Mead v. Western Slate (June 24, 2002)
(Emergency Order to Rescind Commissioner's Order from 10/05/01)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-5074
	)	
	)	By: Margaret A. Mangan
Martin Mead	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Western Slate Inc.	)	
	)	Opinion No 34Y-01WC

RULING ON DEFENDANT'S MOTION FOR EMERGENCY ORDER TO RESCIND OR STAY COMMISSIONER'S ORDER DATED OCTOBER 5, 2001

This matter, decided on October 5, 2001, is now on appeal in the Rutland Superior Court. The order in favor of the claimant was the subject of a Motion to Stay in this department and at least two Motions to Stay in the superior court, all of which were denied.[1] According to the Claimant, no benefits have yet been paid pursuant to that order and the Rutland Superior Court has found the defendant in contempt.

Defendant now moves for an "Emergency Order" to Rescind or Stay the department's October 5, 2001 order. The motion is based on a Rutland Superior Court award in favor of the claimant in a tort action where a jury found in favor of the claimant for damages caused by the rock side at the defendant's quarry. *Rutland Superior Court Docket No. S0057-00RcC.* The rockslide was also the basis of the worker's compensation claim. The jury determined that the injury was caused by an act committed with a substantial certainty of harm. *Defendant's Statement of Undisputed Facts in Motion for Summary Judgment. Rutland Superior Court, Docket No. 672-11-01Rdcv.* Defendant now argues that the department's worker's compensation order, based on a work place "accident," directly conflicts with a jury finding of an intentional tort and, as such, must be rescinded. It characterizes the present motion as a "emergency" because the "court has directed payment of the Commissioner's Order by June 25, 2002…" *Defendant's Emergency Motion to Rescind or Stay Commissioner's Order Dated October 5, 2001 at 4.*

In essence defendant asks the Commissioner to overturn a superior court order, The carrier may pursue a subrogation claim or take other action in superior court, but he has no basis for the requested relief in this forum.

[1] The Commissioner's Ruling denying the motion for stay is dated November 16, 2001

Also, as a party who has failed to comply with a department order, the defendant may be subject to an administrative citation and penalty. 21 V.S.A.§ 688; WC Rule 45.

THEREFORE, the defendant's motion for an order to rescind or stay this Department's order dated October 5, 2001 is DENIED.

Dated at Montpelier, Vermont this 24th day of June 2002.

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R. Tasha Wallis
Commissioner

Mead v. Western Slate, Inc. (April 26, 2001)
(Motion for Clarification)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	
	)	State File No. P-05074
Martin Mead	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Western Slate, Inc.	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 34C-01WC

RULING ON MOTION FOR CLARIFICATION

After the claimant prevailed at the hearing in this Department, the defendant moved for reconsideration and stay, post-hearing motions which were denied. Defendant then appealed to the Rutland County Superior Court where defense counsel renewed the motion for stay, without success. To date, claimant argues, he has not been paid any benefits ordered by the Commissioner on October 5, 2001.

In the pending motion, claimant asks the Department to clarify two points: the date temporary total disability benefits were to begin and the date when interest began to accrue.

The issue presented at the hearing was solely one of compensability. No specific finding on the period of temporary total disability was made, although the claimant, without objection, presented exhibits outlining the claimed periods of disability. Those exhibits support claimant's claim of entitlement to temporary total disability benefits for 16 weeks, with commencement on July 31, 1999. After concluding that the claim was compensable, the Commissioner ordered defendant to pay all benefits related to his left knee meniscectomy, attorney fees, and interest computed at the statutory rate from October 20, 2000 on the unpaid compensation.

The conclusion that defendant's obligation to pay benefits began on the date of the surgery, October 20, 1999 (Conclusion of Law, ¶ 3), was in compliance with 21 V.S.A.§ § 664 to specify the operative date from which interest was to accrue. It was not the operative date for commencement of temporary total disability benefits.

With regard to interest, defendant argues that it has no obligation pending appeal, a conclusion contrary to the plain language of the statute, which states that "[a]n award or order of the commissioner shall be of full effect from issuance unless stayed by the commissioner, any appeal notwithstanding." 21 V.S.A.§ 675(b). "[I]n no case shall such an appeal operate as a supersedeas or stay unless [the commissioner] or the court to which such appeals is taken shall so order." § 607. Because the order in favor of the claimant included interest at the statutory rate, that interest continues to accrue from October 20, 1999 to the date of payment, notwithstanding the pending appeal.

In sum, claimant is entitled to sixteen weeks of temporary total disability benefits and interest at the statutory rate from October 20, 1999 until paid.

Dated at Montpelier, Vermont this 26th day of April 2002.

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R. Tasha Wallis
Commissioner

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-05074
	)	
Martin Mead	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Western Slate, Inc.	)	Commissioner
	)	
	)	Opinion No. 34R-01WC

RULING ON DEFENDANT'S MOTIONS FOR RECONSIDERATION OR FOR STAY PENDING APPEAL

On October 5, 2001 the Commissioner held that the injury to the claimant's knee arose out of and in the course of his employment with Western Slate, Inc. and awarded relief. In its post hearing motions, the defendant, by and through its attorneys Kiel, Ellis & Boxer, moves for reconsideration and reversal of that decision or for a stay pending appeal. Claimant, by and through his attorney, Thomas W. Costello, opposes the motions.

RECONSIDERATION:

This case involved a question of fact. It was undisputed that the claimant injured his left knee after August 18, 1999 and that the injury resulted in the need for medical care, as well as temporary total and permanent partial benefits. The question presented was whether the injury occurred as a result of the claimant's August 1999 work-related injury. The conclusion that the claimant has proven his case was based on the opinion of Dr. Joseph Vargas, an orthopedic surgeon and the credible testimony of fact witnesses who observed the claimant. After reviewing the arguments of counsel and testimony presented at the hearing, my assessment regarding credibility has not changed and I find no other basis for reversing the conclusion reached.

Therefore, the defense motion to reconsider and reverse the decision is DENIED.

STAY:

Defendant also argues that the award should be stayed pending appeal.

An award of the Commissioner is in full force and effect unless stayed. 21 V.S.A. §675(b). To justify the issuance of a stay the moving party must demonstrate each prong of a four part test: "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 Offices, Inc.*, 148 Vt. 634, 635 (1987).

It is not likely that the defendant would succeed on the merits in this case given the medical specialty and testimony of the claimant's expert. Even if the Department were to accept the defense proposition that the payment of benefits equates with substantial harm harm, no such harm could be found in this case given the limits of the benefits sought. Section 675 (b) was enacted "to prevent the filing of appeals in order to delay the payment of an award by the Commissioner, based on 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" *Bodwell v. Webster Corp.* (December 1996). The best interests of the public would not be granted by issuing a stay in this case.

THEREFORE, the defense motions for reconsideration and for a stay are DENIED.

Dated at Montpelier, Vermont this 16th day of November 2001.

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R. Tasha Wallis
Commissioner

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-05074
	)	
Martin Mead	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Western Slate, Inc.	)	Commissioner
	)	
	)	Opinion No 34-01WC

Hearing held in Brattleboro, Vermont on March 28, 2001
Record closed on May 14, 2001

APPEARANCES:

Thomas W. Costello, Esq. for the claimant
Andrew W. Goodger, Esq. for the defendant

ISSUE:

Is Martin R. Mead's left knee condition compensable?

EXHIBITS

Claimant's 2:	Photo of High Wall
Claimant's 4:	Photo of quarry
Claimant's 11:	Photo (black and white copy) vehicle in quarry
Claimant's 23:	Memorandum from Corp to Petrie dated 9/20/99
Claimant's 53:	Lost wage summary (left knee) with a total of 642 hours or 16 weeks
Claimant's 54:	Health Insurance Claim Forms (7)
Claimant's 54(b):	Medical Bills Summary (left knee) with a total of $7554.00
Claimant's 56:	Temporary total and permanent partial disability calculation (left knee)
Claimant's 57:	Photo of claimant holding child
Claimant's 69:	Rutland Regional Medical Center Emergency Department note 7/18/99
Claimant's 70:	Retainer Agreement
Defendant's A:	Curriculum vitae of Mark J. Bucksbaum, M.D.
Defendant's B:	Claimant's medical records

STIPULATED FACTS:

1. At all relevant times claimant Martin R. Mead was an employee within the meaning of the Vermont Workers' Compensation Act.

2. At all relevant times Western Slate, Inc. was an employer within the meaning of the Vermont Workers' Compensation Act.

3. On August 18, 1999 claimant Martin R. Mead was injured when he was struck by falling rock and other debris while working in the McCarty quarry for defendant Western Slate, Inc. The injuries with which he was diagnosed as a result of the accident consisted of a broken left shoulder and collarbone, broken right hand and broken right leg. He returned to work full-time in February 2000.

4. During the month of August 2000 the claimant sought diagnosis and treatment for pain and discomfort in his left knee. He was subsequently diagnosed with a "torn medial meniscus.' Joseph Vargas, M.D, repaired this problem surgically on October 20, 2000.

5. In a letter signed by Dr. Vargas and dated December 21, 2000 Dr. Vargas rated claimant's left knee condition as a permanent partial impairment of "3% whole person or a 7% of the left lower extremity."

6. The sum of medical bills for treatment to claimant's left knee is $2,746.00.

FINDINGS OF FACT:

1. Martin Mead, the claimant, has had limited formal education. He is a self-described hustler who could do many different kinds of jobs at the quarry including general mechanics work, building and welding. He has had past experience as a mechanic, truck driver and sawyer.

2. Claimant was injured during the fall of rock and debris ("rock slide") on August 18, 1999 at the quarry, his place of employment. The injury occurred during the course of his employment and arose out of his employment.

3. The rockslide was violent and tumultuous. The rock and debris fell a distance of approximately one hundred and thirty four (134) feet and amounted to material that would have filled several wheelbarrows. Some of the rocks were large, others small. The debris consisted of soil and vegetation.

4. The falling materials landed on and around the claimant. Some of the material struck him directly and some struck him after ricocheting off the surface on which the claimant was standing, called the "pillar," or off the vertical surface, called the "highwall."

5. Claimant was then thrown to his knees onto the pillar and then from the pillar a distance of approximately fifteen (15) feet over the rock surface into a pool of water. He found himself on his knees and elbows in the pool of water.

6. Rick Mead, the claimant's brother who had been working near him, rescued and evacuated the claimant from the pit. He was the only witness and recalls that the claimant had been struck all over his body, including both knees.

7. The Poultney rescue service transported the claimant to the Rutland Regional Medical Center. The report of the rescue service indicates that the claimant was hit "down his back and legs" by the rock and debris.

8. The emergency department record from the date of the injury reports claimant's history as follows:

> The patient …works at a quarry. He was doing some drilling a large slab of rock came down and hit him on the back of the left shoulder, and also another piece came down and hit him on the right hand. He started running out of the area and *another piece came down and hit him on the back of his left leg*." (emphasis added).

Emergency Department Report, Rutland Regional Medical Center, 8/18/99 (Exhibit 69).

9. Claimant was diagnosed with fractures of the right hand, left scapula, left shoulder and lacerations and bruises on both of his upper and both of his lower legs and back, shoulders and trunk. His pain was severe. At the hospital his left arm was splinted and placed in a sling. He was given pain medication and sent home.

10. Two days later the claimant returned to the emergency department with a complaint of severe pain in his right leg with any weight bearing. A diagnosis of a fractured right fibula (the smaller of the 2 major bones in the lower leg) was made at that second visit and an air cast applied.

11. The mechanics of the accident and its immediate aftermath involved sudden and severe twisting, turning, stretching and bending of and to the claimant's legs and resulted in significant stress to and on the knee joints.

12. Both of claimant's knees were swollen after the accident.

13. Claimant was totally disabled from work from the day of the accident until December 16, 1999. During that period he convalesced at home under the treatment of Dr. Vargas.

14. Claimant returned to work in the quarry part-time on December 16, 1999, then full-time on February 6, 2000. His work was heavy physical labor.

15. During the period after the accident the claimant did not receive treatment for any problem with his left knee. Although he had some discomfort in that knee, it was not anything that kept him from working so he did nothing about it.

16. Claimant expected discomfort after the accident and did not make much of his knee pain until it became severe. When he noted increasing pain in the left knee in the spring of 2000 at a time when he was no longer under the care of a physician, he did nothing.

17. An August 1, 2000 note from the claimant's visit to the Mettowee Health Clinic reflects his complaint of knee pain of two weeks duration.

18. There is no evidence of any trauma to the claimant's left knee before August 1, 2000 except the August 18, 1999 accident.

19. On August 5, 2000 a child fell against the claimant's feet. Although the impact was slight, the claimant felt pain in his knee. The medical record states that it was the claimant's niece, who would have been about six years old at the time, who fell against him. The claimant testified that it was his granddaughter, about a year old and just learning to walk, who fell on his feet.

20. Claimant ultimately returned to Dr. Vargus who on September 13, 2000 wrote that the claimant might have complained of pain in both of his knees on occasion in the past, although he might not have recorded those complaints.

21. Dr. Vargas diagnosed a torn meniscus. He then performed an arthroscopy and excision of a complex tear of the posterior horn of the claimant's medial meniscus on October 20, 2000.

22. Claimant submitted a copy of his contingency fee agreement with his attorney. No documentation supporting his claim for 103.5 hours and $584.90 in costs has been filed.

MEDICAL OPINIONS:

1. In the opinion of Dr. Joseph Vargas, the claimant's treating orthopedic surgeon, the claimant tore his meniscus on August 18, 1999 but did not notice it because the tear at that time was slight and he had many other more obvious injuries. As time went on and he continued to work, the tear increased until the claimant could no longer tolerate it.

2. Dr. Vargas's opinion that the claimant's torn meniscus was caused by the August 18, 1999 accident is based on his physical findings, his laboratory findings, the claimant's history and his clinical judgment formed in 30 years of orthopedic practice. During the surgery he performed on the claimant's knee, he noted a complex tear that appeared to have extended over time. Dr. Vargas explained that discomfort associated with a torn meniscus is proportional to the degree of tear. In the early stage when only a minimal tear was present, the claimant's symptoms would have been minor. However, as the tear later progressed, his symptoms would have increased. Dr. Vargas expressed confidence that causation exists despite the absence of written documentation of left knee symptoms for almost a year.

3. Dr. Mark Bucksbaum, a physiatrist, testified for the defendant after reviewing the claimant's medical records. He had not seen the 1999 emergency room reference to rocks hitting the claimant's left leg. He noted that all medical references to leg injuries were to the claimant's right side until August of 2000. Dr. Bucksbaum explained that a torn meniscus commonly occurs from rotating or twisting movements, in this case more likely the niece falling on the claimant's legs than any rock sliding accident a year earlier. Because there was no documentation of left knee involvement until the summer of 2000 and because close to a year had elapsed since the accident, Dr. Bucksbaum concluded that there is no way to link the 1999 event to the torn meniscus. At the time of his testimony, Dr. Bucksbaum did not recall if the claimant had hit the ground at the time of the accident. He did not know that the claimant had been thrown twenty feet.

DISCUSSION:

1. 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).

2. 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).

3. The claimant testified credibly that he had left knee pain after the 1999 accident but did not think much of it until it became severe in the summer of 2000. This is a man who suffered injuries to multiple areas of his body, one of which –the fibula—had been fractured without his or his physician's noticing it for two days. It is not surprising that he may not have reported minor symptoms.

4. Dr. Vargas's testimony is more persuasive than that of Dr. Bucksbaum because of his expertise in orthopedic surgery and his knowledge of the events surrounding the accident. His conclusion that the claimant's 1999 accident led to the torn meniscus is well founded on a credible history, observations of the injured site during surgery and a logical explanation of the escalation in symptoms when a minor tear progresses to a major one requiring surgery.

5. To accept the defense position that a child caused the claimant's torn meniscus would be to ignore the fact that a clear documentation of the claimant's knee pain predated any child's falling on his legs. The meniscus had already been torn.

CONCLUSIONS OF LAW:

1. With credible lay and medical testimony, the claimant has met his burden under *Burton*, 112 Vt. 17 of proving that it is more probable than not that his meniscal tear arose out of his 1999 work-related accident. As such he is entitled to medical expenses under 21 V.S.A. § 640, temporary total disability benefits under § 642 and permanent partial disability benefits under § 648 for treatment, disability and permanency related to the left knee meniscectomy.

2. In addition, because he has succeeded in this claim because of the efforts of his attorney and has provided proof of his contingency fee agreement, he is awarded attorney fees based on 20% of the total award. 21 V.S.A. § 678 (a).

3. The defendant's obligation to pay benefits began with the meniscectomy on October 20, 2000. Accordingly, the defendant is obligated to pay interest computed at the statutory rate on the total amount of unpaid compensation from that date. 21 V.S.A. § 664.

ORDER:

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

1. All benefits related to his left knee meniscectomy;
2. Attorney fees of 20% of the amount awarded;
3. Interest computed at the statutory rate from October 20, 2000 on the unpaid compensation.

Dated at Montpelier, Vermont this 5th day of October 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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.