Dr. Rosen agreed with Claimant's primary care physician that Claimant had perfectionist standards, which drove him to work excessively, to perform at a high level and to advance within the Grand Union corporate structure. When advancements did not work out as expected, Claimant felt devastated. One such event occurred on December 2, 1999.

73. From the tests administered to Claimant Dr. Rosen concluded that Claimant is among those who "dramatize and exaggerate their mental health symptoms and make little or no attempt to temper their distress or present a positive picture." But he also concluded that the MMPI results showing of a socially misfit, odd, outcast type individual, are inconsistent with the achievements Claimant has attained in his life, including managing other people. In Dr. Rosen's opinion, Claimant's responses to questions demonstrated exaggerated responses regarding mental health symptoms and that his responses were exaggerated when compared with other back pain patients with a similar MMPI.

74. In sum, Dr. Rosen did not believe the MMPI results were accurate because if they were her would be ""extremely psychologically disturbed and lacking basic social skills, perhaps even psychotic or paranoid…. The profile does not fit his clinical presentation."

75. Dr. Rosen concluded that while the Claimant has an adjustment disorder, "the disorder is not severe or incapacitating for work."

76. Claimant submitted an affidavit and fee agreement with his attorney in support of his claim for a contingency in this case and evidence of $3,194.35 in costs. A portion of that claim, $1,744.35 in costs, remains unchallenged.

CONCLUSIONS OF LAW:

1. The claimant seeks temporary total or partial benefits associated with the fall down the stairs in 1999, attorney fees, costs and interest. The defense denies all claims.

2. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). 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).

3. 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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

4. Vermont workers are entitled to benefits if they incur injuries that arise out of and in the course of employment. 21 V.S.A.§ 618.

Fall down stairs on December 3, 1999

5. Claimant maintains that injuries he sustained in the fall down the stairs are compensable because the accident arose out of and in the course of his employment. The employer has denied the compensability of the accident on the basis that the Claimant is unable to meet the rigorous test for a mental-physical claim that first requires proof of a mental injury. *Plante v. Plante, Hanley & Gerety, Opinion* No. 9-92WC (July 2, 1993); see also *Bedini v. Frost* 165 Vt. 167 (1996). In addition, the defendant argues that the fall resulted from a problem personal to the Claimant, which under the doctrine of idiopathic injuries is not compensable. See, *Marcy v. Georgia Pacific*, Opinion No. 27-98WC (June 1, 1998).

6. In this case, Claimant's fall clearly was in the course of employment because it took place "within the period of the employment, at a place where the employee reasonably may be, and while the employee [was] fulfilling work duties or engaged in doing something incidental thereto". 1 Larson's Workers' Compensation, Ch 12. "Scope" at 12-1.

7. The question then becomes whether the fall arose out of the employment. Claimant argues that the controlling doctrine here is that of positional risk articulated by the Court when it held that an injury "arises out of the employment if it would not have happened 'but for' the fact the conditions and obligations of the employment placed claimant in position where he was injured." *Miller v. IBM*, 161 Vt. 213 (1993).

8. Claimant worked in a setting where access from his office to the main floor required walking down a flight of stairs that ended on a concrete landing. Traversing that route was a necessary condition of employment and involved the potential hazard of the stairs. The stairs were part of Claimant's employment; the stress he was under at the time of the fall was personal to him. "When employment and personal risks concur to produce injury, the injury arises out of the employment, since the employment need not be the primary cause, but need only contribute to the injury." 1 Larson's, Chapter 4, "Scope" at 4-1.

9. In *Plante*, supra, on which the defendant relies, no external condition of employment contributed to the claimant's injury, which clearly distinguishes it from this case.

10. Because the fall down the stairs would not have happened "but for" the conditions and obligations of employment, *Miller*, 161 Vt. 213, the injuries incurred in that fall are compensable.

Mental Stress

11. Claimant had been working an extraordinary number of hours, was managing a store with too few employees and was rebuffed by his superiors when he tried to hire more employees. As such, he seeks compensation for psychological injuries he contends result from that work situation.

12. Great objectivity is necessary in what is called mental-mental cases. *Bedini v. Frost* 165 Vt. 167 (1996). A claimant's subjective impression that work-related stress caused an injury often forms the basis for the medical opinion that the injury was caused primarily by work- related stress. Id. Consequently, a claimant in a mental-mental claim must prove not only that job-related stress actually existed, *Mazut v. General Elec. Co*., Opinion No. 3-89WC (October 26, 1990), but that the stress is of significantly greater dimension than the daily stresses encountered by similarly situated employees. Id.; *Bedini* 165 Vt. 167; *Crosby v. City of Burlington*, Opinion No. 43-99WC (Dec. 3, 1999).

13. A managerial role by its nature is stressful. Keyworth presented persuasive evidence that all Grand Union managers experienced the same stressful conditions Claimant experienced in his last few months of employment, including limited resources and long hours. Claimant himself had perfectionist tendencies that had make work the highest priority in his life.

14. Any differences that existed between Claimant's work as manager and that of Keyworth when he resumed the role of manager cannot be considered of a "significantly greater dimension" than daily stresses encountered by other Grand Union managers. Consequently, Claimant is not entitled to benefits for his psychological condition.

Disability

15. A claimant is totally disabled for work under 21 V.S.A. § 642, while he is either: (1) in the healing period and not yet at a maximum medical improvement, *Orvis v. Hutchins*, 123 Vt 18 (1962), or (2) unable as a result of the injury either to resume his or her former occupation or to procure remunerative employment at a different occupation suited to his or her impaired capacity, Roller *v. Warren*, 98 Vt 514 (1925). It is only when maximum earning power has been restored or the recovery process has ended that the temporary aspects of the workers' compensation are concluded. See, *Moody v. Humphrey*, 127 Vt. 52, 57 (1968); *Orvis v. Hutchins*, 123 Vt. 18, 24 (1962); *Sivret v. Knight*, 118 Vt. 343 (1954).

16. Any disability benefits to which the Claimant is entitled must be based on the physical effects of his fall.

17. Claimant sought mental health treatment within 10 days of the fall in December 1999. Then, in the spring of 2000 when Claimant learned that he had been replaced as the manager of the South Burlington store, his condition clearly worsened. Even if his initial stress claim were deemed compensable, his reaction to Keyworth's appointment as manager would not be because the action by Grand Union was a bona fide personnel action. See, *Bluto v. Compass Group/Canteen Vending*, Opinion No. 11-02WC (Feb. 25, 2002) (Stress from bona fide personnel actions, such as transfers or disciplinary actions, is not compensable.) See, *Wilson v. Quechee Landowners Assoc*., 9- 87WC (Nov. 4, 1987); *Crosby v. City of Burlington*, Opinion No.43-99WC. "The statute did not intend to provide redress to every employee unhappy with the business decisions a company must necessarily make, including decisions to hire, fire, reorganize, or reduce and reallocate its work force." *Mazut v. General Electric Co*., Opinion No. 3-89WC (Oct. 26, 1990).

18. It is necessary to consider only if the compensable portion of this claim, the back, continues to disable him from work. Defendant argues that the back condition never disabled him.

19. One interpretation of the FCE is that Claimant can work; the other is that he cannot. Dr. Bucksbaum considered both the physical and psychological condition when he rendered opinions regarding disability. His opinion was necessarily based at least in part on the history given them by the Claimant. Dr. Evans opined that the back alone disabled him, as reflected in an October 2000 letter. Dr. Evans, too, relied on the history from the Claimant. As an individual receiving disability benefits, it was in the Claimant's interest to continue his status as disabled.

20. On one hand, the videotape captured the claimant's guarded movements even when he was unaware that he was being observed. On the other hand, it showed him performing functions that are inconsistent with his self-reports of limitations.

21. Considering the Claimant's abilities as reflected in his work history, family activities, videotape, expert opinions, and physician's notes, it is clear that the Claimant has had a light duty capacity to work and was on notice by January 5, 2001 that he had a duty to seek work within his restrictions. A Form 27 was filed on this basis. With no evidence that he made that effort, he is not entitled to temporary total disability benefits afterwards. See, WC Rule 18.1300.

22. In sum, Claimant's fall down the stairs at Grand Union caused a compensable physical injury. As a result he is entitled to temporary total disability benefits from the date of injury until January 5, 2001. In addition he is entitled to on-going medical benefits for the treatment of his back. Because the compensability of this claim was highly contested and Claimant prevailed in part because of the efforts of his attorney, fees are appropriate in proportion to his degree of success.

23. Under 21 V.S.A. § 678(a) a prevailing claimant is entitled to necessary costs as a matter of law and reasonable attorney fees as a matter of discretion. Claimant has prevailed on a portion of this claim due to the efforts of his attorney, who is entitled to a contingency fee, which under Rule 10 is limited to 20% of the total award not to exceed $9,000. Claimant is also awarded costs of $1,744.35, necessarily incurred in the successful aspect of this claim and the portion of the total request that is uncontested. On the contested aspect of the request for costs, the parties may submit arguments in support of their respective positions if they are not able to resolve the issue informally.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, Grand Union is ORDERED to pay Claimant:

1. Medical benefits for treatment of his back condition;

2. Temporary total disability benefits from December 1999 until January 5, 2001;

3. Attorney fees of 20% of the total award, costs of $1,744.35 and additional costs as noted above.

4. No decision regarding permanency can be made at this time.

Dated at Montpelier, Vermont this 20th day of August 2002.

_____

R. Tasha Wallis
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.