

Potts v. Fibermark (May 8, 2003)

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

Danny Potts	)	State File No. P-13102
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Fibermark, Inc.	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 24-03WC

Hearing Held in Montpelier on March 17, 2003  
Record Closed on March 31, 2003

**APPEARANCES:**

Thomas C. Bixby, Esq., for the Claimant  
Marion T. Ferguson, Esq., for the Defendant

**ISSUE:**

Is the Claimant entitled to temporary total disability payments from May 2001 until October 2002 following the approval of a Form 27 based on Dr. Thatcher's medical end result determination and until the carrier voluntarily resumed payments based on a decision to undergo a spinal fusion?

**EXHIBITS:**

Claimant's Exhibit 1:	Medical Records
Claimant's Exhibit 1a:	Medical Summary
Claimant's Exhibit 2:	Vocational rehabilitation records
Claimant's Exhibit 3 a,b,c:	Photographs
Claimant's Exhibit 4:	Form 22
Claimant's Exhibit 5:	Form 28
Claimant's Exhibit 6:	Patient Information for Radio Frequency Lesioning
Claimant's Exhibit 7:	IDET Information
Claimant's Exhibit 8:	Herniated disk program
Claimant's Exhibit 9:	Monadnock Bill
Claimant's Exhibit 10:	Attorney fee request
Claimant's Exhibit 11:	Transcript of deposition of Dr. Thatcher
Defendant's Exhibit A:	Medical records

## **FINDINGS OF FACT:**

1. At all times relevant to this action, Claimant Danny Potts was an “employee” and Fibermark his “employer” as those terms are defined in the Workers’ Compensation Act.
2. On December 13, 1999 while rolling a ream of paper weighing several thousand pounds Claimant incurred an injury to his lower back.
3. Claimant underwent a course of medical treatment for back pain with various health care providers for almost a year. Doctors Shapiro, Fisher and Raul all evaluated him. An MRI study was performed; medications and physical therapy were prescribed.
4. Then, after a sneeze in late September 2000 resulting in severe pain, Dr. Thatcher performed a discectomy at L5-S1 on October 5<sup>th</sup>. Dr. Thatcher later opined that the work related injury probably resulted in a bulging disc that after the sneeze actually herniated.
5. Postoperatively, Claimant’s symptoms improved. By November 2000 he was able to walk up to a mile, although he had some discomfort in his left leg. Claimant was advised not to return to his previous work. At physical therapy, Claimant received a TENS unit that he continues to use for pain control.
6. On March 12, 2001 Dr. Thatcher placed the Claimant at medical end result with a 10% permanent partial impairment. He explained, “it does not appear that he will need further medical treatment at this time other than finishing up with the present therapy problem.”
7. In May of 2001 Dr. Thatcher suggested that could be a candidate for fusion surgery, but should not undergo the procedure while still smoking.
8. Claimant continued to treat for persistent left leg pain and chronic low back pain. In July 2001 Dr. Provost stated that Claimant had not yet reached medical end result due to the fact that radiofrequency lesioning for pain control had not yet been done. He predicted that pain relief with the procedure should last six to twelve months. Dr. Provost then applied trigger point injections at the L4-5 level for pain control. The radiofrequency lesioning at L3, L4 and L5 was done on November 20, 2001.

9. Claimant then consulted with Dr. Banco in Boston, who opined in January 2002 that Claimant had not reached medical end result. Dr. Banco recommended a discogram and surgical fusion at L4-5 and L5-S1. The carrier denied payment for the surgery by Dr. Banco because the fee exceeded permissible charges under the Vermont Rule 40 fee schedule and because the procedure was one that could be performed in Vermont.
10. Claimant has elected to have the fusion and has arranged for another surgeon to perform the surgery, which has been scheduled.
11. The carrier reinstated temporary total disability payments in October 2002 in anticipation of the surgery although that at the time of hearing had not yet occurred.
12. Claimant submitted a claim for attorney fees based on 58.9 hours at \$116.25 an hour and costs totaling \$272.00.

**CONCLUSIONS OF LAW:**

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
2. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. When an injury causes total disability for work, a claimant is entitled to temporary total disability compensation until reaching medical end result or successfully returning to work. 21 V.S.A. § 642; *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996); *Orvis v. Hutchins*, 123 Vt. 18 (1962). Periods of temporary disability may be intermittent. See, 21 V.S.A. § 650 (c); *Stannard v. The Stannard Company*, Op. No. 33-01 (2001).

4. 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. WC Rule 2.1200. The fact that some treatment such as drug or physical 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. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996). “[A] claimant may reach medical end result, relieving the employer of temporary disability benefits, but still require medical care associated with the injury for which the employer retains responsibility. *Pacher v. Fairdale Farms* 166 Vt. 626, 629 (1997); *Coburn*, 165 Vt. at 532. The necessity of treatment such as physical therapy or medications is not inconsistent with finding medical end result. *Pacher*, 166 Vt. 626.
5. Palliative care means medical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition. *Id.*
6. Claimant analogies this case to *Mears v. Schwan’s Sales*, Op. No. 39-02WC (2002) where the Commissioner accepted the treating physician’s determination that the claimant had not reached medical end result for two years after this surgery, based on the expectation that his knee range of motion and gait would increase in that interim.
7. At the time Dr. Thatcher made the medical end result determination in this case, Claimant had indeed reached a plateau in the healing process. His condition had been stable and, unlike the situation in *Mears*, significant improvement was not expected. Since then all treatment has been for the relief of pain, not to heal or to eliminate a medical condition. The medical care has been compensable as palliative care; it is not a bar to a finding of medical end result.
8. A determination of medical end result is a legal one. Although Doctors Banco and Provost stated that Claimant had not reached a medical end, they did so with the expectation that further treatment might relieve pain, not that the underlying condition remained unstable. Only Dr. Thatcher addressed those elements considered by this Department in making the legal determination.
9. It is possible for one to be at medical end result when all nonsurgical treatment has been exhausted and the underlying condition has been stable, even though a Claimant may opt for elective surgery at some point in the future. To hold otherwise could allow for an open ended period of temporary total disability dependent on the subjective decision of a Claimant or it could force one into surgery sooner than would otherwise be recommended.

10. Such is the case here. Claimant had reached medical end result when Dr. Thatcher made that determination. Now that Claimant has elected to undergo the spinal fusion, surgery, the carrier is responsible for medical expenses associated with the surgery and for temporary total benefits for those periods he is disabled postoperatively.

**ORDER:**

THEREFORE, base on the foregoing findings of fact and conclusions of law, the claim for temporary total disability benefits from May 2001 until October 2002 is DENIED.

Dated at Montpelier, Vermont this 8<sup>th</sup> day of May 2003.

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Michael S. Bertrand  
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.