K. J. v. Northern Power Systems (October 6, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

K. J.

v.

Northern Power Systems, Inc.

Opinion No. 39-08WC

By: Phyllis G. Phillips, Esq.,
Hearing Officer

For: Patricia Moulton Powden,
Commissioner

State File No. X-60104

OPINION AND ORDER

Hearing held in Montpelier on July 23rd and 24th, 2008

APPEARANCES:

Brendan Donahue, Esq., for Claimant
Wesley Lawrence, Esq., for Defendant

ISSUE PRESENTED:

1. Did Claimant suffer a compensable work-related injury to his cervical spine on August 1, 2005 and/or December 20, 2005?

2. If yes, to what benefits is Claimant entitled?

3. In issuing its May 9, 2007 interim order, did the Department apply an inappropriate standard of review or otherwise violate Defendant's constitutional rights?

EXHIBITS:

Joint Exhibit I: Joint Medical Exhibit

Claimant's Exhibit 1: Patrick Towbin statement
Claimant's Exhibit 2: Seth Beck statement
Claimant's Exhibit 3: Steven Emmerling statement
Claimant's Exhibit 4: E-mail correspondence between Claimant and Karl Johnson
Claimant's Exhibit 5: Various e-mail correspondence
Claimant's Exhibit 6: January 18, 2006 Transition Agreement
Claimant's Exhibit 7: January 23, 2006 Transition Agreement
Claimant's Exhibit 8: Earnings Statements
Claimant's Exhibit 9: *Curriculum Vitae*, Kuhrt Wieneke, MD
Claimant's Exhibit 10: *Curriculum Vitae*, Bruce Tranmer, MD

Defendant's Exhibit A: Employee's Injury Report, March 11, 2006
Defendant's Exhibit B: Deposition of William F. Boucher, MD, August 8, 2008

CLAIM:

Temporary disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640
Permanent partial disability benefits pursuant to 21 V.S.A. §648
Attorney's fees and costs pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. Judicial notice is taken of all forms and correspondence contained in the Department's file relating to this claim.

2. At all times relevant to these proceedings, Claimant was an employee and Defendant was an employer as those terms are defined in Vermont's Workers' Compensation Act.

3. Defendant's business involves building and installing large power systems. Claimant began working for Defendant as a construction manager in 2003. His duties included supervising on-site subcontractors and otherwise directing operations so as to ensure that the projects to which he was assigned were completed on time and within budget.

4. In 2005 Claimant was assigned to a steam energy project in Racine, Wisconsin that involved constructing and installing two gas turbines and generators. Claimant had been involved in the sale of this project to the client and was to receive an incentive bonus upon its timely completion within budget.

5. On August 1, 2005 Claimant was at the construction site when he bent over to pick up a package weighing 40-60 pounds that had been delivered to his trailer. He immediately felt a deep burning sensation in the area of his upper back, neck and/or left shoulder. Claimant set the package down and sat at his desk. Within a short time thereafter, the pain grew much worse and started stabbing, shooting and burning down his left arm.

6. Steve Emmerling, a subcontracted carpenter, witnessed this event. He recalled that Claimant groaned when he picked up the package and seemed to be in pain. Mr. Emmerling asked Claimant what was wrong and Claimant replied that he had hurt his left shoulder. Mr. Emmerling then asked Claimant if he wanted to go to the on-site medical clinic and Claimant responded, "No; maybe later."

7. Later in the day Claimant informed both Patrick Towbin, the project engineer, and Seth Beck, the project manager, of his injury during telephone conversations with each of them. Claimant acknowledged that in his role as construction manager he was aware of OSHA requirements for reporting work-related injuries, and that is why he told both Mr. Towbin and Mr. Beck that he had hurt himself. Claimant did not believe it his responsibility to take any further action beyond that, as he assumed others would take care of filing the appropriate forms or notices.

8. Upon learning of Claimant's injury, both Mr. Towbin and Mr. Beck recommended that he see a doctor, but Claimant declined to do so. Instead, he left work early, returned to his hotel and retired to the bar in an attempt to self-medicate his pain.

9. Claimant also informed his wife (who had remained in Vermont during Claimant's assignment to the Racine, Wisconsin project) of his injury when he telephoned her that night.

10. Claimant continued to experience radiating pain from his left shoulder down into his left arm for the remainder of his time on the Racine, Wisconsin project. He neither sought medical attention nor missed time from work, however, but instead continued to self-medicate nightly with alcohol. The project was in a crucial phase at that point and Claimant felt that his presence on site was imperative to its timely completion. As noted above, Claimant's compensation included an incentive or commission for the project's completion on time and within budget. Claimant had both a professional interest and a personal financial stake in seeing that it did so, therefore.

11. Over time the pain in Claimant's left shoulder and arm subsided somewhat, but it never went away. Claimant and his wife spoke about it almost daily during their regular telephone conversations. During this time Claimant began to notice other troublesome symptoms as well. He had difficulty raising his left hand overhead, started stumbling on occasion and noticed that his watch, which had been sized tight, was beginning to slide around his left wrist.

12. The Racine, Wisconsin project was completed in late November or early December 2005, and Claimant returned home to Vermont. Claimant's wife testified that she noticed that Claimant had lost weight and that his left arm was so weak that he could not use it to dry his hair. Both Claimant and his wife testified that Claimant decided to have his symptoms evaluated medically, but that they had difficulty securing an appointment. Ultimately Claimant scheduled an appointment for a physical examination with Dr. Rapaport, a primary care provider at Montpelier Health Center, on January 26, 2006.

13. On December 20, 2005 Claimant was working at Defendant's Waitsfield, Vermont office when he slipped and fell in the snow. A co-employee attempted to help him up by pulling on his left arm. Claimant felt increased pain and also, for the first time, numbness and tingling down his left arm and into his hand. As before, Claimant did not seek medical attention but rather self-medicated with alcohol.

14. On January 11, 2006 Claimant treated with Dr. Burdick, a primary care provider at Montpelier Health Center, for tobacco abuse, various dermatological issues and borderline high blood pressure. Of note, the medical record makes no mention of any upper back, neck, left shoulder or arm problems. Claimant testified that he did not discuss his symptoms with Dr. Burdick because he already had an appointment scheduled with Dr. Rapaport later in the month and intended to do so then. Notwithstanding this explanation, the omission is somewhat perplexing.

15. Claimant's prior medical history includes two neck injuries. The first one occurred in 1973, when Claimant dove into a swimming pool and either fractured or sprained his C3-4 vertebrae. Claimant was hospitalized for a period of time and wore a soft collar on his neck for some months thereafter. He completely recovered within one year and experienced no residual after-effects. Claimant also injured his neck in a 2000 motor vehicle accident but recovered within three months and again, experienced no residual symptoms thereafter. In neither of these prior accidents did Claimant experience the kind of stabbing, shooting pain radiating down his left arm as he felt after the August 1, 2005 event, or the numbness and tingling he experienced after the December 20, 2005 incident in the snow.

16. On Friday, January 13, 2006 Claimant learned from Karl Johnson, Defendant's Project Management Director, that Defendant likely would be laying him off the following week because there were no ongoing projects for him to work on. Claimant was shocked and disappointed, and initially responded to Mr. Johnson's news with anger.

17. On Monday morning, January 16th, Claimant sent Mr. Johnson an e-mail in which he apologized for his angry response the previous Friday and suggested that he be temporarily reassigned to another department or even given part-time duties as an alternative to being laid off. Claimant also made the following comment:

> I have been injured on several projects and have never complained. But ... neither myself or my family have been able to go to the doctor or dentist due to my work schedule or being out of town. Now, for the first time that my family and I have a chance to address our health needs, I am faced with being out of a job, and therefore not having the health insurance to cover it.

18. Mr. Johnson responded to Claimant's e-mail at 3:00 PM on Monday afternoon, indicating that he would discuss Claimant's situation with Darren Jamison, Defendant's president, and get back to him with more information the following day.

19. At some point during the day on Monday Claimant began to experience chest pains and numbness in his left arm. He presented to the Central Vermont Hospital Emergency Department Monday evening, thinking that he was having a heart attack. Claimant was hospitalized for two days, during which time he was attended by Dr. Rapaport, his primary care physician.

20. Dr. Rapaport determined that the origin of Claimant's symptoms was musculoskeletal, not cardiac. In Dr. Rapaport's opinion, Claimant's 1973 swimming pool injury caused degenerative changes in Claimant's cervical spine, which likely accounted at least for his shoulder pain, though not the numbness and tingling in his left arm and fingers. Dr. Rapaport noted that Claimant had reported experiencing these latter symptoms for the past several weeks, which would date them to the approximate time of his slip-and-fall in the snow on December 20, 2005. As for next steps, Dr. Rapaport anticipated further diagnostic work-up and treatment of Claimant's cervical condition on an outpatient basis. Last, Dr. Rapaport determined that Claimant was temporarily totally disabled from working and recommended that he not return to work until January 23, 2006.

21. Following his release from the hospital, on January 18, 2006 Claimant telephoned Mr. Jamison to inquire whether Defendant had had an opportunity to consider further the alternatives to lay-off Claimant had proposed in his January 16th e-mail. Mr. Jamison advised that it was Defendant's position that Claimant had quit the previous Friday, January 13th. Claimant expressed shock at this news. Claimant maintained then, and continues to maintain now, that he did not voluntarily terminate his employment with Defendant.

22. Also on January 18, 2006 Defendant sent Claimant a proposed "Transition Agreement and General Release," essentially an employment severance package. Claimant objected to the terms of the package and refused to sign it. Subsequently, on January 23, 2006 Defendant proposed a second severance package with somewhat more favorable terms. Claimant rejected this proposal as well.

23. Claimant has continued to treat with Dr. Rapaport since January 2006. In Dr. Rapaport's opinion, Claimant aggravated his underlying degenerative disc disease and suffered a cervical disc herniation when he lifted the heavy package at work on August 1, 2005. The December 20, 2005 incident in the snow aggravated this condition even further.

24. On January 10, 2007 Claimant underwent cervical disc surgery, including fusions at both C3-4 and C4-5, performed by Dr. Tranmer, a board-certified neurosurgeon. In Dr. Tranmer's opinion, Claimant's condition clearly represented a degenerative chronic problem that had been acutely exacerbated by the August 1, 2005 lifting incident at work.

25. Following surgery Claimant experienced complete relief of his left shoulder pain. Within six weeks thereafter, however, he began to feel pain, tingling and muscle spasms in his neck. In Dr. Tranmer's opinion, these symptoms resulted from nerve root compression at C2-3 caused both by the August 2005 disc injury and by the prior disc fusion at C3-4 and C4-5. To address these symptoms Claimant underwent a second neck surgery on March 10, 2008. Since that time, many of his more troublesome symptoms have abated. Claimant continues to treat conservatively for those that remain, and has not yet been declared at end medical result. The record does not reflect his current work status. It is likely that he will have some residual permanent impairment.

26. Claimant has undergone two independent medical evaluations, one at his own behest with Dr. Wieneke and one at Defendant's request with Dr. Boucher. Dr. Wieneke's opinion comports with those of Drs. Rapaport and Tranmer – the August 1, 2005 work injury precipitated an acute cervical pain syndrome and aggravated Claimant's underlying chronic cervical degenerative disc disease. According to Dr. Wieneke, the symptoms Claimant exhibited thereafter – including muscle weakness and shooting pains radiating down his left arm – were consistent with an injury to the neck, not the shoulder. The December 2005 incident caused further damage to the cervical nerve roots, resulting in additional symptoms, including numbness, tingling and muscle atrophy, all indicative of a cervical disc herniation. With that diagnosis in mind, Dr. Wieneke concluded that both the January 2007 and the March 2008 cervical surgeries were causally related to the August and December 2005 work injuries.

27. In contrast, Dr. Boucher believes that Claimant suffered an acute muscular injury to his left shoulder in August 2005 but that that injury resolved and did not cause any cervical disc herniation. In Dr. Boucher's opinion, Claimant's underlying degenerative disc disease finally progressed to the point of becoming symptomatic, resulting in the need for treatment and ultimately, surgery. To Dr. Boucher's mind, therefore, neither the January 2007 surgery nor the March 2008 surgery was causally related to Claimant's work injury.

28. Although Claimant notified both the project engineer and the project manager of his August 1, 2005 injury on that same day, he did not take any action to pursue a workers' compensation claim until mid-March 2006. Claimant admitted that he never would have filed a claim had his employment with Defendant not terminated, but denied that he did so to "get even" with Defendant. He testified that he did not appreciate in January 2006 how badly he had been hurt.

29. Defendant denied Claimant's claim for workers' compensation benefits upon receipt, on the grounds that he had failed to sustain his burden of proving that either the medical treatment he received beginning in January 2006 or his claimed inability to work thereafter were causally related to any work injury. Defendant particularly noted that Claimant did not seek medical treatment or lose time from work after the August 2005 incident, and also that the medical records relating to Claimant's treatment in January 2006 did not mention specifically the December 2005 fall in the snow as an instigating event for his symptoms. Defendant also questioned Claimant's credibility, noting that it was only after his employment with Defendant terminated that he alleged any work-related injury and resulting inability to work.

30. Claimant objected to Defendant's denial and requested that the Department issue an interim order for benefits. Following an informal conference with the attorneys for both parties, in July 2006 the Department's Workers' Compensation Specialist rejected Claimant's request, finding that Dr. Rapaport's medical records were too ambiguous on the question of causation to support an interim order.

31. Subsequently, in November 2006 Claimant submitted additional medical documentation from Dr. Rapaport and renewed his request for an interim order. The Specialist again determined that the medical evidence was insufficient to support an interim order and therefore, in February 2007 she again denied Claimant's request.

32. Claimant made a third request for an interim order shortly after the second one was denied. By the time the Specialist responded to this request, she had before her a complete medical record from Claimant's treatment providers, the same written statements from Patrick Towbin, Seth Beck and Steve Emmerling that were admitted as Claimant's Exhibits 1, 2 and 3 in the current proceeding and a copy of Claimant's January 3, 2007 deposition. In support of Defendant's position, the Specialist had Dr. Boucher's independent medical evaluation.

33. This time the Specialist granted Claimant's request and on May 9, 2007 issued an interim order for benefits. In explaining her reasons for doing so, the Specialist noted that she had reviewed all of the evidence that had been submitted and had concluded that Dr. Boucher's expert medical opinion against work-related causation was less credible than the opinions Claimant's treating providers had posited in favor of such causation. With that in mind, the Specialist determined that Claimant "has met his burden of proof by submitting sufficient credible evidence" to support a finding of compensability, and that therefore an interim order was appropriate. Defendant has been paying workers' compensation benefits in accordance with the Specialist's interim order ever since.[1]

34. Claimant did not work for many months after his employment relationship with Defendant ended. From June through November 2006 he worked for a New Hampshire engineering firm, overseeing a steam turbine installation project in Cambridge, Massachusetts. Although his employer paid to relocate him temporarily to an apartment in New Hampshire, Claimant still had a long daily commute, and he had to discontinue the pain medications he had been using because they interfered with his ability to drive. As a result of both these and other personal stressors, Claimant suffered an emotional and physical breakdown for which he was hospitalized briefly on November 30, 2006. Claimant's employer terminated his employment on that date.

35. In December 2007 Claimant began working as a construction project manager for another employer. He did not immediately report his employment to Defendant's workers' compensation insurance carrier, with the result that for a period of time thereafter he received temporary total disability benefits to which he was not entitled. The parties have agreed to credit this overpayment against any future permanent partial disability benefits to be paid.

[1] At Defendant's request, in July 2007 the Department's Staff Attorney reviewed the Specialist's determination. She concluded that Defendant's evidence did not provide "reasonable support" for its denial and therefore declined to rescind the interim order.

CONCLUSIONS OF LAW:

Compensability

1. At issue in this claim is compensability. Defendant argues two alternative grounds for finding that Claimant's injury is not compensable. First, Defendant contends that Claimant failed to satisfy the six-month notice requirement of 21 V.S.A. §656(a) and that therefore his claim is time-barred. Second, Defendant contends that Claimant failed to satisfy his burden of proof as to either factual or medical causation.

2. As to the notice issue, the statute requires that an injured worker give notice of an injury to his or her employer "as soon as practicable" after the injury occurs. 21 V.S.A. §656(a). The statute further requires that a claim for workers' compensation benefits be made within six months of the injury. *Id*. Notwithstanding these requirements, however, a claim is not time-barred "if it is shown that the employer, the employer's agent or representative, had knowledge of the accident or that the employer has not been prejudiced by the delay or want of notice." 21 V.S.A. §660(a).

3. Claimant introduced uncontradicted evidence to the effect that he notified both Patrick Towbin, Defendant's project engineer, and Seth Beck, its project manager, of the August 1, 2005 injury on that same day. Defendant failed to allege any basis for discrediting that evidence. The evidence establishes that Defendant had knowledge of the accident when it occurred. Under 21 V.S.A. §660(a), therefore, the claim is not time-barred.

4. On the issue of factual causation, Defendant argues that Claimant's account of the August 1, 2005 incident as the cause of his injury lacks credibility because he did not seek medical treatment or lose time from work for many months thereafter. Defendant also makes much of the fact that Claimant delayed filing a workers' compensation claim and admitted that he never would have done so at all had his employment with Defendant not terminated in January 2006.

5. It is true that a claimant may have difficulty sustaining his or her burden of proof when he or she delays filing a workers' compensation claim for a significant period of time after an alleged injury. In such instances, the trier of fact must evaluate the factual evidence carefully so as to explore any inconsistencies, investigate possible intervening causes and evaluate "hidden or not-so-hidden motivations." *Russell v. Omega Electric*, Opinion No. 42-03WC (November 10, 2003), citing *Fanger v. Village Inn*, Opinion No. 5-95WC (April 20, 1995).

6. The Commissioner has enumerated four questions to assist in this process. First, are there medical records contemporaneous with the claimed injury and/or a credible history of continuing complaints? Second, does the claimant lack knowledge of the workers' compensation reporting process? Third, is the work performed consistent with the claimant's complaints? And fourth, is there persuasive medical evidence supporting causation? *Larrabee v. Heavensent Farm*, Opinion No. 13-05WC (February 4, 2005), citing *Seguin v. Ethan Allen*, Opinion No. 28S-02WC (July 25, 2002).

7. Here, although there are no contemporaneous medical records, there is a credible, consistently reported history of continuing complaints, all relating directly back to the August 1st and December 20th, 2005 incidents as the precipitating cause of Claimant's symptoms. There also is evidence that although Claimant was aware generally of work-related injury reporting requirements, he did not claim any knowledge of the specific steps necessary to report a workers' compensation claim beyond advising his supervisors that he had been hurt, which he did. I do not find, therefore, that consideration of the first two questions posed above fatally undermines Claimant's credibility.

8. I also find that the work performed was consistent with Claimant's complaints. Significantly, there is no evidence that Claimant engaged in any intervening non-work-related activities that otherwise might have accounted for his symptoms. This has been a key factor in denying compensability in other late-reported claims. *See Pratt v. Fletcher Allen Health Care*, Opinion No. 69-05WC (November 29, 2005); *Larrabee, supra*; *Russell, supra*; *Fanger, supra*.

9. Last, applying the oft-quoted factors to be considered in weighing conflicting medical evidence, *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003), I find that the medical evidence propounded by Claimant's experts in favor of work-related causation is more persuasive than that put forth by Defendant's medical expert against such a finding. I conclude that the fourth question posed above also merits a response in Claimant's favor.

10. I also am persuaded that for Claimant to acknowledge that he never would have filed a workers' compensation claim had his employment with Defendant not terminated reflects a sense of loyalty rather than a desire for revenge. Perhaps it would appear differently in the context of more damning facts, but I do not find those to be present here.

11. I conclude, therefore, that Claimant has sustained his burden of proving that he suffered a compensable work-related injury on August 1, 2005.

Temporary Total Disability

12. Claimant having been paid most of the workers' compensation benefits owed him to date pursuant to the Department's interim order, the only outstanding claim he presented at formal hearing was for temporary disability benefits from January 16, 2006 through January 26, 2006.[2] I find that Claimant has proven his entitlement to these benefits, but only through January 23, 2006, the date on which Dr. Rapaport's out-of-work slip expired. *See* Joint Medical Exhibit at CVH 610. Contrary to Defendant's assertion, furthermore, the three-day waiting period referred to in 21 V.S.A. §642 does not apply, as over the course of this claim Claimant was disabled for more than seven consecutive calendar days after the first three.

[2] Although it is likely that Claimant will be seeking permanent partial disability benefits, he has not yet been determined to be at end medical result, and therefore this claim is not yet ripe.

Appropriateness of Interim Order

13. Defendant has raised the appropriateness of the Department's May 9, 2007 interim order as a corollary issue in this claim. Defendant argues that the Department violated its constitutional right to due process by applying the incorrect standard of review to the evidence before it. Had the Department analyzed the evidence before it correctly, Defendant argues, it would have concluded that there was insufficient basis for an interim order and would have denied Claimant's request.

14. When a dispute arises as to the compensability of an injured worker's claim for benefits, the statute provides for a formal dispute resolution process. 21 V.S.A. §663. It also empowers the Commissioner to act in the meantime, however, by issuing an interim order that benefits be paid until such time as the claim can be adjudicated formally. Specifically, 21 V.S.A. §662(b) states:

> In the absence of an agreement [to pay workers' compensation benefits], the employer or insurance carrier shall notify the commissioner and the employee in writing that the claim is denied and the reasons therefore. Upon the employee's application for a hearing under section 663 of this title, the commissioner may review the evidence upon which denial is based and *if the evidence does not reasonably support the denial,* the commissioner may order that payments be made until a hearing is held and a decision is rendered. [Emphasis added].

15. The "reasonable support" standard is further defined as follows:

> "Evidence that reasonably supports an action" means, for the purposes of section . . . 662(b) of this title, relevant evidence that a reasonable mind might accept as adequate to support a conclusion that must be based on the record as a whole, and take into account whatever in the record fairly detracts from its weight.

21 V.S.A. §601(24).

16. The proper analysis for determining whether an interim order should issue under §662(b) differs in two important respects from the analysis used to determine compensability at a formal hearing. First, the statute directs the commissioner to apply a "reasonable support" standard for reviewing the evidence at the interim order stage, rather than the "preponderance" standard used at the formal hearing level, *see Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

17. Second, by directing the commissioner to enter an interim order only when "the evidence does not reasonably support the denial," the statute looks to the employer to produce sufficient evidence that on its face conceivably could support a finding against compensability. In contrast, at the formal hearing stage of proceedings the burden is on the claimant in the first instance to produce the evidence necessary to establish a *prima facie* case in favor of compensability, *see Goodwin v. Fairbanks*, 123 Vt. 161 91962).

18. The distinction is fine, perhaps even dicey. Notably, the burden of producing evidence is met "when one with the burden of proof has introduced sufficient evidence to make out a *prima facie* case, though the cogency of the evidence may fall short of convincing the trier of fact to find for him." *Black's Law Dictionary* 178 (5th ed. 1979).

19. In the current context, therefore, an employer might produce sufficient evidence to defend successfully against an interim order, and yet still lose at the formal hearing level. This is as it should be. There is a qualitative difference between the evidence submitted for and against a proposed interim order and that produced later at a formal hearing. Witnesses do not appear in person and are not sworn, discovery often is still ongoing and sometimes neither the facts nor the issues are fully developed. With that in mind, a statutory scheme that places the burden of production on the employer at the same time that it imposes a lower standard of proof represents an ingenious compromise.

20. I find that the Specialist in this claim failed to evaluate Claimant's request for an interim order with an eye towards whether sufficient evidence had been produced which on its face reasonably could support a finding against compensability. By focusing instead on whether Claimant had established a sufficient case in favor of compensability, she allocated the burden of producing evidence inappropriately and applied the wrong evidentiary standard.

21. Although the Specialist may have erred in her analysis, however, I cannot conclude that her decision was so "arbitrary, irrational or conscience-shocking" as to amount to an unconstitutional denial of due process. *See T.B. v. University of Vermont*, Opinion No. 06-08WC (February 12, 2008), and cases cited therein. Furthermore, as I now have determined that Claimant's claim is in fact compensable, the Specialist's error has been rendered harmless. What clarification this claim offers as to the appropriate standard for reviewing a request for an interim order, therefore, is for the future.

Attorney's Fees and Costs

22. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $7,510.60 and attorney's fees totaling $23,686.00. An award of costs to a prevailing claimant is mandatory under the statute. Charges for expert medical testimony must comply with the limits set by Workers' Compensation Rule 40.110, however, and it appears that the charges submitted for both Dr. Wieneke's and Dr. Tranmer's hearing testimony do not do so. In addition, charges relating to time spent by an expert witness conferring with Claimant's attorney and preparing his or her testimony also are not recoverable under 21 V.S.A. §678. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03WC (October 22, 2003). With those limits in mind, costs in the amount of $3,010.60 are hereby awarded. Claimant shall have 30 days from the date of this decision to supplement his request for reimbursement with a more detailed statement relating to Dr. Wieneke's and Dr. Tranmer's charges, at which time additional costs may be awarded.

23. As for attorney's fees, these lie within the Commissioner's discretion. Factors to be considered in fashioning an award of attorney's fees include the necessity of representation, difficulty of issues presented, time and effort expended, clarity of time reports, agreement with the claimant, skill of counsel and whether fees are proportional to counsel's efforts. *T.K. v. Green Mountain Steel Erectors*, Opinion No. 29-08WC (July 3, 2008), citing *L.W. v. NSA Industries, Inc.*, Opinion No. 27A-05WC (April 27, 2005). Here, Claimant has submitted a detailed 32-page statement of time spent pursuing Claimant's claim. As Defendant has not voiced any objection to the charges I presume it agrees they are reasonable, and they are hereby awarded.

ORDER:

Based on the foregoing, Defendant is hereby **ORDERED** to pay:

1. Temporary disability benefits from January 16, 2006 through January 23, 2006;

2. Additional workers' compensation benefits as proven to be causally related to the injuries incurred on August 1, 2005 and/or December 20, 2005;

3. Costs in the amount of $3,010.60, to be supplemented as provided in Conclusion of Law No. 22 above, and attorney's fees totaling $23,686.00.

DATED at Montpelier, Vermont this 6th day of October 2008.

_____
Patricia Moulton Powden
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.