STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. M-15231
	)	
Donald Wilson	)	By: Margaret A. Mangan Hearing Officer
v.	)	
	)	For: R. Tasha Wallis Commissioner
Webster Corporation	)	
	)	
	)	Opinion No. 33S-00WC

RULING ON DEFENDANT'S REQUEST FOR A STAY

The defendant Webster Corporation, by and through its attorneys, McCormick, Fitzpatrick, Kasper & Burchard, P.C., and pursuant to 21 V.S.A. § 675(b), requests that the Commissioner stay the order set forth in Opinion No. 33-00WC, dated October 5, 2000. The claimant, by and through his attorney, Michael J. Hertz, opposes the motion.

Any award or order of the Commissioner shall be in full force and effect from its issuance unless stayed, any appeal notwithstanding. 21 V.S.A. § 675(b). Section 675(b) " was enacted to prevent the filing of appeals in order to delay payment of an award by the Commissioner, based upon the legislature's belief 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, not the rule."
Bodwell v. Webster Corp. Opinion No. 62S-96WC (Dec. 10. 1996).

The Commissioner has the discretionary power to grant or deny a request for a stay in whole or in part. *Austin v. Vermont Dowell & Square Co.,* Opinion No. 2A-88 (Sept. 20, 1988). In order to justify the issuance of the stay, the moving party must demonstrate each of the following four elements: 1) that it is likely to succeed on the merits; 2) that it would suffer irreparable harm if the stay were not granted; 3) that a stay would not substantially harm the other party; and 4) that the best interests of the public would be served by the issuance of the stay. *In re Insurance Services, Inc*., 148 Vt. 638, 635 (1987).

In this case, the defendant argues that it is likely to persuade a jury that the claimant had committed fraud and, if not, at least that the claimant had reached a medical end result when the original Form 27 was filed. The defendant argues further that it will be irreparably harmed if required to pay benefits immediately because it is unlikely to recover any benefits paid to the claimant. Public interest would be served, the defendant argues, by preventing the injustice that would result from the payment of benefits that might not be recovered later. Finally, it argues that the allegation of fraud minimizes any concern that the claimant would be substantially harmed by the issuance of a stay.

The claimant argues that the defendant fails the four-part test. First he suggests that the evidence presented and accepted at the hearing in this Department indicates that the defendant is not likely to succeed on the merits before a jury. His claim of disabling back pain was supported by the testimony of the claimant himself, his wife and a friend who spent almost every workday with him. Doctors Jones and Park also supported the claimant even after viewing the videotapes which failed to dissuade them. As the trier of fact, it was the province of the hearing officer to determine the credibility of the witnesses and weigh the persuasiveness of the evidence. *Bruntaeger v. Zeller*, 147 Vt. 247, 252 (1986). A credibility dispute is not a sufficient basis on which to grant a stay. *Bodwell, supra.*

Next, the claimant cites several cases in which this Department has ruled that the payment by an insurer does not equate with irreparable harm. Otherwise, every order in favor of a claimant would be subject to a stay. *Durand v. Okemo Mountain*, Opinion No. 41S-98WC (Dec. 12, 1997); *Austin v. Vermont Dowell & Square Co.*, Opinion No. 05S-97WC (May 29, 1997); *Menard v. Vermont Castings*, Opinion No. 17S-00WC (Aug. 24, 2000). The defendant has not convinced me that payment in this instance differs from payment in the cases cited and that it would cause it irreparable harm.

Third, the defendant contends that an allegation of fraud should lessen any concern about substantial harm to the claimant if a stay is granted. In response, the claimant argues that the defendant has not met its burden of proving that a stay would not cause substantial harm to the claimant. He contends that he remains unable to work, that he has been without benefits for almost a year and that, as a result, he and his family are in desperate financial circumstances.

Finally, the claimant argues that the best interest of the public would be best served by denying, not granting the stay. The defendant's argument on this point is essentially the same as the one advanced for its irreparable harm argument, i.e. that it will be unable to recoup the benefits advanced should it prevail on appeal. To the contrary, denying the stay in this case best advances the best interests of the public, thereby avoiding the delay, expense and financial hardship entailed in an appeal. *Durand* at 2*; Austin* at 1.

When the four-part *In Re Insurance Services Offices, Inc.* factors are weighed, it is clear that the defendant has failed to meet its burden.

Accordingly, its motion for issuance of a stay is DENIED.

Dated at Montpelier, Vermont, this 28th day of November 2000.

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R. Tasha Wallis
Commissioner

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Hearing held in Montpelier on May 19, 2000.
Record closed on July 19, 2000.

APPEARANCES:

Michael J. Hertz, Esq. for the claimant
Stephen A. Fegard, Esq. for the defendant

ISSUES:

1. Was the termination of temporary total disability compensation and medical benefits on November 27,1999 appropriate?

2. Has the claimant reached a medical end result?

The claimant seeks:

1. Temporary total disability benefits from the date of the continuance.

2. Reinstatement of benefits associated with claim from the date of the discontinuance.

3. Attorney's fees, costs and interest.

EXHIBITS:

Joint Exhibit I:	Medical records with Dr. White's curriculum vitae and report
Joint Exhibit II:	Stipulation of the parties
Defendant's Exhibit A:	Videotape (2)
Defendant's Exhibit B:	Videotape (1)
Defendant's Exhibit C:	surveillance notes 9/13/99 for i.d. only
Defendant's Exhibit D:	surveillance notes 9/16/00 for i.d. only
Defendant's Exhibit E:	Diagram of the spine Defendant's Exhibit

Stipulation of Uncontested Facts:

1. Claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act ("Act") on February 1, 1999.

2. Defendant was an employer within the meaning of the Act on February 1, 1999.

3. Liberty Mutual was the workers' compensation insurance carrier for defendant on February 1, 1999.

4. On February 1, 1999 claimant suffered a personal injury to his back by accident arising out of and in the course of his employment with defendant.

5. At the time of the accident and subsequently, claimant has had one dependent under the age of twenty-one.

6. At the time of the accident claimant had an average weekly wage of $679.27 resulting in a weekly compensation rate of $462.85. Effective July 1, 1999, claimant's weekly compensation was increased to $483.23.

7. Claimant was paid temporary total disability benefits from February 4, 1999 to November 27, 1999.

8. On November 18, 1999 defendant filed a Form 27 based upon Dr. Wieneke's report (after viewing videotapes as supplied to the Department) that claimant had achieved medical end result.

9. On November 22, 1999, the Department of Labor and Industry reviewed and approved the Form 27 suspending indemnity and medical benefits.

10. On December 2, 1999 the claimant filed a Form 6, requesting a hearing and reinstatement of his compensation, his medical benefits and for attorney's fees, interest and costs, claiming that he is not at medical end result.

11. There is no objection as to the qualifications of any of claimant's treating or examining health care professionals.

FINDINGS OF FACT:

1. The exhibits listed, except Defendant's C and D, are admitted into evidence. Official notice is taken of all Department forms. Those forms are:
   - Form 1 - First Report of Injury, filed February 22, 1999
   - Form 10/10s - Certificate of Dependency, filed February 22, 1999
   - Form 25 - Wage Statement, filed February 22, 1999
   - Form 21 - Agreement for Temporary Total Disability Compensation, approved March 22, 1999
   - Weekly Net Income Worksheet
   - Vocational Rehabilitation Referral Form Filed April 28, 1999
   - Vocational Rehabilitation Entitlement Assessment July 14, 1999
   - Form 28 - Notice of Change in Compensation Rate, October 6, 1999

- Form 27 - Notice of Intention to Discontinue Payments, approved on November 22,1999
- Form 6 - Notice and Application for Hearing, filed December 2, 1999

2. The claimant began working for Webster Corporation in 1991 after recovering from a previous back injury and receiving vocational training as a truck driver. At the time of the injury at issue in this case, he was employed as a truck driver at Webster.

The February 1, 1999 Injury

3. On February 1, 1999 at approximately 5:00 or 6:00 on a cold morning, the claimant injured his back while cranking down the landing gear on a trailer. He felt popping and pain in his lower back. The claimant testified that he worked the rest of the shift, thinking that the pain would resolve, but that it only got worse. After his shift, he went to the Emergency Department at the Brattleboro Memorial Hospital where he was given an injection and prescribed pain medication.

4. By the next day, the claimant's pain had gotten worse and he was unable to work. He has not returned to employment at any time since February 1, 1999.

5. On February 3, 1999 the claimant went to his primary care physician, Peter C. Park, M.D., at the Deerfield Valley Health Center. The claimant reported severe back spasms and a great deal of pain going down his back and into his left knee. On physical examination, Dr. Park noted that the claimant's back had "significant amounts of muscle spasm" and a positive straight leg-raising test. Dr. Park's impression was that claimant had suffered an "acute exacerbation of chronic low back pain" and he prescribed pain medication. In his note for that visit and for a visit a month later, Dr. Park clearly related claimant's condition to the incident at work. He described it as an "acute exacerbation of chronic low back pain," with "an acute onset following him trying to hook up a trailer." At the visit, just two days after his work injury, Dr. Park told the claimant to " [b]e up and around, do not have bed rest."

6. Also on February 3, the claimant went to see a chiropractor, March E. Jones, D.C., to whom he reported severe pain in his lower back, radiating into his left thigh. Dr. Jones noted that the claimant was in "obvious, severe, excruciating pain and that he could hardly walk or change position." On examination, he found muscle spasms in the lumbosacral area, positive straight leg raising in both legs, and severely reduced range of motion with pain. Dr. Jones diagnosed lumbosacral and left sacroiliac joint sprain/strain, lumbar posterior facet syndrome and lumbar nerve root irritation.

7. The claimant treated with Dr. Jones two to three times a week from February 3, 1999 until December 3, 1999 for lumbar and sacroiliac manipulation. During that time, Dr. Jones described the claimant's pain as vacillating between severe and moderate. Dr. Jones's notes reflect claimant's report that his pain increases with physical activity such as a walk, or by changes in weather. The claimant said that his pain varied from day to day or even from hour to hour within a day.
8. A MRI performed on February 12, 1999 at the Brattleboro Memorial Hospital and compared to a March 1998 MRI demonstrated a slight increase in the small L4-5 disc protrusion.

9. On February 16, 1999 Dr. Park examined the claimant again for his back pain. The doctor noted that the claimant was slowly getting better, although he was unable to bend or lift up his legs to tie his shoes. His neurologic examination was described as "nonfocal." Dr. Park recommended that the claimant continue to take pain relievers and to be as active as possible. On April 27, 1999, Dr. Park again advised the claimant to continue to walk as best he can.

10. Dr. Jones referred the claimant to a neurologist, Rand S. Swenson, M.D., whom he first saw on March 24, 1999. Dr. Swenson's note for that visit states that the claimant's pain "waxes and wans [sic] but nonetheless has been there. It occurs even when he is completely inactive and minor activities, such as walking around the house, makes his worse. The pain tends to shoot into both thighs, mostly on the left." The claimant also told Dr. Swenson that he had trouble sleeping and occasional numbness in his legs.

11. Dr. Swenson noted that the claimant was "in clear distress secondary to low back pain." He noted that the claimant "frequently changes position and his posture is one assumed by a patient with lumbar disease, typically lumbar disc disease." Dr. Swenson diagnosed "a severe focal pain generator in the lumbar spine with referral of pain to the lower extremities." He interpreted the MRI as demonstrating significant degeneration, particularly of the L4-5 disc, which looked worse than the 1988 injury and prompted Dr. Swenson to suspect a recent injury. He suggested that a referral to the Spine Center at the Dartmouth Hitchcock Medical Center might be appropriate if he failed to show signs of improvement.

12. The claimant also saw Dr. Park on several occasions through May 5, 1999. Dr. Park prescribed medications, primarily Vicodin for pain and Flexeril, a muscle relaxant. Dr. Park noted some improvement, but described the pain as persistent. He also described a flare up of back pain in his note of April 27, 1999 when the claimant reported having fallen due to numbness in his leg when he tried to take a walk the evening before.

13. On May 5, 1999 the claimant gave Dr. Jones a list of activities that tended to cause an increase in back pain: walking, sitting in a regular chair, lying on his stomach, bending over, twisting his foot too much to turn, and wearing pants with a belt.

14. When the claimant saw Dr. Swenson again on May 12, 1999, the doctor thought that he had improved about 40%, but that he was still very restricted. The claimant reported that the pain was often worse in the morning and in the evening, and that it got worse if he walked a lot or bent over or lifted. He described his pain as being in the center of his low back and down into his tailbone.

15. On July 14, 1999, as reflected in a Vocational Rehabilitation Entitlement Assessment, Concentra Managed Care determined that the claimant was not entitled to vocational rehabilitation services because he was expected to return to the same job at Webster Trucking. The author of that report, Kenneth Yeates, specifically stated, "If Mr. Wilson is unable to return to the same employer it will be difficult for him to earn a suitable wage…" He also stated that "[s]hould Mr. Wilson's medical recovery be poor and his functioning such that he cannot return to his employer and truck driving position, his entitlement to VR services should be reassessed."

16. Dr. Jones encouraged the claimant to be active around the house. On August 23, 1999, for example, Dr. Jones noted that the claimant was trying "to stay somewhat physically active." The chiropractor encouraged him "to try to do various things around the house because he always has the option to stop and rest if he needs to." At the next visit, on August 27, 1999, Dr. Jones noted that "I have asked him to continue to gradually, slowly but surely increase his physical activities at home over the next few months before he sees the neurosurgeon."

17. Dr. Swenson noted that the claimant's progress had been slow, but that he did not see any surgical alternatives for him. He then recommended the referral to the Spine Center at DHMC where the claimant attended a program from July 19 to July 30, 1999. That program consisted of instruction in body mechanics, stretching, strengthening, cardiovascular training, individualized functional conditioning, and work simulation.

18. During his program at the Spine Center, the claimant was encouraged to be as active as possible, without overdoing it. He was given an informational sheet entitled "Exercise & Activity Pacing," which included specific advice and a "do and don't" list. On that list is the statement, "[d]on't ever not do something because the insurance company or employer might catch you having fun or working around the house."

19. At the end of the program, the claimant's progress was described as minor. He was deemed capable of performing light work, with lifting up to 20 pounds occasionally and up to 10 pounds frequently. Light work also included jobs without lifting. The report emphasized that he had not achieved his pre-injury level of functioning.

20. Mary Kasper, the claimant's vocational counselor at the Spine Center, stated in her report that she anticipated he would progress to medium work capacity over the next six weeks and be able to return to his previous employment as a truck driver.

21. By letter dated July 30, 1999, Sikhar Bannerjee, M.D., director of the Spine Center, stated that the claimant could return to work as a shuttle load driver starting the week of August 2. He recommended that the claimant work three days a week for the first two weeks. Dr. Bannerjee's report was obviously based on assessments that others at the Center had made. He had never examined the claimant nor had he ever met with him individually.

22. A representative at Webster told the claimant that he needed a Department of Transportation physical examination before he could return to work and scheduled that examination for August 5, 1999. The claimant said that when he attempted to lift his left leg to simulate using a clutch, he experienced sudden and severe pain in his back, radiating down his leg. The claimant did not pass the physical because of high blood pressure, generalized tremor, and being unable to flex his legs. The objective physical signs, particularly the increase in the claimant's blood pressure, indicate that the determination that the claimant was unable to work was based on more than the claimant's subjective impression. The medication he was taking also would have rendered him unfit to drive a truck.

23. The claimant saw Dr. Jones on August 6, 1999 who noted the he was quite discouraged

about failing the DOT physical examination. Dr. Jones stated that the claimant's inability to pass the examination was consistent with his opinion that the claimant "really is unable to return to work at this time." The claimant told Dr. Jones that the spine program had helped him mentally, but that it had not helped with his physical condition.

24. On August 9, 1999 Dr. Bannerjee noted that the claimant and his wife were both "quite discouraged and somewhat angry that he was sent back to work too quickly." Following a history and physical examination, Dr. Bannerjee concluded that the claimant was not capable of returning to work at that time. He referred the claimant to a neurosurgeon to resolve whether surgical intervention would be indicated.

25. In mid-September, 1999, at the request of the insurance carrier, a private investigator secretly videotaped the claimant on four days. The first tape was made on September 11, 1999. At 11:41a.m, the claimant is seen in his driveway with his wife unloading a cap from a pick-up truck and carrying it around the side of the house. He testified that his 13-year-old son lifted and moved the corner of the shell that he is seen carrying. The son could not be seen in that part of the videotape. At 11:51 the claimant is seen picking up some paper and a cardboard box from the lawn. Then at 12:43 he is shown raking up some brush for a minute or two. He was bending carefully and holding his back at times. At 12:48 he is seen walking slowly up the slight hill from the garage, limping and holding his left leg. At 1:18 he is seen operating the riding lawn mower for a minute or two, dismounting by swinging his leg over the steering wheel, then giving it back to his son. At 1:21 the claimant is seen putting his hands over his head and lifting a swing set to move it out of the way for the mower. He testified that he should not have done this because it weighed 25-30 pounds. At 1:23 he pushed a power lawn mower up a hill, dragged a picnic bench and moved the swing set back, about halfway to where it was before. At around 1:35 he is seen starting a lawn mower, pulling the starter rope approximately 36 times, alternating between his left and right hand. He then mowed for less than a minute. The taping for September 11 ended at 1:39 p.m., after approximately two hours.

26. The claimant testified the by moving the swing set and by his repeated attempts to start the lawn mower, he overdid it. He also said that the swing set was very light and that the starter rope on the mower was not engaging, so that most of the pulls were without resistance. However, the cord recoiled after each time the claimant pulled.

27. On Sunday September 12, 1999 the tape begins at 11:38 then jumps to 11:53 a.m. At about noon the claimant is seen hosing mud off his truck. Then he went with his wife and her mother to a flea market. They left at 12:53 p.m. and arrived at 1:44 p.m. Shortly after 2:00 p.m. the claimant is seen at the flea market, standing then walking, holding his cane in apparent discomfort. At 2:03 the claimant is seen returning to his car and very carefully getting into the backseat. He is seen in his driveway briefly at 2:22 p.m., although it is difficult to tell whether he is using his cane or not. He then got into the driver's seat of a car without any difficulty and drove it down his driveway. If he was using the cane when he got out of the car, the videotapes did not show it and he could not remember if he was using the cane after he returned home or not.

28. Dr. Jones's office notes for September 13, 1999 reflect the claimant's statement that he had suffered through a long and difficult weekend.

29. On September 14, 1999 the claimant spoke with a nurse case manager, Mary Eriksen, and informed her that he could not sit, squat, bend or climb stairs without great pain.

30. On the tape from Tuesday, September 14 the claimant is seen from 2:48 p.m. until 3:49 p.m., working with a friend, Joe Mangiacotti, in repairing the corner of a cement block wall. During the first ten minutes or so, he is seen walking in and out of the garage, looking at the wall and checking a plumb line. Beginning at 3:02 he is seen picking up several blocks and moving them into place, usually without having to bend, and often bracing himself with his hand when he does bend. The claimant testified that the blocks he was lifting were only half blocks. He is also seen mixing the concrete and scooping up cement in a gallon pail or a coffee can and pouring it into the wall. At the hearing the claimant testified that he mixed cement only to show Mr. Mangiacotti how to do it.

31. Mr. Mangiacotti testified that he visited the claimant almost daily to help him around the house. He confirmed credibly that the claimant often instructed him to do the more physically strenuous task when they were working together on a project such as the cement block wall.

32. On Wednesday, September 15, 1999, Dr. Jones provided the claimant with a lumbosacral brace. At approximately noon that day, the tape shows the claimant going to a building supply store. The claimant testified that the part not seen on tape was when a store employee and his friend, Joe Mangiacotti, loaded the concrete blocks they bought into the back of his truck. After returning home, the claimant is seen at 12:32 p.m., wearing the back brace he had just gotten from Dr. Jones, then working on the cement block wall for approximately 18 minutes. He sprayed the cement with a hose, mixed the cement briefly, then filled and poured coffee cans of cement into the wall. At one point, he dropped the coffee can, then bent over gingerly to pick it up with one hand braced on his leg.

33. On September 27, 1999, Dr. Jones fitted the claimant for an orthomold brace which he thought would provide greater support and symptom relief. Because Liberty Mutual never approved the request, the claimant did not obtain the brace.

34. On October 4, 1999, at the insurance company's request, the claimant saw Kuhrt Wieneke, M.D. for an examination. Dr. Wieneke is an orthopedic specialist who recently retired from private practice. Dr. Wieneke found that the claimant had suffered an aggravation on February 1, 1999 with an increase in low back pain and radiation to both legs. He concluded that the claimant has a long-term chronic and very well developed pain pattern in his lumbar spine. Dr. Wieneke also noted that the claimant had regressed significantly since his two-week program at the Spine Center. The doctor testified at the hearing that his findings on October 4 were consistent with a disc injury and chronic, intermittent back pain. His assessment was largely based on the claimant's oral representations as to his disabilities.

35. Dr. Phillips saw the claimant on October 25, 1999 for the neurosurgical evaluation. He determined that surgery was not indicated. In his opinion, the disc bulge at L4-5 was not the source of the claimant's symptoms, at least not "in a reversible fashion." Dr. Phillips suggested that sacroiliac (SI) joint dysfunction might be the source of the claimant's

symptoms and he recommended a block that could be helpful diagnostically and possibly therapeutically. Bilateral SI injections were performed on November 9, 1999. The claimant realized relief from his symptoms for approximately one week. Dr. Phillips had no further recommendations.

36. After he wrote his report of October 4, 1999, Dr. Wieneke viewed the videotapes and issued a supplemental report on November 15, 1999. Based on those tapes, without another examination, Dr. Wieneke changed his opinion and concluded that the claimant was capable of normal ranges of motion of his lumbar spine. He placed him at a medium duty capacity, stating that he could lift 40 pounds on a regular repetitive basis, without restrictions as to bending, twisting, working on his hands and knees, and climbing and descending ladders.

37. In response to a letter from Liberty Mutual dated November 15, 1999, Dr. Wieneke stated that the claimant had reached a medical end result. He also testified that continued chiropractic care was not indicated.

38. The claimant had been receiving temporary total disability benefits, beginning February 1, 1999 pursuant to a Form 21 Agreement for Temporary Total Disability Compensation, signed by the carrier and the claimant on February 25 and 26, respectively, and approved by the Department on March 22, 1999. The carrier had also been providing medical benefits.

39. On November 18, 1999, Liberty Mutual filed a Form 27, terminating temporary total disability and medical benefits as of November 27, 1999, on the grounds that the claimant had reached a medical end result, "as well as the evidence provided on videotape showing the same."

40. On December 3, 1999 the claimant discontinued his treatment with Dr. Jones because the insurance carrier was no longer paying for it. Since then, he has treated with Dr. Jones only on two occasions in February when he said he had a dramatic increase in pain while taking a walk.

41. On December 15, 1999 the claimant resumed treatment with Dr. Park, whom he had not seen since May 5. Dr. Park has treated him primarily with pain medication, continuing the Vicodin and adding MS-Contin and Oxycontin. Because of side effects, the claimant discontinued the newer medications, then was prescribed Naprosyn. On February 24, 2000, Dr. Park prescribed Methadone, stating, "We are really at a loss in terms of how to help this man regain some of his functionality so again concentrating on pain relief and pain control and hopefully he can regain some semblance of his life."

42. When the claimant saw Dr. Park on March 24, 2000, he told the doctor that he had not been able to purchase his medications because his workers' compensation medical benefits had been terminated. Dr. Park told him that he should try to continue taking Methadone.

43. In a report dated May 15, 2000, Dr. Park reiterated his opinion that the claimant's chronic pain condition was related to his work injury of February 1, 1999. He stated that the claimant's pain was severe at times and generally worsened by physical activity. Dr. Park

also stated that it would be difficult for the claimant to work on a regular basis, i.e., 6-8 hours per day, 4 to 5 days per week. He opined that the claimant could only work if the job were flexible enough to accommodate his exacerbations of back pain. To follow Dr Park's evaluation, the claimant would have to find an employer who would not require regular attendance or a minimum number of hours since he testified that his pain varied from day to day and even from hour to hour.

44. Based on his understanding that there are no medical alternatives to pursue except to manage his chronic pain, in his May 15, 2000 note, Dr. Park opined that the claimant had reached a medical end result.

45. Nothing in the videotapes altered Dr. Park's opinions. He noted that at the time the tapes were made, the claimant had recently completed the two-week program at the Spine Center where everyone encouraged him to be as active as possible.

46. Dr. Jones opined that the claimant has not been employable since his work injury of February 1, 1999. He testified that the claimant was not capable of working on a regular, full-time basis, and that his ability to work even on a part-time basis was limited by his pain, which was unpredictable.

47. Dr. Jones was surprised by some of the activities he saw the claimant do on the videotape. For example, he would not have thought that the claimant could have swung his leg over the steering wheel of the riding mower or started a lawn mower with repetitive pulling of the starter cord. In his records there is note that Dr. Jones also "wondered" how much the truck cap weighed and noted that moving the swing set, pulling a hand mower up a hill and twisting could not have been good for his back. At the same time he observed that the claimant was "a typical hard working Vermont male with a typical hard working male ego." He said that he encourages his patients to do as much as they can do without "going over the limit," but that it was often difficult to tell where that limit was from day to day. Dr. Jones noted that the claimant's symptoms "vacillate from very severe to being quite good" and that sometimes he went to Dr. Jones's office with a cane and other times without one.

48. Dr. Jones does not believe that the claimant is "faking it." He testified that the claimant's appearance at his office visit on September 13 was similar to his appearance in the videotape on September 12. According to the office note for September 13, he had been worse over the weekend. That Sunday, he was shown on the videotape using a cane. At the office visit on September 15, the claimant reported that the previous treatment had helped until the night before, when his back pain started increasing again. According to the claimant, this is consistent with the September 14 videotape demonstrating that he was apparently feeling better.

49. In Dr. Jones's opinion, the claimant has not yet reached a medical end result. He stated that the claimant's condition and level of functioning were improving slowly while in his care. Dr. Jones expected further improvement. Since discontinuing treatment with him, Dr. Jones said that the claimant had gotten worse and has become less functional. He believes that the claimant's condition and function would improve if he were to resume treatment, perhaps to the point where he would be able to perform light duty employment.

50. Dr. Jones stated that he was unaware of any definitive studies clearly indicating that long-term chiropractic care was or was not helpful. It is his practice to continue chiropractic treatment so long as the patient's condition is improving under his care. He cited literature emphasizing the importance of the physician making decisions on an individualized basis. Dr. Jones opined that further chiropractic care would be likely to increase the claimant's level of functioning. Dr. Jones has not seen the claimant on a regular basis since December 1999.

51. The carrier had the claimant examined on May 2, 2000 by Eric White, M.D. At the hearing, Dr. White noted that the claimant had a thoracic spine injury in 1988 and that since the injury at issue here, he has a chronic, but perplexing, lower back condition. In his opinion, the videotapes contradict the presentation that the claimant made to his treating physicians. He opined that the claimant had obvious work capabilities and that there is nothing to suggest that the claimant was incapacitated to a significant degree in the lumbar area. Dr. White concluded that the claimant might be magnifying his symptoms, on a conscious or unconscious level. If the magnification is not conscious, that means that the claimant perceives his symptoms as he describes them and is reporting them truthfully.

History of Back Problems

52. The claimant has a history of back problems. His first back injury was in the late 1970's. He started treating with chiropractors off-and-on until his next work-related back injury in March of 1988. At that time, while working for a book manufacturer, the claimant fell off a ladder with a large box in his hands, landing on his back with the box on top of him. He was diagnosed with an injury to his lower thoracic/upper lumbar spine. As a result of this accident, the claimant qualified for and participated in vocational rehabilitation where he was trained as a truck driver. As determined by Dr. Marcy Jones, the claimant received a permanent impairment rating of 11.5% to the lumbar spine.

53. The claimant continued treating off and on with a chiropractor until February 25, 1998 when he went to see Dr. William Sargent. Dr. Sargent's notes indicate that the claimant complained of an increase of back pain, which was then radiating upward to the neck and downward to the right buttock and thigh. Dr. Sargent noted that over the previous year, that pain had gotten worse. At that time Dr. Sargent diagnosed thoracolumbar back pain with a radiation pattern that did not correspond to a dermatome pattern (A dermatomic area is the area of the skin supplied by branches from a single spinal nerve. Stedman's Medical Dictionary, 25th edition). Because the claimant had few supportive findings on physical examination and negative work-ups for chest and abdominal pain, Dr. Sargent raised the possibility of role playing as a concern.

54. On March 3, 1998 the claimant had a MRI at the Brattleboro Memorial Hospital. Dr. Green reviewed the findings and opined that the claimant had a paracentral bulge at L4-5, but that it was unlikely to be symptomatic because he was not suffering from a L-5 radiculopathy. Such a finding suggests that the claimant did not have pain in the pattern one would expect with an L-5 lesion.

55. On March 16, 1998 Dr. Stengal at DHMC saw the claimant and noted that he had complained of pain in the entire length of the spine, for the top of the neck to his coccyx (tailbone).

56. The claimant continues to treat for the 1998 injury with Michelle Doucett, D.C. Aetna Life & Casualty, the carrier for that injury, continues to pay for the treatment.

57. The claimant's last visit to DHMC before the injury at issue here was on January 26, 1999, five days before the Webster Corporation injury. The note for that visit indicates that the claimant had pain from the occiput to his lumbar spine. The examiner noted that the claimant was in obvious distress and that his spinal range of motion was limited in all directions.

58. The claimant testified that prior to February 1, 1999, he never experienced pain that radiated down to his tailbone. Despite this apparent conviction that the earlier injury was anatomically above the area where he now has pain, the medical records demonstrate that he had very low back pain even with the earlier injury.

59. The claimant submitted evidence of his fee agreement with his attorney and a statement reflecting 67.60 hours worked and costs totaling $1604.41.

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, Morse Co*., 123 Vt. 161 (1963). 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. Book Press*, 144 Vt. 367 (1984).

2. The parties having entered into a Form 21 agreement, in which the defendant accepted the compensability of the claim and paid temporary total disability and medical benefits, the burden is on the defendant to prove that its termination of the claimant's benefits was proper. That agreement "reached between an insurer and a claimant and approved by the Department through an official workers' compensation form bec[a]me a legal, binding contract between the two parties involved. See *Valley v. Orleans Central Supervisory Union,* Opinion No. 55-98WC (Sept. 15, 1998); *Abbott v. Bombardier, Inc*., Opinion No. 10-96WC (March 13, 1996); *Catani v. A.J. Eckert Co*., Opinion No. 28-95WC (July 14, 1995); *Craig v. Alpine Vanity*, Opinion No.8-93WC (July 15, 1993).

3. Once a carrier or employer has accepted a claim, the burden shifts to that party to establish the propriety of ceasing or denying further compensation. *Kobel v. C & S Wholesale Grocers*, Opinion No. 28-99WC (Aug. 2, 1999), citing *Cormier v. Capital Candy Co*., Opinion No. 60-96WC (Oct. 25, 1996) and *Merrill v. University of Vt.* 133 Vt. 101 (1974).

4. In order to meet its burden of proof, the defendant must create in the mind of the trier of fact more than a possibility, suspicion or surmise. Its position must be the more probable hypothesis. *Burton v. Martin Lumber*, 112 Vt. 17 (1941).

5. From the beginning of the claim, it was assumed by virtually all-medical treatment providers that the claimant had suffered a work-related back injury. Specifically, the claimant related that he suffered immediate lower back pain while he was cranking down the landing gear on a trailer. Nothing in this case has convincingly contradicted that fact.

6. However, the records clearly document a long history of back complaints, including complaints to a doctor just weeks before the Webster incident. It is equally clear that the claimant injured his back at Webster, resulting in further injury measured by MRI scan and accepted by his medical care providers. "Our law is clear that the aggravation or acceleration of a preexisting condition by an employment accident is compensable under the workers' compensation law." *Jackson v. True Temper Corporation*, 151 Vt. 592, 595 (1989) (citations omitted). The carrier had a valid basis for entering into the Form 21.

7. Nevertheless, the claimant's self reports are not completely reliable. This is not to say that the claimant deliberately attempted to deceive anyone, but the videotape behaviors are not consistent with the history the claimant has given his doctors.

8. Under Vermont workers' compensation law, a claimant is entitled to temporary disability compensation until reaching a medical end result or successfully returning to work. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529,532 (1996). "Medical end result" is 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. Workers Compensation Rule 2(h); *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997).

9. Under Workers' Compensation Rule 45 and 21 V.S.A. § 708, any claimant who willfully makes a false statement or representation in order to obtain workers' compensation benefits may be forced or required to forfeit all or a portion of his workers' compensation benefits.

10. To justify termination of temporary total disability benefits, the defendant in this case must prove that the claimant willfully misrepresented his condition in order to obtain workers' compensation benefits, has successfully returned to work, or has reached a medical end result. 21 V.S.A. § 708; *Coburn,* 165 Vt. 529. Whether any of these factors has been proven depends largely on the medical evidence.

11. In determining the medical issues in this case, it is necessary to evaluate the opinions of Doctors Wieneke and White who evaluated the claimant for the employer and Dr. Jones and Dr. Park who have been treating the claimant.

12. This case turns much less on the differences in the medical opinions than on their similarities. For example, all agreed that the videotapes demonstrate that the claimant's activities belie his own description of his abilities. From that basis, the defendant argues that the claimant willfully made a false representation in order to obtain workers' compensation benefits and must be forced to forfeit any workers' compensation benefits pursuant to Rule 45 and 21 V.S.A. § 708. Although I agree that the claimant probably can do more than what he says he can do, I do not believe that he has willfully misrepresented his condition. The opinions of Dr. White, Dr. Jones and Dr. Park all support the conclusion that with the belief that his condition dramatically vacillates, it is

clear the claimant believes what he has told his physicians, even though that belief may not always be grounded in reality. Consequently, fraud is not a bar to this claim.

13. Next, based on opinions Doctors Wieneke and White rendered after they viewed the videotapes, the defendant argues that the claimant has a work capacity. However, the work that the claimant was trained to do required a driver's license that the claimant could not obtain because of medications prescribed by his treating physician. Furthermore, a careful viewing of the surveillance videotapes demonstrates that they are not the "smoking gun" the defendant believes they are. The claimant is usually seen moving slowly and deliberately, at times limping or favoring his left leg, supporting himself with a hand on his legs when he bends over, at times holding his back. They do not demonstrate pain-free functioning. Clearly, the pace at which his is seen working to repair the corner of the foundation would not satisfy any employer, nor would the relatively short periods of time he is seen working.

14. The physicians at the Spine Center instructed the claimant to be as active as possible around his home. The claimant argues that he was simply doing what he had been instructed to do. Neither Dr. Park nor Dr. Jones, the physicians who know this claimant best, altered their opinions after viewing those tapes. At the hearing, Dr. White explained that he needed to extrapolate from the time he saw on the videotape to a full day in order to determine that the claimant could work. He conceded that those tapes were not designed to determine work capacity. Those tapes, without more, do not prove that the claimant could engage in gainful employment at the time they were taken.

15. Nor are the videotapes a sufficient basis for a medical end result determination. However, all the experts, except Dr. Jones, agree that the claimant has reached a medical end result, that he has reached a substantial plateau in the recovery process. Dr. Park described it best when he wrote that there were no medical alternatives to pursue except to manage his chronic pain. The need for palliative care to relieve that pain does not preclude a finding of medical end result. *Coburn*, 165 Vt. 529. Dr. Jones's opinion that he has not yet reached a medical end result is based on his hope that the claimant will improve with more chiropractic care. That hope cannot outweigh the record of claimant's lack of progress and the other medical opinions on this issue. The overwhelming evidence is that the claimant has reached a medical end result.

16. However, the experts disagree as to when the claimant reached a medical end. Had he reached a medical end in November 1999? If not, is the claimant entitled to temporary total benefits between November 1999 when the benefits were discontinued and May 15, 2000 when Dr. Park placed him at a medical end? Based on his review of the videotape, Dr. Wieneke opined that the claimant was at a medical end result at the time he was taped in 1999. Benefits, therefore, were discontinued on November 27, 1999, based Dr. Wieneke's report. Conversely, Dr. Park placed the claimant at a medical end result on May 15, 2000. At that time, Dr. Park was in the best position to determine from a clinical relationship with the claimant and an objective view of the facts, that the claimant had been through multiple programs, had seen various specialists and had undergone various testing. After those attempts, it was clear to Dr. Park and well supported in the record, that the claimant had reached a substantial plateau in the recovery process such that significant further improvement was not expected. Rule 2 (h) (May 15, 1996). Consequently, I accept Dr. Park's evaluation that the claimant reached a

medical end result on May 15, 2000. Therefore, the claimant is entitled to temporary total disability benefits from the time of discontinuance until that date.

17. Additionally, the employer must provide the claimant with another vocational rehabilitation entitlement assessment because, contrary to the original assessment, he is not able to return to driving vehicles given the medications his physicians have prescribed for him.

18. Finally, the claimant contends that he is entitled to attorney fees, costs, and interest. Pursuant to 21 V.S.A. § 678(a) a prevailing claimant is entitled to necessary costs as a matter of law and reasonable attorney fees as a matter of discretion. Under § 664, "if the employee prevails at a hearing, the commissioner's findings shall include the date on which the employer's obligation to pay compensation … began." Interest at the statutory rate shall be "computed from that date on the total amount of unpaid compensation." *Id*.

19. Based on the opinion of Dr. Jones, the claimant argued that his total disability has continued unabated since the February 1, 1999 injury. However, I have concluded that the period of temporary total disability ended on May 15, 2000. Although the claimant has "prevailed," he is not awarded all that he claimed. Given this partial success, the complexity of the case, time required and necessity of legal representation, the claimant is awarded attorney's fees in the amount of one half of that claimed, $60 per hour for 34 hours. Because the full amount of the costs of $1604.41 was necessary for the success of this claim, that amount is awarded. Finally, interest at the statutory rate on the unpaid temporary total disability benefits shall be computed from November 27, 1999 until paid.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Webster Corporation is ORDERED to:

1. Pay claimant temporary total disability benefits from the date of termination on November 27, 1999 to May 15, 2000;

2. Reassess the claimant's vocational rehabilitation entitlement;

3. Resume payment of reasonable medical care; and

4. Pay claimant attorney's fees of $2040 based on one half of the hours worked, that is 34 hours at $60 per hour; costs of $1604.41; and interest at 12% per annum from November 27, 1999 until paid.

Dated at Montpelier, Vermont, this 5th day of October 2000.

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R. Tasha Wallis
Commissioner