STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-19582
	)	
Ilia Dinis	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Handy's Texaco	)	Commissioner
	)	
	)	Opinion No. 12-01WC

Hearing Held in Burlington on October 24 and 25, 2000 and February 26, 2001
Record Closed on March 27, 2001

APPEARANCES:

Gary W. Lange, Esq. and Daniel H. Maguire, Esq. for the claimant
Glen L. Yates and James W. Coffrin, Esq. for the defendant

ISSUES:

Did the claimant's injury arise out of and in the course of his employment?

EXHIBITS

Claimant's:

1: Burlington Police Department photographs of the scene on April 1, 1998:
1A: View from the front of Handy's Texaco, Inc. from South Winooski Avenue
1B: View of the office and portion of the front bay
1C: License plate of the Ford F-150 truck on the lift in Bay #1
1D: Photo of the Ford F-150 pickup truck on the lift inside Bay #1
1E: Photo of Bay #1, looking towards the west wall
1F: Photo of Bay #1, looking towards the south wall
1G: Photo of the floor of Bay #1, looking northwest
1H: Photo of the starter motor on the floor of Bay #1
1I: Photo of starter motor
1J: Photo of the starter motor on the floor of Bay #1, with starter motor bolt
1K: Photo of the underbody of the F-150 pickup truck, depicting where the starter motor would be installed
1L: Photo of floor of Bay #1 between Bay #2 and Bay #1 with a trail of stains
1M: View of the office door from Bay #1
1N: Stoop of the office door
1O: Photo of desk with telephone and red stains

2. NASTRA 3185 starter motor for Ford F150 pickup truck
3. Curriculum Vitae of Dr. Bruce Tranmer
4. Medical records:
   A. The Operative Report of Dr. Martin Bednar dated April 1, 1998
   B. CT Scan Report of April 1, 1998 at of 3:15 p.m.
   C. CT Scan Report of April 1, 1998 at 5:20 p.m.
   D. The four-page Discharge Summary of Dr. Bednar dated of May 4, 1998
   E. The CT Scans of April 1, 1998, one taken at 3:15 p.m. and one at 5:20 p.m.
   F. Dr. Tranmer letter of May 9, 2000 to Gary Lange
5. Diagram of Handy's Texaco marked up by Ilia Dinis
9. Depositions of Richard Brisson dated January 12, 2000, and May 17, 2000
10. Videotaped deposition and transcript of Nikoll Marku of May 17, 2000
11. Information and Affidavit of Probable Cause relating to the Simple Assault charge relating to Mr. Marku for assaulting Muzahem Alsayaf
12. Information and Affidavit of Probable Cause relating to the Simple Assault by Mr. Marku of Kevin Sinclair
14. Northwest State Correctional Facility documents relating to:
   A. Disciplinary reports with supporting documentation
   B. Grievances filed by Nikoll Marku
15. Dr. Elizabeth Michaels' letter to Thomas Costello, Esq. dated January 5, 2000
16. Letter from Dr. Zweber to Thomas Costello dated July 21, 2000
17. Dr. James Whitlock's IME letter/report to Glen Yates dated October 5, 2000
18. Psychiatric evaluation/report to Dr. Drudge from Dr. Elizabeth Michaels and Dr. Ragan Willmuth
19. Dr. George White's IME report to Glen Yates dated March 22, 1999
20. Dr. George White's IME report letter to Glen Yates dated October 13, 2000
21. Functional Capacity Evaluation at Northeastern Rehabilitation Hospital dated September 20, 2000.

Defendant's Exhibits:

C: Attending physician note of April 1, 1998
D: BST/On call chief resident admit note.
L: Photo: Man reaching up to the underside of a vehicle on a lift
M: Photo: Man reaching up to the underside of a vehicle on a lift (side view)
O: Photo: underside of vehicle
P: Orthopedic/Hand Consultation
Q: Neurosurgical Note
R. Videotape
W: Dr. Seirig's calculations re: energy required for skull fracture
X: Emergency Room note of April 1, 1998
Y: Curriculum vitae of Ali A. Seirig

STIPULATION OF FACTS:

1. Ilia Dinis was an employee of Handy's Texaco, Inc. within the meaning of the Vermont Workers' Compensation Act (Act) at all relevant times.

2. Handy's Texaco, Inc. was an employer within the meaning of the Act all relevant times.

3. Cincinnati Insurance Company was the Workers' Compensation insurance carrier for Handy's Texaco at all relevant times.

4. At the time of this injury, and for several years previous to it, Ilia Dinis was employed as an automotive mechanic at Handy's Texaco, Inc.

5. On April 1, 1998 Ilia Dinis was working on a Ford F-150 pickup truck which was on the hydraulic lift in Bay # 1. Ilia was in the process of replacing the starter motor on the truck. He had removed the old starter motor, and was awaiting the delivery of the new starter motor when Nikoll Marku arrived on the Handy's Texaco, Inc. premises.

6. Nikoll Marku had visited Ilia in the past at Handy's Texaco and was known to the individuals who worked at Handy's Texaco as an acquaintance of Ilia's.

7. On April 1, 1998 Nikoll Marku walked through the office area of Handy's Texaco, was acknowledged by Handy's employee Richard Brisson, and then entered the bay area of the garage to visit with Ilia Dinis.

8. The bay area of the garage between Bays 1,2, and 3 is an open area. There was a mechanic, George Korol, working in Bay No. 2 and another mechanic; Hoang Nguyen working in Bay No. 3 at the time of the incident which gives rise to this claim.

9. Ilia and Nikoll spoke for five or ten minutes in a friendly manner.

10. The new starter motor arrived for installation into the Ford F-150 pick-up truck. Ilia returned to his work.

11. Ilia, with his back to Nikoll, started to install the starter motor on the truck, which was raised up on the hydraulic lift. Claimant was attacked from the rear by Nikoll Marku.

12. Nikoll Marku ran from the premises immediately thereafter.

13. Nikoll Marku denies that he assaulted Ilia Dinis. He denies that he was at Handy's Texaco on April 1, 1998. Nikoll Marku states that Ilia was his friend and that he had no reason to harm him.

14. Mr. Dinis has suffered numerous physical and other injuries as a result of the attack.

FINDINGS OF FACT:

1. At the claimant's request, this hearing went forward before the criminal matter against Mr. Marku had been concluded. Nevertheless, the parties have stipulated that Mr. Marku was the claimant's assailant on April 1, 1998.

2. Despite the stated policy at Handy's that no visitors be allowed to enter the bay area of the garage, family and friends frequently were allowed in the area to visit the mechanics. And it was not unusual for customers to be allowed in that area to learn about repairs their vehicles.

3. Hoang Nguyen, one of the mechanics, sometimes used his native language skills to help translate for Vietnamese clientele.

4. The claimant Ilia Dinis, often called "Lee," had some of his Albanian friends and acquaintances visit him at Handy's. Some would have their cars fueled up and, on occasion, had their cars repaired at Handy's.

5. Claimant and Nikoll Marku met as part of the Albanian community in Burlington. They played soccer together, rode bikes together, and saw one another in local establishments. For awhile, they lived together. From time to time, Marku visited the claimant at Handy's where he was recognized as "Lee's friend."

6. Claimant helped Marku locate leads for employment and provided transportation to him so that he could keep appointments for job applications.

7. In 1994 Marku moved to South Carolina and the claimant moved to Chicago. Before moving, claimant sold Marku a van for $800.00. At the time of the sale, Marku could only afford $200.00. Claimant testified that he forgave the rest of the debt. Marku testified that he still felt he owed the claimant money from that sale.

8. Claimant and Marku both returned to Vermont in 1995 and the claimant returned to his job at Handy's. When he saw Marku living out of his car, claimant invited Marku to live with him until he could find his own place. Marku paid no rent. After two months of living together the claimant asked Marku to move out. Later when the claimant had another roommate, Marku sometimes visited. Marku said that he referred to the claimant as "little brother."

9. Sometime following their return to Burlington in 1995 or 1996, Marku appeared at Handy's where he confronted claimant with needing to go to a judge to explain why he broke the window on Marku's car. Charlie Handy testified that voices were raised and seemed angry during that discussion. Marku told the claimant that someone had told him to suspect that the vandal was one to whom Marku owed money. Regardless of the rational basis for his belief, Marku thought that the claimant broke the window. Believing that the issue remained unresolved, the claimant went to Marku's home after work to discuss the matter. He made that extra effort because he considered Marku a friend.

10. At a bar sometime later, Marku believed that the claimant flicked cigarette ashes into his beer. Afterwards, he avoided the claimant when their paths crossed.

11. The claimant was successful in his personal and work lives. Marku apparently was not. Claimant saved up enough money to take a trip to Albania to visit his family, a subject that he and Marku were discussing the day of the injury at issue here.

12. Marku testified that he had his car serviced at Handy's several times. However, the evidence shows that those times were years before the incident at issue in this case.

13. Handy's Texaco is a four bay garage located on the west side of South Winooski Avenue, a north-south street. The station is roughly rectangular. Looking at the station from the front and going from left to right (south to north), one first sees the office, then Bay 1 (claimant's bay), then Bay 2 (George Korol's bay), then Bay 3 (Hoang Nguyen's bay), then Bay 4 (Samir's bay). Samir was on vacation on the day of the injury. Because the claimant's work area was directly next to the office and between the office and the other bays, it was the most open and had the most traffic.

14. On April 1, 1998, Marku appeared at Handy's Texaco. He greeted and smiled at Richard Brisson, the gas station attendant and asked if Lee were in. When told that the claimant was inside, Marku went inside the service bay area to visit with the claimant. Marku was not at the service station for any business. At that time, the claimant had just removed a starter motor from a truck that was elevated on the hydraulic lift and was waiting for a new motor. The starter motor is located at the bottom of the engine on the passenger side of the Ford F-150. With the vehicle raised, the bottom of its tires was approximately at the level of the claimant's shoulders. The truck had been driven front first into the bay and was facing in a westerly direction.

15. Claimant and Marku, who was last seen at Handy's about four weeks earlier, greeted one another with smiles and a handshake. Claimant agreed that Marku was there to see him and not one of the other mechanics. The men spoke in Albanian for about 10 to 15 minutes about personal matters such as family. The claimant realized that word of his upcoming trip to Albania had probably traveled through the Albanian community to Marku. They also talked about the civil war and killing going on in their native land. From all accounts, it was a friendly, personal and easy conversation. Their conversation had nothing to do with cars, car repairs or anything to do with Handy's business.

16. During Marku's visit, Hoang walked through Bay 1 on his way to the office and saw "Lee's friend" as he was passing through.

17. While Marku was still with the claimant, Charlie Handy arrived with the new starter motor and asked if the claimant needed any help. The claimant said "no." Handy left the new starter motor, still in its box, and returned to the office. Hoang returned from the office area at about this time and again walked through Bay 1.

18. Charlie Handy is a native of Lebanon who grew up and was educated in Burlington. He

worked at the Handy's Texaco garage when he was in high school. In 1998, Handy was the manager of garage, but still did automotive work as necessary.

19. Handy testified that he was uncomfortable around Marku because Marku had asked personal questions about money, but he did not think that Marku presented any safety concern. Handy thought Marku had been to the station 10 times or so before April 1, 1998, each time without a problem. Handy explained that the business is a family-oriented business so friends and family were routinely let into the station so long as they were not in the way.

20. Sometime after the new starter motor arrived and while Marku was still with the claimant, the claimant returned to his work, turning his back to Marku. The claimant expected to continue the conversation with Marku while he worked.

21. Claimant removed the new starter motor from its box and put the old one in the box. The starter motor, Nastra model 3185, weighs about 12 to 13 pounds. It is about nine inches in length and about four inches in diameter. It is cylindrically shaped with a protrusion on one side. The starter motor goes into the vehicle from underneath and, when attached, sits with its long axis parallel to the long axis of the vehicle. It is secured to the engine block with two bolts. In a demonstration, Handy, whose height is approximately the same as claimant's, showed that the bottom of the starter motor is about 10" above the side of the head. He demonstrated that the motor is held to the left side and forward of the head.

22. There was a difference of opinion as to where the starter motor is held when it is being installed. Handy demonstrated that the starter is held in front of the technician so that the technician can see the bolts and line up the holes. Nguyen agreed with that description. However, the claimant testified that he was holding the starter motor directly overhead. He also said that one needs to see the bolts and holes, which would be difficult if it were directly overhead.

23. Claimant lifted the starter motor in his left hand, cradling it in the palm in such a way that one end was between the thumb and index finger. He held a bolt in his right hand with the plan to screw it into a hole found on the underneath of the starter motor. Claimant lifted up the motor and screwed the bolt a couple of turns when he was struck across the back of his neck with something sharp.

24. The claimant at first testified that he remembered little after that blow, although when called back to testify he said that the blow pushed him forward. He then moved his hands to the back of his head and neck in an attempt to protect himself against more blows.

25. The blow knocked the claimant off balance. The starter motor fell. A loud banging noise brought everyone to Bay 1—Charlie Handy and Richard Brisson from the office; George Korol and Hoang Nguyen from their bay areas. Nguyen testified that he also heard a scream.

26. The claimant does not remember being struck more than once. He blacked out for a time, unable to see or feel. The next thing he knew, he was leaning against his toolbox. Then he staggered to the office where he told Handy that Marku had knifed him. The photographic evidence shows a trail of blood across the floor that leads southerly from under the vehicle to then back northerly to an area between Bay 1 and Bay 2. The photographs show no pooling of blood in the bay areas. No knife or other weapon Marku may have brought with him was found at the scene.

27. Hoang Nguyen in Bay 3 looked up to see "Lee's friend" running to the door to the office and the claimant standing in from of the Ford F-150 holding his neck and moaning. Richard Brisson saw Nikoll Marku run out of Bay 1 through both office doors to the outside. He said that Marku used both of his hands. He did not see any weapons in Marku's hands.

28. Hoang gave chase through the office into the parking lot to Bank Street, but did not catch up with Marku. Both Korol and Nguyen testified that they looked up immediately on hearing the bang and the cry and saw the claimant standing. All evidence supports a finding that the claimant did not fall to the ground in the bay area.

29. There was no weapon found at the scene. The starter motor had landed on the ground beneath the area where it was being installed. The bolts were also on the floor near the starter motor. Photographs show blood drops on the starter motor.

Nikoll Marku

30. Nikoll Marku denied that he assaulted the claimant. He denied that he was at Handy's Texaco on April 1, 1998. Marku stated that Ilia was his friend and that he had no reason to harm him.

31. Marku is still incarcerated pending trial on charges of aggravated assault and attempted murder. Also pending against him are two simple assault charges, one involving Muzahem Alsayef in August 1997 and the other involving Kevin Sinclair in March 1998. Marku knew both Alsayef and Sinclair.

Medical Care

32. The claimant was taken to the Emergency Department at Fletcher Allen Health Care where one note states that he was struck with a hammer like object; another refers to the claw surface of a hammer and still another simply refers to an object. The claimant told at least one person that he had been stabbed with a knife. Another observer noted that the claimant was not a good historian. The notes record that he had been struck multiple times, predominantly to the head and neck, but also to the right upper extremity, which the claimant apparently was using to protect himself. At the time of his initial assessment, the claimant "could express single words, moved his limbs awkwardly and had frequent gaze deviation to the upper left." He also had significant ongoing bleeding from multiple scalp lacerations, a laceration on the right side of his neck, arm, wrist and hands. X-rays revealed a skull fracture in the left parietal area. Consecutive CT scans revealed increasing bleeding on the

left side of his brain. Clinically, he had a right-sided weakness and expressive aphasia. Claimant was taken to surgery where a blood clot was evacuated from his brain. He was discharged to a rehabilitation unit on April 19.

Expert Medical Opinions

33. Bruce Tranmer, M.D., Chief of Neurosurgery at Fletcher Allen Health Care opined that the skull fracture suffered by Ilia Dinis was caused by a heavy blunt object and would not have been caused by a knife or sharp object.

34. Dr. Tranmer examined the CT films and x-rays. He testified that the skull fracture claimant suffered was approximately four centimeters by five centimeters or four by seven. The fracture was not depressed or concave. A bone fragment was actually lifted above the skull surface. In Dr. Tranmer's opinion, such a fracture occurs from a heavy blunt object falling from above. He testified that the fracture would be compatible with the starter motor falling on the claimant's head from a distance of approximately one-foot. On a starter motor identical to the one the claimant was installing on day he was injured, Dr. Tranmer identified a blunt edge he considered very capable of causing that kind of injury.

35. If the starter motor had been the cause of the claimant's head injury, Dr. Tranmer would have expected to see blood, hair and other tissue from the claimant on it. Although the same type of starter motor has been introduced as an exhibit in this case, the original is in the hands of the prosecutor and no forensic testing has been offered in this case. Although photographs show there were a few drops of blood on the motor, I do not know if hair or other tissue from the claimant's head is on that motor.

36. Dr. Tranmer opined that the claimant's injury would not have been caused by a blow to the head with a hammer. His opinion was based on his professional neurosurgical training as well as experience treating approximately a thousand skull fracture cases. He testified that had the injury occurred the way Prof. Seirig described it, the claimant would have had a depressed or concave fracture, not the fracture evidenced on this claimant's CT scans.

Ali A. Seireg, Ph.D.

37. Dr. Seireg is a Professor of Engineering from the University of Wisconsin, a position he has held since 1965. He wrote a textbook on mechanical systems and has performed biomedical analyses of musculoskeletal structure in medicine and sports. His text specifically evaluated the forces required to cause fractures of 1200 skulls including both dry and fresh cadavers. He has taught courses on orthopedic biomechanics and biomedical engineering.

38. Professor Seirig analyzed the claimant's fracture from energy and stress vantage points. With the energy approach, he testified that a fracture depends on how concentrated the energy source is. He said that the conventional wisdom from Lissner studies is that 400 to 900 inch pounds of energy are required to fracture the skull. Energy is determined by multiplying the weight times the distance traveled times a geometry factor. The geometry factor reflects the physical fact that impact at other than 90° only imparts a component of energy, so impact at 45° imparts only 50% of the energy. The geometry factor was not

explained further. Professor Seirig testified that to have caused the fracture this claimant suffered, the starter motor would have to have fallen over 30 inches and hit the skull at a 90° angle to create 400 inch pounds of energy (13 pounds x 30 in. = 390 inch pounds). Based on the claimant's testimony that he had his head tilted to the left and that the starter motor was about 24" over his head led Professor Seirig to conclude that the starter motor did not cause an energy-induced fracture.

39. Professor Seirig also evaluated this fracture as a stress-induced fracture. All materials have physical properties that include a characteristic elasticity in the fact of stress. All objects, including bone, have a known modulus of elasticity, which allows scientists to extrapolate their conclusions from experiments with one material to situations with other materials. In the 1970's, Professor Seirig performed controlled studies of hollow plastic cylinders that actually recorded the progress of compressive waves turning into tensile stress at a distance from the impact site. When tensile stress in bone reaches 12,000 p.s.i., tensile fracturing will occur. After an impact, stress waves spread through bone in much the same way as waves travel outward in a circle when something is dropped in water.

40. Professor Seirig testified that the approximately circular tensile fracture and accompanying shearing force separation of weak area between the inner and outer plates of the skull is a typical "stress" fracture. He explained that the skull will undergo a tensile fracture when struck at 90° by a hard object traveling at a velocity of 21.28 feet per second. He also showed that a person can swing an object through a swing angle of 50° to 60° and generate sufficient velocity (at a right angle) to cause a resultant tensile stress fracture. A blunt, hard object that hits the skull at a 90° angle with a velocity of at least 21.28 f.p.s. will impart a compressive stress to the skull that in turn will generate tensile (pulling) stresses to the bone. When those tensile stresses build to 12,000 psi, fracturing of the bone occurs. Professor Seirig testified that any object falling a distance of one foot takes only 0.25 seconds to cover that distance.

Medical Expenses, Legal Fees and Costs

41. The claimant submitted evidence of medical bills in the amount of $156,244.63, which he says are continuing.

42. The claimant seeks payment of legal fees and costs based on the following:

- evidence of 106.25 hours of legal work and $29.70 in costs incurred through the office of Sandra Baird and Barry Kade;
- evidence of 88.8 hours of legal work and $743.78 in costs incurred by the law office of Costello and Mabie;
- evidence of 834.55 hours of legal work and $9,966.74 in costs incurred by the law office of Swanson and Lange.

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, Morse Co*., 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal relationship between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

2. Where the causal connection between an accident and an injury is obscure and the layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc*. 137 Vt. 393 (1979).

3. The claimant must prove that his injury arose: 1) out of and 2) in the course of his employment. *Miller v. IBM*, 161 Vt. 213, 214 (1993); *Clodgo v. Rentavision, Inc*., 166 Vt. 548 (1997). In this case the claimant was clearly on duty at a place where he was reasonably expected to be while fulfilling the duties of the employment contract. Therefore, he received the injury in the course of his employment. Id. The crucial and difficult inquiry becomes whether the injury arose out of his employment.

4. An injury arises out of employment "if it would not have occurred but for the fact that the conditions and obligations of the employment placed the claimant in the position where he was injured." *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993); *Miller*, 161 Vt. 213. It arises out of employment unless the circumstances are so attenuated from the condition of employment that the cause of the injury cannot be reasonably related to the employment. *Shaw* at 594.

5. The expert testimony in this case reveals the heart of the controversy presented, that is whether the assault was purely personal in nature or whether an instrumentality the claimant was using in his work caused the injury. Although the claimant had lacerations on several areas of his body the injury that caused him the most damage and which has led to what appears to be permanent disability, was the injury to his head.

6. As our leading commentator has explained:

> All risks causing injury to a claimant can be brought within three categories; risks distinctly associated with employment, risks personal to the claimant, and "neutral" risks-i.e, risks having no particular employment or personal character. Harms from the first are universally compensable. Those from the second are universally noncompensable. It is within the third category that most controversy in modern compensation law occurs. The view that the injury should be deemed to rise out of employment if the conditions of employment put claimant in a position to be injured by the neutral risk is gaining increased acceptance.

> When employment and personal risks concur to produce injury, the injury arises out of employment, since the employment need not be the primary cause, but need only contribute to the injury.

1 *Larson's Workers' Compensation Law*, ch. 4.

7. With regard to assaults, Larson provides:

> Willful assaults on the claimant, like injuries generally, can be divided into three categories: those that have some inherent connection with the employment, those that are inherently private, those that are neither and may be called neutral.

1 *Larson's* § 8.03(1).

8. The first category of assaults is almost universally compensable, the second is universally not and the final, neutral, category is the area of some debate. A minority of jurisdictions hold that the neutral category of assaults are non-compensable for lack of proof of distinctive employment risk as the cause of harm, but a growing majority applying the positional; risk doctrine award compensation for those injuries when sustained in the course of employment. Id. § 8.13D[2][B].

9. "When the animosity or dispute that culminates in an assault is imported into the employment from the claimant's domestic or private life, and is not exacerbated by the employment, the assault does not arise out of the employment under any test. *Larson's* § 8.02[1][a].

10. The claimant argues that this is one of the neutral cases that should be found compensable. In support, he cites this Department's decision, *Estate of Moore v. Stephen L. Moore Construction Company*, Opinion No. 37-95WC (August 18, 1995), in which an unexplained assault was found to be compensable. Further, he cites *Myott v. Vermont Plywood*, 110 Vt. 131 (1938) in which the behavior of an off-duty employee who had returned to the work site caused an injury to the claimant. In *Myott,* the claimant who was known as one easily frightened, had returned to his work and was performing his duties in the usual manner at the time when the off-duty worker took hold of him causing him to hurt his leg. The Court affirmed this Department's finding of compensability, reasoning that it would be an unreasonable construction "to construe this statute to exclude an injury caused by the willful act of a third person directed against an employee in the circumstances in this case when it was within the reasonable contemplation of the employer that the act would be committed and that such probability created an additional hazard incident to claimant's employment." *Myott* 110 Vt. at 136.

11. The instant case is distinguishable from both *Moore* and *Myott.* In *Moore*, a finding of compensability was consistent with the *Larson* principle that injuries caused by roving lunatics and unknown assailants may be compensable. Although Marku may have had propensities that led to violence, his appearance at Handy's was not that of a roving lunatic unknown assailant.

12. Everyone at Handy's recognized him. He had had an acquaintance with the claimant for years and he clearly was there to see the claimant, no one else. He was not there to carry on any business with Handy's.

13. The personal relationship the claimant had with Marku prior to the assault convinces me that Marku's presence at Handy's the day of the assault was for a personal visit to the claimant and had nothing to do with any services Handy's Texaco offered. If Marku alone caused the claimant's injuries with any private weapon he may have wielded, this is not a compensable claim. On the other hand, if, as the claimant alleges, the starter motor fell on his head causing his injury, the employment contributed to the episode and the injury, making the claim compensable under the *Larson's* principle quoted above.

14. The medical records make no mention of the starter motor. They refer to a hammer. However, no source of that history has been identified and the claimant was probably not capable of describing a weapon. It is uncontested the claimant was in the process of installing the motor when he was attacked. The motor was found on the ground.

15. Professor Seirig's testimony about engineering principles he finds applicable do not entirely defeat this claim. His measurements do not take into consideration that the claimant was undoubtedly in motion after the initial attack, which could have placed his head lower, and squarely under the starter motor. Without an eyewitness to the attack itself, the exact mechanism cannot be determined.

16. However, if the starter motor had hit the claimant's head before it hit the floor, the claimant's hair, blood and other tissue would have attached to the motor. Without that evidence of more than a few drops of blood seen in a photograph, to find that the starter motor caused the injury would be pure speculation and no more likely than a weapon Marku may have used then hidden. The claimant cannot sustain his burden of proof with mere speculation.

ORDER:

Based on the forgoing Findings of Fact and Conclusions of law, this claim is DENIED.

Dated at Montpelier, Vermont this 24th day of April, 2001

_____
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.

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DEPARTMENT OF LABOR AND INDUSTRY

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	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Handy's Texaco	)	Commissioner
	)	
	)	Opinion No. 01SJ-01WC

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

The primary issue in this case is whether the claimant suffered an injury that is compensable under the Workers' Compensation Act. If the claim is found to be compensable, the issues whether the claimant is entitled to permanent total disability benefits and benefits associated with the nursing care provided by his parents must then be determined. The hearing began in October 2000 with two days of evidence, including the introduction of medical records, testimony from the claimant's fact witnesses and his medical expert on causation. The hearing is to be continued later this month.

The claimant now moves for summary judgment on the issue of permanent total disability based on the evidence presented. Attorneys Gary W. Lange and Daniel H. Maguire of Swanson & Lange represent the claimant. Attorney Glen L. Yates represents the employer.

FACTS:

The following facts are not in dispute:

1. Claimant Ilia Dinis, born on February 19, 1972, was an employee and Handy's Texaco his employer as those terms are defined in the Vermont Workers' Compensation Act ("Act") and Rules.

2. Cincinnati Insurance Company was the Workers' Compensation carrier for Handy's at all relevant times.

3. At the time of the injury at issue in this case, and for several years beforehand, the claimant was employed as an automotive mechanic at Handy's.

4. On April 1, 1998 the claimant was working on a Ford F-150 pickup truck that was on the hydraulic lift in Bay # 1 at Handy's. In the process of replacing the starter motor, he had removed the old one and was waiting for the new one when Nikoll Marku arrived on the premises.

5. Nikoll Marku had visited the claimant at work in the past and was known to those who worked at Handy's. On April 1, 1998, Marku walked through the office area at Handy's, was acknowledged by a Handy's employee, Richard Brisson, then entered the bay area of the garage to speak with the claimant.

6. In the open bay area of the garage, the claimant worked in bay #1, mechanic George Korol in Bay # 2 and mechanic Hoang Nguyen in Bay #3 at the time of the incident that gave rise to this claim.

7. The claimant and Marku spoke for five to ten minutes in a friendly manner. While they were talking, the new starter motor arrived for installation into the pickup.

8. The claimant, with his back to Marku, began to install the starter motor that was elevated on the hydraulic lift. Marku attacked the claimant from the rear, then immediately ran from the premises.

9. Marku denies having assaulted the claimant. He denies that he was at Handy's on April 1, 1998. Marku states the claimant was his friend and that he had no reason to harm him.

10. As a result of the attack, the claimant suffered numerous injuries. His head injury resulted in a right-sided hemiparesis with impairments in gait, speech and fine motor skills. He also suffered cognitive and psychological impairments.

11. The parties agree, based on a report from Dr. Eric White, that the claimant reached maximum medical improvement on March 22, 1999.

12. On January 5, 2000, Dr. Elizabeth Michaels, claimant's treating psychiatrist, opined that he is permanently and totally disabled, unemployable and would be institutionalized but for the care rendered by his parents.

13. On July 21, 2000, Dr. Thomas Zweber, Director of Physical Medicine/Rehabilitation at Fletcher Allen Health Care, opined that "it is highly probable that this gentleman is unemployable even in the most protected, supervised, structured and facilitory type of situation.

14. At the defendant's request, the claimant had an IME conducted at the Northeast Rehabilitation Hospital. Dr. James Whitlock, who oversaw that evaluation, summarized his findings as follows: " It is my impression that Mr. Dinis has a permanent and essentially total disability. While further slow improvements may accrue over time—especially if there is a breakthrough in treatment of his PTSD/depression, he is unlikely to be capable of any kind of gainful employment or competitive employment in the future."

The defendant produced an affidavit from Jane Ropulewis-Shaw, a vocational rehabilitation specialist, which recited the following: First, Ms. Ropulewis-Shaw listed her professional qualifications and contacts with the claimant and his doctors. She stated that the claimant received vocational rehabilitation services provided by the State of Vermont Rehabilitation

services and occupational therapy to improve his skills with his non-dominant hand. Defense counsel's law firm donated a computer for the claimant's use and plans proceeded to assist the claimant by enhancing the skills and positive attributes he had to train him to perform a sedentary job. Through personal contacts of the employer, a site for job coaching was located at a motel as a receptionist. The intent of the plan was to give the claimant realistic and rewarding employment that would generate income and give him a felling of self-esteem. Claimant's attorney terminated the rehabilitation process, stating that it would be resumed only if the employer accepted the case as compensable.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate only where, taking the allegations of the nonmoving party as true, it is evident that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. See *In re Margaret Susan P.*, __ Vt. __, __, 733 A.2d 38, 43 (1999). In determining whether material facts exist for trial, all reasonable doubts are resolved in favor of the party opposing summary judgment.

2. Under the Workers' Compensation Act, an individual is permanently and totally disabled pursuant to 21 V.S.A. § 644 in the case of the following, non exclusive, list of injuries: 1) The total and permanent loss of sight in both eyes; 2) The loss of both feet at or above the ankle; 3) The loss of both hands at or above the wrist; 4) The loss of one hand and one foot; 5) An injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg and of one arm; and 6) An injury to the skull resulting in incurable imbecility or insanity."

3. To qualify for permanent total disability, the claimant's injury must either fit one of those enumerated in 21 V.S.A. § 644, or must have as severe an impact on earning capacity as one of the scheduled injuries. *Drinkwater v. Norton Brothers, Inc*., Opinion No. 21-98WC (Apr. 30, 1998); Gravel *v. Cabot Creamery*, Op. No. 15-90WC (July 10, 1991); *Bishop v. Town of Barre*, 140 Vt. 565 (1982).

4. If a claimant qualifies for permanent total disability, the employer is obligated to pay sixty-six and two thirds of his average weekly wage "for the duration of the permanent total disability, but in no event …for less than three hundred and thirty weeks." 21 V.S.A. § 645(a). After three hundred and thirty weeks, benefits continue "if the injury results in the loss of actual earnings or earning capacity after the injured employee is as far restored as the permanent character of the injuries will permit and results in the employee having no reasonable prospect of finding regular employment." Id.

5. The medical reports dramatically demonstrate the claimant's severe impairment. Yet, the affidavit from Ms. Ropulewis-Shaw creates a genuine issue of material fact related to the claimant's actual employability. Has a realistic vocational plan been attempted? In this young man with a strong work ethic, will such a plan lead to work that will improve his condition? Such material disputed facts preclude judgment as a matter of law.

Accordingly, the claimant's motion for summary judgment is DENIED.

Dated at Montpelier, Vermont this 3rd day of January 2001.

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R. Tasha Wallis
Commissioner