STATE OF VERMONT
DEPARTMENT OF LABOR

J. H. Opinion No. 53S-05WC

v. By: Margaret A. Mangan
Hearing Officer

Therrien Foundations For: Patricia A. McDonald
Commissioner

State File No. M-12928

RULING ON DEFENSE MOTION TO STAY AWARD OF FEES AND COSTS

After a hearing on the compensability of proposed surgery and claimant's entitlement to temporary total disability benefits, the Commissioner found the surgery reasonable and, therefore, compensable under 21 V.S.A. § 640(a), but denied the claim for temporary total disability benefits because claimant had reached medical end result, had a documented work capacity and had not worked in the months leading up to the surgery. Opinion No. 53-05WC**.**

The issue of the proposed surgery was a hotly contested one, requiring travel to depose experts and overall expensive discovery. The work expended on that issue alone justified the award of attorney fees, which were awarded in full.

Claimant appealed the denial of temporary total disability benefits; the defense appealed the award of fees.

At this juncture pending the appeal, the defense asks that the award of fees be stayed. 21 V.S.A. § 675. To prevail on its request, Defendant must demonstrate: (1) it is likely to succeed on the merits; (2) it would suffer irreparable harm if the stay were not granted; (3) a stay would not substantially harm the other party; and (4) the best interests of the public would be served by the issuance of the stay. In re Insurance Services Offices, Inc., 148 Vt. 634, 635 (1987). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v.Webster Corporation*, Opinion No. 62S-96WC (1996).

This was an unusual claim involving complex medical issues. The legal work involved would have been required even if the question of surgery were the only issue for decision. Because of the strength of the claimant's expert, it is not at all likely that the court will consider the issue differently. Hence it cannot meet the first criterion.

Nor has the defense sufferer demonstrated that it would suffer irreparable harm were a stay not granted, the second criterion, because it does not explain what that harm would be. Payment of $25,000 alone does not constitute irreparable harm.

However, the defense has met the third factor by showing that the claimant will not suffer irreparable harm were a stay granted. Staying an award of fees and costs does not affect his ability to have the surgery.

In this case, the best interests of the public would be best served by the payment of the fees in this case. This action was protracted because of the defense supported by physicians unfamiliar with the surgery proposed. It would be fundamentally unfair to deny payment of fees to the claimant who had to meet those extreme defenses.

As defendant has not met the four required criteria, the Motion for Stay is hereby **DENIED.**

Dated at Montpelier, Vermont this 9th day of December 2005.

____
Patricia A. McDonald
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.

J. H. v. Robert Therrien (October 13, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR

J. H.	Opinion No. 53R-05WC
v.	By: Margaret A. Mangan Hearing Officer
Robert Therrien	For: Patricia A. McDonald Commissioner
	State File No. M-12928

RULINGS ON
CLAIMANT'S MOTION FOR RECONSIDERATION AND CLARIFICATION AND FOR ADDITUR
DEFENDANT'S MOTION FOR RECONSIDERATION OF AWARD OF FEES AND COSTS

APPEARANCES:

Dennis O. Shillen, Esq., for the Claimant
Wesley M. Lawrence, Esq., for the Defendant

Claimant's Motion for Reconsideration and Clarification and for Additur

Claimant argues that the Department erred in denying his claim for temporary total disability (TTD) benefits and seeks additional costs in light of a statement received after the record closed.

Because the Commissioner found that claimant's kyphosis had progressed, claimant argues that she must also find that claimant is entitled to the resumption of TTD until after he recovers from the approved surgery. However, the claimant reads the decision too narrowly. When an injury causes total disability for work, a claimant is entitled to temporary total disability compensation until reaching medical end result or successfully returning to work. 21 V.S.A. § 642; *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996); *Orvis v. Hutchins*, 123 Vt.18 (1962). This is a claimant who terminated vocational rehabilitation services for reasons unrelated to his work related injury. Dr. Fenton had placed him at medical end result in 2000. Dr. Fanciullo placed him at medical end result in 2002. He had a work capacity despite the kyphosis. Termination of TTD was appropriate. The surgery approved by this Department, while reasonable, is also elective. A decision to have surgery does not negate the MER finding. And, one is not entitled to TTD postoperatively when he had no wages before the surgery because no wages were lost. *Plante v. Slalom Skiwear*, Op. No. 19-95 (1995). Therefore, the claimant's motion to reverse the conclusion regarding temporary total disability benefits is DENIED.

Next, claimant seeks an additional cost of $5,875,00 for Dr. Grottkau's testimony and record review, billed at $1,000 for the first hour, $500 for each additional hour and $750 per hour for reviewing materials. The request was submitted after the record closed. Defendant objects to the request in its totality because it was filed too late and because it is excessive. Although late, I will permit the recovery of fees for this physician whose opinion was the basis for a finding of compensability. However, it is limited to the fees allowable under WC Rule 40.111, $300.00 for one hour or less and $75 for each additional 15 minutes. I am satisfied that the time submitted was necessary and compensable.

Defendant's Motion for Reconsideration of Award of Fees and Costs

Defendant asks this Department to reduce the award of fees and costs granted the claimant, based on 177.5 hours and $8,028.52 in costs. The challenge goes to several areas, including the type of vehicle claimant's counsel rented and cost of parking. Claimant counters with a list of those areas never include in the billing. He urges the Department to approve the claim for fees and costs as originally ordered. Defendant accurately characterizes this case as "unique." Part of the uniqueness involves extraordinary expenses for both claimant and defendant. The award as stands only partially compensates the claimant for his costs to pursue the claim for compensability of the unusual surgery. I am satisfied that the original award is consistent with the standards of 21 V.S.A. § 678(a) and WC Rule 10.000. It shall stand.

ORDER:

Therefore,

Claimant's motion for reconsideration is DENIED. His motion for additur is GRANTED IN PART.

Defendant's motion for reconsideration of fees and costs is DENIED.

Dated at Montpelier, Vermont this 13th day of October 2005.

Patricia A. McDonald
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.

J. H. v. Therrien Foundations (August 19, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR

J. H.	)	Opinion No. 53-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Therrien Foundations	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. M-12928

Pretrial conference held on February 9, 2005
Hearing held in Montpelier on July 25 and July 26, 2005
Record closed on August 8, 2005

APPEARANCES:

Dennis O. Shillen, Esq., for the Claimant
Wesley M. Lawrence, Esq., for the Defendant

ISSUES:

1. Is the surgery proposed by Dr. Brian Grottkau reasonable surgical treatment causally related to claimant's work-related injury and, therefore, compensable under 21 V.S.A. § 640(a)? If so, do the charges estimated by Dr. Grottkau fall within the "good cause exception" to the Vermont Fee Schedule?

2. Has the claimant reached medical end result? If not, is he entitled to temporary total disability benefits after the discontinuance in August of 2004?

EXHIBITS:

Joint 1:	Medical Records
Claimant 1:	Dr. Fenton Medical Records Review
Claimant 2:	Letter to Atty. Moore from Dr. Fenton
Claimant 3:	Letter from Atty. Moore to Dr. Fenton
Claimant 4:	Letter from Atty. Moore to Dr. Vincent
Claimant 5:	Greenburg's Handbook of Neurosurgery excepts
Claimant 6:	Curriculum Vitae- Dr. Brian Grottkau
Claimant 7:	Dr. Grottkau's Office Chart
Claimant 8:	Sketch by Dr. Grottkau
Claimant 9:	Accident Report
Claimant 10:	Photograph of car
Claimant 11:	Photographs of claimant
Claimant 12:	Videotape deposition of Jeremy Harness
Claimant 13:	Curriculum Vitae- Dr. Terry Cantlin
Claimant 14:	Curriculum Vitae- Dr. Michael Moran
Claimant 15:	Curriculum Vitae-Dr. Jonathan E. Fenton
Claimant 16:	Curriculum Vitae-Dr. Ronald L. Vincent
Defendant 1:	Claimant's Vocational Rehabilitation Documents

FINDINGS OF FACT:

1. At the time of his work related injury in 1998, claimant was 22 years old, working as a labor foreman in Robert Therrien's concrete and construction business. Before his employment with Therrien, he worked in other manual labor jobs with no problems other than minor backache.

2. On December 9, 1998, claimant was traveling to a work-site with a coworker when his vehicle rolled, ejecting him from it and throwing him about 150 feet. His shoes were knocked off. He thought his friend had been killed, although he later learned otherwise.

3. Immediately after the accident, claimant was taken to an emergency department where the following diagnoses were made: thoracic spine compression fracture; several fractured ribs; a fractured scapula and clavicle; trauma to his chest, shoulder, hip, head and ear; lacerated liver; ruptured spleen; and several right foot fractures.

4. Shortly afterwards, claimant's spleen was removed, followed by multiple abdominal hernias.

5. Claimant was involved in minor accidents before and after his work-related accident, but those accidents did not affect his work related injuries.

6. Several physicians who treated the claimant after the work related accident concluded that he incurred traumatic thoracic compression fractures as a result. Those doctors included Dr. Chen, an emergency medicine physician; Doctors Sporer and Gross,

Bernini, and Grottkau, orthopedic surgeons; Dr. Cantlin, osteopathic family physician, and Doctors Goodwin and McIntyre, radiologists who diagnosed compression deformities. Doctors Fenton, Banerjee and Moran also agree with this conclusion.

7. In the course of claimant's many examinations it was revealed that he had kyphosis, a curvature of the upper spine that was not diagnosed or ever created problems for claimant prior to the injury. Since the accident and as a result of the compression fractures, the kyphosis has worsened.

8. Claimant's treatment has included physical therapy, massage, bracing, traction, chiropractic, osteopathic manipulation, psychological counseling, narcotic pain medication, ultrasound, therapeutic exercise and pool therapy.

9. In the course of his treatment for pain and the progressive kyphotic deformity, claimant consulted with Dr. Bernini in the orthopedic department at Dartmouth who suggested that claimant see Dr. Brian Grottkau in Boston who has particular expertise in the treatment of kyphosis.

10. Dr. Grottkau is a Harvard educated board certified orthopedic surgeon who has surgically corrected kyphotic deformities in other patients. When he first examined the claimant on December 19, 2002, he measured the deformity at 60 degrees (normal is 20 to 40) and noted the healing thoracic compression fractures.

11. By February of 2003, Dr. Grottkau recommended surgical correction of claimant's "significant post traumatic kyphosis." By September of 2004, it was 70 degrees.

12. Dr. Grottkau would not perform the surgery until the claimant stopped smoking, which he has recently done.

13. The proposed surgery would involve two phases, with an anterior approach first and the posterior approach second, approximately one week apart. The claimant would be required to undergo extensive physical therapy following the surgery. Dr. Grottkau is one of a few physicians experienced in this procedure, which he has performed more than 50 times.

14. Claimant's current treatment requires him to take numerous narcotics for pain, decreasing his functional ability.

Expert Medical Opinions

15. Dr. Grottkau has been treating the claimant since 2002. He is board certified in orthopedic surgery. Dr Grottkau has published works and has an extensive knowledge in the treatment of orthopedic injuries such as those suffered by the claimant. Dr. Grottkau also has extensive training and experience in the anterior/ posterior fusion surgery recommended for the claimant.

16. Dr. Ronald L. Vincent is a neurosurgeon who actively practiced for 26 years. He had extensive experience involving spinal surgeries. He is board certified in neurosurgery. He is retired from practice, and has not performed any surgery in over 10 years. Dr. Vincent is no longer active in the medical care and treatment of patients and is not affiliated with any hospitals.

17. Dr. Terrance W. Cantlin has been the claimant's primary family physician since 1988. Dr. Cantlin is a doctor of osteopathic medicine and is board certified in family practice since 1984.

18. Dr. Fenton is a doctor of osteopathic medicine and the defendant's independent medical examiner. He has been involved in this matter since 2000. He examined claimant on two occasions and performed two comprehensive record reviews on the issue of the reasonableness and necessity of the proposed surgery.

19. Dr. Ivar Birkeland, an orthopedic surgeon, drafted his expert opinion jointly with Dr. Vincent.

20. Dr. Grottkau recommends the surgery to correct claimant's kyphotic deformity, prevent further progression of that deformity, decrease and/or alleviate claimant's pain, enhance claimant's functional capacity and improve the cosmetic appearance of his "hunchback." With the surgery, claimant may be weaned from chronic narcotics and improve his quality of life. Without the surgery, claimant will have ongoing pain and disability and will need to continue chronic narcotic pain medication with all the side effects of those drugs.

21. Side effects and risks of the proposed surgery include death, stroke, heart attack, failed fusion, failure to reduce pain and possibly a worsening of pain, a need to repeat the operation due to failed fusion, damage to major blood vessels and isolated muscle weakness in the foot or arm, incontinence and infection.

22. Dr. Grottkau rejects Dr. Fenton's suggestion for diagnostic injections as an unnecessary step not likely to help with the claimant's underlying progressive kyphosis. Dr. Grottkau noted that the treatments proposed by Dr. Fenton would pose unnecessary risks and would yield no long-term benefits to the claimant's current condition.

23. Dr. Grottkau opined that claimant's pain and the worsening of the kyphotic deformity were caused by the work related motor vehicle accident.

24. Dr. Jonathan Fenton placed claimant at medical end result on January 15, 2000 and assessed permanency for claimant's thoracic spine injury and fractured right foot, although a month later claimant had surgery for incisional hernias.

25. Instead of a surgical approach to treat the claimant, Dr. Fenton recommends many of the conservative treatments claimant has already had as well as multi-disciplinary psychotherapy and diagnostic injections. Dr. Fenton does not perform surgery.

26. Dr. Vincent examined the claimant and, together with Dr. Birkeland, an orthopedic surgeon, provided defendant with an opinion in support of the denial of this claim. Dr. Vincent disagreed with all other physicians who examined this claimant when he opined that claimant never suffered compression fractures of the thoracic spine from the December 1998 motor vehicle accident. The decision is based on their interpretation of the medical history, mechanism of injury and reading of the radiologic studies.

27. Dr. Vincent concluded that the surgery proposed by Dr. Grottkau is not medically reasonable or necessary. He has never done such a procedure and conceded that it is less invasive than procedures done for kyphosis when he was in active practice.

Claim for temporary total disability benefits

28. Claimant has not worked since December 9, 1998, although he has looked at various employment opportunities and rejected them. He enrolled at Randolph Vocational Center and obtained his adult high school diploma. Subsequently in the summer of 2002, claimant began a 2-year Associate degree in Business Technology and Management.

29. Dr Fenton placed the claimant at medical end result in March 2000.

30. A functional capacity evaluation was performed in July 26, 2000. The report concluded that the claimant has a medium work capacity.

31. Doctors at Dartmouth Hitchcock Medical Center reached this same conclusion on November 12, 2001, indicating that the claimant has a medium physical demand level.

32. On July 16, 2002, Dr. Gilbert Fanciullo of Dartmouth Hitchcock, concluded that the claimant is "really at the point of maximum medical improvement."

33. Dr. Grottkau opined that if the claimant decided not to undergo the elective procedure that he would certainly be at medical end point.

34. Despite the finding of medical end result, carrier continued to pay the claimant TTD benefits until August 2004.

35. Claimant requests that the department find Dr. Grottkau's proposed surgery reasonable, and order the defendant to pay for it. Claimant further argues that he has not yet reached medical end result, and requests TTD payments from August 2004 until the present. Claimant also requests an award of litigation costs and attorney's fees on an hourly basis pursuant to Rule 10.1210. Claimant submitted evidence that his attorney worked 177.5 hours on his case, and incurred $8,028.52 in costs.

CONCLUSIONS OF LAW:

1. This case presents several issues for decision. First, is claimant's progressive kyphotic deformity causally connected to his work related injuries? If so, is the surgical procedure proposed by Dr. Grottkau reasonable and necessary and if so, does the proposed surgery fall under the Medical Fee Schedule's "good cause exception"? Finally, with regard to claimant's TTD claim, has he reached a medical end result?

2. 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 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

3. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the fact proven must be the more probable hypothesis. *Burton v. Holden and Martin Lumber Co.*, 112 Vt. 17 (1941). Where the causal connection between an accident and an injury is obscure, and a lay person would have no well grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979).

<u>Causation</u>

4. The claimant argues that although the kyphotic deformity pre-existed his work related injuries, the 1998 car accident aggravated this condition. During the accident, the claimant tumbled and rolled an approximate distance of 150 feet. This trauma caused the claimant to suffer thoracic compression fractures, which led to an acceleration of his kyphotic deformity. The physicians who examined the claimant, with the exception of Dr. Vincent and Dr. Birkeland, but including one of defendant's expert witnesses, agree that the thoracic compression fractures are causally related to the acceleration of claimant's deformity.

5. The defendant, through Dr. Vincent and Dr. Birkeland, argue that there is no causal relationship between the work related injuries and claimant's progressive kyphotic deformity. The defendant bases this argument on the fact that the claimant's condition was pre-existing, that the kyphosis is at T6-T8, which is lower than the area of T4-T5, and that his current symptoms and pain are directly attributable to the effects of juvenile kyphosis.

6. The experts' differing conclusions require a balancing of certain factors so as to determine which expert's opinion should be granted the most weight. When evaluating the amount of weight to be given to expert testimony in workers' compensation decisions, the following factors are used: 1) the length of time the physician has provided care to the claimant, 2) the physician's qualifications, including the degree of professional training and experience, 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Opinion No. 20-97WC (1997); *Gardner v. Grand Union*, Opinion No. 24-97WC (1997), *Yee v. International Business Machines*, Opinion No. 38-00WC (2000).

7. Four doctors gave their opinion as to causation; Dr. Cantlin, the patient's long time treating family physician; Dr. Fenton, the defendant's independent medical examiner (IME); Dr. Grottkau, claimant's treating surgeon and Dr. Vincent, a neurosurgeon doctor and carrier's second IME. Dr. Cantlin and Dr. Grottkau have the advantage of being the claimant's long time physicians, as well as having a comprehensive understanding of claimant's records. None of the experts, with the exception of Dr. Grotkkau, have indicated an expertise in kyphosis, thus Dr. Grottkau has the better position with regard to the second factor. Because Dr. Cantlin and Dr. Grottkau are the patient's treating physicians as well as Dr. Grottkau's expertise, their opinions are granted the most weight.

8. The records and testimony indicate that it is more probable than not that the accident and injuries sustained in the work related incident are causally connected to the claimant's progressive kyphosis. Dr Cantlin and Dr. Grottkau, the claimant's treating physicians, as well as Dr. Fenton agree that the thoracic compression fractures caused the worsening kyphosis. Objective medical records support their opinions. These include the record of claimant's injuries after the 1998 accident as well as x-rays that show signs of sclerosis, indicating the body's attempt to heal the fractures. Also, Dr. Vincent relied on an incorrect assumption that the claimant never reported injuring his head, which played an important factor in his conclusion to the causal connection. Overall, it is more probable that the work related accident caused his current condition.

9. Furthermore, there is a lack of medical records documenting claimant's kyphosis prior to 1998. Defendant argues that records documenting claimant's past back injuries prior to 1998 should break the causal link established by various experts. This argument is unpersuasive. The fact that no medical records exist of kyphosis complaints make it more likely than not that the claimant had not suffered from this condition to the same extent he does now. A reasonable conclusion to be made from the expert testimony, as well as the records, indicate that the progressive nature of claimant's kyphosis is related to the 1998 car accident.

Reasonableness of proposed surgery

10. Under the workers' Compensation Act, the employer must furnish "reasonable surgical, medical and nursing services to an injured employee." 21 V.S.A. § 640(a).

11. Despite the causal connection, the claimant must also satisfy the burden of proof that the proposed procedures are "reasonable" under §640(a). "In determining what is reasonable under § 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 the claimant's back symptoms and maintain [his] functional abilities." *Quinn v. Emery Worldwide,* Opinion No. 29-00WC (2000). Therefore, claimant must still meet the burden of proving that the proposed surgeries would relieve his current back and neck pain.

12. Claimant argues that the surgery is reasonable, that it would alleviate a whole range of problems that he continues to suffer from. These include back pain, correcting and preventing his progressive kyphosis, enhance his functioning ability and improve his self-esteem and psychological outlook. Claimant also argues that the surgery would remove his current dependency on narcotics. Dr. Grottkau confirms claimant's argument. He opined that the surgery would relieve 100% of the deformity, 70% of the pain and would allow the claimant to rid himself of his dependency on narcotics.

13. Defendant argues that the surgery is not reasonable. Defendant notes that the claimant has unreasonable expectations of the surgery, that there is a lack of objective evidence as to the source of the pain and that this type of complex and invasive surgery could increase the claimant's level of pain as well as his dependency on narcotics.

14. With regard to this issue, the experts once again reach differing conclusions. However, because Dr. Grottkau is one of the claimant's treating physicians, is an expert on the claimant's condition, is one of the few surgeons who performs this type of surgery and is most knowledgeable of its consequences and results, his opinion should be granted the most weight.

15. With the evidence presented, it is more likely than not that the surgery is reasonable, and would help rid the claimant of pain as well improve some of his functioning abilities. Although there is some dispute as to where the pain originates, the evidence presented demonstrates it is more probable that the claimant's kyphosis is the source of the pain, the fact that the claimant suffers from progressive kyphosis along with the weight granted to Dr. Grottkau and his experience with this condition as well as the results of the surgery, makes it more probable that the surgery would cure the claimant's pain.

16. Also, claimant's current form of treatment requires him to take numerous narcotics for pain, decreasing his functional ability. Dr. Grottkau noted that in his experience, the surgery would help alleviate claimant's current narcotics dependency. The defendant has argued that the surgery is not without risk, and the claimant could end up in a greater amount of pain, and continue with his narcotics dependency. However, no surgery is without risk of complications or unintended consequences. Dr. Grottkau's experience demonstrates that it is more probable the claimant can be removed from his narcotic dependency, whereas the current treatment and that which is proposed by Dr. Fenton would do little to alleviate it. Thus, I find it more probable that the proposed surgery would help with claimant's narcotic dependency and return him to a greater functioning capacity.

17. Furthermore, in this case, the patient's psychological state of mind, as well as his unrealistic expectations of the surgery's outcome are irrelevant to the determination of this issue. As noted previously, it is not what the claimant desires or believes to be the most helpful, but rather what is established by competent expert evidence. See, *Quinn v. Emory Worldwide*, Supra. The claimant's own personal belief of the outcome or of the consequences of not undergoing the procedure are immaterial. The claimant has determined through competent expert evidence that the proposed surgery would more likely than not reduce his level of pain as well as return him to a greater functioning level. Therefore, I find the procedure proposed by Dr. Grottkau to be reasonable.

<u>Fee Schedule</u>

18. Even if surgery is deemed reasonable, the defendant's liability to pay for medical expenditures is not unlimited. "The liability of the employer to pay for medical, surgical, hospital and nursing services and supplies provided to the injured employee under this section shall not exceed the maximum fee for a particular service as provided by a schedule of fees and rates prepared by the commissioner." 21 V.S.A §640(d). The maximum fee can be overcome, at the commissioner's discretion, if the proposed procedures are not available at the schedules rate. W.C Rule 40.080

19. Defendant notes that this procedure is not compensable because the cost of the proposed surgery is above that which is outlined in Vermont's Fee Schedule. The defendant argues that there is a lack of evidence as to whether the surgery can be performed at a lower fee, whether it can be performed by a surgeon in Vermont as well as question Dr. Grottkau's testimony on the limited number of surgeons available to perform the surgery.

20. However, I find that the claimant has established that the proposed procedure cannot be performed at a rate lower than that set out in the fee schedule. Dr. Grottkau as well as the defendant's experts agree that the proposed surgery is a highly complex procedure. Furthermore, Dr. Grottkau, who is an expert in this area of practice, noted the lack of doctors available to adequately perform the surgery. Considering the lack of evidence presented by the defendant to counter Dr. Grottkau's assertions, the proposed procedure meets the fee schedule exception and is compensable at the amount proposed by Dr. Grottkau.

Temporary Total Disability

21. Claimant also requests temporary total disability benefits retroactive to the termination of claimant's TTD benefits on August 26, 2004. Although Dr. Fenton concluded in March 2000 that claimant had reached a medical end result, claimant argues that his condition is not "static," that he has not yet completed the healing phase of his injury and that Dr. Fenton had hastily concluded that the claimant had reached a MER.

9. Medical end result is the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected regardless of treatment. WC Rule 2.1200.

10. It is possible for one to be at medical end result when all nonsurgical treatment has been exhausted and the underlying condition has been stable, even though a Claimant may opt for elective surgery at some point in the future. To hold otherwise could allow for an open ended period of temporary total disability dependent on the subjective decision of a Claimant or it could force one into surgery sooner than would otherwise be recommended. *Potts v. Fibermark, Inc.,* Opinion No. 24-03 (2003).

22. I find that the claimant's situation is similar to that of the claimant in *Potts*. The claimant has been assessed as having a medium work capacity on several occasions. None of the medical experts have testified that the claimant's condition is unstable, or opposed the numerous opinions of various physicians who over the years have concluded that the claimant is at a medical end result and has a medium work capacity. Because this type of treatment may be granted even after a medical end result has been declared, the claimant's claim for temporary total disability benefits is denied.

23. Having prevailed, the claimant is entitled to reasonable attorney's fees and costs pursuant to 21 V.S.A §678(a) and Worker's Compensation Rule 10. The hours claimed are reasonable given the amount of time and work required to litigate this claim, and costs incurred were necessary.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to pay for;

1. Dr. Grottkau's proposed surgery;
2. Attorney fees of $15,975 (177.5 hours x $90/ hour) and costs of $8,028.52 in expenses.

Dated at Montpelier, Vermont this ____ day of August 2005.

____

Patricia A. McDonald
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.