STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-08038
Gary Greene	)	
	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
	)	Commissioner
US Airways	)	
	)	Opinion No. 03AS-02WC

RULING ON MOTIONS TO RECONSIDER AND AMEND AND FOR A STAY PENDING APPEAL

The defendant, by and through its attorney, Glenn S. Morgan of Ryan, Smith & Carbine, Ltd., moves for reconsideration or amendment of the decision, Opinion No. 03-02WC dated January 30, 2002, in which an order in favor of the claimant was made. In addition, it moves for a stay of that order pending appeal. Claimant, by and through his attorney, Thomas C. Nuovo, Esq. of Bauer, Anderson and Gravel, opposes the defense motions.

Motion to Reconsider or Amend

The defense argues first, that contrary to the conclusion of the Commissioner, claimant did not meet his burden of proving the causal connection between the alleged injury and claimant's employment. Next, it seeks a specific order on the defense that claimant intentionally acted to harm himself. 21 V.S.A.§ 649. Finally, in the event that reconsideration of the ultimate holding is not made, it argues that the claimant should not be entitled to temporary total disability benefits during those periods of time he was on vacation and used vacation time.

Claimant has Charcot's foot, a complication of diabetes. The claimant's burden was to prove that his work aggravated or accelerated the Charcot's foot condition. See, *Jackson v. True Temper Corp*., 151 Vt 592, 595 (1989). He met that burden directly through the testimony of Dr. LaPointe and indirectly through the testimony of Dr. Pulde. Dr. LaPointe testified that once the claimant's foot began to swell, standing and moving baggage at work caused or worsened the deformities in his foot. Because Dr. Pulde relied on facts about non work-related activities the hearing officer rejected, his ultimate conclusion that the condition was not work-related lost persuasive authority. Yet, he testified to the general complex interaction of a variety of factors in the development of Charcot's neuropathy, including trauma. Therefore, there was sufficient evidence to support the conclusion that the work claimant did on his feet all day aggravated or accelerated his Charcot's foot.

Next, the defendant asks for a specific ruling on its intentional injury defense on which it has the burden of proof. Under 21 V.S.A.§ 649 "[c]ompensation shall not be allowed for an injury caused by an employee's willful intention to injure himself or another or by or during his intoxication or by an employee's failure to use a safety appliance provided for his use." That defense is based on the claimant's alleged lack of adherence to medical advice. In paragraphs 4 and 5 of the original conclusions of law, the Commissioner cited § 649 and noted the defense emphasis on the claimant's failure to adhere to prescribed medical treatment on one hand and on the other hand its argument that the claimant's use of a treadmill as prescribed aggravated his condition. The conclusion was that "there is no evidence that the claimant actually used the treadmill as prescribed, 20 minutes per day, five days a week. And even if he had, such a short period of time would pale in comparison to the close to eight hours a day the claimant spent on his feet at work." Paragraph 5. The defense seeks to have it both ways: claim willful intent to injure himself if the claimant did not follow medical advice and lack of causation when he did, at least in regard to the treadmill.

The defense argument, however, extends beyond treadmill use to the claimant's failure to follow dietary guidelines for persons with diabetes. It is such failure to adhere strictly to prescribed medical regimes that the defense characterizes as "willful intention to injure" himself. "The word 'willful' is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent." *Hazen v. Biggins*, 507 U.S. 604 (1993). A willful act is one done intentionally, knowingly, and purposely as distinguished from an act done thoughtlessly, heedlessly or inadvertently. See *Workers' Compensation Division v. Blow* Op. No. 26-97PEN (Aug. 27, 1997). Claimant's eating and drinking habits were those acquired over time. Perhaps they were negligent once he was diagnosed with diabetes, but there is nothing in the record to prove that they or other departures from medical advice constituted willful intent to injure self under § 649.

Next the defendant argues that the claimant should not be entitled to temporary total disability benefits during the weeks he took vacation time. There is nothing in the Workers' Compensation Act to support the argument that sick leave or vacation time is an alternative to workers' compensation benefits. Nor is there a prohibition against one taking a "vacation" while on temporary total disability benefits. The issue is whether he was totally disabled from working pursuant to § 642. Defendant cites no authority for its contention that benefits should be reduced for the vacation time and I can find none.

Therefore, the defense motion to reconsider is DENIED. However the order is amended to add: The defense that claimant willfully intended to injure himself is DENIED.

Motion to Stay

The defense also moves for a Stay pending appeal. "Any award of the commissioner shall be of full effect from issuance unless stayed by the commissioner, any appeal notwithstanding." 21 V.S.A.§ 675(b). The statutory authority extends to a discretionary power to grant, deny or modify a request for stay. Id. This section was enacted:

> to prevent the filing of appeals solely to delay payment of an award of the commissioner. The legislature believed that such delays unduly burdened injured claimants and forced them to accept settlements for less than the award in order to meet their financial obligations. The legislature anticipated that the granting of stays would be the exception rather than the rule.

King v. C & L Plumbing and Heating, WC Opinion (Mar. 23, 1993).

In order for a Stay to be granted, the party seeking a Stay must demonstrate that: 1) it is likely to succeed on the merits; 2) it will suffer irreparable harm if the Stay is not granted; 3) if the Stay is issued, the other party will not be substantially harmed; and 4) the best interests of the public will be served by the issuance of the Stay. *In re Insurance Services Office, Inc*. 148 Vt. 634 (1987) (mem).

Whether the defense is likely to succeed on the merits would depend on the court's instructions to the jury and the jury hearing and interpreting the medical evidence and the job description differently than the hearing officer did in light of those instructions. Given the clear state of the law under *Jackson v. True Temper Corp*., 151 Vt 592, such result is unlikely. Irreparable harm to the defendant is not likely given the benefits due. Yet the claimant is likely to suffer substantial harm without benefits should his condition disable him. The best interests of the public would be best served in this case with prompt payment of the benefits ordered. Therefore, a stay is denied.

Therefore,

1) The Order is amended to add: The defense that claimant willfully intended to injure himself is DENIED.
2) The Request for a Stay is DENIED.

Dated at Montpelier, Vermont this 21st day of March 2002.

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R. Tasha Wallis
Commissioner

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US Airways	)	Commissioner
	)	
	)	Opinion No. 03-02WC

Hearing Held in March 8, 2001
Record Closed on July 17, 2001

APPEARANCES:

Thomas C. Nuovo, Esq. for the claimant
Glenn S. Morgan, Esq. for the defendant

ISSUES:

1. Is the claimant's Charcot's arthropathy a compensable injury?

2. If so, is the claimant entitled to indemnity and medical benefits, interest, attorney fees and costs?

EXHIBITS:

Joint Exhibit I:	Medical Records
Joint Exhibit II:	Report of Occupational Injury
Claimant's Exhibit 2:	Map/Lay-Out prepared by claimant
Defendant's Exhibit A:	Curriculum Vitae of Milo F/ Pulde, M.D.
Defendant's Exhibit B:	Transcript of deposition of Dr. Pulde

FINDINGS OF FACT:

1. Judicial notice is taken of all Department forms and the exhibits listed above are admitted into evidence.

2. At all times relevant to this action claimant was an "employee" and US Airways his "employer" as those terms are defined in the Workers' Compensation Act (Act) and Rules.

3. Claimant has worked for US Airways, or an airline which was merged with or purchased by US Air for approximately 30 years. In 1991 he moved from California to Vermont when his San Jose station closed.

4. Since his transfer to Vermont, claimant has worked at the first-class ticket counter at US Air processing passengers. He works from 5:00 a.m. to 1:30 p.m., five days a week from Wednesday through Sunday. During each day he gets two fifteen-minute breaks, one 30-minute lunch break and additional breaks with permission.

5. Processing a passenger includes checking the ticket, checking bags and putting tags on the luggage. Then claimant puts the bags on the conveyor belt. If he thinks a bag weighs more than 70 pounds, he must take it to a scale a few feet away to weigh it to determine the charge for excess baggage.

6. Occasionally claimant was required to go to the baggage claim area to collect unclaimed bags and return them to the US Air station.

7. Before 1999 the claimant was required to be behind the check-in counter for the entire day. When he was at the counter, he was on his feet. He also walked to other locations at the airport, including the baggage claim area, the break room or any other area he was asked to go to.

8. In November 1986 claimant learned that he had diabetes. At first he was treated with pills, but eventually required insulin treatment.

9. Claimant's primary care physician has been Dr. Ward.

10. Claimant has not always followed his doctor's orders with regard to his health. For example, despite recommendation that he exercise, he failed to follow the exercise regiments set out for him. He failed to follow prescribed diets. Although he quit smoking at one point, he restarted in 1997 after both his parents died. And he often went out to bars to have a few drinks after work.

11. In 1997 the claimant first noticed problems with his feet with initial redness and soreness. The condition worsened to a point in 1999 when Dr. Ward recommended that claimant see a podiatrist.

12. Claimant once owned property in Underhill where he used to take walks. He sold that land in 1997. Since then he has led a relatively sedentary life outside of work. The majority of the walking and standing he has done has been at work.

13. The podiatrist who treated the claimant was Dr. Stephan L. LaPointe who first saw the claimant in the summer of 1999. Dr. LaPointe took the claimant out of work, and put his foot—by then red, hot and swollen—in a non-weight bearing cast.

14. Claimant was confined to a wheelchair and told not to bear weigh on his left foot.

15. After several months of no weight bearing, claimant's foot condition started to improve. He was given a special non-weight bearing shoe which allows him to walk, but reduces the chance that he would further injure his foot.

16. From August 27, 1999 to January 8, 2000 the claimant was out of work and totally disabled.

17. Claimant's condition is known as "Charcot's foot," more specifically Charcot arthropathy or neuroarthropathy. It involves the destruction of bony tissue, but is not a fracture. The foot is red, hot, swollen and distorted in shape. If left untreated the bony structures in the foot breakdown to the point where it is impossible to walk. In extreme cases, amputation of the foot becomes necessary. Immobilization is the treatment because the foot cannot improve if weight bearing continues.

18. Dr. LaPointe is a Doctor of Podiatric Medicine and has a Ph.D. in biomedical engineering. He is a member of the American Podiatric Medical Association, a contributing editor for the Journal of Foot and Ankle Surgery and is the research director for the Podiatry Institute. He is also a member of the American Academy of Podiatric Sports Medicine.

19. In Dr. La Pointe's opinion, there was a relationship between the claimant's use of his foot and the development of Charcot's foot. He further opined that the claimant's work could have contributed to that condition and that once the foot began to swell, the standing and moving at work caused or worsened the deformities in the claimant's foot.

20. Clearly the demineralization of the claimant's foot occurred because of his diabetes. Dr. Pointe concluded, however, that it was the trauma to the foot from standing and walking that caused the Charcot's foot.

21. Dr. Milo Pulde reviewed the claimant's medical records for the defendant in this case. Dr. Pulde is a board certified Internist with many years experience in the treatment of patients with the complications of diabetes. He is now a staff physician and clinical instructor in Medicine at Harvard.

22. Dr. Pulde offered two opinions regarding causation, both reaching the ultimate conclusion that claimant's work did not cause, aggravate or accelerate his Charcot's foot. First, he opined that the condition is a natural result of the claimant's diabetes and that it would have occurred regardless of what he was doing. Second, he opined that activities typified by his walking down the aisle at his wedding and walking on a treadmill (20 minutes per day five times a week) would contribute to the development of Charcot's neuroarthropathy, but that standing at work would not. He based that opinion on assumptions about the claimant's activities and his understanding of gait analysis, kinetics and the biomechanical factors that contribute to bone destruction.

23. Nevertheless, Dr. Pulde agreed that it is possible that the claimant's work contributed to his Charcot's foot, but testified "it is not probable in that his working did not change the inevitable and natural history and development of his Charcot's."

24. Dr. Pulde testified and I find that the well-established changes associated with diabetes make up the primary cause of Charcot's foot, but that trauma is a secondary cause.

25. Claimant continues to work at the first class customer service window at US Air. He now uses a stool to take pressure off his feet.

26. Claimant submitted evidence of his attorney fee agreement. His attorney spent 115.5 hours pursuing this claim and incurred $582.58 in reasonable and necessary medical expenses.

CONCLUSIONS OF LAW:

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. 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).

3. As the Supreme Court has stated clearly, "[o]ur law is clear that the aggravation *or acceleration* of a pre-existing condition by an employment accident is compensable under the workers' compensation law." (emphasis in the original) *Jackson v. True Temper Corp*., 151 Vt 592, 595 (1989). "Furthermore, while it is common to think of an accident as an external event such as an explosion or a fall, it has long been established that an accident "may also be something going wrong within the human frame itself….'" (citations omitted). *Campbell v. Savelberg*, 139 Vt. 31, 35 (1980).

4. The defense argues that this claim should be barred by what it describes as claimant's intentional acts to harm himself. Under V.S.A. § 649, [c]ompensation shall not be allowed for an injury caused by an employee's willful intention to injury himself or another or by his intoxication…." The burden is on the defendant to prove such willful intent. Id.

5. The defense emphasizes the claimant's failure to adhere to prescribed medical treatment. On the other hand, it points to one such prescribed treatment, use of the treadmill, to argue that walking outside of work aggravated the Charcot's foot. Yet there is no evidence that the claimant actually used the treadmill as prescribed, 20 minutes per day, five days a week. And even if he had, such a short period of time would pale in comparison to the close to eight hours a day the claimant spent on his feet at work.

6. The medical evidence presented can be summarized as follows: For the defense, Dr. Pulde testified that trauma is a secondary factor in the progression of Charcot's foot. He agreed that work was a possible aggravating factor and he based his theory that non-work related walking was more likely than work to have caused the condition on the inaccurate assumption that claimant was active outside of work. Dr. LaPointe testified that the more the claimant was on his feet, the more trauma to the foot resulted, which ultimately led to and continued to aggravate the Charcot's foot. While the underlying diabetic condition may have predisposed the claimant to the development of the condition, it was the claimant's almost continuous standing at work that accelerated and worsened the deformities in the claimant's foot.

7. The undisputed medical opinion that trauma accelerates the progression of Charcot's foot dovetails with the factual finding that it was his job that put claimant on his feet most of the day to create the conclusion that work more probably than not accelerated the progression of the claimant's Charcot's foot. Therefore, his claim is compensable.

8. The employer's obligation to pay benefits begins with the date of this decision.

9. Under 21 V.S.A. § 678 and Workers' Compensation Rule 10, a prevailing claimant is entitled to attorney fees as a matter of discretion and reasnonable and necessary costs as a matter of law. Claimant prevailed in this difficult medical dispute due to the efforts of his attorney. Discovery involved and hearing time necessary justifies the hours claimed. Therefore, claimant is entitled to attorney fees based on 115.5 hours and $582.58 in reasonable and necessary medical expenses.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, the Defendant is ORDERED to assume adjustment of this claim, including payment to the claimant of:

1. Temporary total disability benefits from August 27, 1999 to January 8, 2000;

2. Attorney fees of $8,085 (115.5 x $70.00 per hour) and costs of $582.58.

Dated at Montpelier, Vermont this 30th day of January 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.