

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

	)	State File No. D-12456
	)	
Theresa Morin	)	By: Margaret A. Mangan
	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Essex Optical and The Hartford	)	
	)	Opinion No. 41A-01WC

**AMENDED DECISION**

Caption

The Hartford is a named defendant in this case, although its name was omitted from the hearing decision issued on November 20, 2001. To correct that omission, the amended caption appears above.

Costs

Claimant has complied with the order that she submit an amended cost request in compliance with Rule 40 (erroneously designated as Rule 45 in the decision.). In addition, she submitted a request for reimbursement of a \$720.00 bill received from Matrix Health Systems for a therapist's involvement in this claim, a necessary expense. Accordingly, claimant is awarded reimbursement for necessary costs of \$6767.56, which represents the amended request of \$6,047.56 plus \$720.00 the Matrix Health Systems statement.

Dated at Montpelier, Vermont this 23<sup>rd</sup> day of January 2002.

\_\_\_\_\_  
R. Tasha Wallis  
Commissioner

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Essex Optical, Inc.	)	
	)	Opinion No 41-01WC

Hearing held in Montpelier on December 13 and 14, 2000, February 1, 2001 and May 7, 2001.  
Record closed on August 1, 2001

**APPEARANCES:**

Christopher McVeigh, Esq. for the claimant  
John W. Valente, Esq. for the defendant

**ISSUE:**

1. Is the claimant permanently and totally disabled?
2. If the claimant is not permanently totally disabled, to what permanent partial benefits is she entitled?

**EXHIBITS:**

Joint I a. and b.: Medical Records in two volumes  
Joint II: Records from Dr. Kenosh  
Joint III: Social Security file  
  
Claimant's 1: List of Medications (i.d. only)

**STIPULATION:**

The claimant's stomach surgery was causally related to her low back injury.

## **FINDINGS OF FACT:**

1. The stipulation is accepted as true. Joint exhibits are admitted into evidence and judicial notice is taken of all department forms filed in this case.
2. On December 17, 1990 in the course of her employment with Essex Optical, the claimant injured her back when she fell from a chair she was standing on to reach a high object.
3. Dr. Nancy Binter performed surgery on the claimant's back on February 19, 1991 and placed her at medical end result on or about March 24, 1992 when she also assessed a 27% permanent partial impairment of the spine.
4. During a course of physical therapy for her work-related injury, the claimant re-injured her back while lifting.
5. On May 21, 1991 this Department approved the parties' Agreement for Temporary Total Disability Compensation (Form 21).
6. On May 19, 1991 and June 18, 1991, the claimant underwent a functional capacity evaluation (FCE) at Fanny Allen Hospital. That evaluation has not been updated since. The FCE found that the claimant had not achieved her work required lifting capacity and demonstrated other limitations. It assessed her work capacity at sedentary.
7. On May 12, 1992 Crawford & Company closed its vocational rehabilitation file on this claimant on the basis that she had "returned to work for her old employer in a diminished capacity." However, because of her back pain, claimant was unable to do her work. Therefore she left.
8. Claimant began treating with a psychiatrist on November 16, 1993 for psychological distress related to her chronic back pain and the impact it had on her life. At that time, Dr. Marsh identified as claimant's primary stressor her back injury and chronic pain. Since then the claimant has treated with Eleanor (Nori) Sims, a clinical mental health counselor with Community Health Plan, and a number of different psychiatrists, including most recently, Dr. Gary Keller, with whom claimant has treated since May of 1997.
9. In June 1996 the insurer sent the claimant to Dr. Paul Cotton of the Physician's Network for an evaluation. According to his report, drugs and alcohol played no role in the claimant's depression, and he found no evidence of personality disorder "based upon her previous good function, her high earning capacity and the intactness of her family." Dr. Cotton placed her in the moderate to marked depression category. And he predicted that her prognosis for recovery was poor.

10. In April 1998 the claimant underwent gastric surgery during which 80% of her stomach was removed. That surgery was performed for what had been diagnosed by biopsy as cancer. However, no cancer was noted during the surgery or in the pathology studies that followed. At surgery a significant ulcer was detected and removed.
11. Eventually physicians determined that the anti-inflammatory medications claimant had been using for her back pain caused her stomach problems.
12. Since the stomach surgery, the claimant has had difficulties with a reflux problem and nausea. And this needless surgery significantly contributed to the psychological harm she suffered as a result of her low back injury.
13. On September 15, 1998 the Department approved the Employer's Notice of Intention to Discontinue Benefits (Form 27) on the basis that there was "No medical documentation supporting ongoing disability and/or treatment."
14. On October 19, 1998 the discontinuance was reversed and temporary total disability benefits were reinstated.
15. A subsequent Notice of Intention to Discontinue Benefits based on evidence that the claimant had reached medical end result was approved on July 19, 1999.
16. Since he began treating the claimant, Dr. Keller has adjusted her psychotropic medication in an effort to address her depression and psychological state. The extent of the claimant's depression became apparent to him when he diagnosed olfactory hallucinations manifested by her sensing a bad smell in her home that was not present and could not be detected by others. Dr. Keller's March 2000 group therapy notes document his diagnosis of hallucinations.
17. Claimant's injury severely strained her independence, which had always been important to her well-being.
18. Claimant's back injury combined with the effects of her stomach surgery unalterably changed this claimant. Her medical records indicate that she is not the same person she was before her work related incident.
19. Claimant's ability to make an articulate, amiable presentation masks a depression that is profound as evidenced by her medical records and the testimony of her treating clinicians.

#### Expert Opinions

20. Ms. Sims has practiced counseling for twenty years, since 1991 for CHP/Kaiser Permanente. She has met with the claimant frequently, often several times a week, and in the process has helped improve her psychological condition and better cope with her chronic low back pain. In addition, Ms. Sims has been able to observe changes or stability in the claimant's condition since she began treating her in 1993.

21. Based on her knowledge of the claimant's stomach condition, chronic low back pain and her psychological condition, Dr. Stephanie Bellomo, a family physician who was the claimant's treating physician until May 1999, opined that the claimant lacked the capability of performing regular gainful employment.
22. On August 26, 1999, Dr. Robert Theisen, a clinical psychologist, recorded his evaluation of the claimant after conducting a two-day interview and reviewing medical records. He concluded that the claimant's severe depression prevented her from holding and performing gainful employment on a regular basis.
23. Based on the 4<sup>th</sup> Edition of the AMA Guides to the Evaluation of Permanent Impairment, Dr. Theisen concluded that the impact the claimant's chronic low back pain had on her psychological condition has resulted in a 55 % permanent partial impairment. Dr. Theisen rested his conclusions upon the impact that claimant chronic low back pain has had on her life. That impact includes a diminished ability to maintain herself and her home, a diminished capacity to maintain her own finances, diminished judgment and the diminished ability to enjoy simple pleasures.
24. When he factored in the impact of the unnecessary stomach surgery, Dr. Theisen increased the impairment rating to 70% of the whole person.
25. On February 12, 1997, The Hartford sent the claimant to the Center for Musculoskeletal Medicine for an initial evaluation to determine if she was a candidate for the program. Steven Mann, Ph.D. determined that she had suffered from a psychological condition caused by her low back injury of December 17, 1990. She was deemed eligible for the program.
26. Dr. Mann as well as virtually all other clinicians who evaluated the claimant observed that she had functioned well emotionally before her back injury.
27. In his February 1997 report, Dr. Mann concluded that the claimant suffered severe depression and that her scores on several psychological tests demonstrated significant degrees of depression.
28. For example, he noted that she scored 21 on the Beck Depression Inventory, a significant level of depression, which had increased since her 1991 score at the Spine Institute. By March of 1999 that score had increased further to 35.
29. The permanent partial disability rating Dr. Mann explained at the hearing did not incorporate any psychological disability attributable to her stomach condition.

30. Dr. Mann used an apportionment model to derive the permanent partial impairment rating for the claimant's psychological condition from the low back injury, which he assessed at 6% of the whole person. He did not quantify an impairment rating for her pre-injury state. Nor did he assign a rating for her total psychological impairment, with the work-injury and pre-injury rating combined. However, he agreed that the claimant's December 1990 back injury aggravated any pre-existing psychological condition she may have had.
31. Dr. Michael Kenosh, a psychiatrist, evaluated the claimant for the defendant in this case, concluding that she has a sedentary work capacity. Yet the observations in his report contradict that conclusion. For example, he noted that the claimant has difficulty with yard work and house work because of her pain and that her daughter recently moved in to help with vacuuming, washing chores and laundry. She reported a sitting tolerance of 15 minutes, a standing tolerance of 20 minutes. On physical examination, Dr. Kenosh was able to reproduce her severe low back pain.
32. Dr. Kenosh's conclusion relied heavily on a functional capacity evaluation of 1991, an evaluation that predated the significant psychological harm resulting from the stomach surgery.
33. Claimant's attorney submitted evidence that he incurred \$7,184.02 in expenses in this case and 201.8 attorney hours.

#### **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. A claimant is entitled to permanent total disability if her injury is within the enumerated list articulated in 21 V.S.A. § 644, or if, without considering individual employability factors such as age and experience, the medical evidence indicates that she is totally disabled from gainful employment. *Fleury v. Kessel/Duff Constr. Co.* 148 Vt. 415 (1987). 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 standard is further articulated in § 645(a), which specifies that one must have “no reasonable prospect of finding regular employment.”
5. Dr. Gary Keller, the claimant’s treating psychologist, concluded that she did not have the capability of engaging in regular gainful employment. Based on her work with the claimant, counselor Nori Sims concluded that the claimant did not have the capability of engaging in regular gainful employment because of her psychological condition. Dr. Robert Theisen concluded that the claimant did not have the capability to engage in regular gainful employment. And Dr. Stephanie Bellomo, who had been the claimant’s regular treating physician, concluded as of May 3, 1999 that the claimant did not have the capability to engage in regular gainful employment.
6. Plainly this claimant deals with chronic persistent back pain, stomach discomfort that can be embarrassing and depression caused by the back and stomach problems. Her only attempt to return to work in 1992 was met with failure. The claimant’s social history, in which she persevered through abusive relationships to continue employment and raise five children, portrays an individual who would be working if she could be working.
7. Defendant leans heavily upon Dr. Michael Kenosh’s evaluation and suggestion that the claimant has a sedentary work capacity. Yet that conclusion is based on an FCE that predated her stomach surgery and ignores the unsuccessful attempt the claimant made to return to work.
8. The treating clinicians are the most persuasive ones in this case, because they have had the opportunity to observe the claimant frequently over time. Their observations are particularly important in this case with a woman whose presentation belies her disability.
9. Claimant has met her burden. This case is similar to *Fleury*, 148 Vt. 415 and *Gravel v. Cabot Creamery*, Opinion No. 15-90WC (July 10, 1991). There is ample expert evidence that the pain from her back injury, the effects from her stomach surgery and her profound depression when viewed in combination totally disable her from any gainful employment. Therefore, she is permanently totally disabled.

#### Statute of Limitations

10. Defendant argues that the claimant’s claims arising out of an injury which occurred on December 17, 1990 are barred by the six-year statute of limitations because her “claim for additional temporary total disability benefits for stomach surgery, permanency benefits for the psychological claim, stomach claim, and permanent total claim were filed February 18, 2000, ten years after the injury in this case.” The Hartford’s Memorandum of Law at 8.

11. In *Hartman v. Ouellette Plumbing*, 146 Vt. 443, 447 (1985), the Vermont Supreme Court held that the discovery rule applies to workers' compensation claims for determining when the statute of limitations begins to run and that the statute of limitations commences when an "injury becomes reasonably discoverable and apparent." *Id.* "If such a claim is denied or contested, the claimant may then bring an action within six years from the date the injury was reasonably discoverable and apparent." *Id.* This claimant filed a claim when her injury occurred on December 17, 1990 and since then The Hartford has been paying various aspects of her workers' compensation claim.
12. While the claimant started treating for her psychological injury in 1993, The Hartford was paying for that treatment and continues to do so. As for her claim for permanency on her psychological claim, the claimant would not have known that she had a permanent impairment until she had reached a medical end result for it and had been assessed with a permanency rating. At best that occurred on March 18, 1998 when Dr. Mann concluded that Theresa Morin was at medical end result. Additionally, the claimant could not have filed a claim on her stomach condition before she knew about it and the potential causal relationship to the medication she was taking. She did not have the stomach surgery until April 1998 and it was some time after that when she learned of the potential causal link. Therefore, these claims were brought well within six years of their discovery.

#### Attorney Fees, Costs and Interest

13. An award of reasonable attorney is a matter of discretion; necessary costs a matter of law when a claimant prevails. 21 V.S.A. § 678 (a). However, recovery of costs such as expert depositions is subject to the limitations of Rule 45, which is not reflected in the claimant's disbursement description.
14. Because the claimant has prevailed in this protracted case through the efforts of her attorney, an award of fees based on the submitted 201.8 hours is appropriate. Four days of hearing and the extensive discovery justify the hours claimed. However, because the list of costs was not compiled with the Rule 45 limitations, the claimant must resubmit that description before an award for necessary costs will be made.
15. The employer's obligation to pay benefits begins with the date of this decision. Past interest is not due.



**ORDER:**

Based on the Foregoing Findings of Fact and Conclusions of Law, claimant is awarded:

1. Permanent total disability benefits;
2. Attorney fees of \$14,126.

Dated at Montpelier, Vermont this 20<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.