STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-01798
	)	
Herbert Sargent	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Town of Randolph Fire Department	)	Commissioner
and	)	
Liberty Mutual Insurance	)	Opinion No. 37R-02WC

RULING ON THE CLAIMANT'S MOTION FOR RECONSIDERATION

Claimant, through his attorneys, moves for reconsideration of the decision in Opinion No., 37-02WC, dated August 22, 2002, in which his claim for permanent total benefits was denied. The defendant, through counsel, opposes the motion.

Claimant argues that the conclusions are against the weight of the evidence in this matter and fail to properly consider the rating question on his chronic pain condition. On the contrary, the factual evidence demonstrated that the Claimant has capabilities with his upper extremities, no atrophy and normal strength, despite his perception that he is unable to work since the 1997 injury. He has extensive work experience and assists his son in the business, albeit on a limited basis.

The evidence supports Dr. Fenton's and the FCE conclusion that Claimant has a full time sedentary work capacity with mild accommodations. Vocational rehabilitation should help him achieve suitable work. Furthermore, the medical evidence shows not only that psychological factors do not preclude him from working, but also that work may actually improve his psychological state.

Like the *In re 75,629 Shares of Common Stock*, 169 Vt. 82; 725 A.2d 927 (1999) appellant, Claimant argues that the Department erred by adopting the opinion of the defense expert over his experts. Like a trial court, it is up to this Department to "determine the credibility of witnesses and to weigh the persuasive effect of evidence." See, *In re Appeals of Shantee Point, Inc*. No.2000-474 slip op. (Vt. Sup.Ct., Oct. 4, 2002) The underlying opinion in this case demonstrates the reasoning behind the adoption of Dr. Fenton's opinion, which incorporated a rating for the Claimant's pain. The case presented strong advocacy, difficult medical evidence and a sympathetic claimant. However, given the heavy burden of proving permanent total disability under 21 V.S.A.§ 644, it is clear that the original decision is amply supported and must stand.

Accordingly, the motion to reconsider is DENIED.

Dated at Montpelier, Vermont this 5th day of November 2002.

_____

R. Tasha Wallis
Commissioner

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Herbert Sargent	)	State File No. L-01798
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Town of Randolph Fire Department	)	
and	)	For: R. Tasha Wallis
Liberty Mutual Insurance	)	Commissioner
	)	
	)	Opinion No. 37-02WC

Hearing held April 4, 2002 in Montpelier, Vermont
Record closed on April 29, 2002.

APPEARANCES:

Patricia K. Turley, Esq. and Robert Halpert, Esq. for the claimant
Keith J. Kasper, Esq. for the defendant

ISSUES:

1. Is Claimant permanently and totally disabled as a result of his work injury?

2. If Claimant is not permanently and totally disabled,
   a) when did he reach medical end result?
   b) what is the extent of his permanent partial impairment?

EXHIBITS:

Joint Exhibit I	Claimant's medical records
Joint Exhibit II	Claimant's supplemental medical records (surgeries)
Claimant's Exhibit 1	Mark J. Bucksbaum, M.D., deposition transcript, February 6, 2002
Claimant's Exhibit 2	Kenneth G. Borie, D.O., deposition transcript, March 20, 2002
Claimant's Exhibit 3	John H. Porter, M.D., deposition transcript, February 11, 2002
Claimant's Exhibit 4	Daniel M. Sax, M.D., deposition transcript, February 13, 2002
Claimant's Exhibit 5	Curriculum Vitae of Dr. Bucksbaum
Claimant's Exhibit 6	Curriculum Vitae of Dr. Sax
Claimant's Exhibit 7	Curriculum Vitae of Dr. Porter
Claimant's Exhibit 8	Curriculum Vitae of Dr. Borie

Defendant's Exhibit A	Jonathan Fenton, D.O., deposition transcript, January 24, 2002
Defendant's Exhibit B	Carlson A. Theodore, deposition transcript, March 18, 2002
Defendant's Exhibit C	Curriculum Vitae of Dr. Fenton
Defendant's Exhibit D	Curriculum Vitae of Steven B. Mann, Ph.D.
Defendant's Exhibit E	Curriculum Vitae of Mr. Theodore

FORMS:

Form 1	dated July 24, 1997
Form 21	approved October 2, 1997
Form 25	dated August 13, 1997
Form 27	approved January 16, 2001

STIPULATED FACTS:

1. On May 25, 1997, Claimant was a volunteer for the Town of Randolph Fire Department ("Fire Department").

2. On May 25, 1997, the Fire Department was covered by a workers' compensation insurance policy issued by Liberty Mutual Insurance Company.

3. On May 25, 1997, Claimant suffered a personal injury by accident arising out of and in the course of his work for the Fire Department.

4. On May 25, 1997, Claimant's average weekly wage was $728.92 resulting in an initial compensation rate of $485.95 and, after annual COLA, in a weekly compensation rate of $576.17.

5. At all times relative to this matter, Claimant had no dependents.

6. Claimant's injuries consist of physical injuries and a psychological injury, and Claimant has reached medical end result for all injuries.

FINDINGS OF FACT:

1. Exhibits are admitted and stipulated facts are accepted as true. Notice is taken of all department forms on file.

2. Claimant Herbert Sargent had owned and operated a construction contracting business for eleven years at the time of his May 25, 1997 injury. Prior to that, he had been employed for twenty-five years at the Randolph facility of Ethan Allen, working his way up to a supervisory position. Additionally, Claimant and his family bought, fixed up and managed rental properties. Claimant had been a volunteer firefighter for the town of Randolph for approximately fifteen years prior to the accident.

3. Claimant attended school through the eighth grade and later obtained a GED.

4. In 1990, in the course of his construction contracting, Claimant was injured when the scaffolding he was working from collapsed. Claimant suffered a compression fracture at T-12 and L-1, from which he returned to work after a period of about eight months. Claimant resumed work without restrictions, and experienced occasional back pain associated only with heavy lifting.

5. On May 25, 1997, Claimant was thrown onto his back when the pressure in the fire hose he was holding suddenly increased. Claimant's buttocks struck the ground first, and then he felt a snap in his neck when the brim of his helmet hit the ground.

6. Claimant immediately felt pain in his back and neck. He went home and lay down in bed. The following morning his neck was swollen and he had difficulty swallowing and moving his head. Claimant sought treatment with Dr. Coxon at Gifford Medical Center.

7. On June 4, 1997 Dr. Coxon recorded neck and upper back tenderness and lower back, leg and foot aches. Dr. Coxon diagnosed muscle strain and cervical strain and prescribed use of a cervical collar and Motrin.

8. On June 11th, Dr. Coxon noted that Claimant's attempt to work the previous day had caused neck stiffness and tenderness.

9. Claimant saw William E. Minsinger, M.D., an orthopedist, on July 8, 1997. Dr. Minsinger noted pain and tenderness in Claimant's upper and lower back, with pain radiating toward his left leg. Dr. Minsinger prescribed an anti-inflammatory medication and referred Claimant for physical therapy. When Claimant reported that his pain was not improving, Dr. Minsinger ordered a CT scan.

10. The CT scan revealed a mild slip and a suggestion of a left sided disc at L5 and S1 with a probable pars defect at L4-5. Dr. Minsinger referred Claimant to Dr. William Abdu at Dartmouth Hitchcock Medical Center for surgical consultation. Dr. Abdu read the CT scan as demonstrating spina bifida occulta and a left-sided spondylolysis of L-5 as well as a healed pars defect on the right side of L-5.

11. After discussing a surgical option with Claimant, Dr. Abdu first proceeded with a spinal injection on August 15, 1997, which afforded Claimant essentially complete relief for one week. Dr. Abdu noted on September 9th that "[claimant] then rode his four wheeler for approximately a mile and a half and used his weed whacker the following day and he had the return of his pain." Dr. Abdu further noted that Claimant's "pain begins in the early morning and by five hours at work his pain is significant and towards the end of the day his is back to his baseline pain."

12. Dr. Abdu and Claimant decided to proceed with surgery. On October 2, Claimant underwent an MRI of the lumbar spine in advance of the surgery. The MRI revealed facet hypertrophy, spondylolysis and an abnormal posterior arch at L5.

13. Dr. Monsey at Fletcher Allen Health Care provided a second opinion regarding the surgery on December 16, 1997, in which he concurred that Claimant was a reasonable candidate for surgical intervention.

14. Dr. Abdu performed surgery on January 19, 1998 at Dartmouth-Hitchcock Medical Center, approximately eight months after Claimant's injury. The surgery included spine fusion from L5 to S1 bilaterally, with iliac crest bone graft, and left-side nerve root decompression through foraminoty at L4-L5 left.

15. Claimant remained hospitalized because of flu-like symptoms for three days following the surgery. He was discharged on January 22, 1998. Notes on January 20th, 21st and 22nd indicate that Claimant had no leg pain.

16. Claimant's pain showed significant improvement following the fusion surgery. On February 10, 1998 Dr. Abdu's notes reflect that Claimant's "left leg symptoms have completely resolved." Dr. Abdu discussed work limitations with Claimant and recommended that Claimant take at least three months out of work except for supervision responsibilities. On April 21, 1998 Dr. Abdu noted "considerable resolution of [Claimant's] pre-operative symptoms with regards to both the leg and the back. The left leg is essentially asymtomatic. The back pain is minimal. He is taking an occasional ibuprofen for early morning stiffness and soreness." Dr. Abdu released Claimant to half-time light duty work for six weeks, and to full duty after that.

17. At a July 24, 1998 follow up visit Dr. Abdu noted, "With his increasing work [claimant] is having increasing back pain and left leg pain." Dr. Abdu provided Claimant with a note to remain on half-time work for another six weeks.

18. At a November 6, 1998 follow up visit Dr. Abdu, noted that Claimant "reports continued improvement in his left leg pain. He still has some soreness in his back, which limits his workday to approximately eight hours. On occasion, he is having some right leg pain, as well." Dr. Abdu suggested continuation of activities as tolerated, with the possibility of a revision fusion if symptoms progressed to an intolerable degree.

19. Kenneth Borie, D.O. is a family and osteopathic physician and has been Claimant's primary care physician since 1987. Following the May 25, 1997 injury, Dr. Borie first saw Claimant on April 16, 1998. At that time, Dr. Borie noted depression, heart palpitations and reflux. He prescribed Paxil, Klonopin and Zantac. Lab reports show elevated cholesterol and triglycerides. On May 22nd Claimant was experiencing suicidal thoughts and continuing back pain. Dr. Borie increased the Paxil dosage. On July 27th Claimant's anxiety and depression remained essentially unchanged. Claimant had returned to work part-time but found he could not do it. Claimant reported that he took 6-8 Motrin a day for back pain and had had chronic neck pain since May 1997. Dr. Borie prescribed Relafen and discontinued ibuprofen. On August 28th Dr. Borie noted that Claimant had been working half time for 16 weeks. Claimant's depression was much improved although he reported fatigue and difficulty concentrating. Dr. Borie outlined a plan to wean Claimant off Klonopin, to which he attributed Claimant's fatigue. He noted that Claimant was taking Mevacor in addition to Paxil, Klonopin, Relafen and Zantac. On October 8th Dr. Borie reported that Claimant had returned to work full time and was experiencing exhaustion, trouble bending over and leg pain and "still cannot think straight." Dr. Borie referred Claimant to Dr. Porter for depression and ordered a CT scan of the brain. The CT scan was normal.

20. On December 10, 1998 Claimant complained of pain in both legs and feet, and difficulty in working 8-hour days. Dr. Borie increased his Relafen dosage. On January 8, 1999 Claimant was working half days, was "better" regarding his depression and his back, but "hurt all the time." On January 22nd Claimant felt he could not do any physical work. Dr. Borie notes Claimant positive for sciatica, tenderness in his lower back, restricted range of motion in his neck and lots of headaches.

21. January 21, 1999, Claimant saw Robert J. Rose, M.D. at the Dartmouth Hitchcock pain clinic. Dr. Rose noted that Claimant had not had physical therapy since his surgery, and that Claimant sometimes forgot to take his Relafen for pain. Claimant complained of pain from the base of his neck down to the bottom of his feet and numbness in the balls of both feet. Twisting and lifting activities increased the pain. Claimant felt he was only able to work 4 or 5 hours a day. Dr. Rose referred Claimant for physical therapy.

22. On January 26, 1999 Dr. Borie opined that Claimant was "totally disabled for all physical types of work," and had been since July 1998.

23. In a March 5, 1999 visit with Dr. Abdu, Claimant had multiple complaints, including neck pain, back pain, buttock pain, leg pain below the knee, and pain and burning in the planter aspect of the feet. Dr. Abdu note that Claimant's sciatica pain, for which he underwent his surgery, had resolved, but unfortunately his fusion was not successful and his back pain could be a result of his continued pseudarthrosis. Dr. Abdu concluded that pseudarthrosis could explain the back and buttock pain, but not the other multiple complaints, which did, however, appear to be associated with Claimant's May 1997 injury, based on history. Dr. Abdu ordered an MRI of the lumbosacral spine.

24. The MRI, performed on March 26, 1999, found a cauda equina tumor posterior to the L2 vertebral body.

25. On April 27, 1999 Perry Ball, M.D. at Dartmouth-Hitchcock discussed surgery with Claimant. Claimant complained that he was only able to work 2-3 hours a day due to pain. Dr. Ball recommended removal of the tumor but informed Claimant of the possibility that none of Claimant's complaints would improve as a result.

26. Claimant sold his rental properties before the tumor surgery "in case anything happened," and because he could no longer keep them up.

27. Dr. Ball removed the tumor on June 2, 1999 and Claimant was discharged on June 4th. At a July 12th follow up visit, Claimant reported his symptoms absolutely unchanged. Dr. Ball recommended radiation to reduce the likelihood of recurrence. He also recommended that Claimant pursue participation in the functional restoration program at the Dartmouth-Hitchcock Spine Center.

28. Birgit A. Ruppert, PT at the Spine Center evaluated Claimant on August 17, 1999. Claimant reported that he was unable to tolerate any construction work at that time. Ms. Ruppert recorded moderately limited range of motion of the lumbar spine in extension, and minimally limited range of motion in flexion. No directional preference of centralization was noted with repeated movement testing. Ms. Rupert concluded that physical therapy was unlikely to improve Claimant's back, but recommended a functional assessment to determine Claimant's eligibility for the Back Rehabilitation Program.

29. During September, October and November 1999 Claimant participated in a behavioral medicine chronic pain group at Dartmouth-Hitchcock. He also underwent radiation treatment as follow-up to his spinal tumor excision.

30. During November 1999 and early 2000 Claimant continued to treat with Dr. Minsinger who recommended medication adjustments and vocational rehabilitation and considered resumption of physical therapy or an epidural injection. In early 2000 Claimant received massage therapy at Gifford Medical Center. The therapist noted "T12 sore."

31. On March 1, 2000 Sikhar Banerjee, M.D. at Dartmouth-Hitchcock examined Claimant for assessment of permanent disability, on referral from Dr. Ball and Dr. Borie. Dr. Banerjee referred Claimant for electrodiagnostic testing, which was performed by Nancy Bagley, M.D. on March 14th. Dr. Bagley found Claimant's testing results consistent with probable bilateral radiculopathy and a possibility of mild axonal peripheral neuropathy.

32. On an April 10, 2000 visit to Dr. Borie, Claimant complained of dizziness, vertigo, nausea and dry mouth. On June 5th 2000 Claimant discussed suicide with Dr. Borie following a denial of SSI benefits. On June 19th Claimant reported intermittent vertigo on rapid head turning, decreased hearing, vision "off" and tinnitus. Dr. Borie sent Claimant for audiological evaluation, which found mild to moderate mid to high frequency sensorineural hearing loss bilaterally. In September 2000, Claimant was still experiencing dizziness and continuing numbness in left buttocks, groin and leg area. Dr. Borie prescribed Atenolol.

33. On September 2000, at Dr. Minsinger's referral, Claimant began treating with Daniel S. Sax, M.D., a neurologist at Gifford Medical Center. He noted Claimant's neurologic complaints as dizzy spells, headaches and chronic pain. Dr. Sax prescribed Neurontin for neuralgic pain and ordered testing at Dartmouth-Hitchcock Medical Center. Claimant's EEG was normal with medication effect, and his brain MRI was normal.

34. On October 22, 2000 and December 1, 2000 Jonathan E. Fenton, D.O. performed a medical record review and an IME of Claimant on referral from Liberty Mutual. Dr. Fenton utilized the Fourth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment ("Guides"). Dr. Fenton diagnosed chronic pain syndrome. He placed Claimant at medical end result as of March 26, 1999, but qualified that determination should Claimant choose to participate in multi-disciplinary evaluation and treatment. Dr. Fenton concluded that Claimant's spondylolisthesis with pars defect was preexisting, no doubt for decades, and that his work injury triggered pain. He opined that Claimant's present disability related to the pre-existing spondylolisthesis, the spinal cord tumor which had originally caused Claimant's right leg symptoms, subsequent treatments, including surgery, and anxious depression. Dr. Fenton found a DRE category III lumbosacral spine impairment based on Claimant's radiculopathy, which is rated as a 10% whole person impairment. Additionally, Dr. Fenton found a DRE Category I cervical spine impairment, which carries a 0% rating.

35. Claimant received massage therapy at Gifford Medical Center on three occasions in January 2001. Elaine Russell, CMT notes "T12 nice release; felt good for three days; energy level better; able to focus better; lower back still sore." Claimant experienced improvement in neck pain. Dr. Sax prescribed 12 weeks of massage therapy on January 30, 2001. Ms. Russell's reports, approximately weekly from February 9 to June 8, 2001, indicate temporary relief of some pain symptoms, with return of most symptoms between visits.

36. Claimant began treating with John H. Porter, M.D., a psychiatrist at Gifford Medical Center, in October 1998, and continued into 2002. Dr. Porter describes his treatment of Claimant as cognitive behavioral therapy and medication management for pain and depression. Dr. Porter categorized Claimant as DSM IV code 296.32, "major depression recurrent moderate," and at an overall stable level of depression throughout his treatment, although he found that Claimant had periods of ups and downs. Dr. Porter opined that Claimant's "ongoing physical disability and pain" caused Claimant's depression and that depression was not causing or increasing Claimant's disability. Dr. Porter did not place Claimant at medical end result psychologically as of March 2002 because "there are still things we haven't tried" and "because [claimant's condition] has plateaued now does not mean that it's at end result." He noted that adjustments of medications for both pain and depression might improve Claimant's condition. Dr. Porter recommended that Claimant continue treatment at the pain clinic, continue pool therapy and be as active as he can handle.

37. At a March 15, 2001 visit to Dr. Borie Claimant complained of dizzy spells and blurred vision, which Claimant attributed to medication changes the previous August. Neither Dr. Sax nor Dr. Porter believed Claimant's dizziness resulted from his medications.

38. On March 26, 2001 Steven Mann, Ph.D. performed an Independent Behavioral Medicine and Pain Experience Evaluation of Claimant on referral from Liberty Mutual. Dr. Mann utilized Chapter 14, Mental and Behavioral Disorders, of the Fifth Edition of the Guides. He concluded that Claimant had reached medical end result for his psychological condition in that, after three years of psychiatric care, Claimant's ongoing consultation with Dr. Porter consisted primarily of periodic medication checks. Dr. Mann found Class III (moderate) psychological impairment relating to depression and anxiety. Although Chapter 14 of the Guides does not assign numerical impairment ratings to these qualitative impairment classifications, Dr. Mann derived a 16% whole person impairment rating exclusively for Claimant's psychological condition. He arrived at this number by utilizing the 16% to 25% suggested percentage equivalents for a moderate psychological impairment recommended by the Colorado Division of Workers' Compensation Psychiatric Taskforce. Dr. Mann noted that this numerical rating closely coincides with the low end of the 15% to 29% numerical range assigned to a moderate impairment in Chapter 13 of the Guides, which addresses Central and Peripheral Nervous System. Dr. Mann determined that using a figure from the low end of each range was appropriate because he found Claimant's impairment levels to be only slightly above the mild range. Neither party contests Dr. Mann's 16% psychological impairment rating.

39. Claimant was found to be entitled to vocational rehabilitation services in early 2001, and began working with Carlson Theodore, a Vocational Rehabilitation Counselor at Cascade Disability Management. An initial Individual Written Rehabilitation Plan (IWRP) for vocational exploration was developed in April 2001, which included vocational assessment and a Functional Capacity Examination (FCE).

40. In April 2001 Claimant was accepted for Social Security disability.

41. On May 14 and 15, 2001 Joe Barry, MS, OTR/L, performed an FCE of Claimant at Gifford Medical Center. Mr. Barry found that Claimant had good hand skills and cognitive abilities and normal strength, but that gross body movements were limited due to back and leg pain. Mr. Barry determined that Claimant could not engage in sustained standing or walking, and that Claimant's lifting abilities were restricted. Mr. Barry concluded that Claimant had a sedentary work capability for 8 hours per day and 40 hours per week, with the ability to move frequently and readjust posture. Mr. Barry suggested computer work with a high backed chair and forearm supports to reduce postural stressors.

42. Dr. Borie opined that Claimant had a sedentary work capacity of 4 to 6 hours per day, based on Claimant's self-reports, but asserted that he would "keep hammering away at" Claimant to "get him to do something" because gainful activity would help Claimant's mental health.

43. On June 19, 2001 Mark J. Bucksbaum, M.D., a physical medicine and pain management specialist, performed an IME at Claimant's request, including a review of medical records and an examination of Claimant. He utilized the Fifth Edition of the Guides. Dr. Bucksbaum described that a fusion surgery could be successful "structurally" because the graft took without correcting the effects of pressure placed on the nerve and relieving pain. Dr. Bucksbaum analogized to a garden hose that is compressed: if the compression is of short duration, the hose will resume its original shape when the compression is removed; however, if exposed to a compression of long duration, the hose will remain compressed even when the force is removed. Dr. Bucksbaum noted that there is a correlation between the elapsed time and the success of restoring form and function of the nerve, and that six months is the approximate point where success rates take a downturn, changing an acute injury to a chronic injury. Dr. Bucksbaum found Dr. Mann's 16% whole person psychological impairment rating reasonable, and rated Claimant's spinal injury as category DRE IV based on Claimant's spinal fusion, to which he assigned a 23% whole person impairment rating. Fusion is not included in the DRE IV description in the Fourth Edition of the Guides, and Dr. Bucksbaum determined that Claimant's spinal fusion alone brought Claimant's impairment into this category under the Fifth Edition. Dr. Bucksbaum argued that chronic pain can be assessed separately under the Fifth Edition, and when it is, Claimant falls into Category III moderate impairment. Dr. Bucksbaum assigned Claimant a 25% whole person rating for chronic pain impairment using the same category-to-rating conversion that he understands has been adopted nationally for rating psychiatric impairment. The rating for a moderate impairment under this method is a range of 25% to 50%, and Dr. Bucksbaum placed Claimant on the low end of that range. Dr. Bucksbaum then combined the three impairment ratings according to the Combined Values Chart in the Guides, and reached a 52% whole person impairment rating. He asserted that Claimant cannot return to work for vocationally relevant periods of time, is unable to participate in vocational re-training in a meaningful way and is permanently and totally disabled.

44. At a July 15, 2001 visit to Dr. Borie Claimant complained of pain in his toes and the balls of his feet, left sciatica, blurred vision and trouble concentrating. On October 12, Claimant reported worsening sciatica over the previous six to eight months and that his feet were getting worse.

45. In July 2001 Mr. Theodore referred Claimant to Lewis R. Sussman, Psy..D. and Rob Ferguson, Ph.D. at Dartmouth-Hitchcock Medical Center to determine Claimant's need for further pain management counseling and cognitive behavioral therapy. Their assessment found that Claimant did not appear to need further pain management counseling, or psychotherapy beyond that provided by Dr. Porter. They made speculative recommendations regarding additional medications and caffeine reduction to improve Claimant's sleep.

46. Mr. Theodore developed an amended IWRP in July 2001 based on the FCE results. Property Loss Claims Adjuster, with a light physical demand, was identified as the primary vocational goal, with a purely sedentary secondary option. Strategies for reaching this goal included computer skills training, insurance agent training and investigation of potential jobs. Claimant cancelled and failed to reschedule a tutorial in computer key boarding at the Randolph Learning Center. An ergonomic chair, keyboard support platform and keyboarding software were provided for Claimant's home use. In January 2002 Mr. Theodore reported, "No sustained activity has occurred using the tools for computer skill enhancement." Mr. Theodore opined that Claimant's focus and concentration were limited due to chronic pain, anxiety and depression. In February 2002, Mr. Theodore concluded that Claimant was then unable to meaningfully participate in vocational rehabilitation services due to his medical condition, and services were discontinued. Mr. Theodore believes that, with training, Claimant could perform the identified jobs, and he is willing to resume vocational services to Claimant.

47. On August 8, 2001 Claimant underwent an audiogram and ENG at Dartmouth-Hitchcock Medical Center as follow-up for his continuing dizziness. Dr. Gosselin found moderately severe high-frequency sensorineural hearing loss, likely from noise exposure.

48. In January 2002 Dr. Sax referred Claimant for an MRI to rule out recurrence of the spinal tumor. The cervical spine was found to be normal, the thoracic spine was "fairly unremarkable," and no evidence of tumor recurrence was identified. Dr. Sax noted chronic pain secondary to the May 25, 1997 injury, and "[claimant] also has as part of his chronic back pain, osteoarthritic changes and wedge deformity in his thoracic and lumbosacral region with compression fracture at T12-L1."

49. Dr. Sax and Dr. Minsinger opine, and the parties agree, that Claimant's spinal tumor did not contribute to his present condition, including his chronic pain.

50. At a February 4, 2002 visit to Dr. Borie Claimant complained of his feet getting worse, lots of trouble with his knees, his fingers getting sore and higher dose of Neurontin making him tired.

51. On March 11, 2002 Dr. Sax reported, "From a neurological standpoint [claimant] has shown no progression."

52. Claimant has submitted evidence that his attorneys worked 382.8 hours on this case. He also submitted an itemization of costs in the amount of $3891.68.

CONCLUSIONS OF LAW:

1. Claimant seeks permanent total disability benefits. Alternatively, Claimant seeks permanent partial disability benefits for his physical and psychological injuries based on Dr. Bucksbaum's assessment of 52% whole person disability. Defendant argues that Claimant is not entitled to permanent total disability and supports an award of permanent partial disability in accordance with Dr. Fenton's assessment of 10% whole person impairment for Claimant's spinal injury and Dr. Mann's assessment of 16% whole person psychological disability.

Permanent Total Disability

2. Prior to July of 1999 a Claimant was entitled to permanent total disability if his injury was among those enumerated in 21 V.S.A. § 644, or if, without considering individual employability factors such as education and experience, the medical evidence indicates that he is totally disabled from gainful employment. *Fleury v. Kessel/Duff Constr. Co.*, 148 Vt. 415 (1987); *Pelkey v. Chittenden County Sheriffs Dept*., Opinion No. 24-02WC (May 29, 2002). The standard is further articulated in § 645 (a), which specifies that one must have "no reasonable prospect of finding regular employment." *Pelkey*, *supra*.

3. Injuries enumerated in § 644 include: total and permanent loss of sight in both eyes; loss of both feet at or above the ankle; loss of both hands at or above the wrist; loss of one hand and one foot; spinal injury resulting in permanent and complete paralysis of both legs or both arms or of one leg and one arm; and skull injury resulting in incurable imbecility or insanity.

4. Because Claimant's injury predates the 1999 amendment to § 644, his injury must either fit into one of the categories enumerated in § 644 or have as severe an impact on his earning capacity as one of the scheduled injuries. See *Bishop v. Town of Barre*, 140 Vt. 565 (1982); *Liscinsky v. Temporary Payroll Incentives, Inc*. Opinion No. 9-01 WC (March 22, 2001). On this issue, Claimant bears the burden of proof.

5. Dr. Bucksbaum supports Claimant's claim for permanent total disability with the opinion that the spinal impairment, a psychological condition and chronic pain syndrome resulting from Claimant's May 25th work injury combine to prevent Claimant from having even a sedentary work capacity. In fact, Dr. Bucksbaum concludes that Claimant would be totally disabled for work as a result of his spinal injury alone.

6. Nonetheless, the evidence as a whole fails to support a claim for permanent total disability. None of the other opinions offered in this case reach a similar conclusion as Dr. Bucksbaum. The FCE determined that Claimant had a full time sedentary work capacity, with a light work capacity in some limited areas. Claimant's IWRP identified available job categories that met Claimant's demonstrated functional capacity. Dr. Fenton's opined that, based on purely objective criteria, Claimant should meet a sedentary/light work capacity, but that a sedentary capacity was reasonable when his psychological condition was also considered. Dr. Borie, who has had the most sustained treating relationship with Claimant, opines that Claimant is physically capable of performing 4 to 6 hours of sedentary work per day. Dr. Mann and Dr. Porter each found that Claimant's psychological condition would not preclude him from employment capability.

7. Claimant's work history, physical and cognitive capabilities, and the weight of the medical evaluations fail to convince me that this Claimant is totally disabled for gainful employment.

8. Therefore, Claimant has not sustained his burden of proving permanent total disability.

Permanent Partial Disability

9. Rating Claimant's permanent partial disability for purposes of compensation entails utilizing the "most recent" edition of the AMA Guides to the Evaluation of Permanent Impairment ("Guides"). 21 V.S.A. § 648 (b); Rule 11.2000,Vermont Workers' Compensation and Occupational Disease Rules. As of January 1, 2001, a Fifth Edition supplanted the Fourth Edition of the Guides. Dr. Fenton utilized the Fourth Edition in performing his evaluation of Claimant, and Dr. Bucksbaum utilized the Fifth Edition. The two evaluations, besides differing on the rating of pain, reached different results for Claimant's lumbar spine disability based solely on differences between the two editions of the Guides.

10. Claimant contends that the evaluator should utilize the most recent edition of the Guides relative to the date of the evaluation; defendant argues that the pertinent date for determining the most recent edition of the Guides is the date of medical end result. Permanent partial disability benefits for an impairment commence "at the termination of total disability," 21 V.S.A. 648 (a), and the existence and degree of the permanent partial impairment shall be made only in accordance with the most recent edition of the Guides. *Id.* § 648 (b). The Fifth Edition of the Guides states, "An impairment is considered permanent when it has reached maximal medical improvement." Guides, Fifth Edition at 2. A stabilized medical condition allows different physicians to reach the same general conclusions as to impairment when utilizing a standardized protocol. Guides, Fourth Edition at 2/7. The Guides define the term "maximal medical improvement" to mean essentially the same as "medical end result" under the Vermont Workers' Compensation Act, a plateau or stability in the patient's condition. Determination of a permanent impairment and assignment of a permanency rating are triggered by a Claimant reaching medical end result. The statutory mandate to use the "most recent" edition of the Guides is most logically applied to mean the same date.

11. 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." Rule 21.2100, Vermont Workers' Compensation and Occupational Disease Rules. As the Vermont Supreme Court made clear in *Coburn v. Frank Dodge*, the "fact that some treatment, such as physical or drug therapy, continues to be necessary does not preclude a finding of medical end result if the underlying condition causing the disability has become stable and if further treatment will not improve that condition. 165 Vt. 529, 533 (1996); *Boucher v. Bennington College*, 14-02WC (Apr. 2, 2002). "[T]he proper test is whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement." *Coburn, supra* at 533; Rule 2.1200, Vermont Workers' Compensation and Occupational Disease Rules.

12. Claimant has been diagnosed with three components to the work-related injury of May 25, 1997: 1) a physical injury to the lumbar spine; 2) a psychological disability comprised of depression and anxiety and; 3) chronic pain syndrome.

13. In that there is no dispute between the parties regarding Dr. Mann's 16% whole person psychological impairment rating, utilizing the Fifth Edition of the Guides, I accept that figure.

14. Various medical providers have offered contending dates of medical end result for Claimant's lumbar spine injury. Dr. Fenton found that Claimant had reached medical end result in March, 1999; Dr. Sax at one time opined a medical end result in February of 2001, and later revised that to the spring of 2002. In March 2002 Dr. Borie opined that Claimant had reached medical end result "probably a couple years ago. Maybe 19--maybe the year 2000." When Dr. Bucksbaum performed his evaluation of Claimant in June 2001 he determined that Claimant had previously reached medical end result, but did not identify any corresponding date.

15. Since March 1999, Claimant has undergone pain management treatment, physical therapy; massage therapy, psychological counseling, medication adjustment, neurological assessment and repeated evaluations. These treatments were intended to address Claimant's depression and chronic pain syndrome or were palliative in nature, but none were "reasonably expected to bring about significant medical improvement" of Claimant's lumbar spine injury. The possibility of additional spinal surgery contemplated by Dr. Abdu in November of 1998 was never pursued. Dr. Borie, Claimant's primary care physician, places Claimant's medical end result at a point no later than 2000. Therefore, I find March 1999 to be the appropriate date of medical end result for Claimant's lumbar spine injury.

16. A medical end result date prior to January 1, 2001 requires rating Claimant's lumbar spine injury under the Fourth Edition of the Guides. As Dr. Fenton's evaluation is the only one utilizing the Fourth Edition to rate this injury, and his DRE category III finding is logically consistent with this Claimant's deficits, I accept his 10% whole person impairment rating.

17. Chronic pain is a multifaceted illness rather than a localized disease process. Guides, Fourth Edition at 15/309. The focus of treatment is on management rather than cure. Management requires a multi-disciplinary effort that is carried out at a comprehensive pain center and should be oriented toward an increase in functional capacity and a decrease in dependencies on medication and medical care providers. *Id*. Claimant participated in the Dartmouth Hitchcock chronic pain group in late 1999. Although Dr. Fenton noted in December 2000 the possible benefit of further multi-disciplinary evaluation and treatment for pain, Claimant did not undergo such additional treatment. Nonetheless, Dr. Bucksbaum found Claimant to have reached medical end result prior to his June 2001 IME.

18. The Fifth Edition of the Guides contains a completely revised chapter on pain. Chapter 18 of the Fifth Edition provides for the formal assessment--the "scoring" and "classification"--of pain-related impairment that the evaluator determines substantially exceeds that incorporated within a "conventional" organ and body system impairment rating, or when an individual has a well-recognized medical condition that is characterized by pain in the absence of measurable dysfunction of an organ or body part. This formal assessment results in the classification of a pain-related impairment into one of four categories—mild, moderate, moderately severe and severe. Additionally, for the moderate and higher classifications, the evaluator is to determine whether the subject's pain is *ratable* or *unratable*. This confusing terminology does not relate to a percentage impairment *rating* but serves to identify syndromes that are ambiguous or controversial. Under this protocol, pain-related impairments are not assigned a stand-alone percent rating, but the categorizations are noted for disposition as provided by the procedures of the applicable administrative agency. Dr. Bucksbaum followed this protocol until the final stages, where he determined a percentage impairment rating for Claimant's "moderate" chronic pain syndrome by analogy to the rating for "moderate" psychological impairment. However, this detailed process for evaluating pain-related impairment was not delineated prior to the Fifth Edition and so was not in effect at the time Claimant reached medical end result for his chronic pain syndrome.

19. Under Rule 11.2220 of the Vermont Workers' Compensation and Occupational Disease Rules, for injuries occurring after April 1, 1995, spinal impairment ratings and impairment ratings of other body parts, systems or functions must each be converted into a number of compensable weeks before being added together. The impairment to the spine is 10% x 550 weeks, or 55 weeks. The psychological impairment is 16% x 405 weeks, or 64.8 weeks. Claimant is therefore entitled to compensation based on 119.8 (55 + 64.8) weeks.

20. Claimant was found entitled to receive vocational rehabilitation services in the spring of 2001, but failed to fulfill most of the return-to-work goals of his IWRP. Dr. Bucksbaum's opinion that Claimant cannot meaningfully participate in vocational retraining is countered by Dr. Minsinger, who recommended vocational training for Claimant, by Dr. Porter, who asserts that Claimant should be as active as he can handle, and by Dr. Borie, who opined that Claimant's "mental health will be better if he does something gainful that he feels proud of." In this regard, I give great weight to the opinions of the three doctors who have each treated Claimant over a period of years. Vocational rehabilitation services should be resumed.

21. In that Claimant has not prevailed in this claim, he is not entitled to attorney's fees or costs.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, The Town of Randolph/Liberty Mutual is ordered to:

1) Pay permanent partial disability benefits based on 119.8 weeks.
2) Resume Vocational Rehabilitation services

All other claims are DENIED.

Dated at Montpelier, Vermont this 22nd day of August, 2002

_____
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.