STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

John Pfalzer	)	State File No. J-11011
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Pollution Solutions of	)	
Vermont and Liberty Mutual	)	For: R. Tasha Wallis
Insurance Co.	)	Commissioner
	)	
	)	Opinion No. 23A-01WC

AMENDED DECISION

After the opinion in this case was issued on August 1, 2001, the claimant moved to strike paragraphs 13 and 14 from the conclusions of law, arguing that those conclusions addressed issues that went beyond the scope of the issues presented. Specifically, he objected to any reference to the reasonableness of the claimant's September 4, 1998 surgery. Because such a conclusion went beyond the issues to which the parties had agreed, paragraphs 13 and 14 are hereby stricken. Those and subsequent paragraphs are replaced with the language that appears below. The order necessarily has been amended as well.

Below is the decision in its entirety with the amendments.

APPEARNCES:

Christopher McVeigh, Esq. for the claimant

Keith J. Kasper, Esq. for the defendant

ISSUE:

Is the claimant entitled to temporary total and temporary partial disability benefits?

STIPULATIONS:

1. On November 1, 1995, claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act ("Act").

2. On November 1, 1995, defendant was an employer within the meaning of the Act.

3. On November 1, 1995, claimant suffered a hernia, which resulted in a personal injury by accident arising out of and in the course of his employment with defendant.

4. On November 1, 1995, claimant's initial workers' compensation temporary total disability rate was $296.11.

5. When claimant returned to work at Ecology and Environment in April of 1998, he alleges his average weekly wage increased to $567.32 resulting in a new initial compensation rate of $378.18. This compensation rate is subject to the cost of living adjustments.

6. On November 1, 1995, and currently, claimant has no dependents within the meaning of the Act.

7. On or about June 11, 1996, claimant separated from his employment with defendant.

8. Claimant seeks all workers' compensation benefits associated with the claim, and specifically in the instant matter temporary total disability benefits for the periods of time claimant was not employed following his separation from defendant and particularly June 11, 1996 to June 9, 1997; June 8, 1998 to August 6, 1998; September 4,1998 to October 12, 1998; and from May 13, 1999 to September 19, 2000, when defendant began voluntarily advancing benefits. Furthermore, if successful, claimant seeks attorney fees, interest and costs of the formal hearing process. Issues as to claimant's achieving medical end result and resulting degree of permanent partial disability are not ripe for review at this juncture.

9. The parties agree to the admission of the medical records of claimant as a joint exhibit.

10. The parties agree that the Department may take judicial notice of any and all forms or agreements between the parties in its files in this matter.

11. There is no dispute as to the qualifications of any of the claimant's treating or examining health care professionals.

12. If at hearing, or otherwise, any stipulated facts are challenged, the stipulation on that fact shall not abide.

EXHIBIT LIST:

Joint Exhibit I:	Stipulation
Joint Exhibit II:	Medical Records
Claimant's Exhibit 1:	Payment Records from Ecology and Environment Inc. from 12/27/97 to 05/08/99
Claimant's Exhibit 2:	Letter from 08/18/97 and Form 27
Claimant's Exhibit 3:	Department of Employment and Training Form for Overpayment and Medical Certification from 06/26/96, and Determination Report from 07/24/96
Defendant's Exhibit A:	Liberty Mutual Activity Logs from 12/05/95 to 07/08/00

FINDINGS OF FACT:

1. Stipulations 1 through 7 are adopted as true and the exhibits are admitted into evidence.

2. John Pfalzer, claimant, holds a bachelor's degree in environmental sciences from the State University of New York at Plattsburgh. Prior to his employment at Pollution Solutions of Vermont, claimant had worked in his field for several different employers as an environmental chemist. Claimant's education, experience, and innate abilities make him a highly skilled employee who is able to perform complex, non-physical, mental tasks.

3. In June of 1995 claimant began working for Pollution Solutions of Vermont as an environmental chemist. As part of his job as an environmental chemist, claimant conducted field tests by collecting samples at various properties throughout Vermont and performed any number of job-specific chemical analyses. As an employee of Pollution Solutions, claimant was expected to perform some warehouse work in addition to his primary duty as an environmental chemist.

4. Prior to November 1995, claimant was in good health with no history of injury or chronic pain.

5. At sometime in November 1995, claimant, who was living in Plattsburgh New York, suffered a work-related hernia injury. Claimant chose to treat his injury in Buffalo, New York. Ralph Doerr, M.D. operated on the claimant at Buffalo General Hospital on November 29, 1995. No complications arose during the course of surgery and the procedure, at least initially, appeared successful. Claimant soon returned to work and was performing light duty and office functions as of December 7, 1995.

6. Claimant began taking on physical tasks within the next few weeks following surgery. On December 29, 1995, claimant, while moving a 55lb. barrel in the warehouse, suffered a sharp, piercing pain in the site of his hernia that extended down to his left testicle and left thigh. Claimant sought treatment for his pain on January 3, 1996 at Fletcher Allen. The treating emergency room physician found the hernia not to be damaged or noticeably swollen. The ER physician recommended claimant to be placed on light duty until further tests could establish whether the hernia was damaged. This was the only note restricting claimant's work capacity until September 1998.

7. Claimant followed his emergency room visit with several appointments, but no damage to the hernia was ever found. Instead, claimant was scheduled for pain treatment. The treatment culminated in a series of three steroid injections delivered to the patient on April 19, 1996, May 16, 1996, and June 14, 1996. The injections were designed to relieve claimant of his pain, but they failed to provide the claimant with total or lasting relief beyond a few weeks. At no time during the pain treatment did any of the treating Fletcher Allen physicians recommend any limitations on the claimant's work capacity beyond what he could subjectively tolerate on a task by task basis.

8. As early as April 10, 1996, claimant began complaining about his employer and blaming it for all of his pain problems. On April 24, 1996, claimant informed Sue Ward, his case manager for Liberty Mutual, that he was looking for another job because of his belief that Pollution Solutions wanted to get rid of him. Claimant informed Ward of his continuing intentions on May 6, 1996.

9. Claimant voluntarily ended his employment with Pollution Solutions of Vermont on June 11, 1996. Though claimant was suffering pain at the time, Pollution Solution had not required him to perform any task beyond the scope of any subjective or objective medical limitation.

10. Instead of dealing with Liberty Mutual or Pollution Solutions, claimant sought compensation through the Vermont Department of Employment and Training (VDET), from whom he received benefits for the next 26 weeks from late June 1996 to January 1997. During the 26 weeks claimant applied and sought employment in the Plattsburgh-Burlington area. The search yielded several job offers that, for individual reasons, did not work out. Claimant did not seek medical treatment for his pain condition during this entire period.

11. In July 1996, claimant was scheduled for an independent medical evaluation with Dorothy Ford, M.D. as arranged through Liberty Mutual. Claimant failed to appear for the examination, and Liberty Mutual did not attempt to re-schedule or contact claimant to inquire about alternative dates. At the same time, claimant never informed Liberty Mutual about his job search, the resulting job offers, or his inability to work.

12. Liberty Mutual closed claimant's file on August 22, 1996. No Form 27 was filed at the time.

13. Claimant left the Plattsburgh-Burlington area in mid-February, 1997 and returned to Buffalo, New York. There the claimant began treating with Pratibha Bansal, M.D. of the Pain Rehab Center of Western New York. Treatment included cryoanalgesia, a procedure where the doctor pierces the abdomen with a cold needle that alternately freezes and thaws nerves. Despite initial success in mitigating claimant's pain, Dr. Bansal's treatments lessened in effectiveness while continuing to be an intensely painful procedure.

14. In April and May 1997, claimant sought second and third opinions regarding his pain condition from James Egnatchick, M.D., Robert Plunkett, M.D., and Eugene Gosy, M.D. Claimant became convinced that surgery was the only viable solution to his problem. However, none of claimant's treating physicians advocated surgery. Each new treating doctor wanted further examinations. Thus instead of solving his problem, each new physician wanted more time to determine what was causing the pain described.

15. On May 7, 1997 claimant began working for Ecology and Environment, a Buffalo area company, as an environmental chemist. Although he began on a temporary basis, claimant became a full-time employee by December 1997. As part of his hiring, claimant took an employee physical. While he did not speak of his pain condition, Harvey Merlin, M.D., the doctor giving the physical, found claimant to be healthy, capable of performing normal work duties, and placed no restrictions on him. Claimant did not inform Liberty Mutual of his new employment status.

16. Claimant continued sporadic pain treatment throughout the summer and expanded his range of treating physicians to include Gregory Bennett, M.D., Michael Geraci, M.D., and Kevin Pranikoff, M.D. Their work throughout the summer of 1997 led to an expansion of the treatment area from the groin and hernia to the claimant's left hip and spine. Liberty Mutual used the expanding hypotheses and treatment, which it perceived to be beyond the scope of claimant's original injury, as the basis for a Form 27 filed on August 20, 1997. The form specifically denied medical benefits but did not address indemnity benefits or medical end results and permanency. The Department initially approved the form.

17. Following the filing of the Form 27, claimant discontinued his treatment and his recently initiated rehabilitation with Jill LaVallee, PT, SCS, at Buffalo Rehab Group (August 26, 1997). For the next five months (September, 1997 to January, 1998) claimant sought no medical treatment for his pain. In late January 1998, claimant resumed medical treatment when he began treating with Kevin McMahon, M.D., of the Buffalo Family Practice Medical Associates. At this time Claimant described his pain as being similar to having his "balls in a vice." Dr. McMahon recommended claimant resume treatment with Dr. Gosy. Dr.

18. Contrary to all relevant medical opinion, claimant chose to take a medical leave of absence from Environment and Ecology on June 8, 1998. Claimant returned to work on August 6, 1998. Claimant continued to treat with several physicians throughout his leave but underwent no radical treatments or gave any indication that his condition was any more critical than it was during his prior period of employment. In fact the pain experienced during the leave of absence, as reported to his physicians, appears normal if not slightly less because the success of medications such as Percocet and Zoloft which claimant had recently begun taking.

19. On September 4, 1998, Dr. Reynhout performed an illionguial neurectomy, excised the lipoma of the cord, and surgically explored the left groin area. The surgery was performed without complications. At this time, claimant received a prescription to stay out of work for thirty days following the surgery. In post-operative examinations, claimant reported some discomfort and general numbness in the area but still felt some pain. Claimant returned to work on October 10, 1998. Around the same time, he began physical therapy with Beverly Stewart, P.T. for 14 sessions lasting until February 1999. Physical therapy improved claimant's post-operative range of motion, but by February, he still complained of acute sharp pains and chronic lower level pain.

20. Pain treatment resumed in March of 1999 with Dr. Gosy who began performing nerve blocks and urinary tract testing. Claimant continued treatment with Dr. Gosy and Dr. McMahon through June 1999. Unfortunately, in May 1999, claimant was laid off from Ecology and Environment due to financial cut backs at the company. Claimant has not worked since.

21. During the next 26 weeks (May, 1999-October, 1999), claimant received unemployment benefits and focused on solving his pain problems. Claimant's search eventually led him to Dr. James Campbell of Johns Hopkins Medical Center in November 1999.

22. In December 1999, the Department reopened claimant's case and reversed its prior granting of Form 27. Liberty Mutual had never been removed as carrier, but it was ordered to resume paying benefits.

23. Dr. Campbell's treatment of claimant culminated in September 2000 with surgery. The surgery failed to solve claimant's pain symptoms but did relieve some of them. Dr. Campbell also introduced OxyContin into his daily drug regime, which included Percocet, Elavil, and Tylenol. As of November 22, 2000 claimant has reached a medical end result. As examined by John Rubinstein, M.D., claimant has continuing pain but very few promising medical options for relief. The conclusion of the evaluation is that the claimant is employable in sedentary occupations and will benefit from any mental challenges that alter his focus on the pain.

CONCLUSIONS OF LAW:

1. There is no question that the claimant's injury arose out of and in the course of employment. The only issue at hand is whether Liberty Mutual owes claimant retroactive temporary total or temporary partial benefits. In worker's compensation cases the claimant has the burden of proof when the insurer denies benefits. *See Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1963).

2. In order to fulfill the burden, there must be created in the trier of fact something more than a possibility, suspicion, or surmise that incidents complained of were the cause of the injury and the resulting disability and the inference from the facts proved must be the more probable hypothesis. *See Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941).

3. The State of Vermont recognizes from the case of *Merrill v. University of Vermont*, 133 Vt. 101 (1974), that pain can be a disabling factor and that an injured worker has the capacity to testify about the disabling nature of his or her own pain. The dispositive nature of the injured worker's testimony without medical support depends on his or her credibility as a witness. *See Andreescu v. Blodgett Supply Co.*, Opinion No. 33-94WC (November 3, 1994).

4. In claimant's case his testimony regarding his pain is inconsistent with the objective medical record. Despite his claims of intense pain that caused him to leave work, claimant failed to treat medically for eight months following his departure from Pollution Solutions. Testimony as subjective as pain testimony is sensitive to any objective contradiction. *See Merrill* at 106 (claimant's testimony found credible "as well it might be in light of the medical testimony that, even though not expected, it was possible"). Furthermore, the claimant's testimony that he was unable to perform light-duty or sedentary work is unpersuasive.

5. The general rule, in regards to an employee who claims temporary total disability after leaving an employer, is that a claimant who voluntarily quits his job for reasons unrelated to the injury is not entitled to temporary total disability. *See Andrew v. Johnson Controls*, Opinion No. 3-93WC(June 13, 1993) *citing, Pearl v. Builders Iron Foundry*, 73 R.I. 304, 55 A.2d 282 (1947); *Powers v. District of Columbia Dept. of Employment Serv.*, 566 A.2d 1068 (1989); *Coon v. Rycenga Homes,* 146 Mich. App. 262, 379 N.W. 2d 480 (1985).

6. To avoid harsh results, there is an exception to the general rule for a claimant who can demonstrate: 1) a work injury; 2) a reasonably diligent attempt to return to the work force; and 3) the inability to return to the work force or that a return at a reduced wage is related to her work injury and not to other factors. *See Andrew* at conclusion 6.

7. Claimant chose to leave Pollution Solutions. While claimant argues that he left Pollution Solutions because of his pain, there is no proof that Pollution Solutions made him work beyond his physical abilities, nor is there persuasive proof that the injury and pain forced the claimant to quit. In fact the lack of medical records, stating a restriction or suggesting limitations because of claimant's pain, persuades that the pain was less than probable as the reason why claimant quit. Furthermore, claimant's failure to pursue medical care undercuts his testimony and any claims for partial disability. Therefore according to the general rule, Claimant is not eligible for temporary total disability because he voluntarily left his employer.

8. As far as eligibility for the exception to the general rule, claimant meets the first criterion, a work injury. Arguably claimant fulfills the second criterion since there is a credible record of job search initially following his resignation in 1997. Claimant, however, fails to persuade on the third criterion, namely that he was unable to find work because of his injury. In fact, claimant was able to eventually find a better paying job within a year while suffering no recorded (or claimed) change in his pain condition. Thus claimant is not eligible for temporary total disability under the exception to the general rule.

9. In regards to claimant's argument for temporary total disability in June through August 1998 and May through September 1999, the holding of *Merrill* must be considered alongside the parallel body of law found under *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979). *Lapan* states that where the claimant's injury is obscure and the layperson could have no well-grounded opinion as to its nature or extent, expert testimony is the sole means of laying a foundation for an award for both compensability issues as well as the extent of the award sought. *See Id*. and *Jaquish v. Bechtel Corp.*, Opinion No. 30-92WC (Dec. 29, 1992).

10. *Merrill* does not give a claimant the right to self-treat. While it does empower claimants to testify to levels of subjective pain, acceptance of that testimony depends on its reliability. Furthermore, it cannot take the place of expert opinion in diagnosis and treatment. Claimant has shown a willingness to seek medical attention and treatment, but each time he chose to quit his job or take a leave of absence, it was under his own advisement.

11. Additionally, defendant's argument against awarding claimant's temporary total disability benefits after his lay-off in May 1999 is persuasive. Claimant became unemployed in May 1999 because of an economic downturn at Ecology and Environment, Inc. Thus his unemployment is the result of an economically related lay-off and has nothing to do with his pain. Furthermore, claimant has not established that he was unable to find work after May 1999 because of his pain condition.

12. The claimant clearly suffered pain throughout the period in question, 1996-2000. However, his testimony alone has not established that the pain disabled him. Claimant cannot be the only party capable of diagnosing and treating his ailment. Such self-treatment, like the claimant's leave of absence in 1998, leaves no room for expert medical opinion or ability for the insurance carrier to objectively assess the injured party (should it so choose). Any argument that *Merrill* allows more than the establishment of pain and possible level of disability misinterprets its holding. The legacy of *Merrill* is an acceptance of pain in individuals, but *Merrill* is concerned with proving the continuation of disabling pain and begins with a stipulation by the parties that the initial pain was disabling. Causation and treatment of pain are the realm of medical experts even when they are, as in this case, flummoxed by the unrelenting and incurable nature of the pain. By acting without the advice of his physicians or Liberty Mutual, claimant cut off any potential rights to total temporary disability. Thus the periods of time, June 11, 1996 through May 7, 1997, June 8, 1998 through August 6, 1998, and May 8, 1999 through September 19, 2000, that claimant requests for retroactive disability are simply not covered by workers' compensation.

13. In contrast, claimant's request for temporary total disability for the period of August 29, 1998 through October 10, 1998 is granted. Here Dr. Renhyout's out of work slip is accepted. The medical record and claimant's testimony lead to the conclusion that the claimant was unable to work between August 29th and October 10th, 1998. Furthermore, the claimant's surgery and recovery period are a result of his pain condition, which dates back to his compensable work related injury. Therefore under 21 V.S.A. §642, claimant is eligible for temporary total disability for the six weeks from August 29 to October 10, 1998.

14. Under §642 claimant receives two-thirds of his weekly wage income for the time he is unable to work due to his injuries. Since the defendant has offered no argument that claimant had a different wage than stipulated, it is accepted that at the time of claimant's temporary total disability his weekly wage was $567.32. Thus claimant is awarded temporary total disability benefits based on that average weekly wage plus annual adjustments.

15. Since claimant has prevailed on a part of his claim, he is eligible to recover reasonable attorney fees and necessary costs under 21 V.S.A. § 678 (a) and Workers' Compensation Rule 10. Under Rule 10(a)(2), the Commissioner has discretion as to the basis of attorney fees. Since claimant has only prevailed on a small part of his claim, attorney fees are granted on a 20% contingency basis.

16. Under Rule 10(c), claimant is also eligible for necessary costs associated with the case. Claimant has prevailed on the issue of temporary total disability benefits through the medical record and testimony alone. Therefore, the necessary costs are limited to the costs of the medical record amounting to $390.40.

17. Finally, the question of unemployment benefits co-existing with a claim for temporary total disability is not reached in the current situation and is therefore not addressed.

ORDER:

Based on the foregoing findings of fact and conclusions of law the carrier is ordered to pay claimant:

1. Temporary total disability benefits for work missed on August 29, 1998 through October 10, 1998 pursuant to 21 V.S.A. §642;

2. Attorney fees based on 20% of the amount awarded , $390.40 in necessary costs pursuant to 21 V.S.A. §678 and Workers' Compensation Rule 10 and interest since October 10, 1998.

Dated at Montpelier, Vermont, this 5th day of October 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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Hearing held in Montpelier on Thursday, January 11, 2001
Record Closed on March 27, 2001

APPEARANCES:

Christopher McVeigh, Esq. for the claimant
Keith J. Kasper, Esq. for the defendant

ISSUE:

Is the claimant entitled to temporary total and temporary partial disability benefits?

STIPULATIONS:

1. On November 1, 1995, claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act ("Act").

2. On November 1, 1995, defendant was an employer within the meaning of the Act.

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EXHIBIT LIST:

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Defendant's Exhibit A:	Liberty Mutual Activity Logs from 12/05/95 to 07/08/00

FINDINGS OF FACT:

1. Stipulations 1 through 7 are adopted as true and the exhibits are admitted into evidence.

2. John Pfalzer, claimant, holds a bachelor's degree in environmental sciences from the State University of New York at Plattsburgh. Prior to his employment at Pollution Solutions of Vermont, claimant had worked in his field for several different employers as an environmental chemist. Claimant's education, experience, and innate abilities make him a highly skilled employee who is able to perform complex, non-physical, mental tasks.

3. In June of 1995 claimant began working for Pollution Solutions of Vermont as an environmental chemist. As part of his job as an environmental chemist, claimant conducted field tests by collecting samples at various properties throughout Vermont and performed any number of job-specific chemical analyses. As an employee of Pollution Solutions, claimant was expected to perform some warehouse work in addition to his primary duty as an environmental chemist.

4. Prior to November 1995, claimant was in good health with no history of injury or chronic pain.

5. At sometime in November 1995, claimant, who was living in Plattsburgh New York, suffered a work-related hernia injury. Claimant chose to treat his injury in Buffalo, New York. Ralph Doerr, M.D. operated on the claimant at Buffalo General Hospital on November 29, 1995. No complications arose during the course of surgery and the procedure, at least initially, appeared successful. Claimant soon returned to work and was performing light duty and office functions as of December 7, 1995.

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8. As early as April 10, 1996, claimant began complaining about his employer and blaming it for all of his pain problems. On April 24, 1996, claimant informed Sue Ward, his case manager for Liberty Mutual, that he was looking for another job because of his belief that Pollution Solutions wanted to get rid of him. Claimant informed Ward of his continuing intentions on May 6, 1996.

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18. Contrary to all relevant medical opinion, claimant chose to take a medical leave of absence from Environment and Ecology on June 8, 1998. Claimant returned to work on August 6, 1998. Claimant continued to treat with several physicians throughout his leave but underwent no radical treatments or gave any indication

19. On September 4, 1998, Dr. Reynhout performed an illionguial neurectomy, excised the lipoma of the cord, and surgically explored the left groin area. The surgery was performed without complications. At this time, claimant received a prescription to stay out of work for thirty days following the surgery. In post-operative examinations, claimant reported some discomfort and general numbness in the area but still felt some pain. Claimant returned to work on October 10, 1998. Around the same time, he began physical therapy with Beverly Stewart, P.T. for 14 sessions lasting until February 1999. Physical therapy improved claimant's post-operative range of motion, but by February, he still complained of acute sharp pains and chronic lower level pain.

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23. Dr. Campbell's treatment of claimant culminated in September 2000 with surgery. The surgery failed to solve claimant's pain symptoms but did relieve some of them. Dr. Campbell also introduced OxyContin into his daily drug regime, which included Percocet, Elavil, and Tylenol. As of November 22, 2000 claimant has reached a medical end result. As examined by John Rubinstein, M.D., claimant has continuing pain but very few promising medical options for relief. The conclusion of the evaluation is that the claimant is employable in sedentary occupations and will benefit from any mental challenges that alter his focus on the pain.

CONCLUSIONS OF LAW:

1. There is no question that the claimant's injury arose out of and in the course of employment. The only issue at hand is whether Liberty Mutual owes claimant retroactive temporary total or temporary partial benefits. In worker's compensation cases the claimant has the burden of proof when the insurer denies benefits. *See Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1963).

2. In order to fulfill the burden, there must be created in the trier of fact something more than a possibility, suspicion, or surmise that incidents complained of were the cause of the injury and the resulting disability and the inference from the facts proved must be the more probable hypothesis. *See Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941).

3. The state of Vermont recognizes from the case of *Merrill v. University of Vermont*, 133 Vt. 101 (1974), that pain can be a disabling factor and that an injured worker has the capacity to testify about the disabling nature of his or her own pain. The dispositive nature of the injured worker's testimony without medical support depends on his or her credibility as a witness. *See Andreescu v. Blodgett Supply Co.*, Opinion No. 33-94WC (November 3, 1994).

4. In claimant's case his testimony regarding his pain is inconsistent with the objective medical record. Despite his claims of intense pain that caused him to leave work, claimant failed to treat medically for eight months following his departure from Pollution Solutions. Testimony as subjective as pain testimony is sensitive to any objective contradiction. *See Merrill* at 106 (claimant's testimony found credible "as well it might be in light of the medical testimony that, even though not expected, it was possible"). Furthermore, the claimant's testimony that he was unable to perform light-duty or sedentary work is unpersuasive.

5. The general rule, in regards to an employee who claims temporary total disability after leaving an employer, is that a claimant who voluntarily quits his job for reasons unrelated to the injury is not entitled to temporary total disability. *See Andrew v. Johnson Controls*, Opinion No. 3-93WC(June 13, 1993) *citing, Pearl v. Builders Iron Foundry*, 73 R.I. 304, 55 A.2d 282 (1947); *Powers v. District of Columbia Dept. of Employment Serv.*, 566 A.2d 1068 (1989); *Coon v. Rycenga Homes,* 146 Mich. App. 262, 379 N.W. 2d 480 (1985).

6. To avoid harsh results, there is an exception to the general rule for a claimant who can demonstrate: 1) a work injury; 2) a reasonably diligent attempt to return to the work force; and 3) the inability to return to the work force or that a return at a reduced wage is related to her work injury and not to other factors. *See Andrew* at conclusion 6.

7. Claimant chose to leave Pollution Solutions. While claimant argues that he left Pollution Solutions because of his pain, there is no proof that Pollution Solutions made him work beyond his physical abilities, nor is there persuasive proof that the injury and pain forced the claimant to quit. In fact the lack of medical records, stating a restriction or suggesting limitations because of claimant's pain, persuades that the pain was less than probable as the reason why claimant quit. Furthermore, claimant's failure to pursue medical care undercuts his testimony and any claims for partial disability. Therefore according to the general rule, Claimant is not eligible for temporary total disability because he voluntarily left his employer.

8. As far as eligibility for the exception to the general rule, claimant meets the first criteria, a work injury. Arguably claimant fulfills the second criteria since there is a credible record of job search initially following his resignation in 1997. Claimant, however, fails to persuade on the third criteria, namely that he was unable to find work because of his injury. In fact, claimant was able to eventually find a better paying job within a year while suffering no recorded (or claimed) change in his pain condition. Thus claimant is not eligible for temporary total disability under the exception to the general rule.

9. In regards to claimant's argument for temporary total disability in June through August 1998 and May through September 1999, the holding of *Merrill* must be considered alongside the parallel body of law found under *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979). *Lapan* states that where the claimant's injury is obscure and the layperson could have no well-grounded opinion as to its nature or extent, expert testimony is the sole means of laying a foundation for an award for both compensability issues as well as the extent of the award sought. *See Id*. and *Jaquish v. Bechtel Corp.*, Opinion No. 30-92WC (Dec. 29, 1992).

10. *Merrill* does not give a claimant the right to self-treat. While it does empower claimants to testify to levels of subjective pain, acceptance of that testimony depends on its reliability. Furthermore, it cannot take the place of expert opinion in diagnosis and treatment. Claimant has shown a willingness to seek medical attention and treatment, but each time he chose to quit his job or take a leave of absence, it was under his own advisement.

11. Additionally, defendant's argument against awarding claimant's temporary total disability benefits after his lay-off in May 1999 is persuasive. Claimant became unemployed in May 1999 because of an economic downturn at Ecology and Environment, Inc. Thus his unemployment is the result of an economically related lay-off and has nothing to do with his pain. Furthermore, claimant has not established that he was unable to find work after May 1999 because of his pain condition.

12. The claimant clearly suffered pain throughout the period in question, 1996-2000. However, his testimony alone has not established that the pain disabled him.

13. In contrast, claimant's request for temporary total disability for the period of September 4, 1998 through October 10, 1998 does have the support of Dr. Reynhout's out of work slip. However, the validity of the claim for TTD following surgery is also dependent upon the compensability of the underlying surgery. Under 21 V.S.A. §656, surgery is compensable if it is work related and it is a reasonable and necessary procedure.

14. The facts demonstrate that a majority of the claimant's treating physicians objected, were unwilling to perform, or did not recommend surgery. The surgery, itself, did not result in any improvement of the claimant's overall condition. And claimant has failed to present any persuasive evidence of a need for surgery prior to the procedure. Thus, the claimant fails to persuade that the surgery was reasonable or necessary within the scope of §656. Furthermore, Liberty Mutual never had the opportunity to judge whether the surgery was reasonable and necessary. It would not follow then to force Liberty Mutual to compensate the claimant for work time lost because of a surgery that it did not approve and a majority of claimant's physicians did not recommend.

15. Finally, the question of unemployment benefits co-existing with a claim for temporary total disability is not reached in the current situation and is therefore not addressed.

ORDER:

THEREFORE, based on the Foregoing Findings of Fact and Conclusions of Law the claimant John Pfalzer's request for temporary total and partial disability benefits are DENIED.

Dated at Montpelier, Vermont, this 1st day of August 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.