

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Benjamin Bacon

Opinion No. 32-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Gerald E. Morrissey, Inc.

For: Anne M. Noonan
Commissioner

State File No. 83-20669

**RULING ON DEFENDANT'S MOTION TO DISMISS AND MOTION FOR SUMMARY
JUDGMENT**

This claim has a long and convoluted history. Claimant originally was injured in 1981 when a wooden plank fell from some scaffolding and hit him on the head. In 1983 he began exhibiting symptoms indicative of a possible seizure disorder, which he contended were causally related to his 1981 injury. Following a formal hearing in 1985, the Commissioner determined that Claimant likely was suffering from post-concussive syndrome. Defendant was ordered to pay both medical and indemnity benefits causally related to that condition. *Bacon v. Gerald E. Morrissey*, Opinion No. 6-85WC (July 26, 1985).

Claimant has continued to treat for seizure-like episodes since 1983, and at various times has sought additional workers' compensation benefits referable to them. In December 2002 he claimed entitlement to temporary total disability benefits on the grounds that his condition was precluding him from continuing to work as a self-employed carpenter. He also claimed entitlement to medical benefits for treatment of liver damage that he alleged had resulted from his use of Tegretol, a seizure control medication, from the mid-1980's until 1990. Last, he claimed that Defendant had failed to pay various medical bills.

Despite prodding from both the Department and Defendant, Claimant repeatedly failed to produce the evidence necessary to support his claims for additional benefits. Time and again, he was advised to produce income tax records documenting his wages for the twelve weeks preceding his alleged disability, but did not do so. He ignored repeated requests from Defendant to schedule his deposition. He failed to sign and return a medical authorization so that Defendant could obtain and review his pertinent records. As a consequence of these repeated failures, in August 2006 the Department cancelled the formal hearing that had been scheduled on the merits of his claim.

Claimant resurrected his claim in early 2010. He now seeks essentially the same benefits to which he claimed entitlement in 2002: (1) temporary total disability benefits for an eighteen-month period from April 2002 through October 2003 during which he claims his seizure disorder precluded him from working; and (2) medical benefits for evaluation and treatment of liver damage allegedly caused by his use of Tegretol.

To his credit, Claimant has been more responsive to Defendant's discovery requests this time through the process than he was previously. He appeared for his deposition, signed a medical authorization and produced his income tax records for 2001 and 2002. Unfortunately, the evidence he has produced is insufficient to support his claims. Specifically:

- Claimant has failed to show that he earned any wages during the twelve weeks prior to April 2002, the date on which he claims his work-related disability began. To the contrary, records obtained from the Internal Revenue Service document that he did not file tax returns in either 2001 or 2002, presumably because he had no income to report for those years.
- Claimant has failed to produce any medical evidence establishing a causal link between his use of Tegretol some twenty years ago and his current liver dysfunction. Indeed, the Department's file contains no medical records at all relating to this condition.

As to the first issue, it is a necessary prerequisite to any claim for wage replacement benefits that there be previously earned wages to replace. *D.G. v. Verizon*, Opinion No. 72-05WC (December 30, 2005); *Plante v. Slalom Skiwear, Inc.*, Opinion No. 19-95WC (May 24, 1995). With no earned wages for at least fifteen months prior to Claimant's claimed period of disability, his claim for temporary total disability benefits must fail as a matter of law. See V.R.C.P. 56(c); *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996) (summary judgment appropriate where no genuine issues of material fact exist); *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428-29 (1979) (summary judgment appropriate where facts involved in a determinative issue of law are clear, undisputed or unrefuted).

As to the second issue, it is Claimant's burden to prove the causal connection between his work injury and any medical consequences that flow from it subsequently. Competent medical evidence is required to establish the link to the required degree of medical certainty. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395 (1979); *Marsigli's Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95, 103 (1964). No such evidence has yet been presented here.

Claimant has had many years within which to develop the evidence necessary to prove his claim for benefits referable to his liver condition, but has failed to do so. More than twenty years have now passed since he last took Tegretol and was first diagnosed with liver dysfunction. Given the passage of time, even were Claimant to produce evidence in support of his position at this point, Defendant's ability to investigate and develop its own evidence would be severely compromised.

The Department has in the past exercised its discretion to dismiss a claim with prejudice when a claimant fails to pursue it in a timely manner. *See, e.g., Holmes v. Northeast Tool*, Opinion No. 26-05WC (April 27, 2005); *Dawson v. Price Chopper*, Opinion No. 20-96WC (April 29, 1996); *Cox v. Staffing Network*, Opinion No. 9-95WC (April 20, 1995). I find that to be the case here. On those grounds, it is appropriate to dismiss with prejudice Claimant's claim for medical benefits referable to the liver damage allegedly caused by his use of Tegretol.¹

ORDER:

As to Claimant's claim for temporary total disability benefits for the period from April 2002 through October 2003, Defendant's Motion for Summary Judgment is hereby **GRANTED**.

Claimant's claim for workers' compensation benefits referable to his liver dysfunction is hereby **DISMISSED WITH PREJUDICE**.

DATED at Montpelier, Vermont this 12th day of October 2011.

Anne M. Noonan
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.

¹ It is unclear whether any medical bills related to Claimant's 1981 injury remain unpaid other than those relating to his liver condition. Certainly Claimant has not produced any, and the time has now long since passed for him to do so. It is appropriate to dismiss this claim with prejudice as well, therefore.