

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

	)	State File No. K-20151
	)	
Jean Butler	)	By: Margaret A. Mangan
	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Huttig Building Products	)	
	)	Opinion No. 43A-01WC

**RULING ON MOTION TO ALTER OR AMEND JUDGMENT**

After Opinion No. 43-01WC was issued in this case, claimant asked for clarification on whether the order was intended to terminate all workers' compensation benefits for this claimant or whether it was meant to terminate only those specified in the Form 27. If termination covers only those benefits included on the Form 27, the claimant would be entitled permanency benefits for his work-related injury, which have yet to be determined. Claimant argues that no misconduct on his part should justify depriving him of permanency benefits.

A Form 27 Notice to Discontinue Benefits contains boxes that can be checked for the discontinuance of temporary total, temporary partial and medical benefits.

At issue in this case was whether the claimant's admitted fraud justified approval of the Form 27 and, if not, whether his activities warranted a discontinuance of some benefits. In paragraph 10 of the Conclusions of Law, I concluded, "such pattern of deception and manipulation and the likelihood that it has not stopped supports a conclusion that the Form 27 must be upheld and all benefits terminated." That pattern of deception included falsifying medical records and misrepresenting facts at the hearing itself, under oath. Such behavior justified termination of all benefits, including permanency, which was the intent of the original order.

Dated at Montpelier, Vermont this 10<sup>th</sup> day of January 2002.

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R. Tasha Wallis  
Commissioner

**STATE OF VERMONT  
DEPARTMENT OF LABOR & INDUSTRY**

Jean Butler	)	State File No. K-20151
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Huttig Building Products,	)	
(formerly Rugby Inc.)	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 43-01WC

Hearing held in Brattleboro on May 31, 2001 and in Montpelier on June 1, 2001.  
Record Closed on July 1, 2001.

**APPEARANCES:**

Richard H. Munzing, Esq. for the Claimant.  
Keith J. Kasper, Esq. for the defendant.

**ISSUE:**

Does the claimant's admitted fraud justify the approval of Form 27 and discontinuance of claimant's compensation benefits? If not, do claimant's activities warrant the discontinuance of some benefits?

**STIPULATIONS:**

1. On February 24, 1997, claimant was an employee of defendant within the meaning of the Vermont workers' compensation Act ("Act").
2. On February 24, 1997, defendant was the employer of claimant within the meaning of the Act.
3. On February 24, 1997, claimant suffered a personal injury by accident arising out of and in the course of his employment with defendant.
4. On September 13, 2000, defendant filed a Form 27 requesting termination of claimant's temporary total and medical workers' compensation benefits alleging fraudulent activity of the claimant.
5. On October 26, 2000, the designee of the Commissioner of the Vermont Department of Labor and Industry approved the Form 27.

6. Claimant has admitted to making the following false statements:
  - a) Two medical notes from Dr. Katz dated April 21, 2000.
  - b) Three receipts for the Fitness Barn seeking reimbursement in excess of payment.
  - c) Mileage reimbursement requests for the following dates for medical treatments not incurred by claimant: 2/22/99, 5/22/99, 6/22/99, 7/12/99, 9/8/99, 12/14/99, 1/25/00, 3/29/00.

These requests for mileage reimbursement resulted in payment to claimant for mileage reimbursement in the amount of \$899.46; plus overcharges for the Fitness Barn of \$564.50 for a total admitted overcharge of \$1,463.96.

7. In furtherance of this matter the parties also agree to the following:
  - i) Claimant is the individual shown in the videotape (Defendant's Exhibit A).
  - ii) Claimant's last two visits to Brigham & Women's Hospital occurred on August 21, 1999 and March 27, 2001.
8. Claimant seeks reinstatement of all workers compensation benefits retroactive to their discontinuance, attorney fees, costs, and interest thereon pursuant to the statute and rules.

**EXHIBIT LIST:**

Joint Exhibit I:	Select medical records of the claimant.
Joint Exhibit II:	Deposition transcript of Dr. Ruhl.
Joint Exhibit III:	Deposition transcript of Dr. Donaldson.
Joint Exhibit IV:	Deposition transcript of Dr. Langweiler.
Claimant's Exhibit 1:	Two Fitness Barn credit card payments.
Claimant's Exhibit 2:	Dartmouth Hitchcock pamphlet on non-epileptic seizures.
Claimant's Exhibit 3:	Munzing letter to D. Tamayo dated 5/26/00.
Claimant's Exhibit 4:	Genex Progress/Closure Report
Defendant's Exhibit A:	Videotape.
Defendant's Exhibit B:	Private investigator's report.
Defendant's Exhibit C:	Claimant's mileage reimbursement requests.
Defendant's Exhibit D:	Defendant's summary of mileage reimbursement requests, for which defendant has been unable to locate a corresponding medical record.
Defendant's Exhibit E:	Alleged records from Brigham & Women's Hospital dated 4/21/00.
Defendant's Exhibit F:	Fitness Barn receipts.
Defendant's Exhibit G:	Curriculum Vitae of Kurt Wieneke, M.D.
Defendant's Exhibit H:	Curriculum Vitae of James A. Grubman, Ph.D.

## **MOTION FOR SUMMARY JUDGMENT:**

1. Claimant made a motion for summary judgment prior to the formal hearing requesting an immediate restoration of all temporary disability benefits, medical coverage, and vocational rehabilitation. Claimant argues that the defendant's filing and the Commissioner's acceptance of a Form 27 on the basis of misrepresentation for the purpose of obtaining workers' compensation benefits contravenes the claimant's rights under 21 V.S.A. §708(a). The department holds that misrepresentation for the purpose of obtaining workers' compensation benefits is valid grounds for a Form 27, and that its approval, given the proper evidence, does not contravene the claimant's rights.
2. The basis for the insurer's termination of benefits was the claimant's alleged fraudulent activities. But, claimant argues forfeiture of benefits can only be initiated by the Commissioner under 21 V.S.A. §708(a) and must include notice and opportunity for hearing. However, it is not realistic, nor required, that this department initiate all such actions.
3. A Form 27 is based on 21 V.S.A. §643a, which allows for the discontinuance of benefits by the employer under several conditions. First, unless the employee has returned to work the employer must notify both the Commissioner and the employee prior to terminating benefits. The notice must be filed on a Form 27, shall include the date of discontinuance, and the reasons for it. Every notice is then reviewed by the Commissioner to determine sufficiency of the basis for discontinuance. The Commissioner will then either approve the discontinuance or upon finding the evidence does not reasonably support the discontinuance will order payments to continue. See 21 V.S.A. §643a. In the current case, the defendant filed a Form 27 with the department and the claimant on September 12, 2000. The defendant specified a reason for the discontinuance and filed supporting evidence. Importantly, the form states that the discontinuance did not go into effect until September 22, 2000, ten days after it was mailed, giving the claimant statutory notice of the discontinuance. On October 26, 2000, after review, the Commissioner accepted the evidence as basis for discontinuance and approved the form.
4. Claimant argues that misrepresentation for the purpose of obtaining workers' compensation benefits is not a valid basis for a Form 27. While 21 V.S.A. §643a is silent on what grounds can form a basis for the discontinuance of benefits, Workers' Compensation Rule 18 lists examples of what has been used. It does not list all possible bases for termination. In the current case defendant alleges that the claimant misrepresented his condition, his expenses, and his doctor's reports to obtain benefits and compensation. Sufficient evidence has been submitted to establish the basic elements of that position. Claimant now has the opportunity to refute those allegations in the formal hearing and appeals process.

5. Relying on Workers' Compensation Rule 45, claimant argues that 21 V.S.A. §708(a) restricts the forfeiture of benefits on the basis of misrepresentation for benefits to a motion initiated by the Commissioner. Claimant's reading of §708(a) and Rule 45, however, is too restrictive. Section 708 addresses administrative penalties and grants the Commissioner the power to assign penalties such as forfeiture of benefits or fees of up to \$1,000. While there is no question that §708 empowers the Commissioner, the statute does not go as far as to limit the power to bring such an action to her. The statute contains the conjunctive "and" when it states, "[a] person who wilfully makes a false statement or representation...may be assessed an administrative penalty of not more than \$1,000.00 **and** shall forfeit all or a portion of any right to compensation under the provisions of this chapter..." (emphasis added). The "and" would be surplusage were it not possible for an insurance carrier to bring an action to terminate or reduce benefits.
6. Similarly, §708(a) in no way abridges the defendant's right to cease payment when misrepresentation is discovered. Rather the statute serves to empower the Commissioner to act when misrepresentation is discovered. It is an administrative penalty that Commissioner wields as time and circumstances dictate. Finally, the claimant's due process is not violated by Form 27 discontinuance because it requires a level of proof to obtain the Commissioner's approval and is subject to formal administrative hearing during which the claimant is fully heard.
7. Therefore, claimant's motion for summary judgment to nullify a Form 27 based on a supported allegation of fraudulent activity is DENIED.

**FINDINGS OF FACT:**

1. Claimant was injured in the course of his employment with Rugby, Inc. (now known as Huttig Building Products, collectively "employer") when he was working as a driver of a tractor-trailer truck. At a loading dock, a heavy load of glass doors weighing more than 1,000 pounds shifted and struck him on his head resulting in fractures and dislocations at C5 and C6 plus central cord contusion and compression and ruptured disks at C5-6 and C4-5. Claimant immediately suffered a loss of consciousness and paralysis of all four extremities, followed by pain in his neck, trunk and extremities and weakness of the left arm. He also had other injuries including trauma to the left knee, headaches, depression, dizziness, insomnia and weight loss.
2. In the three weeks following the accident, the claimant underwent three cervical spine surgical procedures: 1) discectomies with bone grafts on February 25, 1997; 2) repositioning of the bone grafts on February 28, 1997; and 3) discectomy, foraminotomy and placement of a graft to refuse the vertebrae from C4 to C6 on March 10, 1997.
3. At the end of March 1997 the claimant was discharged to his home under the care of Clifford Langweiler, M.D. who became his primary care physician. Because he could not walk at first, he was dependent on others for assistance with activities of daily living. For the treatment of pain, depression and other symptoms, he was prescribed OxyContin, Tylox, Hytrin, Senokot and Ambien. He received extensive physical and occupational therapy and home nursing services through Southern Vermont Home Health Agency (SVHHA).

4. Gallagher Bassett Services administered this case for the employer. Deb Tamayo was the insurance adjuster.
5. By mid April 1997 personnel at SVHHA documented intense rage and anger in the claimant directed at the employer and its agents. Depression secondary to his physical condition was diagnosed and Elavil, Amitriptylene and Zoloft were prescribed.
6. A psychiatrist, Dr. Dennis Agallianos, diagnosed severe major depressive disorder and recommended continued use of Zoloft and the addition of Halcion. Eventually a referral for psychotherapy services was made to Nicholas Belsky, a psychiatric social worker.
7. Mr. Belsky has been a staunch advocate for this claimant, testifying that he believes in the claimant's truthfulness and sincerity. Such a conclusion may assist him in his therapeutic relationship with the claimant, but is at odds with the overwhelming evidence of this claimant's deceit.
8. Claimant denied categorically to Dr. Agallianos that he had any history of drug and alcohol abuse, despite such a history.
9. Because of the severity of the claimant's injuries, the defendant initially paid mileage reimbursement and other requests submitted without question.
10. For follow-up care, the claimant continued under the primary care of Dr. Langweiler, and saw neurosurgeon Dr. Robert Krug in Connecticut, orthopedist Dr. Thomas Kleeman in Manchester, New Hampshire. He later treated with Dr. Theodore Ruel and Dr. Deirdre Donaldson, both neurologists, and Dr. Nathaniel Katz, a pain specialist.
11. On May 31, 1997 the claimant fell at home, striking the back of his head on a cast iron stove. A five-day hospitalization followed. Dr. Lawrence Jenkyn, a neurologist, treated the claimant for what was thought to be a seizure disorder, an altered mental state and falling. A negative EEG ruled out a seizure disorder.
12. However, at the time when a seizure disorder was still suspected, the claimant was advised not to drive, advice he told his physicians he was following. Claimant later denied ever having been told not to drive. And he drove, often with his children in the car.
13. Between January of 1999 and August 2000, Dr. Theodore Ruel, a neurologist, treated the claimant for what was thought to be a seizure disorder. In his opinion, neither the description of the seizure nor the EEG results were typical for an epileptic seizure.
14. Another neurologist, Dr. Dieder Donaldson, first saw the claimant on August 23, 2000 at the Brattleboro Memorial Hospital to evaluate what was thought to be seizures.
15. In February 1999 claimant was prescribed a 20-mg dose of OxyContin.

16. On August 12, 1999 Dr. Katz at the Brigham and Woman's Hospital in Boston, noted that the claimant's OxyContin dosage was 40 mg. three times per day (120mg/day) and that he would attempt to decrease it to 20 mg a dose or 60 mg. per day.
17. An orthopedic clinic note of March 29, 2000 states as part of the claimant's history that he was taking 240 mg. of OxyContin a day and what additional amount he thought was needed.
18. The forged records from Nathaniel Katz, M.D. dated April 21, 2000 required some computer skill. The logo for the hospital, medical record number, date of dictation and transcription all appear, as they would in a legitimate record.
19. One of the notes for the fictional April 21, 2000 visit (Defendant's Exhibit E1) was for an increase in the dose of Neurontin from 900 mg. to 1200mgs per day, Dilantin from 1200 mg. to 1600 mg per day, OxyContin 80 mg. from two to three times per day, OxyContin 40 mg. from two to three times daily and OxyContin 20 mg. from two to three times per day. The OxyContin daily dose under that note was up to 420mg. per day. Before that time he had been prescribed far lower dosages---120mg. per day according to one note, 240mg. according to another. The reliability of the 240 mg number is suspect, however, since it was based on the claimant's history.
20. During an August 2000 hospitalization a nurse documented a stark change in the claimant's behavior one day—he had been up walking, performing activities of daily living and cleaning up then resting comfortably until his wife arrived when he complained of discomfort and dizziness even with the raising of the head of his bed. His wife then cut up his food and fed him part of his meal.
21. Claimant told his treatment providers that he was religiously taking his Dilantin, an anti-seizure medication, yet inexplicably his blood levels were far below therapeutic levels, suggesting at first that some metabolic function accounted for the discrepancy between dosage and blood level. When a time came when his medication administration could be observed directly during a hospitalization, blood levels of Dilantin rose to therapeutic levels. Medical testimony strongly supports non-compliance as the only logical explanation for the difference. Clearly the claimant was not taking the medication as prescribed yet always used up a 30-day supply.
22. The claimant did not see Dr. Katz in Boston from August of 1999 until March of 2001 although he represented to his other physicians that Dr. Katz was following him for pain control.
23. Claimant admits to forging two medical notes from Dr. Katz, both dated April 21, 2000. He admits to forging two receipts to the Fitness Barn. He admits to falsely seeking mileage reimbursements for trips to medical providers he did not take on February 22, 1999, May 22, 1999, June 22, 1999, July 12, 1999, September 8, 1999, December 14, 1999, January 25, 2000 and March 29, 2000.

24. Although he has not admitted to it, it is clear that the claimant also falsified mileage reimbursement claims he made for going to Boston's Brigham's Hospital on April 21, 2000, a date for one of the forged records. The same is true for mileage reimbursement requests for trips to Boston to see Dr. Katz on October 23, 1999, February 15, 2000 and March 27, 2000 when he never saw Dr. Katz on those dates.
25. When confronted with the forged medical records, claimant initially blamed the forgery on his son. He testified that he wanted to see if his son would stand up for him. Claimant denied his own involvement in the forgery to his wife, mental health counselor and others.
26. He then justified the falsifications by stating they were necessary because of the delays in getting reimbursement. Later he said it was to reimburse himself for out-of-pocket expenses. Yet he never told his wife, mental health counselor or other health care professionals that he was owed funds for unreimbursed prescriptions or services.
27. Claimant submitted false claims for payment of the Fitness Barn (a health club) membership. Then he blamed the Fitness Barn for overcharging him.
28. Claimant's local primary care physician, Dr. Langweiler, simply wrote prescriptions for what he thought was a dose prescribed by Dr. Katz in Boston. In the process the claimant was taking what physicians determined were astonishing doses of opioids. He is now in need of hospitalization for treatment of this self-inflicted opioid dependency.
29. After the Form 27 was filed in this case, the claimant cancelled his physical therapy visit, falsely stating that he was to be hospitalized. Two weeks later he told the therapists he was not yet released to do physical therapy, a bold lie.
30. Claimant has presented to physicians a claw-like deformity (known as "main en griff posture") in his hands. He claims that he must wear gloves because his hands are so cold, and did so at the hearing. However, a videotape taken in January 2001 shows him in shirtsleeves and no gloves. There was snow on the ground. He was holding, loading, aiming and shooting a rifle, evidencing no sign of a claw-like hand formation, or inability to perform fine motor movement.
31. Claimant presents as one unable to use his hands yet has been observed without his gloves unscrewing the top off a medicine bottle. Several health care providers—including doctors and a physical therapist—were surprised when they observed the claimant's activities on videotape given the disabled picture he presented to them.
32. Claimant has been prescribed treatment for a seizure disorder because of a history he has given and behavior his wife has observed during which his body goes into "contorted movements" and he turns red, although he remains conscious. An EEG (electroencephalogram)—the gold standard for diagnosing a seizure disorder-- was negative. However, it is possible that the claimant has what are known as pseudo seizures, caused by conscious or unconscious forces.



33. An April 26, 2001 note from Dr. Katz records his opinion that the claimant had reached maximum medical improvement.
34. On occasion the claimant has worked at a friend's store, selling items and ringing up sales on a cash register.
35. Claimant does not challenge the defense testimony through Deb Tamayo that the claimant received more income from his social security and workers' compensation benefits combined than he did while working.
36. As a result of the claimant's work-related spinal injury, he has pain, left sided weakness and depression. He has been left with a permanent impairment.
37. I accept Dr. James Grubman's definition of malingering as the production of fraudulent behavior for secondary gain. Such behavior is possible even with one who has suffered a legitimate work-related injury. It is a simple cost-benefit phenomenon.

#### **CONCLUSIONS OF LAW:**

1. The burden is the defendant's to prove that the claimant willfully made a "false statement or representation for the purpose of obtaining any benefit or payment ..." 21 V.S.A. § 708(a). Because the alleged conduct is analogous to civil fraud, the higher standard of clear and convincing evidence applies. See, *In re Smith*, 169 Vt. 162 (1999) (citing *Harrington v. Department of Employment and Training*, 152 Vt.446, 448-49 (1989); *Lyndonville Sav. Bank & Trust Co. v. Peerless Ins. Co.*, 126 Vt. 436, 439 (1967)).
2. Defendant has met that burden.

A person who wilfully makes a false statement or representation, for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for her or himself or for any other person, after notice and opportunity for hearing may be assessed an administrative penalty of not more than \$1,000.00 and shall forfeit all or a portion of any right to compensation under the provisions of this chapter, as determined to be appropriate by the commissioner after a determination by the commissioner that the person has wilfully made a false statement or representation of a material fact.

21 V.S.A. § 708 (a)

3. Material alteration of a medical record and presentation of that record to the employer in the context of a workers' compensation claim is the willful making of a false representation. Rule 45(5). *Workers' Compensation Division v. Emerson-Weston Opinion No. 45SC-99WC* (Nov. 10, 1999).

4. This claimant lied to his health care providers and to his family in order to increase his workers' compensation benefits. When finally confronted with evidence of the forged medical records, he attempted to blame the forgery on his son. When confronted with evidence of false bills for a health club, he responded that its billing practices were somehow faulty.
5. Yet the claimant's deception is not limited to his forging medical records and billing receipts. He has presented to physicians and to the hearing officer stiffness in his hands. He claims he must wear gloves because his hands are so cold, and did so at the hearing. However, a videotape taken when claimant did not know he was being observed showed him outside in snowy weather, holding a gun without wearing gloves and with no sign of a difficulties with his hands, although his gait was clearly stiff.
6. The real question presented is the extent of benefits the claimant should forfeit as a result of his deceptive practices. His work related injury is undisputed. He incurred severe injuries, underwent major surgical procedures and has chronic pain. Undoubtedly his permanency rating once determined will be significant.
7. Claimant has received at the carrier's expense medical care from physicians in Vermont, New Hampshire and Massachusetts. They include orthopedists, neurologists, pain specialist, a physical therapists, counselor and primary care physician. He received physical therapy until the Form 27 was filed.
8. Claimant received at the carrier's expense temporary total disability benefits from the date of his injury on February 24, 1997 until those benefits were terminated in November of 2000. He received vocational rehabilitation benefits until the Form 27 was filed.
9. In this unusual case, there is ample diverse evidence supporting the defense position that this claimant indeed malingered. He undisputedly forged medical records. He earned more from combined benefits than he could of by working. He exaggerated symptoms when in the presence of health care providers. Objective evidence demonstrated that the claimant could do more than what he represented to his physicians. As a result he has already received more benefits than what he was owed. If I were convinced that his deceptive practices had stopped, I would consider the resumption of some benefits. But the evidence suggests that the pattern is ongoing and that what he tells to health care providers cannot be trusted.
10. Such pattern of deception and manipulation and the likelihood that it has not stopped supports a conclusion that the Form 27 must be upheld and all benefits terminated.

**ORDER**

1. Based on the Foregoing Findings of Fact and Conclusions of Law:
2. The defendant's request for approval of the Form 27 is GRANTED.
3. The claimant's request for the resumption of benefits is DENIED.

Dated at Montpelier, Vermont this 16<sup>th</sup> day of November 2001.

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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.