STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-24374
	)	
Charles Emerson	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Transport Dynamics/	)	Commissioner
CIGNA Insurance Co.	)	
	)	Opinion No. 40A-02WC

AMENDED DECISION

Pursuant to the Department's Decision in this matter, No. 40-02WC, Claimant Charles Emerson submitted an amended Request for Costs and Fees and a contingency fee agreement with his attorney. In addition to the fees already awarded, Claimant seeks $832.50 in fees for paralegal work and costs totaling $3,967.80. Defendant objects to an hourly fee in this case, and to expert fees beyond that necessary to prepare a report and attend the deposition.

The post trial submissions of the parties demonstrate general agreement that the attorney fee award in this case should be based on a contingency fee with its regulatory maximum, not an hourly basis, as originally ordered. Workers' Compensation Rule 10.1200 provides: At the commissioner's discretion, an award may be based on either an hourly or contingency basis. Awards of attorney's fees to a prevailing claimant shall not exceed:

> 10.1210 a charge of not more than $90.00 per hour, supported by an itemized statement, or
> 10.1220 a contingency fee to cover all legal services not to exceed 20% of the compensation awarded, or $9,000.00, whichever is less.

Particularly with agreement of the parties, a contingency basis is an appropriate method of calculating attorney fees in this case and is hereby awarded. In accordance with Department precedent, the contingency award must be calculated on the total award, including indemnity as well as medical benefits. See, *Downs v. Weyerhauser*, Opinion No. 6-93WC (1993). With this coverage of "all legal services" under Rule 10.1220, paralegal work is encompassed in the total.

Next is the issue of costs. Initially Claimant sought $4,267.80 in costs for litigation expenses including expert witness fees. Because the amount requested for the expert exceeded the limits set under Rule 40, Claimant reduced the total request to $3,967.80, including $3,005.00 in expert fees. Defendant seeks to limit the costs awarded to the Claimant for expert fees and urges the Department to exclude time for transcription and time speaking with Claimant's attorney, reviewing medical literature, collating medical records and preparing for the deposition. Because administrative costs ought not be chargeable to the Defendant as expert witness fees, time spent on transcription and collating records must be excluded. Under the "necessary" standard of 21 V.S.A.§ 678 (a), research is appropriately included, but the time conversing with Claimant's attorney and preparing for deposition are not because that time goes to litigation strategy, not to the expert opinion. Consequently, $1,280 is subtracted from the total request for expert fees, which results in allowable $1,725.00 for expert fees and an overall total of $2,687.80 in necessary costs under § 678(a) and Rule 10.

Pursuant to 21 V.S.A.§ 664, this order shall include interest on the unpaid compensation at the statutory rate computed from the date on which the employer's obligation to pay compensation began. In this highly contested and unusual case, fairness requires that the date on which the employer's obligation began is the date of this order.

THEREFORE, the order in this case is AMENDED to read:

Defendant is ORDERED to pay Claimant:

1. Attorney fees based on 20% of the amount awarded, not to exceed $9,000.00;

2. Necessary costs of $2,687.80;

3. Interest on unpaid compensation computed from the date of this order.

Dated at Montpelier, Vermont this 6th day of December 2002.

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R. Tasha Wallis
Commissioner

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Hearing held in Montpelier, Vermont on March 15, 2002
Record closed on May 30, 2002

APPEARANCES:

Christopher McVeigh, Esq. for the Claimant
William A. O'Rourke, III, Esq. for the Defendant

ISSUE:

Did Charles Emerson experience a work-related heart attack while working for Transport Dynamics?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	Curriculum Vitae of Paul Minton, M.D.
Claimant's Exhibit 2:	Transactions by Payroll Item
Claimant's Exhibit 3:	Claimant statement 6/15/98
Defendant's Exhibit A:	Transcript of deposition of Christopher Terrrien, M.D.

FINDINGS OF FACT:

1. Judicial notice is taken of Department forms. The exhibits are admitted into evidence.

2. At all times relevant to this action, Claimant was an "employee" and Transport Dynamics his "employer" as those terms are defined in the Workers' Compensation Act, 21 V.S.A.§ 601 et. seq.

3. At all times relevant to this action, Claimant was a long distance truck driver for Transport Dynamics.

4. Claimant and his employee, Herb Bartemy, agreed that according to federal guidelines, a tractor-trailer driver could drive ten hours at a time with eight hours off.

5. On Tuesday morning at 4:00 on May 26, 1998 Claimant left St. Albans, Vermont to transport a load of whey to Glasgow Spray-dry in Glasgow, Kentucky, a trip of approximately 1,000 miles expected to take 18 to 19 hours. At the time of his departure from Vermont, he was not certain of his return load.

6. Claimant arrived in Glasgow Wednesday morning.

7. While Claimant was en route to Kentucky, Herb Bartemy, owner of Transport Dynamics, secured a load of skim milk to be transported from Glasgow Spray-dry to a Baskin Robbins facility in Southbury, Connecticut. The scheduled delivery date in Southbury was for Friday, May 29 at 11:00 a.m., but Herb Bartemy told Claimant he would try to arrange for an earlier time. Distance from Glasgow to Southbury Connecticut is approximately 1,000 miles.

8. The policy of Transport Dynamics was for drivers to contact Herb Bartemy at home each morning when they were on the road and when loading and unloading a delivery.

9. Once Claimant arrived at Glasgow, Kentucky the load Claimant delivered was unloaded smoothly. Glasgow Spray-dry employees then cleaned out the tanker before loading it with skim milk for transport to Southbury, Connecticut.

10. While the trailer was unloaded and reloaded, Claimant lay down in his cab, but did not sleep restfully.

11. On Wednesday afternoon, Claimant began his trip east from Kentucky to Connecticut. When he arrived in Port Jervis, New York, he phoned Bartemy with whom he discussed the delivery time and then continued through to the Connecticut plant without the shower and rest he otherwise would have taken in Port Jervis.

12. Claimant arrived in Southbury, Connecticut at approximately 2:00 p.m. on Thursday afternoon, May 28, 1998. He pulled into the Baskin Robbins ice cream plant only to learn that he did not have permission to unload the truck and had to wait until the next day as originally scheduled.

13. It is unclear whether Claimant misunderstood Bartemy or whether he was deceived. However, it is clear that Claimant expected his truck to be unloaded when he arrived in Southbury on Thursday afternoon.

14. When he was told he could not unload the truck until Friday morning, Claimant became angry and agitated. He then phoned Bartemy from a payphone, yelling, screaming and cursing into the phone.

15. Emotional interactions with his employer and driving from St. Albans, Vermont to Glasgow, Kentucky then to Southbury, Connecticut in the scope of 56 hours were not ordinary parts of the Claimant's job at Transport Dynamics. In fact, they were extremely unusual events.

16. At Baskin Robbins, Claimant unhitched his trailer, and then drove to a mall where he had a meal he was unable to finish. He returned to his truck, made up the bed and tried to cool off the cabin temperature.

17. At about 5:30 when he phoned his wife, Claimant was still wound up from his emotional outburst and the delay in unloading the trailer. He told his wife he did not feel well and she suggested he get some sleep, which he tried to do. He tossed and turned and took some antacid in an effort to relieve pressure he felt in his chest.

18. As the evening progressed, Claimant's discomfort worsened to a point where he thought he should get some help. At about midnight, he drove to a McDonald's to inquire about where he could find police or an ambulance. Then he got back in the truck, struggled to shift gears and drove slowly to the ambulance station where no one was available. He returned to his truck, drove slowly and erratically down the road and then noticed a police car behind him. He pulled off to the side of the rode, vomited and told the police officer he thought he was having a heart attack. The officer summoned an ambulance that arrived at 1:50 a.m. and transported Claimant to St. Mary's Hospital in Waterbury, Connecticut. An EKG confirmed a heart attack.

19. At St. Mary's Hospital Claimant was treated with a medication to lessen damage to heart muscle and transferred to St. Vincent Medical Center in Bridgeport Connecticut where he underwent cardiac catherization and angioplasty.

20. The laboratory test known as CPK (also identified as CK) and the more specific MB-CK are elevated when heart muscle is damaged as in a heart attack. In most cases, the CPK is elevated within six to 10 hours of a heart attack.

21. At 2:30 a.m., Claimant's CPK levels were within normal limits. When next measured at 8:00 a.m., they were significantly elevated.

22. Claimant's medical history revealed cardiac risk factors, including high blood pressure, smoking and high cholesterol.

EXPERT MEDICAL OPINIONS:

1. Dr. Paul Minton, a retired cardiologist who practiced clinically and taught until 1999, reviewed the medical records and the Claimant's recorded statement. Based on his education, knowledge, experience and the review in this case, he opined that Claimant's heart attack was the result of his long, fatiguing drive and violent argument with his employer. He explained that mental stress can be equal to physical stress on one's heart.

2. Dr. Minton explained the physiology of stress and its connection to a heart attack. Stress leads to the increased release of adrenaline and the contraction of blood vessels. He described how one could have vague symptoms hours before a heart attack. In this case, he noted that the Claimant had classic symptoms of a heart attack, including nausea, not feeling well, neck and jaw pain, pressure in his chest and vomiting.

3. Dr. Minton acknowledged that Claimant had cardiac risk factors, but opined that the emotional event with his employer and long fatiguing drive caused the heart attack by aggravating the pre-existing risk factors. He observed that the EKG taken at 3:31 a.m. revealed a heart attack that had occurred before that time, although the cardiac enzymes were not yet elevated.

4. Dr. Minton found that the EKG and normal CPK levels do not fit. That is because the EKG was grossly abnormal and the CPK was still within normal limits, although a test 6 hours later confirmed the severity of the attack. In Dr. Minton's opinion, Claimant's heart attack symptoms began at approximately 5:30 p.m.

5. Dr. Minton described how a heart attack is a dynamic event and that often, when stress-induced, does not occur right away. In cases such as this, one experiences symptoms within hours of the event and then has the heart attack.

6. Dr. Christopher Terrien, also a cardiologist, reviewed the medical records in this case for the defense.

7. In Dr. Terrien's opinion, Claimant's heart attack was caused solely by the preexisting risk factors—hypertension, high cholesterol and cigarette smoking. He did not believe that the long driving or emotional outburst played any role. However, Dr. Terrien agreed that extraordinary stress can cause a heart attack and that a stressful event is more likely to cause an attack in one with a predisposition because of risk factors. He also agreed that neck and jaw pain is a classic sign of the onset of a heart attack.

8. Dr. Terrien did not review the Claimant's statement to the insurance adjuster or Claimant's hearing testimony, although he had the opportunity to review Dr. Minton's transcribed hearing testimony.

9. Dr. Terrien could not reconcile Claimant's CPK levels with the stressful events. Because the CPK level is expected to increase within six to 10 hours of a heart attack, Dr. Terrien opined that Claimant's heart attack had to have happened hours after the stress he had experienced, and, therefore, could not have been related to it.

10. At Cigna's request, Dr. Kenneth Brown also reviewed the medical records in this case. He concluded that he could not "state with a reasonable degree of medical certainty that the acute myocardial infarction [heart attack] was not causally related to the emotional stress while at work."

11. Claimant's average weekly wage is $804.79. On May 29, 1998 he had two dependents. Because of his heart attack, he was out of work from May 29, 1998 through August 5, 1998 and has continued to receive medical treatment.

12. Claimant submitted evidence that in pursuit of this litigation, 87.5 hours were expend in attorney time and 18.5 hours in paralegal time. In addition, costs of $4,267.80 were incurred, although the fee requested for the expert medical witness is not in compliance with WC Rule 40.110.

DISCUSSION:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). He must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

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

> If expert medical evidence establishes a causal connection between the results of the injury incurred in performance of the work for which the employee was hired, and an aggravation of the existing disease, the award must stand. *Morrill v. Charles Bianchi & Sons, Inc.*, 107 Vt. 80, 87. This is the effect of our statute even though it be true that the disease, if left to itself, would in time inevitably produce death, independent of the injury received on the job. *Gillespie v. Vermont Hosiery and Machinery Co*., 109 Vt. 409; *Laird v. State Highway Dept.*, 112 Vt. 67.

Marsigli v. Granite City auto Sales, 124 Vt. 95, 104-104 1964).

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 form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

4. This case requires that the Department clarify the standard to be applied in heart attack cases because the preponderance standard was applied in *Caouette v. Wilmington School District*, Opinion No. 29-82WC (April 6, 1983) and the unusual or extraordinary stress standard in *Olander v. Town of Corinth*, Opinion No. 17-98WC (April 15, 1998), *Mattson v. C.E. Bradley*, Opinion No. 52-95 WC (Nov. 2, 1995) and other cases.

5. Claimant asks this Department to apply the preponderance standard and, in so doing, to distinguish between the standard necessary for a heart attack case and the one necessary to prove a psychological claim. A heightened, extraordinary stress, standard is required for a claim based on a psychological injury because of myriad causative mechanisms and the subjective nature of such a claim. See, *Bedini v. Frost*, 165 Vt. 167 (1996). In contrast, a heart attack case is based on objective evidence. Defendant urges the Department to follow recent precedent and apply the heightened standard, which is the appropriate standard in this case.

6. In determining the compensability of heart attacks,

> Vermont follows those jurisdictions that require evidence that the heart attack was the product of some unusual or extraordinary exertion or stress in the work environment. Cf., *Dane v. Winterset, Inc*., Commissioner's Opinion #22-86WC (1986) (A heart attack suffered by the decedent, an overweight forty year smoker with controlled hypertension and a family history of heart disease, was held to be compensable based on evidence that the decedent had done heavy lifting (thirty to fifty pounds) two hours earlier in the work day) *with Bollee v. Town of Calais*, Commissioner's opinion #22-86WC (1986) (A heart attack suffered by the claimant, a forty year smoker with uncontrolled hypertension and a family history of heart disease, was held to be non-compensable as factors other than work-related stress were found to be the cause of the attack); *Turner v. J. Galanes and Sons*, Commissioner's Opinion #11-86WC (1986)(A heart attack suffered at work was held to be non-compensable since there was no medical evidence that the heart attack was caused by work-related stress).

Mattson v. C.E. Bradley, Opinion No. 52-95 WC at 5 (¶ 3).

7. Even with the unusual or extraordinary exertion standard, our inquiry must begin with the basic question whether Claimant's particular work-related stress contributed causally to the heart attack. The exertion according to the Claimant included an extraordinary lengthy drive with little sleep and an emotional outburst with his employer. Defendant argues that those factors played no role in a heart attack caused by personal factors alone.

8. The medical experts agree that stress can cause or accelerate the onset of a heart attack. A stressful event is more likely to cause a heart attack in one with risk factors than with others. In this case, the Claimant was stressed by fatigue and emotion by the time he parked his trailer in at the Baskin Robbins plant. When he called his wife at 5:30 p.m. he had chest discomfort, but did not realize what it was. His discomfort persisted all evening. When he finally arrived at the hospital it was clear that he had a substantial heart attack, although the CPK level had not yet risen to abnormal levels. From Dr. Terrien's opinion that Claimant's heart attack did not occur until 1:00 a.m., the defense argues that work stress could not have played a role because the stressful events occurred hours before.

9. However, evidence as a whole supports Dr. Minton's conclusion that work-related factors led to the Claimant's heart attack. Both experts agree that extraordinary stress can cause a heart attack and that a stressful event is more likely to cause an attack in one with the predisposition. From that general premise, Dr. Minton considered the Claimant's lengthy driving, emotional outburst, early evening vague symptoms and discomfort to support his conclusion that the stress caused the heart attack. His conclusion is consistent with the timing of early symptoms, the EKG and subsequent blood work.

10. Under the well-established rule that causation can be found if a work related event aggravated a pre-existing condition, even though the disease if left to itself would in time have produced the same result, see *Marsigli* 124 Vt. 95l, causation can be found in this case because the work related stress accelerated the onset of Claimant's heart attack.

11. Next is the question whether the exertion was unusual or extraordinary. On the facts presented, it is clear that the long drive with minimal rest, 2,000 miles in 56 hours, was more stress than Claimant experienced in his usual work life. An emotional reaction added to the stressful driving was also stress greater than the usual work situation. As such, the Claimant has met his burden of proof.

12. Pursuant to 21 V.S.A.§ 678 (a), a prevailing claimant is entitles to attorney fees as a matter if discretion and necessary costs as a matter of law.

CONCLUSIONS OF LAW:

1. The evidence as a whole proves that it is more probable than not that Claimant's heart attack arose out of and in the course of his employment with Transport Dynamics. See, *Burton*, 112 Vt. 17 (1941). Accordingly, Claimant is entitled to medical benefits related to that attack and temporary total benefits during the period he was disabled as a result.

2. Pursuant to 21 V.S.A.§ 678 (a) and WC Rule 10, this prevailing claimant is awarded fees of claimant $7,875 (87.5 x $90) in attorney fees. Because it is unclear how much is requested for paralegal time, which must be less than that awarded for an attorney, and because the costs are not in compliance with Rule 40, Claimant has 30 days from the date this opinion is mailed to submit an amended request for costs and additional fees.

ORDER:

THEREFORE, based on the Foregoing Findings of Fact and Conclusions of Law, Defendant is ordered to:

1. Adjust this claim:
2. Pay attorney fees $7,875.

Claimant has 30 days in which to file an amended request for costs and additional fees.

Dated at Montpelier, Vermont this 27th day of September 2002.

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R. Tasha Wallis
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.