STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. H-09653
Robert Ashline	)	
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
LDL Company, Inc.	)	
	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 36S-01WC

RULING DENYING DEFENDANT'S MOTION FOR STAY

APPEARANCES:

Craig Weatherly, Esq. for the claimant
William A. O'Rourke, Esq. for the defendant

Since the issuance of opinion number 36-01WC dated, October 23, 2001 the defendant, LDL Company, Inc. by its attorneys Ryan, Smith and Carbine Ltd. and pursuant to 21 V.S.A. Section 675(b), moved this department to stay that order. The claimant has since filed a memorandum in law and opposition to the motion for stay.

In order to receive a stay the requesting party is required to demonstrate all four elements of a four-prong test: a) that it is likely to succeed on the merits; b) that it would suffer irreparable harm if the stay were not granted; c) if the stay were issued it would not substantially harm the party; d) that the best interest of the public would be served by the issuance of the stay. *In re Insurance Services Office, Inc.*, 148 Vt 635 (1987)(mem).

To prevail on appeal in superior court the defendant would have to offer testimony that would refute that of Dr. Willmuth, which on the record as it exists is not likely. At the workers' compensation hearing, defendant's medical expert did not testify and his records do not discredit the opinion of Dr. Willmuth regarding claimant's ability to work. Under these circumstances, I cannot conclude that the defense is likely to succeed on the merits. Nor has the defendant proven that it would suffer irreparable harm with a denial of this stay. Finally, the best interest of the public would best be served by the denial of the stay in this instance, particularly because of the length of time this case has been pending. In sum, defendant has not met its burden of proving each element of the four-part *In re Insurance Services, Inc.* test.

THEREFORE, the request for a stay is Denied.

Dated at Montpelier, Vermont this 9th day of January 2002.

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R. Tasha Wallis
Commissioner

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LDL Company	)	
	)	Opinion No 36-01WC

Hearing held in Montpelier on April 26, 2001
Record closed on May 17, 2001

APPEARANCES

Craig Weatherly, Esq. for the claimant
William A. O'Rourke, III, Esq. for the defendant

ISSUE:

Is the claimant permanently and totally disabled by reason of the injuries he suffered on November 10, 1994?

EXHIBITS

Joint I:	Medical Records
Joint II:	Vocational Rehabilitation Records
Joint III:	Social Security file
Claimant's 1:	Meisenheimer VESID report re: Goss Tire
Claimant's 2:	Letter dated 6/2/97 from Champlain Valley Educational Services
Claimant's 3:	Report dated 4/16/96 from Honorio T. Dispo, M.D.
Claimant's 4:	Vita, Mary E. Willmuth, Ph.D.
Claimant's 5:	Report dated 7/14/97 from Dr. Willmuth
Claimant's 6:	Letter dated 9/21/00 from Dr. Willmuth
Defendant's A:	Transcript of deposition of Gregory LeRoy, M.Ed.

STIPULATION OF FACTS:

1. On November 10, 1994 LDL Company, Inc. employed the claimant as a greenhouse installer.

2. At that time, State Farm Insurance Company was the workers' compensation carrier for LDL Company, Inc.

3. On November 10, 1994 the claimant suffered a personal injury by accident that arose out of and in the course of his employment.

4. Claimant has not been gainfully employed since November 10, 1994.

FINDINGS OF FACT:

1. On November 10, 1994 the claimant suffered a brain injury when in the course of his employment he fell through a greenhouse roof panel. He was 29 years old at the time.

2. Claimant received temporary total disability benefits effective from the date of his injury until a Form 27 was filed in June 1997, terminating those benefits effective July 1, 1997. Opinions from Dr. Ciongoli and Dr. Jennings that claimant had reached medical end result supported the Form 27.

3. Claimant then received permanent partial disability payments based on a 14% impairment of the head and 13% upper extremity impairment.

4. Between May of 1995 and July of 1997 the claimant participated in a vocational rehabilitation program which ultimately resulted in his obtaining a Certificate of Completion in the automobile mechanic program at Champlain Valley Tech and being placed in a job as an automobile mechanic at Goss Tire.

5. On October 4, 1997 as evidenced by Claimant's Exhibit 1, claimant was fired from Goss Tire after one week's work for "not knowing his trade, ruining the vehicles he was asked to work on and for not listening to instruction, training or direction from his superiors…."

6. Claimant has not worked since Goss Tire fired him.

7. Claimant receives social security disability benefits.

MEDICAL TESTIMONY AND DISCUSSION:

1. Claimant relies on the opinion of Mary Willmuth, Ph.D., a rehabilitation psychologist. Defendant relies on the opinion of Kenneth Congoli, D.P., a neurologist and Gregory LeRoy, a vocational rehabilitation expert.

2. Dr. Ciongoli's opinions are based on his review of the claimant's medical records and are recorded in two letters dated April 3, 1996 and May 15, 1996. Dr. Ciongoli offered the opinion that the claimant was capable of "working as a repairman, particularly in something mechanical." He assessed the claimant's permanent impairment at a range from 10% to 14% of the whole person.

3. On May 15, 1996 Dr. Ciongoli met the claimant and performed what he called a "mini mental status exam." Such an examination is informative but cannot reach the nature and depths of the deficits this claimant has. Nevertheless, that meeting with the claimant convinced Dr. Ciongoli that the claimant was not capable of performing work where difficult instructions were involved.

4. Dr. Willmuth opined and I find that a reliable assessment of employability in cases such as the claimant's cannot be done on the basis of a medical records review alone. In-depth cognitive testing is required.

5. Dr. Willmuth involved the claimant in two day long sessions of examination and in depth neuropsychological testing, which Dr. Ciongoli had recommended in his May 15, 1996 letter.

6. The largest areas of mental functioning in which the claimant has suffered deficits are executive functioning and short-term memory. Even in work involving simple tasks, the claimant is not capable of competitive employment.

7. Because the claimant has poor recall of recent events he has a limited ability to learn new things. He also lacks insight into the nature of his memory loss and is therefore unable to use compensatory strategies. For example, he is not able to use a calendar successfully to note and recall appointments.

8. Executive functioning is what allows a person to initiate activity. Because of the claimant's head injury, the claimant cannot identify chores that need to be done without reminders. Although he sometimes takes his medication without being told to do so, his mother checks on him everyday to make sure that he has. Those anti-seizure medications are essential, yet the claimant sometimes forgets them.

9. The claimant does not do simple chores around his home without reminders from his mother or other family members. Without such prompting, he does not do the dishes, vacuum his carpeting, cut the grass or shovel the snow. He will do laundry once he has run out of clean clothing, but otherwise needs reminders to do it.

10. The nature of the claimant's disability in the area of executive functioning is such that he

simply does not do many tasks, although he is physically capable of doing them. This is a major impediment to any employment.

11. Dr. Willmuth's opinion is the most persuasive one received, based on in depth testing, personal observations, review of medical records and years of clinical experience. She opined and I find that the combination of the claimant's executive functioning deficit, limited short term memory and lack of insight into the nature of his disabilities makes it unlikely that he can perform work in a job setting other than a supported environment with a job coach telling him what to do at all times.

12. In his one attempt at post-injury employment working at Goss Tire, the claimant was fired within a matter of days because he was unable to follow his employer's instructions.

13. Dr. Ciongoli's opinion in April 1996 that the claimant was capable of working "as a repairman, particularly in something mechanical" is contradicted by his experience at Goss Tire. There is nothing in the record to suggest that claimant's lack of success at Goss Tire was volitional.

14. Gregory Leroy evaluated the claimant On February 2, 1998. He then used as the foundation for his opinion the medical records of Dr. Ciongoli.

15. Mr. Leroy, the defendant's vocational expert, opined that the claimant is capable of competitive employment involving repetitive simple tasks in a supported environment if one accepts the opinion of Dr. Ciongoli and that he is not capable of such employment if one accepts the opinions of Dr. Willmuth.

CONCLUSIONS OF LAW:

1. In worker's compensation cases, it is the burden of the claimant to establish all facts essential to support his claim. *King v. Snide, 144 Vt. 395 (1984)*; *Goodwin v. Fairbanks, Morse and 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. 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 hypotheses. *Burton v. Martin Lumber Co.*, 112 Vt. 17 (1941).

3. A claimant is entitled to permanent total disability if his injury is within the enumerated list articulated in 21 V.S.A. § 644, or if it has as severe an impact on earning capacity as one of the scheduled injures. *Drinkwater v. Norton Brothers, Inc.*, Opinion No. 21-98WC (Apr. 30, 1998). Under the non exclusive list of injuries in § 644 (a) the following shall be deemed total and permanent: 1) the total and permanent loss of sight in both eyes; 2) the loss of both feet at or above the ankle; 3) The loss of both hands at or above the wrists; 4) The loss of one hand and one foot; 5) An injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg and of one arm; and 6) An injury to the skull resulting in incurable imbecility or insanity.

4. The inclusion of skull injuries in the enumerated list of § 644 is a clear indication that one can be totally disabled without having difficulties with physical movement. Such is the case with this claimant. His brain injury impaired the executive functioning necessary to hold any job, as his only foray into the job market and his daily functioning amply illustrate. His short-term memory is impaired and he lacks insight into the nature of his disabilities. Dr. Willmuth's opinions, based on in depth testing, sound reasoning and extensive experience support the conclusion that the claimant's deficits have as severe an impact on earning capacity as one of the scheduled injures in § 644.

5. In 1999 the Legislature amended § 644 to cover what is known as "odd lot" cases. The revised § 644 (b) provision retains the statement that "[t]he enumeration in subsection (a) of this section is not exclusive," and adds the odd lot language, to wit, " and in order to determine disability under this section, the commissioner shall consider other specific characteristics of the claimant including the claimant's age, experience, training, education and mental capacity." Although claimant's young age militates against a finding of permanent total disability, all other factors support it. This claimant has had limited experience and formal education. His training in vocational rehabilitation exceeded a year, yet was followed by such poor performance that he lost the job. That poor performance was a direct result of the deficits caused by his work-related head injury.

6. The defense portrays the claimant as one unmotivated to work because he has been on assistance from workers' compensation or social security since his injury. Yet there is nothing in the medical records or in the claimant's presentation to suggest that his inability to work is in any way volitional. Finally, the defense argues that claimant's potential ability to work in a supported work environment precludes a finding of permanent total disability. On different facts, that could be the case, particularly if a supported work environment was likely to lead to independent work. But no such finding can be made here.

7. It is clear that this claimant is permanently totally disabled under the pre-1999 standard of §664 and certainly under the odd-lot doctrine as a result of the head injury he sustained in the course of his employment on November 10, 1994.

8. The employer's obligation to pay permanent total disability benefits began with its last permanent partial disability payment. Pursuant to 21 V.S.A. § 664 interest shall be computed from that date on the total amount of unpaid compensation.

9. Claimant's request for attorney fees and costs pursuant of 21 V.S.A. § 678(a) is denied because he did not submit in a timely fashion evidence establishing the amount and reasonableness of the fees and costs as required by Rule 10 (a) (3) (d), Vermont Workers' Compensation and Occupational Disease Rules.

ORDER:

1. Based on the Foregoing Findings of Fact and Conclusions of Law, this claim for permanent total disability is hereby GRANTED.

2. Pursuant to 21 V.S.A. § 664 interest shall be computed from the date claimant received his last permanent partial disability payment on the total amount of unpaid compensation.

Dated at Montpelier, Vermont this 23rd day of October 2001.

_____
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.