Hojohn v. Howard Johnson's, Inc. (January 19, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

David Hojohn	)	Opinion No. 43R-04WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Howard Johnson's Inc.	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. F-17762

RULING ON CLAIMANT'S MOTION FOR RECONSIDERATION OF ATTORNEY FEE AWARD

This matter came before the Department on claimant's motion to reconsider the attorney contingency fee award ordered in this permanent total disability case pursuant to 21 V.S.A. § 678(a) and Workers' Compensation Rule 10.1220. He argues that a more reasonable fee would be based on the hours expended given the time and skill needed to litigate this complex case and now asks for a total of $35,685.00, $4,000 less than the original request. The attorney-client agreement was for a contingency fee.

Because I remain unconvinced, I reiterate the reasoning in the attorney fee decision:

> It is clear that claimant prevailed because of the efforts of his attorneys and the medical issues raised were complex, requiring considerable skill and time. However, the hourly fee requested far exceeds what one would expect in a case of this nature, particularly when the defendant paid the claimant temporary total disability benefits for years and had no role in any delay. Once the Form 27 to discontinue benefits was approved, the case moved expeditiously to hearing. The statement submitted in support of the claim for fees includes time on undisputed aspects of the claim, making a precise determination of an accurate hourly fee difficult.

Hojohn v. Howard Johnson's, Inc. Opinion No. 43A-04WC (December 3, 2004).

Furthermore, nothing in our rules prohibits "an attorney and client from agreeing to a different reasonable hourly or contingent fee." Rule 10.2000.

Therefore, the request for reconsideration is hereby denied.

Dated at Montpelier, Vermont this 19th day of January 2005.

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Laura Kilmer Collins
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.

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

David Hojohn	)	Opinion No. 43A-04WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Howard Johnson's, Inc.	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. F-17762

RULING ON CLAIMANT'S REQUEST FOR ATTORNEY FEES

Claimant David Hojohn succeeded in his claim for permanent total disability benefits as explained in the opinion dated September 28, 2004. His attorney-client contingency fee agreement and statements are offered in support of this request for attorney fees, based on 434 hours worked and fees totaling $7,944.75. If an hourly award for fees were granted, claimant would be entitled to $39,060.00 under WC Rule 10.1210, which limits the hourly fee to $90.00. On the other hand, a contingency fee is limited to 20% of the award, not to exceed $9,000 under Rule 10.1220.

The Workers' Compensation Act provides for a discretionary award of *reasonable* attorney fees for a prevailing claimant. (emphasis added). 21 V.S.A. § 678(a). Mindful of the purposes underlying the Act, this Department has considered one or more of several factors when exercising the discretion necessary for an award of fees.

Those factors include: whether there was unreasonable delay and unnecessary expense in the resolution of the claim; see *Morrisseau v. Legac*, 123 Vt. 70 (1962); whether the efforts of the claimant's attorney were integral to the establishment of the claimant's right to compensation, *Marotta v. Ascutney Mountain Resort*, Op. No. 12-03WC (2003); *Jacobs v. Beibel Builders*, Op. No. 17-03 (2003); *Deforge v. Wayside Restaurant*, Op. No. 35-96WC (1996); the difficulty of the issues raised, skill of the attorneys and time and effort expended, *Dickenson v. T.J. Maxx*, Op. No. 13-03 WC (2003); and whether the claim for fees is proportional to the efforts of the attorney, *Vitagliano v. Kaiser Permanante*, Op. No. 39-03 WC (2003*); Fitzgerald v. Concord General Mutual*, Op. No. 6A-94WC (1995). When a claimant has partially prevailed, a fee will be based on the degree of success. *Brown v. Whiting*, Op. No. 07-97WC (1997). Although this department is not bound by a claimant's private agreement to pay the attorney a contingency fee, that agreement should be an additional factor to be considered in fashioning a fee award.

It is clear that claimant prevailed because of the efforts of his attorneys and the medical issues raised were complex, requiring considerable skill and time. However, the hourly fee requested far exceeds what one would expect in a case of this nature, particularly when the defendant paid the claimant temporary total disability benefits for years and had no role in any delay. Once the Form 27 to discontinue benefits was approved, the case moved expeditiously to hearing. The statement submitted in support of the claim for fees includes time on undisputed aspects of the claim, making a precise determination of an accurate hourly fee difficult.

Therefore, the most appropriate award of fees in this case is one based on a contingency fee of 20% of the total award, not to exceed $9,000.00.

The necessary costs of $7,944.75 are also awarded.

Dated at Montpelier, Vermont this 3rd day of December 2004.

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Michael S. Bertrand
Commissioner

Hojohn v. Howard Johnson's, Inc. (November 2, 2004)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

David Hojohn	)	Opinion No. 43S-04WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Howard Johnson's, Inc	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. F-17762

RULING ON DEFENDANT'S MOTION FOR STAY

Defendant, by and through its attorney Richard Windish, moves the Department to stay the order granting claimant permanent total disability benefits (PTD). See Opinion No. 43-04WC (Sept. 28, 2004). Claimant, by and through his attorneys, Scott R. Bortzfield and John C. Swanson, opposes the motion.

Even though the PTD award was appealed, the order remains in full effect unless specifically stayed by the Commissioner. 21 V.S.A. § 675. The burden to prove the propriety of a stay is on the defendant as moving party, who must demonstrate: "(1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) a stay will not substantially harm the other party; and (4) the stay will serve the best interests of the public." (emphasis added) *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co*., 132 Vt. 554 (1974). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v.Webster Corporation*, Opinion No. 62S-96WC (1996).

Defendant correctly notes that because the appeal is to a superior court, the case will be heard *de novo*. 21 V.S.A. § 670. It then argues that because claimant had some employment, a jury will likely find that he engaged in regular, gainful employment, thereby reversing this Department's decision to the contrary. However, given the strength of the treating physician expert opinions that claimant has no work capacity, it is not likely that the jury will find differently. Defendant therefore, does not meet the first criterion, which makes it unnecessary to go further since all four requirements must be met before a stay will be granted. Nevertheless, it is important to note that defendant has not proven the most important of the criteria, the third. Because claimant has been without benefits for more than a year and a half and has had to forego some treatment because of an inability to pay, further delay in form of a stay would lead to substantial harm. Finally, defendant urges the Commissioner to grant a stay on public policy grounds because of the finding that the carrier waived rights by not acting sooner. But it must be noted that waiver was not the sole grounds for the PTD award in this case. In fact, the defense expert's opinion supported the ultimate conclusion.

ORDER:

Accordingly, the motion for a stay is DENIED.

Dated at Montpelier, Vermont this 2nd day of November 2004.

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Michael S. Bertrand
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.

Hojohn v. Howard Johnson (September 28, 2004)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

David Hojohn	)	Opinion No. 43-04WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Howard Johnson	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. F-17762

Hearing held in Montpelier on April 21, 22, 23 and in Burlington on May 12, 2004
Record Closed on July 8, 2004

APPEARANCES:

John C. Swanson, Esq. and Scott R. Bortzfield, Esq., for the Claimant
Richard J. Windish, Esq., for the Defendant

ISSUES:

1. Is claimant permanently and totally disabled?

2. If not permanently and totally disabled, what degree of permanent partial disability applies?

3. Does claimant's condition include a diagnosis of somatoform disorder and, if so, is it causally related to his workplace injury of January 18, 1993?

4. Are claimant's right leg cramping, knee and back conditions causally related to the 1993 injury?

5. Has claimant's ongoing medical treatment been causally related to his 1993 work related injury?

6. Is claimant entitled to attorney fees and costs?

EXHIBITS:

Joint I: Medical Records I
Joint II: Medical Records II
Joint III: Vocational Rehabilitation Records
Joint IV: Independent Medical Examination

Defendant C: "Other Records"
Defendant D: "Addition to Joint Medical Exhibit"

STIPULATIONS:

1. Claimant David Hojohn was an employee of defendant Howard Johnson's Inc. within the meaning of the Vermont Workers' Compensation Act (Act) at all relevant times.

2. Howard Johnson's was an employer within the meaning of the Act at all relevant times.

3. Peerless Insurance Company was the workers' compensation carrier for Howard Johnson's at all relevant times.

4. At the time of the injury, claimant was employed in maintenance at Howard Johnson's, with an average weekly wage of $323.85.

5. On January 18, 1993, claimant was working his shift at Howard Johnson's. While shoveling snow, he stepped off a curb and suffered an injury to his right ankle.

6. Claimant has suffered pain since January 18, 1993.

7. From October 10, 1994 through December 2, 1994, with vocational rehabilitation assistance, claimant made an attempt to return to work as a maintenance worker at Colburn and Feeley, but suspended the return to work based on a medical directive.

8. On December 2, 1994, Dr. Fries determined that claimant was 100% disabled from work due to right foot spasms and pain.

9. From May 13, 1999 through April 23, 2000, claimant was employed as a maintenance supervisor at Fairfield Inn in Colchester.

10. From April 25, 2000 through February 2, 2001, claimant was employed as a "tool pro" at Sears.

11. On January 25, 2001, Dr. Landry determined that claimant was 100% disabled from work due to chronic right lower extremity pain and cramps.

12. With the exception of claimant's returns to work, Peerless has paid claimant temporary total disability benefits from January 1993 through April 28, 2003.

13. A Form 27 was approved by the Department, terminating all benefits as of April 28, 2003.

14. Claimant has had ongoing medical treatment since January 18, 1993 for his left knee, lower back, and right lower extremity problems; and psychological issues.

FINDINGS OF FACT:

1. On January 18, 1993 while shoveling snow at Howard Johnson's, claimant stepped off a curb and injured his right ankle.

2. Orthopedist Dr. Stanley Gryzb treated the claimant for his ankle injury. The treatment included physical therapy. Notes reflect Dr. Gryzb's intent to return claimant to work with a brace in May, four months after the injury. A few days after that visit, claimant reported to the physical therapist that his foot was locking.

3. On May 28, 1993, claimant had an insurance-requested independent medical examination with Dr. Howard Dananberg, a podiatrist, to whom he also complained of his foot locking.

4. When initial return-to-work efforts were unsuccessful, claimant received extensive vocational rehabilitation services. Paul Langevin, Vocational Rehabilitation Counselor, initially assessed the claimant on March 17, 1994. An approved IWRP was followed with vocational training in gas appliance repair, plumbing and TIG welding.

5. A 1994 Functional Capacity Evaluation noted that claimant had a work capacity with limitations on repetitive standing, lifting and walking.

6. From October to December 1994, with VR assistance, claimant worked as a maintenance worker at Colburn and Feeley.

7. In 1994 Dr. Renstrom placed claimant at medical end point for his orthopedic problems, but not for the cramp-like phenomenon in his right foot. On December 2, 1994 Dr. Fries determined that claimant was 100% disabled from work due to right foot spasms and pain.

8. In March of 1994, Dr. Fries performed an EMG and needle examination. Although the EMG was normal, the needle examination revealed two muscles that fired abnormally during cramps. Dr. Fries explained that when the claimant's leg locked, there was spontaneous firing of those two groups of leg muscles and that the firing rate was not at the usual high frequency seen with a cramp.

Vocational Rehabilitation and Job Opportunities

9. Claimant's first attempt to return to work was in the fall of 1994 when he worked for two months in property maintenance. That job ended on the recommendation of Dr. Fries, who noted that claimant's pain complaints disabled him, although there were no adverse consequences to his working. VR efforts were then suspended.

10. In March of 1996 VR efforts were restarted and claimant retrained in plumbing and electrical skills to allow him to obtain a supervisory job. On November 14, 1996, Dr. Fries provided approval for claimant to proceed with a light maintenance property management job.

11. A May 1996 FCE determined that claimant had a light duty capacity.

12. From the fall of 1997 until spring of 1998, claimant had training in welding after which he was offered a third shift job with TIG Welder under a plan that would have provided accommodations for him. Claimant refused a third shift job, supported by a letter from his physician that he could not work on the third shift for medical reasons.

13. When a second shift job later became available, claimant rejected it as incompatible with family obligations. Further, claimant objected to the job offer because it was being offered through a temporary agency. His VR counselor considered it unsuitable because it was not on the same (day) shift claimant was working at the time of his injury.

14. During the winter of 1999 claimant took a Dale Carnegie course. Through VR, a computer was purchased for him.

15. At the request of the carrier, Dr. Alfred evaluated the claimant in April of 1999 when he determined that claimant had not reached medical end result, but had a work capacity in a sitting role.

16. From May 13, 1999 through April 23, 2000, claimant worked as a maintenance supervisor at Fairfield Inn. Accommodations provided were orthopedic shoes and hydraulic lift. By October, it was noted that claimant was doing well in the job. In November 1999 the VR file was closed.

17. Claimant left the Fairfield job after almost a year because of a change in management.

18. From April 25, 2000 through February 2, 2001, claimant worked as a "tool pro" at Sears, a job he obtained on his own and performed with restrictions.

19. Claimant did not lose time from work at either the Fairfield or Sears job, working continuously for twenty months. However, while he was working at Sears, Dr. Landry increased the dosage for his pain medication because of increasing complaints.

20. On September 11, 2000, neurologist Dr. Zakir Ali noted that in spite of medications, the spasms had increased and were worsening, although he was able to carry on his daily activities.

Continued Medical Treatment

21. On January 25, 2001, Dr. Landry "reluctantly" determined that claimant was 100% disabled from work due to chronic right lower extremity pain and foot spasm.

22. In October of 2001 the dorsal column stimulator, that had previously been implanted to treat claimant's pain, was removed. During the course of the surgical procedure, part of the superior facet in the lumbar region of claimant's spine was inadvertently detached. In Dr. Landry's opinion, the bone removal accounts for the claimant's complaint of back pain.

23. In November of 2002 VR services were resumed, not with the purpose of returning claimant to work, but to address quality of life issues and to help claimant cope.

24. In a January 22, 2002 Orthopaedics/Rehabilitation Health Care Service Interdisciplinary Evaluation summary is the conclusion that claimant has no work capacity.

25. With the exception of claimant's intermittent periods of employment, Peerless paid claimant temporary total disability payments from January 1993 until April 2003 when it discontinued benefits based on medical opinions that claimant had reached medical end result.

26. Claimant has continued to receive medical treatment for leg and ankle pain, leg cramping, lower back pain and psychological issues. Treatment has included physical therapy, lumbar sympathetic blocks, a TENS unit, surgery, a boot brace and air cast, medications, including Botulinum toxin, and dorsal column stimulator.

27. Treatment providers have included: Orthopedists, Dr. Stanley Gryzb, Dr. Joseph Abate, Dr. Per Renstrom, and Dr. Andrew Kaplan; Podiatrist, Dr. Howard Dananberg; Neurologists, Dr. Timothy Fries, Dr. Paul Penar, Dr. Zakar Ali and Dr. Daniel Tarsi; expert in Botulinum toxin, Dr. Mitchell Brin; Psychologist, Dr. Robert Theisin, Dr. William Nash and Dr. Nancy Silberg; Psychiatrist Dr. Paul Cotton; Primary Care Physician, Dr. Landry; Pain Management specialist, Dr. Tarver, and Dr. Rayden Cody; as well as Dr. Noel Perin and Dr. Gary Thomas. None has seen this claimant's clinical presentation before.

28. Diagnoses entertained by the numerous physicians who have treated the claimant have been: syndesmosis injury, reflex sympathetic dystrophy (RSD), fibular fixation, traction injury to peroneal nerve, disabling spasms of the tibialis posterior and other muscles of the right leg, patellofemerol pain syndrome, post traumatic spasms, a variant of neuromyotonia, chronic pain, depression and anxiety.

29. No diagnosis has been confirmed with objective evidence, with the exception of the spontaneous firing noted on needle examination of muscle during spasm. Otherwise, the EMGs, MRIs, and CT scans as well as all other objective tests have been negative. No treatment has worked to relieve claimant's leg pain or spasms, which have worsened over time.

30. Any movement of the claimant's right foot, even passive movement, sets the foot into observable, involuntary spasm. The muscles on top of the foot tighten, the toes curl under and the arch rises. At the hearing, the spasm was evident when claimant removed the brace and sock.

31. Opinions that claimant remains totally disabled are based on the claimant's pain and leg spasms. An ankle brace helps to control the spasm.

Expert Medical Opinions

32. Dr. Fries diagnosed claimant's condition as posttraumatic muscle spasm that is causally related to his January 1993 work related injury. In reaching that diagnosis, Dr. Fries ruled out other diagnoses. He based his opinion on the claimant's history and observable spasms. Specifically, Dr. Fries noted that claimant's spasms are consistent, always firing at the same rate, which means they are not volitional. Although abnormal firing can be feigned, that is not likely with such consistent spasms. He noted no signs of suggestive of malingering.

33. Further, Dr. Fries opined that in the "real world" of work claimant has no work capacity, meaning that he is not capable of commuting to work or even getting up to go to the bathroom at work.

34. Dr. Landry, a treating physician, has managed claimant's pain medications as well as other medical problems. He opined that claimant's pain complaints seem to be related to the 1993 injury.

35. Based on information from the claimant, Dr. Landry opined that claimant's last job, the one at Sears that ended in February of 2001, caused him increased pain. Although Dr. Landry was not familiar with the duties of the Sears job, he increased the dosage of pain medication while claimant was working there.

36. Dr. Nash, a strong advocate for the claimant, diagnosed claimant with a pain disorder associated with both psychological factors and a general medical condition. The inclusion of the general medical condition is based on the claimant's history and the medical records. The psychological factors are anxiety, depression and an adjustment disorder. If the pain were removed, claimant would no longer have the psychological factors.

37. Dr. George White, Occupational Medicine specialist, opined that claimant's ankle sprain may have triggered the right lower extremity spasms and that it is reasonable to attribute claimant's low back pain to the surgery to remove the dorsal column stimulator.

38. Dr. White later altered that opinion based on receipt of prior workers' compensation claims. However, he had only limited records related to those injuries. He opined that there is no causal relationship between the 1993 ankle sprain and claimant's current problems. Specifically, he testified that the 1993 injury was " a trigger, not a cause." Dr. White concluded that claimant is at medical end result for his work related injury with a 12% impairment for loss of range of motion and 3% for pain for a total 15% whole person impairment.

39. Dr. Albert Drukteinis, a psychiatrist, evaluated the claimant for the defendant. Based on interview, records and testing, Dr. Drukteinis concluded that claimant suffers from a pain disorder associated with a medical condition. He later changed that opinion to a pain disorder associated with psychological factors after receiving some information about prior claims. In Dr. Drukteinis's opinion, it is the psychological condition that perpetuates the unusual cramp-like phenomenon.

40. Further, Dr. Drukteinis opined that claimant has a work capacity and that his psychological factors can be treated.

Pre Injury History

41. Claimant has a history of previous workers' compensation claims involving complaints of pain with no objective findings. Although the defense suggests fraud, the credible evidence does not support such an allegation. Claimant received permanent partial disability benefits for those prior injuries.

Attorney Fees and Costs

42. Claimant submitted evidence that his attorneys worked 434 hour on this case and incurred $7,944.75.

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 (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).

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).

Causation

3. After a decade of providing benefits to this claimant, Peerless now challenges causation, a challenge that fails on two fronts. First, its expert, Dr. White, opined that the work related injury was a trigger for his current condition. Although Dr. White distinguishes between trigger and cause, our law does not. It is undisputed that claimant suffered an injury in 1993. "Every natural consequence that flows from that injury" is also compensable. See 1 A. Larson and L.K. Larson, Larson's Workers' Compensation Law ch 10 at 10-1. Therefore, a condition triggered by a work related injury, barring intervening events, is compensable. Second, the carrier has waived its right to challenge causation after such a lengthy period of coverage.

> Waiver is the intentional relinquishment or abandonment of a known right and may be inferred from the party's words or conduct. *Tooley v. Robinson Springs Corp.*, 163 Vt. 627, 628, 660 A.2d 293, 295 (1995) (mem). We have held that the essence of a waiver is a voluntary choice. And thus the party must have acted with a knowledge of all the material facts. *Eastman v. Pelletier*, 114 Vt. 419, 423, 47 A.2d 298, 301(1946).

Humphrey v. Vermont Tap & Die Co. Vt. Sup Ct. Op. No. 96-187 (23 Apr 1997) (entry order).

4. Peerless had all medical and vocational rehabilitation records during the ten years it voluntarily paid on this claim, thereby relinquishing its right to deny it.

Permanent Total Disability

5. For injuries before the 2000 statutory odd lot amendment, a claimant is entitled to permanent total disability if his injury is within the enumerated list articulated in 21 V.S.A. § 644 (loss of sight in both eyes; loss of both feet; loss of both hands; loss of one hand and one foot; paralysis of both legs or both arms or of one leg and of one arm; and injury to the skull resulting in incurable imbecility or insanity) or, without considering individual employability factors such as age and experience, the medical evidence indicates that his injury has as severe an impact on earning capacity as one of the scheduled injuries, see *Bishop v. Town of Barre,* 140 Vt. 565 (1982), that he is totally disabled from gainful employment. *Fleury v. Kessel/Duff Constr. Co*. 148 Vt. 415 (1987).

6. The standard is further articulated in § 645(a), which specifies that one must have "no reasonable prospect of finding regular employment."

7. Regular employment is "work that is not casual and sporadic." Gainful employment means that one earns wages; it is not charitable work. *Rider v. Orange East Supervisory Union,* et. al. Opinion No. 14-03WC (2003).

8. On this issue, the department must choose among conflicting medical opinions, a familiar process that involves consideration of the following factors: 1) the nature of treatment and 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. See *Geiger v. Hawk Mountain Inn,* Op. No. 27-99WC (1999).

9. In support of the claimant are several opinions, including those from Dr. Fries and Dr. Landry who have the treating physician advantage over the defense experts Dr. Drukteinis and Dr. White. The experts examined the pertinent medical records. Doctors White and Druketeinis had evidence of prior injuries, but not all corresponding medical records, making that evidence unduly prejudicial and undercutting the objectivity of their opinions. All experts provided comprehensive evaluations. Dr. Fries has the special expertise with EMGs, making him especially qualified to express an opinion about the nature of the spasms.

10. On balance, therefore, the claimant's treating physicians' opinions are accepted here, supporting claimant's position that his leg spasms are posttraumatic, with origin back to the 1993 ankle injury. Those spasms have resulted in a chronic pain disorder and an adjustment disorder with anxiety and depression. Therefore, the diagnosis of a pain disorder associated with psychological factors and a general medical condition is supported. The back pain is related to the surgery, which was performed for the work related injury.

11. Furthermore, despite vocational rehabilitation efforts and several return to work trials, physicians who know this claimant well have opined many times that he has no work capacity, with Dr. Landry doing so reluctantly.

12. These physicians convince me that claimant, after close to a decade without significant work, has no reasonable likelihood of finding gainful employment. As such, he is permanently and totally disabled as a result of his work-related injury.

13. Furthermore, the medical treatment he has been receiving is reasonable and, therefore, compensable under 21 V.S.A. § 640.

14. A decision on the issue of attorney fees and costs is deferred for 30 days.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, this claim for permanent total disability is GRANTED.

Dated at Montpelier, Vermont this 28th day of September 2004.

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Michael S. Bertrand
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.