STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Gary Mears	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Schwans Sales	)	Commissioner
	)	
	)	Opinion No. 39R-02WC

RULING ON THE DEFENSE MOTION FOR RECONSIDERATION

The defendant, through counsel, moves for reconsideration of the ruling that the Claimant, engaged in an approved vocational rehabilitation, was entitled to the continuation of temporary total disability benefits. Claimant, through counsel, opposes the motion.

Defendant accuses the Department of a legal fiction by equating "suitable employment" in the vocational rehabilitation context with "suitable work" in Rule 18. The obligation to look for work, Defendant argues, cannot turn on "whether a particular employer or carrier has been foresighted enough to insist that a work search provision be incorporated into the IWRP." Defendant's Motion for Reconsideration, September 27, 2002, at 5.

Rather than adopt the Defendant's piecemeal approach to workers' compensation, the Commissioner in the original *Mears* decision, articulated an integrated system in which commonly understood terms such as "work" and "employment" are synonymous and where the goal of returning one to employment remains a goal of on overall system in which vocational rehabilitation is a part. Under the Defendant's theory, a Claimant could be enrolled in a full-time educational program as part an IWRP, yet be required to engage in a good faith job search if the insurer or defense counsel provides such notice. A better, more integrated, plan is to have any job search requirement incorporated in the IWRP.

Wherefore, the defense motion to change the decision is DENIED.

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

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R. Tasha Wallis
Commissioner

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No.L-18348
	)	
Gary Mears	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Schwans Sales	)	Commissioner
	)	
	)	Opinion No. 39A-02WC

AMENDED ORDER

Claimant, who prevailed at his contested hearing, by and through his attorney, Patrick Biggam, seeks an award of interest not addressed in decision 39-02WC, dated September 11, 2002. Defendant, by and through its attorney, Christopher McVeigh, opposes an award of interest at this time.

Pursuant to 21 V.S.A.§ 664, as amended in 1997, if a claimant prevails at a hearing, "the commissioner's findings shall include the date on which the employer's obligation to pay compensation under this chapter began. The award shall include interest at the statutory rate computed from that date on the total amount of unpaid compensation." Given the statutory mandate, it is not necessary for a Claimant to specifically request an award of interest, although in this case he did so.

Accordingly, the order is amended to include that defendant pay claimant:

3. Legal interest on the unpaid compensation, computed from February 14, 2001, the date the approved Form 27 became effective;

4. An additional $180.00 in attorney fees because of the need to respond to the defense objection to this motion.

Dated at Montpelier, Vermont this 14th day of October 2002.

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R. Tasha Wallis
Commissioner

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File Nos. L-18348
	)	
Gary Mears	)	By: Margaret A. Mangan
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Schwans Sales	)	Commissioner
	)	
	)	Opinion No. 39-02WC

APPEARANCES:

Patrick Biggam, Esq. for the Claimant
Christopher McVeigh, Esq. for the Defendant

ISSUES:

1. Did the Claimant reach a medical end result on or about January 18, 2001?

2. If the Claimant did not reach medical end result in January 2001, did he forfeit his claim to temporary total disability benefits for a failure to conduct a good faith effort to look for work?

EXHIBITS

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	Job Search List
Defendant's Exhibit A:	Letters from Dr. Fenton 1/18/01 and 3/21/01
Defendant's Exhibit B:	Form 27 and related documentation (11 pages)

FINDINGS OF FACT:

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

2. Claimant began working for Defendant Schwans Sales in 1986 as a route truck driver delivering frozen food products to businesses and families. The work involved long hours and frequent lifting of heavy boxes.

3. In February 1998 Claimant developed knee pain, which prompted him to seek medical care. Dr. Christian Bean, the orthopedic surgeon he saw at the time, diagnosed a probable work-related medial meniscus tear, which required surgical intervention. That surgery, performed in March 1998, revealed a large defect in the "weight-bearing portion of the knee with significant loss of height and thickness of cartilage."

4. After the surgery, Claimant continued treatment, including physical therapy, but swelling, stiffness and pain in his knee persisted.

5. In April 1999 John May, Vocational Rehabilitation Counselor, determined that Claimant could not return to the job he had when he was injured and that he was entitled to vocational rehabilitation services.

6. After the entitlement assessment, vocational rehabilitation services were deferred until Claimant was physically stable post-operatively.

7. Eventually Claimant was referred to Thomas Minas, M.D., an orthopedic surgeon at Brigham and Women's Hospital and a leading physician in the area of autologous chondrocyte transplantation, which involves extracting cartilage from an individual, growing it outside, and then transplanting it back in the body.

8. On October 14, 1999 Dr. Minas performed a chondrocyte transplantation and patellar realignment on Claimant's left knee. Dr. Minas continued to follow the Claimant.

9. Because of persistent stiffness in the knee, Dr. Minas performed another operation in March of 2000. Claimant engaged in extensive physical therapy afterwards.

10. During follow-up visits, Dr. Minas examined the Claimant, measured range of motion with a goniometer, observed his gait, checked for swelling and assessed strength.

11. In May 2000 the parties, with the approval of the Department, entered into a Vocational Rehabilitation Plan Amendment with the goal that Claimant would successfully complete a Business Management and Marketing Course as a component of the overall goal for a Professional Certificate Program in Business Management at Champlain College. The carrier agreed to pay for tuition and costs, including textbooks.

12. The VR counselor billed RSKCo, Schwans Sales workers' compensation insurer, for services rendered. There is no indication that the carrier denied payment for any VR services.

13. In June of 2000 Dr. Minas estimated that Claimant would reach a medical end point two years after the implantation surgery of October 1999.

14. In December of 2000, the claims representative, Claimant and VR counselor all signed a VR amendment for a change of some classes from Champlain College to Community College of Vermont. The Level of Services was number 4 for and educational/academic program. And the Amended Vocational Goal was for a Sales Representative job.

15. In May of 2001, Dr. Minas noted that Claimant's gait and pain had improved "tremendously." He had range of motion to 90 degrees of flexion.

16. In March of 2002, Defendant accepted the 10% whole person assessment from Dr. Minas and the parties signed a Form 22 incorporating Dr. Minas's report for the rating, but not agreeing to the medical end result date. Also, on March 22, 2002 the defendant filed a Form 27 based on Dr. Minas's report. The Department on April 4, 2002 approved that Form.

Medical Opinions Re: Medical End Result

17. In a November 2, 2000 note, Dr. Minas documented a 95-degree range of motion and expressed hope that it would increase another 5 degrees. From that point, Claimant lost 5 degrees, and then gained it again.

18. On August 31, 2000 Dr. Minas concluded that Claimant could return to work with a sedentary work capacity. At that time, there was no job search requirement in the VR plan. However, on May 1, 2001 Dr. Minas wrote a letter opining that Claimant had been "totally disabled and unable to work …and remains disabled and unable to work due to left knee pain, reconstructions and rehabilitation that have been required. The maximum medical end will be reached in October 2001 and he should be able to be gainfully employed thereafter."

19. On October 4, 2001 Dr. Minas stated that Claimant had reached medical end result and, based on the 5th Edition of the AMA Guides, assessed a 10% whole person impairment. Claimant could flex his knee easily to 90 degrees and, with effort, to 100 degrees. The deep pain in his knee had resolved, although he still had discomfort. Dr. Minas expected some further improvement in symptoms over time, but placed him at medical end result and said he could return to work.

20. Dr. Minas's opinion related to medical end result is based on his expertise in the area of autologus chondrocyte transplantation, evidenced through his own publications and experience performing hundreds of those procedures. His experience led him to conclude that improvement after transplantation surgery progresses from baseline to 24 months when it stabilizes. His conclusion that Claimant reached medical end in October 2001 is one showing that this Claimant's progress was consistent with the pattern he had observed with others.

21. Dr. Jonathan Fenton, an osteopathic rehabilitation physician with certification in performing independent medical examinations, performed an independent medical examination for the defense. Dr. Fenton saw the Claimant on January 18, 2001, performed an examination and reviewed medical records. Dr. Fenton found that Claimant had equal bilateral measurements at the kneecap and thigh, that he did not have instability of his left knee, that he had no complaints of pain, no gait disturbance, no atrophy and no weakness. Dr. Fenton did not expect that Claimant's range of motion would exceed 85 degrees. He did not measure the Claimant's leg strength or his gait. In Dr. Fenton's opinion, Claimant was at medical end result because his condition was not expected to improve over the course of the following year.

22. While Dr. Fenton has experience performing independent medical examinations, he has little clinical experience with patients who had undergone knee cartilage transplant.

Return To Work

23. After it was determined that Claimant was entitled to vocational rehabilitation services, Claimant enrolled in college classes pursuant to a vocational rehabilitation plan and continued aggressive therapy with workouts at a health club. Nowhere in the plan was it determined that Claimant was to look for work, although an August 7, 2001 progress report suggested that job development and placement assistance would be offered in the future.

24. On July 18, 2001 Claimant underwent a functional capacity evaluation (FCE) at Work Recovery. That evaluation demonstrated the Claimant had a medium work capacity with positional limitations for climbing, crouching, kneeling, twisting and sustained positioning of his left leg.

25. On July 25, 2001, Attorney McVeigh for the defense wrote Claimant with instructions to look for work based on the FCE. Mr. McVeigh instructed the claimant to contact 15 employers per week and to document those contacts. Afterwards, Attorney Biggam entered his appearance on behalf of the Claimant.

26. On August 24, 2001 Defendant filed a Form 27 on the basis that Claimant had been "released for work...but has not made a reasonable effort to find work …" Attached to the Form 27 are the FCE and the July letter from Attorney McVeigh.

27. In November 2001, Claimant terminated vocational rehabilitation services with the express intent of considering job placement options. On November 19, 2001 the Workers' Compensation Director approved the vocational rehabilitation discontinuance (VR5).

28. On November 1, 2002 Defendant filed a Form 27 on the basis that Claimant had reached medical end result.

29. Claimant did engage in a job search that resulted in his securing full-time employment with Mekkelsen Trailer Sales & Rentals in East Montpelier, Vermont.

30. Claimant submitted evidence that his attorney worked 50.80 hours on this case and incurred $208.20 in necessary costs.

Discussion

31. Ordinarily, 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).

32. However, once the carrier has accepted a claim, the burden to justify termination of benefits falls to the defendant. See, *Merrill v. University of Vermont*, 133 Vt. 101 (1974).

Medical End Result

33. 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." "The proper test … is whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement." *Coburn v. Frank Dodge & Sons* 165 Vt 529 (1996)(citing Rule 2h). (emphasis added).

34. In cases such as this one, this Department traditionally has considered the following factors in deciding which expert opinion to accept: 1) whether the expert has had a treating physician relationship with the Claimant; 2) the professional education and experience of the expert; 3) the evaluation performed, including whether the expert had all medical records in making the assessment; and 4) the objective bases underlying the opinion. *Yee v. International Business Machines*, Opinion No. 38-00 WC (Nov. 9, 2000).

35. Dr. Minas treated the Claimant preoperatively, performed the surgery and monitored his postoperative progress. Dr. Fenton saw the Claimant once and that was before his range of motion reached its maximum. Dr. Minas's expertise in the area of autologous chondrocyte transplantation exceeds that of Dr. Fenton in this area. Dr. Minas has performed the surgery on hundreds of patients, observed the progress postoperatively and published his findings. It was against a background of such expertise that he evaluated this Claimant. Dr. Minas's evaluation was superior to that of Dr. Fenton because it involved observations over time as a treating physician and because it includes a surgical component and specialized knowledge based on his research in this new area of orthopedics. Finally, both physicians are objective in their assessments. I cannot accept the defense argument that Dr. Minas's objectivity was tainted by his advocacy for this Claimant, although that has occurred in other cases. See, e.g. *McEnany v. Shoreline Corporation*, Opinion No. 31-97 WC (Oct. 4, 1997).

36. Therefore, I accept Dr. Minas's opinion that Claimant had not reached medical end result in January 2001 when Dr. Fenton determined that he had. Since that time, Claimant's range of motion and gait improved; his pain and swelling lessened or resolved. Based on his research, Dr. Minas reasonably expected that his prescribed physical therapy and other treatment would result in significant medical improvement for two years after surgery.

Temporary Total Disability

37. "Under Vermont workers' compensation law, a Claimant is entitled to temporary disability compensation until reaching medical end result or successfully returning to work." *Coburn*, 165 Vt. 529 (citing *Orvis v. Hutchins*, 123 Vt. 18, (1962) (temporary disability ends when maximum earning power has been restored or recovery process has ended)). WC Rule 18 provides that with notice to the Claimant, a carrier may file a Form 27 to terminate temporary benefits to one who has been released to work if, after notice of an obligation to conduct a good faith search for "suitable work," a Claimant fails to do so. As noted above, Attorney McVeigh provided such notice to the Claimant based on Dr. Minas's release to work during a time the Claimant was engaged in vocational rehabilitation.

38. The defendant urges this Department to find that the term "suitable work" in Rule 18 must be not be entwined with the term "suitable employment" in Rule 26 "because the vocational rehabilitation goal of returning someone to suitable employment is different from the Rule 18 goal of encouraging injured worker to return to suitable work…" Schwans Response to Gary Mears' Proposed Findings and Conclusions dated May 17, 2002. However, this Department's interpretation that suitable "work" and suitable "employment" are one and the same has ample support in statutory and case law.

39. Under 21 V.S.A.§ 641(a), "When as a result of an injury covered by this chapter, an employee is unable to perform work for which the employee has previous training or experience, the employee shall be entitled to vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore the employee to suitable employment." (emphasis added). WC Rule 27 provides that "Vocational rehabilitation shall be provided by an employer when, as a result of a compensable injury or occupational disease, an injured worker is unable to return to suitable employment using his/her previous training or experience." As the Court stated, the workers' compensation rules "plainly state that Claimant is entitled to vocational rehabilitation services if she was unable to return to suitable work…" *Peabody v. Home Insurance Company*, 170 Vt. 635 (2000).

40. The defense attempt to create a difference between "employment" in the vocational rehabilitation context and "work" in the return to work context under Rule 18 lacks support in the Act and ignores the reason for vocational rehabilitation. Section 641 provides for restoration to suitable employment through vocational rehabilitation for those unable to perform work for which they had previous training and experience. If the Claimant could have found "suitable work" under Rule 18, he would not have been entitled to vocational rehabilitation at all.

41. From the overall goal of a workers' compensation system to return injured workers to work, it follows that the goals of Rule 18 and of vocational rehabilitation are identical. It would be inconsistent with the goal of vocational rehabilitation to permit a defendant to terminate benefits for failure to conduct a good faith job search under Rule 18 unless the rehabilitation plan itself carries a job search requirement. As the Court stated in *Sivret v. Knight*, one's "incapacity for work is total not only so long as he is unable do any work of any character, but also while he remains unable as a result of his injury either to resume his former occupation or to procure remunerative employment at a different occupation suited to his impaired capacity." 118 Vt. 344, 346 (1945). A vocational entitlement assessment determined that this Claimant could not resume his former occupation. The rehabilitation plan that followed was geared to education leading to employment suited to his impaired capacity. Claimant remained disabled. Therefore, he was entitled to temporary total disability benefits until he reached medical end result in October, 2001.

CONCLUSIONS OF LAW:

1. Because the Claimant did not reach medical end result until October 2001 and had not at that time successfully returned to work, he is entitled to temporary total disability benefits from the date of termination until October 4, 2001. See, *Coburn*, 165 Vt. 529.

2. As a prevailing Claimant, he is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A.§ 678(a). The 50.80 hours in this case are reasonable given the legal issues and necessary discovery. The claimed costs of $208.20 were necessary to the success. Therefore, Claimant is awarded $4572.00 in fees (50.80 x $90.00 per hour) and $208.20 in costs. WC Rule 10.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, Defendant is ORDERED to pay Claimant:

1. Temporary total disability benefits from the date of termination until October 4, 2001;

2. $4572.00 in attorney fees and $208.20 in costs.

Dated at Montpelier, Vermont this 11th day of September 2002.

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R. Tasha Wallis
Commissioner

Appeal:

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