Geiger v. Hawk Mountain Inn/CNA Insurance (09/17/03)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

David Geiger	)	State File No. A-09292
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Hawk Mountain Inn/CNA Insurance	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 37-03WC

Hearing held in Montpelier on March 3 and 4, 2003
Record closed on April 7, 2003

APPEARANCES:

Heidi S. Groff, Esq., for the Claimant
Matthew D. Gilmond, Esq., for the Defendant

ISSUES:

1. Is Claimant permanently and totally disabled as a result of injuries he sustained in the October 27, 1987 work accident?

2. If so, will his compensation rate be capped at his average weekly wage in 1987, or will it be increased by the prevailing annual adjustment rate; and

3. If not, is Claimant entitled to any additional benefits?

EXHIBITS:

Joint Exhibits

1. Medical Records of Claimant
2. Forms Claimant completed for Dr. Bucksbaum's Evaluation
3. Forms Claimant completed for Dr. Weker's Evaluation
4. All Departmental Forms and Agreements, including correspondence to and from the Department

Claimant's Exhibits

1. Curriculum Vitae of Gregory LeRoy, M.Ed., CRC, ABVE

2. Curriculum Vitae of Mark Bucksbaum, MD
3. Curriculum Vitae of Jonathan Weker, MD

Defendant's Exhibit

Curriculum Vitae of Albert Drukteinis, MD, JD

CLAIM:

1. Permanent total disability compensation under 21 V.S.A. §644, including a compensation rate that will exceed Claimant's average weekly wage at such point in time as the July 1st cost of living adjustments would bring about that result;

2. Medical and hospital benefits for both physical and psychological injuries under 21 V.S.A. §640;

3. Attorney fees and costs under 21 V.S.A. §678(a); and

4. Interest on any past due payments pursuant to 21 V.S.A. §664.

STIPULATED FACTS:

1. At all relevant times, Claimant was an employee of the employer Hawk Mountain within the meaning of the Vermont Workers' Compensation Act (Act).

2. At all relevant times, Hawk Mountain was an employer within the meaning of the Act.

3. At all relevant times, CNA was the workers' compensation insurance carrier for employer.

4. On or around October 27, 1987, Claimant suffered a personal injury by accident arising out of and in the course of his employment.

5. At the time of the injury, Claimant's average weekly wage was $356.37, and his compensation rate was $237.58 plus $30.00 for three dependents for a total compensation rate of $267.58. The carrier accepted the claim and paid TTD benefits.

6. Claimant was paid 10% whole person for the impairment to his cervical and thoracic spine only. This resulted in the payment of 33 weeks of PPD benefits beginning May 6, 1991, at the rate of $273.22.

7. Since that time, the carrier has denied payment of any and all benefits, including but not limited to, medical benefits and additional permanency benefits. A Form 27 has never been filed for medical benefits.

FINDINGS OF FACT:

1. After a year of college, Claimant began working in the construction field. From 1979 until he started working at Hawk Mountain in February 1987, he held jobs with ten different employers. He was hired as a framing and finishing carpenter at Hawk Mountain.

2. The only psychological treatment Claimant received prior to the work related injury at issue here was in 1982, when he was treated for alcohol abuse and issues related to earlier childhood abuse.

3. On October 27, 1987, Claimant was working at Hawk Mountain in connection with a construction project, on light duty status because of a previous injury to his wrist, when he was hit in the face with a two by eight board while standing on staging thirty feet in the air. Co-workers helped him off the staging. He sustained a nasal fracture, nerve damage on the right side of his face, and developed headaches. Claimant now says he also experienced neck pain within 24 hours of the injury.

4. Dr. Creekmore noted in November 1987 that Claimant's swelling had largely subsided.

5. Stephen Brittain, M.D., a neurologist, saw Claimant on November 4, 1987 and described symptoms he believed were consistent with post-concussion syndrome. He also noted that a CT scan performed on November 16, 1987 was normal, Claimant's mental status was intact, and there was no evidence of a neurological problem.

6. Jeffrey Bergquist, M.D., an eye physician, examined the Claimant twice in November 1987 for complaints of photophobia and vision problems, but found no disabling eye injury.

7. Dr. Aitken in November 1987 had no explanation for Claimant's severe discomfort and extreme photophobia, and found no direct injury to the eye.

8. When Claimant saw Dr. Brittain again in February 1988, he appeared relaxed without significant pain. Dr. Brittain found no objective deficits. At this time, Claimant reported that he was back at work, and that his pain was virtually gone in January 1988, until he got a cold and developed sinusitis, at which time his pain returned.

9. On February 14 and 21, 1988 Claimant complained of eye pain at the Rutland Regional Medical Center (RRMC) emergency department.

10. On March 22, 1988, Claimant underwent a repair of a septal deviation. Within two weeks, he told his surgeon, Dr. Haberman, that his headaches were essentially gone.

11. From April to May of 1988 Claimant worked as a railroad laborer.

12. On April 24, 1988, Claimant complained of ear and nose pain at the RRMC emergency department.

13. From May to August 1988 Claimant worked for H.A. Manosh, with the following hours per week: 46 ½, 48, 47 ½, 50 ½, 20 ½, 48, 56, 42, 56 ½ for the weeks ending May 28 through July 30. On August 8, 1988 he fell from scaffolding and injured his hip. When he was cleared for work, the temporary job had ended.

14. On November 12, 1988, Claimant visited the RRMC emergency department for neuralgia.

15. On November 23, 1988, Claimant called Dr. Haberman's office to request more of the medication Darvocet, but the doctor refused to renew a prescription without an examination. Dr. Haberman noted Claimant's history of alcohol and drug addiction and a history of manipulating physicians. That same day, Claimant went to the RRMC emergency department requesting pain medication for eye pain.

16. Claimant saw Dr. Roberts in January 1989 for facial pain.

17. On January 11, 1989, Claimant began seeing a chiropractor, Dr. Moelter, for neck pain. This is the first report of neck pain in the record. Dr. Moelter indicated that Claimant did not have a permanent defect and should be able to return to work within two months. Claimant did not visit RRMC for neck pain until November 1990.

18. Claimant continued to seek treatment in the RRMC emergency department for headaches, and at the chiropractic offices. A note in September 1989 from RRMC stated that Claimant was working as a carpenter. Dr. Wheeler of RRMC found in September 1989 that Claimant's spinal alignment was normal. On October 10, 1989, Richard Ashcroft, D.C., a chiropractor, determined that Claimant did not need as much chiropractic care as he was receiving.

19. Claimant's divorce from his second wife was initiated in 1988, and was finalized some time in 1989 after a custody battle.

20. A February 1990 letter from Moelter Chiropractic indicates that Claimant was doing very well until his appointment on January 29, 1990, when he complained of acute pain. Claimant reported a flare-up of his pain after ice fishing and using an ice auger in a repetitious manner for a week.

21. Claimant began his physical therapy program at Vermont Sports Medicine on February 8, 1990. He claims that he experienced an aggravation in his pain symptoms due to the treatment he received in this program.

22. Claimant began to drink alcohol again in March 1990, after 7 ½ years of sobriety. He claims that his unbearable physical pain made him suicidal, and that this relapse into alcoholism was necessary in order to ease his pain.

23. On April 16, 1990, Edward Reiman D.D.S. examined Claimant for temporomandibular joint disorder (TMJ) complaints. He found that Claimant's myofascial pain disorder was due to a long-standing clenching habit, and was unrelated to the 1987 work injury. He also found that Claimant had no disability that would prevent him from returning to work.

24. After receiving treatment for TMJ, Claimant reported that his headaches were gone for two months. He also told Dr. Stern that he could not return to work because of his pool therapy schedule (10:30 – noon on Mondays, Wednesdays, and Fridays).

25. Claimant began seeing Dr. Bucksbaum in the spring of 1990 for pain and muscle spasms. On July 17, 1990 Dr. Bucksbaum declared that Claimant had reached a medical end point with his services, that he was still cleared for light duty work, and that he did not need pain medication. In December 1990, Claimant completed a work hardening program.

26. On January 28, 1991, Dr. Bucksbaum found that the Claimant had significantly improved and released him to unrestricted work activity. He also concluded that the Claimant had "no permanent, partial impairment associated with this injury."

27. On April 15, 1991, Dr. Moelter found that Claimant had a 10% permanent partial impairment of the spine.

28. Claimant visited the emergency department at RRMC three times in June and July 1991, for migraines, head and neck pain, and neck spasms.

29. On August 14, 1991, Claimant saw Dr. Alvarado at the Pain Management Center, who could find no objective evidence for his pain complaints. He reported that the areas in which Claimant reported severe pain were not sensitive to palpation.

30. In November 1991 Claimant went to Dr. Moelter's office disoriented and with the odor of alcohol on his breath.

31. Claimant visited the RRMC emergency department more than once in late November 1991 for alcohol detoxification. At this time, he was diagnosed with chronic facial pain, depression, and alcoholism. When advised to seek inpatient psychiatric treatment for his depression, Claimant declined.

32. Claimant visited the RRMC emergency department again on December 9, 1991 for alcohol detoxification. EEG and psychological tests performed at this time were normal, indicating that there was no memory deficit.

33. On January 21, 1992, David Welch, M.D., who specializes in physical medicine and rehabilitation, examined Claimant. Claimant reported improvement in facial pain and the ability to return to work as a carpenter relatively pain free. Dr. Welch opined that the Claimant was capable of performing many tasks associated with his "previous and current employment activities." He also opined that Claimant's severely worn-down teeth were objective evidence of a TMJ disorder that pre-dated the work injury.

34. On July 8, 1992, Claimant was involved in an automobile accident. He treated with Dr. Moelter for those injuries.

35. On September 25, 1992, Claimant visited the RRMC emergency department for headaches.

36. On November 3, 1992, Dr. Reiman examined the Claimant again, restated his earlier diagnosis, and commented that he would not "relinquish his complaints, no matter what the treatment."

37. On August 20, 1994, Claimant went to RRMC emergency department with the complaint that he had been assaulted the night before and hit on the head with a heavy board or object. He had drunk alcohol before going to the emergency department to "kill the pain."

38. On September 29, 1994, Claimant visited the RRMC emergency department for alcohol detoxification.

39. In 1995 Claimant was admitted to the Brattleboro Retreat for detoxification from alcohol. His physician discharged him with a diagnosis, among others, of chronic pain syndrome related to the 1987 work incident. At this time, there was some evidence of difficulties with immediate memory and mild impairment in right anterior temporal lobe.

40. Claimant's diagnosis was restated at the Retreat on November 7, 1996 when he was readmitted. It was noted that he had medication seeking behaviors and was not pleased when staff directed him away from the medication issue. He discharged himself from the Retreat.

41. On January 1, 1998, Claimant's fiancée suffered a brain injury while they were intimate and soon afterwards passed away. Brattleboro Retreat reported that this event caused severe depression for Claimant, as well as a possible post-traumatic stress disorder. Claimant told Brattleboro Retreat that this event caused him to have a drinking binge.

42. Claimant reported on a separate occasion while at the Retreat that his dissociation and tendency to lose track of time triggers his alcohol consumption. He reported on another occasion that his alcohol consumption just happens, with no perceived antecedents or triggers.

43. While at the Retreat, Claimant reported a family history of migraines and arthritis.

44. Claimant checked into the Brattleboro Retreat six times from 1995 to 1999. In May 1999, the Retreat's diagnosis of the Claimant ruled out cognitive impairment and traumatic brain injury.

45. In the Spring of 1999 Claimant was admitted twice for alcohol detoxification. Claimant visited the RRMC emergency department for alcohol detoxification 14 times between April 1999 and March 2001.

46. Claimant has myofascial pain syndrome and chronic pain disorder. At the time of the hearing, Claimant was taking methadone, Vicodin, Xanex, Soma, Restoril and lidocaine.

47. In 1999 Dr. Elaine Woo, M.D. at the Spaulding Rehabilitation Hospital, diagnosed Claimant with a traumatic brain injury due to the 1987 incident. This was the first diagnosis of a traumatic brain injury (TBI). The diagnosis stated "TBI 11 years ago."

48. Claimant has tried several jobs since his 1987 injury, but none has lasted. He claims he has not been able to keep any of the jobs because of his pain. Claimant worked as a railroad laborer in April and May 1988. He also worked full-time, and over-time as a foreman on a construction project from May to August 1988. He worked on another construction project from April to September 1989. He was hired as a temporary telephone operator in 1989, and worked until the strike against that company was over. He worked briefly as a cashier in 1992. In 1993, he was hired as a seasonal cashier, and left because the season ended. He also worked as a salesman in 1995. He has recently worked as a maintenance worker for his landlord.

49. Claimant wore dark glasses throughout the hearing, which he said was due to photophobia and headaches.

Medical Opinions

50. Mark Bucksbaum, M.D., a board certified physiatrist, began seeing the Claimant in May of 1990. He diagnosed the following injuries related to the 1987 work related injury: fractured nose, facial and dental pain, chronic sinusitis, migraine headaches, neck and back pain, myofascial pain syndrome, post traumatic stress disorder, dissociative disorder with depression, and cognitive dysfunction with impaired executive functioning.

51. Jonathan Weker, M.D., a board certified forensic psychiatrist, performed an examination at the Claimant's request, an examination that included a four hour interview.

52. Dr. Weker diagnosed Claimant with chronic pain disorder, alcohol dependence, cognitive disorder, major depressive disorder, personality disorder, possible mild traumatic brain injury, myofascial pain syndrome and migraine headaches. Dr. Weker explained that Claimant was able to have a stable life prior to his work-related accident because he was able to abstain from alcohol. He opined that Claimant's 1987 accident shattered the Claimant's equilibrium exposing earlier vulnerabilities and creating new ones, and causing him to return to drinking.

53. Dr. Weker concluded within a reasonable degree of medical certainty that Claimant's current psychological condition, particularly his pain disorder, is causally related to his injury at Hawk Mountain. Further, he opined that the Claimant's abuse as a child has no relationship with his current pain disorder.

54. Diane Aja, an occupational therapist, performed a functional capacity evaluation of the Claimant. She concluded that Claimant is unable to sustain work activities for vocationally relevant periods of time and should be considered disabled. Based on his complaints of pain the day after the testing, she concluded that Claimant should be considered disabled for any regular participation in work tasks, even in a sheltered work environment.

55. Gregory LeRoy is a certified rehabilitation counselor with substantial experience in the field. Based on his knowledge and experience, meeting and interview with the Claimant, review of the medical and social security records and a transferable skills analysis, Mr. LeRoy concluded that the Claimant has severe vocational handicaps that have resulted from the work related injury, and that he has no work capacity or reasonable likelihood of engaging in regular employment.

56. Albert Drukteinis, M.D., J.D. is a psychiatrist who evaluated the Claimant for the Defendant. Dr. Drukteinis agreed with Dr. Weker's diagnosis of a pain disorder associated with both psychological factors and a generalized medical condition. However, he does not believe Claimant suffered a traumatic brain injury in 1987. Dr. Drukteinis's opinion is based on the following: Claimant did not report memory or concentration problems until four years after the accident. Although neck pain is a prominent feature in his current condition, there was no note of neck pain at the time of the accident. In January 1991 Dr. Bucksbaum released him to unrestricted work activity with no permanent impairment. Testing of his memory was good. Further, Dr. Drukteinis noted that the Claimant is preoccupied with pain, has many grievances with his physicians who he accused of lying in his records when they noted that had significant pain relief or when they accused him of abusing or selling narcotics and described having been "maimed" during physical therapy. Dr. Drukteinis diagnosed a pain disorder with associated psychological factors and general medical condition and attributed the spreading of Claimant's symptoms to psychological factors. He does not believe that Claimant has yet reached medical end result for psychological factors and noted that overshadowing his pain disorder is a dependence on opioids and alcohol. Nevertheless, he could not exclude the Claimant's 1987 injury as a cause of the Claimant's problems.

57. Dr. Drukteinis concluded that there was no indication of any cognitive disturbance or TBI, and that Claimant's psychological problems were more likely caused by substance abuse, not the other way around. Dr. Drukteinis further concluded that even if the work injury was a cause of Claimant's psychological problems, substance abuse was an intervening and superseding cause.

CONCLUSIONS OF LAW:

1. In order for an employer to be liable for workers' compensation benefits to a Claimant, there must be a "personal injury by accident arising out of and in the course of such employment." 21 V.S.A. § 601(11)(A). It is the burden of the Claimant to establish all facts essential to support his claim. *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963).

2. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941). Sufficient competent evidence must be submitted verifying the character and extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). Claimant in this case carries the burden of establishing that his current medical condition is permanently and totally disabling, and resulted from his work injury.

Permanent Total Disability

3. Claimant is permanently and totally disabled if his injury is within the enumerated list articulated in 21 V.S.A. § 644, or if, without considering individual employability factors such as age and experience, the medical evidence indicates that he is totally disabled from gainful employment. *Fleury v. Kessel/Duff Constr. Co.*, 148 Vt. 415 (1987). Under the non-exclusive list of injuries in § 644 (a) the following shall be deemed total and permanent: 1) the total and permanent loss of sight in both eyes; 2) the loss of both feet at or above the ankle; 3) The loss of both hands at or above the wrists; 4) The loss of one hand and one foot; 5) An injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg and of one arm; and 6) An injury to the skull resulting in incurable imbecility or insanity. 21 V.S.A. §644. The standard is further articulated in 21 V.S.A. § 645(a), which specifies that one must have "no reasonable prospect of finding regular employment."

4. The question is not whether Claimant suffered physical pain, clearly he did, but whether his pain is permanently and totally disabling. *Pfalzer v. Pollution Solutions of Vermont*, Op. No. 23-01WC (2001). Examples of injuries which have been deemed permanent and total are found in *Liscinsky v. Temporary Payroll Incentives, Inc.*, Op. No. 09R-01WC (2001) (Claimant incurred numerous severe complications from surgery treating original back injury); *Ashline v. LDL Co.*, Op. No. 36-01WC (2002) (Claimant sustained permanent brain injury after falling through a roof); and *Soboluesky v. Stanley Works*, Op. No. 56-98WC (1998) (Claimant sustained back, arm, ankle, neck, and hand injuries, from three separate accidents at the same job).

5. Claimant's alleged illnesses are not enumerated in 21 V.S.A. § 644, nor do they totally disable him from gainful employment. See *Fleury v. Kessel/Duff Construction Co.,* 148 Vt 415, 419 (1987). Claimant attempted to return to work many times, but alleges that he could not keep any jobs because of his pain. In *Pfalzer,* the Claimant alleged that he became unemployed as a result of his pain, but the record revealed that Claimant's unemployment was due to an economically related lay-off, and had nothing to do with his pain. *Pfalzer.* Similarly in this case, many of Claimant's jobs were temporary or seasonal, and merely ended because they were over, not because of his pain. Furthermore, Claimant worked more than full-time on regular duty for several months, which indicates that he may be able to work.

6. There is no objective medical evidence in this case to support a claim for permanent total disability. In the absence of objective medical evidence, the fact finder is not required to accept Claimant's subjective complaints of pain. See *Udari v. W.C.A.B. (USAir, Inc.),* 705 A.2d 1290 (Pa. 1997). Where Claimant's disabling pain presentation is based entirely upon his individual perception of pain, and the actual physical findings fail to correlate with his subjective complaints, claim for permanent total disability, from a physical impairment viewpoint, must be denied. *Severy v. The Brattleboro Retreat,* Op. No. 37-99WC (1999).

7. The fact finder may disregard expert testimony in whole or in part, especially where such testimony derives at least in part from Claimant's narrative, and Claimant's credibility is in question. See generally *Appeal of Jonathan Newcomb*, 690 A.2d 562 (N.H. 1997). When evaluating and choosing between conflicting medical opinions, the Department has considered several factors: (1) the nature of treatment and length of time there has been a patient-provider relationship; (2) whether accident, medical, and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation at issue is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination, and (5) the qualifications of the experts, including professional training and experience. *Miller v. Cornwall Orchards*, Op. No. 20-97WC (1997).

8. Factor three is especially relevant in this case, and has not been met. Dr. Bucksbaum was Claimant's treating physician for several years, and is therefore more reliable relative to the other two experts. However, with an opinion as to permanency, a treating physician has no advantage over an independent evaluator. *Yee v. IBM*, Op. No. 38-00WC (2000). Furthermore, since both of Claimant's experts rely on Claimant's subjective complaints of pain, and Claimant is not credible, none of these opinions are sufficiently reliable. Similarly, although both the functional capacity evaluation and the vocational rehabilitation assessment indicate that Claimant is incapable of any type of work, these evaluations are not sufficiently reliable for the same reasons.

9. There are some instances where a Claimant's subjective testimony as to the level of his pain would be sufficient, but this is not one of those instances. Objective verification by medical experts regarding Claimant's pain is not required when the injury and the resultant disability are unquestioned, and there is nothing obscure or abstruse about the condition. *Merrill v. University of Vermont*, 133 Vt. 101 (1974). However, the sufficiency of his testimony without medical support depends on the reliability of the testimony, which depends on his credibility as a witness. *Pfalzer*, citing *Andreescu v. Blodgett Supply Co.*, Op. No. 33-94WC (1994), citing *Merrill*, 133 Vt. at 106.

10. In this case, the resultant disability is in question. Furthermore, the injuries claimed could more readily be seen as obscure and abstruse, because the injury is less severe than the injury in *Merrill*, and the alleged resultant disabilities are much less proximate in time. Finally, Claimant's subjective complaints are not sufficient evidence because Claimant is not credible. Testimony as subjective as pain testimony is sensitive to any objective contradiction. *Pfalzer*, citing *Merrill*, 133 Vt. at 106. Claimant now alleges that he experienced neck pain within 24 hours of the injury, but the medical records contain no reports of neck pain until January 1989. Claimant now alleges that a flare-up in his pain in early 1990 was due to physical therapy treatments, but alleged at the time that it was due to an ice fishing trip. Claimant now alleges that he could never successfully return to work because of his pain, but told one doctor that he could not work because of a time commitment of 4.5 hours each week to pool therapy. Claimant now alleges that his pain caused him to drink, but told doctors in 1998 that his fiancée's death caused a drinking binge, and on a separate occasion that his binges just happen for no reason.

11. Although Claimant is permanently and partially disabled and has already received payment for that disability, he has no permanent partial disability associated with his pain. The largest permanent impairment rating that can be awarded to *any* pain condition is 3%. American Medical Association (AMA), Guides to the Evaluation of Permanent Impairment 573-4 (5th ed. 2001). Moreover, this rating is only available for well-established pain syndromes. *Id.* Chronic pain syndrome on the other hand, is classified as an ambiguous or controversial pain syndrome, and is not ratable as a permanent impairment. *Id* at 571. This does not mean that the pain isn't real; it simply means that the extent to which pain prevents or restricts the Claimant's ability to work cannot be determined. *Id* at 572.

12. Although the principles set forth in the Fifth Edition of the *Guides* are relevant in most recent cases, they are not applicable in the present case. Any determination of the existence and degree of permanent partial impairment shall be made only in accordance with the whole person determinations as set out in the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. 21 V.S.A. § 648(b). "Most recent edition" in 21 V.S.A. § 648(b) means the most recent edition at the time of medical end result. *Sargent v. Randolph Fire Dept.*, et al., Op. No. 37-02WC (2002).

13. Medical end result "means 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." *Sargent*, citing Rule 21.2100, Vermont Workers' Compensation and Occupational Disease Rules. According to Dr. Bucksbaum's own records, Claimant had reached a medical end result by Jan. 28, 1991. By that time, Claimant had completed a work hardening program, been released to unrestricted work activity, and had experienced several significant improvements in his pain symptoms for months at a time.

14. Claimant reached a medical end result by Jan. 28, 1991 at the latest, even if he was still experiencing some pain after that point. "The persistence of pain may not of itself prevent a finding that the healing period is over, even if the intensity of the pain fluctuates from time to time, provided that the underlying condition is stable." Larson's § 57.12(c) at 10-46; *Moulton v. Ethan Allen, Inc.*, Op. No. 09-99WC (1999).

15. Therefore the Third Edition of the AMA Guides applies in this case because that was the most recent edition at the time of Claimant's medical end result in 1991. Unfortunately, the Third Edition does not answer the question of whether chronic pain syndrome should be rated as a permanent impairment. AMA Guides (3rd Ed. 1990). It simply states that professionals could not agree on the matter, and that the question should be deferred until more is discovered about the disorder. *Id*. at 250, 252. The Third Edition does however state that even though *disability* may exist in cases of chronic pain syndrome, little if any *impairment* exists in most instances. *Id*. It also states that chronic pain is treatable, and that a patient suffering from chronic pain syndrome can be restored to full functional capacity, which would seem to indicate that the disorder is not permanent. *Id* at 250.

16. The commissioner shall adopt a supplementary schedule for injuries that are not rated by the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. 21 V.S.A. § 648(b). Although no such supplementary schedule has been developed for pain disorders it is the policy of this Department, as well as of departments in many other states, to require objective medical findings before recognizing pain as a permanent impairment. Objective findings are those findings which cannot come under the voluntary control of the patient. Claimant in this case has not presented sufficient physical evidence on any of these points that would prove a permanent total disability.

Physical-Mental Claim

17. Although Claimant's current physical condition is not permanently and totally disabling, it is possible that his mental condition is. In order to prevail on a physical-mental claim, it must be shown that (1) there is a substantial causal connection between Claimant's work injury and his resulting mental condition; and (2) his mental condition disables him from performing any work activities. *Miller*. It is insufficient that the Claimant honestly believes that his injury is totally disabling; there must be medical evidence substantiating the disabling nature of the psychological injury. *Id.*

18. In *Severy*, although there was no permanent total disability in a physical sense, the Department granted permanent total disability for the Claimant's mental condition, because the persuasive expert who testified to the totally disabling nature of the Claimant's psychological condition was not credibly contradicted or refuted. *Severy*. In this case however, Dr. Drukteinis directly refutes the testimony of Dr. Weker regarding Claimant's mental condition. Dr. Weker concluded that Claimant has pain disorder associated with both psychological factors and a general medical condition, major depressive disorder, personality disorder, TBI, and a cognitive disorder, all of which are causally related to the work injury. Dr. Weker also concluded that Claimant is not capable of sustained and uninterrupted employment. Dr. Drukteinis agreed with the diagnoses of pain disorder, depressive disorder, and personality disorder. Based on his evaluation however, Dr. Drukteinis concluded that there was no indication of any cognitive disturbance or TBI, and that Claimant's psychological problems were more likely caused by substance abuse, not the other way around. Dr. Drukteinis further concluded that even if the work injury was a cause of Claimant's psychological problems, substance abuse was an intervening and superseding cause.

19. Another difference between *Severy* and the present case is that in *Severy*, the Claimant's psychological condition was far more disabling than Claimant's in this case. *Id*. This Claimant has not shown that his current medical condition is sufficiently debilitating to fall within the purview of permanent total disability, either in a physical or a mental sense.

Causation

20. Claimant has also failed to meet his burden of proving causation, because the chain of causation has been broken by intervening causes unrelated to his employment. When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to Claimant's own intentional conduct. *Pelkey v. Chittenden County Sheriff's Dept.*, Op. No. 24-02WC (2002). The progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause. *Pelkey*, citing Larson and L.K. Larson, Larson's Workers' Compensation Law, ch. 10. at 10-1. Claimant's condition worsened over time as a result of his substance abuse, which was an intervening cause unrelated to the work injury.

21. Claimant argues that his physical pain caused him to relapse into alcoholism. However, where Claimant had a pre-existing personal and family history of alcoholism and depression prior to the work injury, neither the injury nor the sequelae of that injury, including the alleged chronic pain, caused Claimant's suicidal tendencies or increases in alcohol consumption following the injury. See *Dixon v. United Illuminating Co.*, 57 Conn. App. 51, 58, 61, 748 A.2d 300, 304, 306 (2000).

22. In all cases involving either an aggravation/recurrence claim or an intervening cause claim, the question is not whether the original injury was involved in the later claim, but whether there is an intervening cause of sufficient magnitude to break the chain of compensability. *Lippard v. T. Copeland & Sons, Inc.*, Op. No. 7-96WC (1996). Although the work injury, the relapse into alcoholism some 2 ½ years later, and all of the ensuing medical consequences of that relapse may bear some tenuous relation to each other, this is insufficient to establish causation. In 1989, Claimant became divorced from his wife, and was involved in a custody battle. This stressful event was more proximate in time to Claimant's relapse than the work injury.

> Where [Claimant's] alcoholism arose on the heels of [another] tragedy, it would take a Solomon to determine the truth of the cause of her problems. Failing evidence that the alcoholism is injury related, the Claimant is a long way from establishing that any aggravation related to the alcoholism is work related.

Loveless v. Berlin Convalescent Center, Op. No. 74-95WC (1995).

23. The Court in *Jackson v. True Temper Corp.*, 151 Vt. 592 (1989) did find causation between Claimant's work injury, his return to alcoholism, and the medical consequences of that return. In that case however, the relapse was not an intervening and superseding cause because it was proximate in time to the injury, and there was no period of sobriety prior to the injury. *Id*. That case therefore, is quite different from the present one.

24. There is no causation for any cognitive disorders or deficits because Claimant's cognitive symptoms were not proximate in time to the work injury, and there is no objective evidence of cognitive deficits until well after the alcohol relapse. According to RRMC, there was no memory deficit at the end of 1991 The first evidence of cognitive impairment did not emerge until 1995, steadily worsening over time, and a traumatic brain injury (TBI) was not diagnosed until 1999, nearly twelve years after the injury. Although Spaulding diagnosed a TBI in 1999, The Brattleboro Retreat ruled out TBI or any cognitive impairment earlier in 1999. If the alleged brain injury bore any relation to the work injury, its symptoms would have been apparent right away, and would have improved, not worsened, over time. In contrast, cognitive deficits due to alcoholism do worsen over time. By the time Claimant entered Brattleboro Retreat for treatment for his alcoholism in 1995, he was already showing several other physiological signs of chronic alcoholism, such as ascites, edema, shakes, and high blood pressure. Cognitive deficits caused by alcoholism would be consistent with these findings.

25. Even if Claimant drank alcohol to cope with his physical pain, he has not shown that the physical pain he felt at that point was related to the work injury. Claimant himself told his chiropractor, Dr. Moelter, that his pain just before the relapse was caused by or exacerbated by an ice fishing trip. He now claims that this aggravation or destabilization in his condition was caused by his physical therapy treatments. But Dr. Moelter noted that the Claimant's pain returned suddenly and his condition was worsened by Jan. 29, 1990, and Claimant's physical therapy treatments didn't start until Feb. 8, 1990.

26. 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). However, where the doctors reached their conclusions based on an incomplete and questionable medical history, and where the history was uniformly crucial to their final conclusions, the opinions must fail. *Loveless.* Claimant's experts in this case found a causal link between Claimant's current problems and his work injury, but their conclusions are based solely on Claimant's allegations of a causal relation. For example, doctors at the Brattleboro Retreat found a causal relationship, although they had no objective basis for such a finding. They simply took the Claimant's word for it, and Claimant's medical history as reported by him was incomplete. Their opinions are therefore insufficient to serve as evidence of causation.

27. There is no causation between Claimant's work injury and his current chronic pain syndrome where a destabilization surfaced well after the period of employment, and following a significant period of progress. *Baldwin v. N.E.F. Publishing*, Op. No. 45-98WC (1998). During the period of almost 2 ½ years between the injury and the relapse, both Claimant and his physicians reported significant improvement, and Claimant was relatively pain free. Subsequent, non work-related, events intervened to break the chain of causation. As such, his right to compensation ended.

ORDER:

THEREFORE, based on the foregoing findings of fact and conclusions of law, the claims for compensation are hereby DENIED.

Dated at Montpelier, Vermont this 17th day of September 2003.

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Michael S. Bertrand
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.