

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

|               |   |                        |
|---------------|---|------------------------|
|               | ) | State File No. S-08342 |
|               | ) |                        |
| James McGraw  | ) | By: Margaret A. Mangan |
|               | ) | Hearing Officer        |
| v.            | ) |                        |
|               | ) | For: R. Tasha Wallis   |
| Numanco, Inc. | ) | Commissioner           |
|               | ) |                        |
|               | ) | Opinion No. 48-02WC    |

Case submitted on the record without live testimony  
Record Closed on June 10, 2002

**APPEARANCES:**

John D. Shullenberger, Esq. for the Claimant  
Edward R. Kiel, Esq. for the Defendant

**ISSUES:**

1. Did the defendant properly discontinue the claimant's medical benefits on October 14, 1984?
2. Was the defendant obligated under the Workers' Compensation Act to advise the claimant that he may have reached medical end result and that he may have been entitled to permanent partial impairment benefits?
3. Is the claimant permanently totally disabled or permanently partially disabled as a result of his October 7, 1980 work-related accident?
4. When did claimant reach medical end result for his October 7, 1980 work-related accident?
5. Is the claimant entitled to an award of interest?

## **EXHIBITS:**

### Claimant's Exhibits

1. Vermont Yankee Nuclear Power Corporation Medical Services Report 10/7/80
2. Vermont Yankee Diagram of Torus
3. Employer's First Report of Injury for 10/7/80 accident, dated 10/16/80
4. Brattleboro Memorial Hospital Records 10/7/80 and 10/9/80
5. Office Notes, Robert Tortolani, M.D., Brattleboro, Vermont 10/9/80
6. Office Notes, Woodcock Chiropractic, Brattleboro 10/10/80
7. (a) Office Notes and Treatment Records; and (b) Aetna Casualty and Surety payment records for payments to Webb Health Centers (chiropractic) for period 10/13/80 to 10/30/90
8. Office Notes and Report, Edward Kelly, D.C., San Clemente, California for period 12/3/80 to 6/13/81 (54 treatments)
9. Department Form 13: Affidavit as to Payment of Compensation by Aetna Casualty and Surety Co. (undated)
10. Form 21 Agreement for Temporary Total Disability Compensation dated June 4, 1981, approved June 23, 1981
11. Office Notes and Report from Vancouver Neurosurgical Group and Southwest Washington Hospital Vancouver, Washington, 10/1/82 to 7/20/83
12. Office and Treatment Notes, Berwick Chiropractic Health Clinic, Berwick, Pennsylvania, 12/16/83 to 3/17/84
13. Report of Raymond Sjerven, D.O., dated 8/25/84
14. Bartlett Nuclear Inc., Personnel File for Claimant 1979 to 1983
15. Forbes Regional Health Center, Monroeville, Pennsylvania Physical Therapy Account Statements for: 1/10/85 to 5/21/85; 6/25/85 to 11/30/85; 11/3/87 to 12/2/87; 2/24/89 to 4/21/89; 4/24/89 to 12/29/89; 1/1/90 to 1/30/90; 1/9/90 to 4/26/90
16. Forbes Regional Health System, Physical Therapy records for period 2/28/89 to 4/19/90
17. Letter from Ronald Zimmerman, M.D., dated 1/30/85
18. Letter from Mary Beth Krafty, M.D., dated 5/6/85
19. Aetna Correspondence: a) 7/11/85 to claimant canceling medical benefits; b) 10/5/84 to claimant notifying him that file was being transferred to Seattle Washington Office; c) payment denial to Webb dated 12/10/85; payment denial to Forbes Regional Health Center dated 12/10/85
20. Aetna payment records a) to various medical providers for period 1/23/81 to 10/15/85 and b) to Veteran's Administration for treatment rendered at the VA Medical Center during 1986, 1987, 1988 and 1989
21. Medical Records, Harmarville Rehabilitation Center, Pittsburgh, dated April 1985
22. Records from Braddock General Hospital, Braddock, Pennsylvania for: a) 5/8/86 to 5/23/86; b) 6/3/86 to 6/7/86; and c) 6/13/86
23. Veteran Administration Medical Center, Pittsburgh, records from 1986. 1989, 2001 and 2002.

24. Medical Records from the files of Daniel Carter, M.D., Monroeville, Pennsylvania
25. Letter from Aetna to Dr. Zimmerman in Pittsburgh and his response, May and June 1992
26. Report from Stuart Burstein, M.D. 3/31/93
27. Records from Jonathan Warren, M.D., Pitairn, Pennsylvania for period 1/17/95 to 5/30/95
28. Records from Leo Bidula, M.D., May 1995
29. Prescription from Anne Valko, M.D., 9/22/95
30. Reports of James Rosen, Ph.D., December 1992
31. Records from Western Pennsylvania Hospital, Pittsburgh (West Penn), for period from 6/24/96 to 7/10/96
32. Records from West Penn for period from 1/31/98 to 2/11/98
33. Records from West Penn for period from 8/5/98 to 8/14/98
34. Records from West Penn for period from 4/2/99 to 4/14/99
35. Report and curriculum vitae from Elliott Goldstein, M.D., 2/26/98
36. Office notes, Dr. Goldstein, 8/9/97 to 5/20/99
37. Pennsylvania Department of Public Welfare, General Assistance and Medicaid Eligibility Determination, 10/1/86
38. Pennsylvania Department of Public Welfare, payment records for General Assistance form 10/17/86 to 3/26/98 and Medicaid from 10.1.86 to the present
39. Social Security Administration, Notice of SSI eligibility, effective 4/1/96
40. U.S. Department of Veteran Affairs, Notice of Entitlement to Non Service-Connected Disability, effective 4/1/96
41. RAD services, Inc., Pittsburgh, Pennsylvania personnel file reports from 1977-1978
42. Retainer agreement between claimant and counsel
43. Department of Labor and Industry, Rule 16: Minimum and Maximum Compensation Rates, Annual Change
44. Costs
45. Transcript of Depositions of:
  - A. Claimant, James McGraw, dated November 20, 1991 with exhibits;
  - B. Claimant dated November 12, 1999;
  - C. Elliott Goldstein, M.D., dated June 26, 2000

Defendant's Exhibits:

- A. Aetna Records related to claimant
- B. Letter from John B. Dorsey, M.D. to Aetna, 2/9/81
- C. Chiropractic Bills submitted to Aetna from Longview, Washington
- D. Boyd's Chiropractic bills, Longview, Washington
- E. Bills from Richard Lemieux, D.C., Longview, Washington
- F. Report and bill from Raymond Sjerven, D.O.
- G. Reports and bills from Gettings Chiropractic Clinic, Richland, Washington.
- H. Aetna's Running Notes
- I. Hospital Progress Notes
- J. Pennsylvania Bureau of Disability Determination, T. David Newman, Ph.D.
- K. Letter and reports from Elliott Goldstein, M.D.
- L. Report and curriculum vitae from Stuart Burstein, M.D.

**FINDINGS OF FACT:**

1. At all relevant times, Claimant was an "employee" and Numanco, Inc, his "employer" within the meaning of the Vermont Workers' Compensation Act, 21 V.S.A. § 601 et. Seq.
2. Travelers/Aetna is the successor to Aetna Casualty and Surety Company which was the workers' compensation carrier for Numanco at all relevant times.
3. A resumé for the Claimant, which appears on a Bartlett Nuclear, Inc. letterhead, lists eleven jobs as a technician in the five years before he began working at Vermont Yankee.
4. In October of 1980, claimant worked as a health physics technician, employed by Numanco, Inc., a radiological health physics service. On October 7<sup>th</sup>, while working at the Vermont Yankee Power Plant in Vernon, Vermont, he fell approximately twenty feet from a ladder and received bruises and strains on his right forearm.
5. Claimant was treated at Brattleboro Memorial Hospital immediately following the accident. X-rays were negative. Claimant was examined, given a plaster arm splint and released. Notes from that visit are not available.
6. On October 10, 1980, Claimant saw a chiropractor in Brattleboro with complaints of pain in his right arm, chest, neck and back. He was treated and told not to work.
7. On October 11, 1980, Claimant returned to his home state of Pennsylvania. Then on October 13, 1980, he sought treatment from Dr. L. H. Webb, a Pennsylvania chiropractor to whom he complained of pain in his right arm, back and neck. Dr. Webb treated the Claimant thirty-two times over the next five weeks.

8. Claimant remained out of work for approximately seven and a half weeks, during which time Travelers paid temporary total disability benefits.
9. On December 1, 1980, Claimant moved to California where he began working for Combustion Engineering, Inc.
10. In California, Claimant treated with Dr. Edward Kelly to whom he reported having fallen twenty feet at work on his chest and right arm. He complained of pain in his right arm, back and neck. In December and January 1981, Dr. Kelly treated the Claimant with twenty-five chiropractic treatments.
11. On January 24, 1981, Claimant was in an auto accident, slid on the ice, went through a guardrail and dropped approximately ten feet. The next day, he refused his chiropractor's advice to get x-rays. Notes for that visit recount Claimant's request that the accident not be reported and his insistence that he was not hurt.
12. At an examination on January 28, 1981, an orthopedic surgeon, Dr. John Dorsey, found no neurological impairment and advised the Claimant to commence a progressive exercise program.
13. Claimant continued with chiropractic treatments.
14. On February 9, 1981, Dr. Dorsey advised Aetna/Travelers that Claimant's physical evaluation and x-rays were within normal limits. He recommended no further treatment.
15. On May 1, 1981, Dr. Kelly wrote that Claimant's symptoms were reducing in severity and frequency. He planned to treat him twice a week for four weeks and then reevaluate him.
16. On June 1, 1981 Dr. Kelly noted that the claimant showed "much improvement and at times is totally asymptomatic." He advised Aetna/Travelers that Claimant was fully asymptomatic and a full recovery was expected. However, at his deposition, Claimant denied that he was ever much improved, that his back, neck, shoulders and hip bothered him all the time and that treatment provided only temporary relief.
17. Sometime in June 1981, Claimant returned to Pennsylvania and to chiropractic treatment with Dr. Webb.
18. On July 27, 1981 Dr. Webb advised Aetna/Travelers that Claimant continued to complain of pain in his lower back and neck, but that the injury was not likely to result in a permanent condition.

19. On June 17, 1981, this Department approved the parties Form 21 Agreement for Temporary Total Disability Compensation for an injury described as: “multiple bruises and strain and contusion of the right forearm.”
20. From August 24, 1981 until September 25, 1981, Claimant worked for Combustion Engineering in Windsor, Connecticut.
21. Claimant did not work again until March of 1982 when he signed on with Duke Power in Charlotte, North Carolina, where he worked for less than two weeks.
22. Before and after the jobs in Connecticut and North Carolina, Claimant returned home to Turtle Creek, Pennsylvania and treated with the Webb Chiropractic Center.
23. In April 1982 Claimant went to work for Trojan Nuclear in Rainier, Oregon where he stayed until October 1982. During that time he saw Dr. Jay Miller, a neurosurgeon, for complaints of left shoulder pain. Dr. Miller diagnosed a progressive soft tissue injury, mostly likely to respond to progressive exercises. He recommended that Claimant stop smoking and taking medication and that he begin exercising. Later when Claimant returned stating that his pain persisted and that he was uncomfortable about the approach the doctor had recommended, a thoracic myelogram was ordered that was negative and a CT of the dorsal (thoracic) spine was also negative.
24. In October 1982, Claimant returned to Turtle Creek and to chiropractic treatment in that area. The following January (1983) he returned to Rainier where he worked and treated until August 1983.
25. In August 1983, Claimant worked for two days for Combustion Engineering in Windsor, Connecticut.
26. It is not clear from the record when Claimant worked for Bartlett Nuclear. However, in February 1984 a supervisor at Bartlett Nuclear, Inc, completed a form for Mr. McGraw identified as a part of “continuous monitoring program” designed for the early recognition of stress. The supervisor checked “no” for any signs of anxiety, depression, incoherence, decreased attention or irritability, “no” for a significant increase in absenteeism and “yes” for physical illness.
27. Claimant returned to the northwest when he took a job with the Washington Public Supply system in Hanford, Washington in April 1984 and worked there until November 1984. During that time he sought treatment for back pain.
28. On June 14, 1984 Aetna/Travelers notified Dr. Webb and Dr. Boyd that it would no longer pay for Claimant’ continued chiropractic treatment, reasoning that the treatment had become maintenance and was no longer corrective.

29. On August 1, 1984 Claimant sought treatment with Dr. Raymond Sjerven in Washington to whom he reported having suffered deep muscle damage after falling thirty-six feet while working in Vermont in 1980. He told the doctor that his back and left shoulder pain had been present for more than four years with little improvement.
30. On August 27, 1984 Claimant sought treatment from Dr. Chet Gettings, a chiropractor in the state of Washington. Dr. Gettings recommended limited treatment and prescribed a home exercise program.
31. On October 5, 1984 Aetna/Travelers advised the Claimant that his claim file was being closed in Pennsylvania and transferred to the Washington state office. However, the transfer did not actually occur due to some confusion.
32. On October 23, 1984 Claimant reported to Dr. Webb with complaints of stiffness in his neck and shoulder. He denied experiencing depression, headaches, and lack of energy or reduced initiative.
33. In November 1984 Claimant returned to Turtle Creek where he has remained. Except for a brief stint in 1986, he has not worked.
34. At a January 1985 evaluation, Dr. Ronald Zimmerman at Medical Rehabilitation, Inc. in Pittsburgh determined that from a physical standpoint, Claimant could work, but expressed concern about his psychiatric status and risk of suicide. Dr. Zimmerman expressed doubt that chiropractic treatment would be helpful because of the temporary nature of relief and recommend that the Claimant remain as active as possible and exercise.
35. Claimant considers himself disabled and lives accordingly. He takes hot baths for pain relief, takes medication for pain and depression and has had several psychiatric hospitalizations.
36. Aetna/Travelers denied payment for a pain clinic in Pennsylvania because of a lack of causation.
37. Claimant participated in an in-patient pain clinic program at Harmarville Rehabilitation Center in Pittsburgh for five days in April 1985, at his mother's expense. The recommended program was four to six weeks, but the Claimant was discharged against medical advice because he did not like his room assignment, he thought his mother could not afford the cost and he did not believe it was working.
38. A clinical psychologist at Harmarville, Beate Friedeberg Jones, described the Claimant's clinical profile as one who is highly defensive, has a readiness to manipulate and may have used pain behaviors to help attain support and shelter from responsibility demands.

39. Between April and June of 1986 Claimant had four psychiatric admissions. In one dated June 25, he was admitted for acting out at home, fighting with his mother and neighbors, breaking glass in doors and not sleeping in four days. During the interview the Claimant tried to focus the conversation on his back and neck pain, which, together with his unemployment, he said was making him depressed.
40. In December of 1989, Aetna/Travelers paid a bill submitted to it by the Veteran's Administration. The defense characterizes that payment as a mistake and denies that such inadvertence implies acceptance of the claim.

### Medical Opinions

41. At the request of the defendant in this case, Claimant underwent an Independent Psychiatric Examination with Dr. Stuart Burstein on March 30, 1993. At that visit, Claimant described his 1980 fall as an "out of body experience" and provided considerable detail. Claimant has since acknowledged that he did not describe his 1980 accident as a near death experience for more than ten years because he only recalled it after seeing a television program where others described similar experiences.
42. Dr. Burstein rejected the depression diagnosis, concluding that the Claimant has a passive-aggressive attitude consistent with a personality disorder. Furthermore, Dr. Burstein opined that Claimant's angry behavior is consistent with one with a tendency toward manipulation and exploitation attributable to inborn or acquired personality traits and not to the 1980 fall. The claimant walked out of the interview because of the personal nature of the questions.
43. In June 1996 Dr. Elliot Goldstein at the Western Pennsylvania Veteran's Administration (VA) Hospital evaluated Claimant. Claimant told Dr. Goldstein that he had fallen thirty-six feet in the 1980 accident, landed on a plank on his side and on the side of his head. This was the first report that he had hit his head. Dr. Goldstein subsequently diagnosed major depression, post-traumatic stress disorder and mild organic brain syndrome, all of which he attributed to the 1980 accident. Dr. Goldstein also opined that the claimant's brain injury and PTSD in combination disabled him from performing any work requiring concentration and organization.
44. At his deposition, Dr. Goldstein explained that he based his PTSD diagnosis on the Claimant's pre-occupation with the accident. He conceded that no objective tests support his organic brain injury diagnosis. Dr. Goldstein based his opinions on the Claimant's complaints and the Claimant's history.

45. According to Dr. Burstein, there is a striking inconsistency between the clear answers the Claimant can provide to questions and the mental compromise expected in one with organic brain syndrome.

### **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).
3. To succeed on a physical mental claim, Mr. McGraw must prove a causal connection between the psychological impairment and a compensable work-related injury. *Brosseau v. North Country Vending*, Op. No. 5-96WC (1996).
4. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).

### Compensability of Chiropractic Care after 1984

5. Claimant argues that the insurer was obligated to file a Form 27 before it discontinued medical benefits in 1984 as required by Workers' Compensation Rule 18.2000. However, it was the rule in effect at the time of the termination that governs this issue, and such a requirement was not in place in 1984. See, *Longe v Boise Cascade Corp.*, 171 Vt. 214 (2000).
6. An employer is obligated to pay expenses for reasonable palliative care. *Rolfe v. Textron*, Op. No. 08-00WC (2000). In determining what is reasonable under 21 V.S.A. § 640(a), the decisive factor is not what the claimant desires or what he believes to be the most helpful. Rather, it is what is shown by competent expert evidence to be reasonable to relieve his symptoms and maintain his functional abilities. *Quinn v. Emery Worldwide*, Op. No. 29-00WC (2000). In this case, Claimant received chiropractic care from several practitioners since his injury, but the treatment failed to relieve him of his symptoms or restore his functioning capacity. Therefore, it cannot be characterized as reasonable. *Colbert v. Starr Farm Nursing Home*, Op. No. 05-01 (2001).

7. Claimant's deposition testimony that his condition has not improved since a couple of days after the accident belies his contention that chiropractic treatments were reasonable.

#### Causation

8. Claimant contends that his present condition reflects an unbroken chain of causation from the fall in 1980 until the present. Defendant denies that such a causal relationship exists. It is undisputed that by the fall of 1984, Claimant had visited a significant number and type of medical care providers, including chiropractors, physical therapists, an orthopedic surgeon, a neurosurgeon and an osteopathic physician. He underwent multiple evaluations and tests, including x-rays, CT scan, myelogram and MRI. All objective tests were within normal limits.
9. Aetna/Travelers termination of chiropractic treatment in 1984 was appropriate not only because of the lack of reasonableness of such treatment after four years, but also because any causation of ongoing symptoms to his work-related injury was speculative at best. Later, in 1985 Aetna/Travelers properly denied Claimant's request for entry into the Harmarville pain clinic upon the Harmarville evaluator's determination that there was no definite link between the Claimant's condition at the time and his 1980 fall.

#### Permanency

10. Aetna/Travelers was under no obligation to inform Claimant of his right under the Vermont Workers' Compensation Act. See, *Longe*, 171 Vt. 214. Therefore, it was not obligated to inform the Claimant of his right to permanent partial disability benefits.

#### Physical Disability

11. Aetna/Travelers paid the Claimant temporary total disability benefits through November 1980 when he returned to work. Defendant characterizes that return to work as successful, and, it is consistent with the duration of the jobs he held before the accident. Thereafter he resumed his pattern of frequent job changes until 1984 when he left the workforce. No medical, health or treatment provider opined that the Claimant was unable to continue his employment as a health physics technician at that time. Nor is there any medical opinion to suggest that his work was worsening his condition.
12. Finally there is no objective evidence to support a finding of physical impairment causally linked to the 1980 fall.

### Physical-mental claim

13. Aetna/Travelers accepted a claim in this case for a right arm injury. It did not accept a claim for depression or any other psychological injury. Therefore, it is the Claimant's burden to prove that he suffered a physical-mental claim that is a causal connection between the physical injury and subsequent mental condition. *Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99WC (1999).
14. The voluminous medical records establish the onset of Claimant's depression and related psychological problems four to five years after his 1980 fall. In the interim, he was in a motor vehicle accident he told his doctor not to mention, the workers' compensation carrier denied him benefits and he removed himself from the workplace. Furthermore, there is strong evidence from Dr. Burstein that he has a personality disorder.
15. Claimant's acting out occurred after Aetna/Travelers denied benefits. He complained bitterly to health care providers about it and his psychological symptomatology escalated. However, as this Department has held in the past, even "wrongful activity by a workers' compensation carrier in adjusting a claim cannot give rise to a work-related injury although it may give rise to an independent action against the insurance company, *Demag v. American Insurance Co.*, 146 Vt 608 (1986), or sanctions brought directly by this Department (see 21 V.S.A. §688) or by the Department of Banking, Insurance, and Health Care Administration (see 8 V.S.A. §4723)." *Miller v. Cornwall Orchards*, Op. 20-97WC (1997). Therefore, to the extent that Claimant's psychological condition stemmed from the denial of benefits, the casual chain with his 1980 fall at work was broken.
16. Furthermore, the passage of five years, intervening work and multiple assurances from health care providers that he was capable of working further attenuate any connection between what was realistically a relatively minor injury in 1980 and the myriad problems that exist today. Of those problems is one Dr. Goldstein identifies as organic brain syndrome, a diagnosis that cannot be accepted because it is based on unreliable subjective reports from the Claimant.
17. In conclusion, there is not a causal connection between Claimant's psychological condition and his work. Nor is there credible evidence to substantiate Claimant's belief that he cannot work as I accept the opinions of Dr. Zimmerman and Dr. Burstein that he is physically and psychologically capable of working.

**ORDER:**

THEREFORE, Based on the Foregoing Findings of Fact and Conclusions of Law, this claim for additional benefits is DENIED.

Dated at Montpelier, Vermont this 20<sup>th</sup> day of November 2002.

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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.