

G. C. v. The Fonda Group Inc.

(January 8, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

G. C.

Opinion No. 37-07WC

By: George K. Belcher
Hearing Officer

v.

The Fonda Group, Inc.

For: Patricia Moulton Powden
Commissioner

State File No. S-13358

OPINION AND ORDER

Hearing held in Montpelier on November 7, 2006. Preservation depositions were conducted on February 21, 2007 (Dr. Johansson), August 13, 2007 (Dr. Dulaney) and April 9, 2007 (Dr. Backus). The record was closed on September 13, 2007.

APPEARANCES:

Christopher J. McVeigh, Esq., for the Claimant
Marion T. Ferguson, Esq., for the Defendant

ISSUES PRESENTED:

1. Did the Claimant reach a medical end result on March 4, 2004 or on August 28, 2006, or at some other date?
2. Were the prolotherapy treatments rendered to the Claimant in this case reasonable and compensable medical treatments?
3. Should the Defendant be ordered to pay for the Claimant's college expenses as a reasonable vocational rehabilitation plan?

EXHIBITS:

Joint: Medical Exhibit
Deposition of Dr. Johansson, DO, dated 21 February, 2007 and exhibits therein
Deposition of Dr. Backus, MD, dated April 9, 2007 (original unsigned)
Deposition of Dr. Dulaney, MD dated August 13, 2007 (original unsigned)

Claimant's Exhibit: Statement of Attorney's Fees, Costs, and Fee Agreement

Defendant's Exhibit A: College transcript of the Claimant

FINDINGS OF FACT:

1. The Claimant was born on November 30, 1959. She has held a number of different types of employment over the years, including EMT work, office work, automobile repair, waitressing, and surveying work. She worked for a time as a substitute teacher until 2001, at which time the Defendant employed her. As a substitute teacher she earned approximately \$55.00 per day.
2. The Claimant's job with the Defendant was as a machine operator in a plant which made paper products. On November 19, 2001, she was operating a large machine when she struck her head on an overhead ladder. She cut her scalp and fell on her buttocks. On the date of the injury, the Claimant was an employee within the definition of the Vermont Workers' Compensation Act and the Defendant was an Employer within the meaning of the same Act.
3. Following her injury, the Claimant began a long course of medical treatments involving the following medical providers: Dr. Carol Thayer (primary care physician); Dr. Rayden Cody; Dr. Jerry Tarver (pain therapy and nerve blocks); Dr. Robert D. Monsey (orthopedic surgeon at the Spine Institute); Dr. Claude E. Nichols, III (orthopedic surgeon); Dr. Raymond Long (orthopedic surgeon); Dr. Eugene Dulaney (neurologist); Dr. Verne Backus (practitioner of occupational and environmental medicine); Dr. Jonathan Fenton (therapist for neuro-musculoskeletal pain); Mary Guyette, BSN, MSN (nurse case manager); Wayne Sullivan (vocational rehabilitation specialist); Leslie Bell (physical therapist); Janet Carscadden (physical therapist); Kathryn Tau (physical therapist); Julia Wick (behavioral health evaluator); Erica Galipeau (functional capacity assessor); and Dr. Zweber (EMG specialist).
4. Before her injury, the Claimant had a history of migraine headaches, which were generally related to her menstrual cycle.
5. Following her injury, the Claimant presented to Dr. Backus with neck pain and right shoulder pain on January 22, 2002. (Joint Medical Exhibit, Tab 3). She was treated conservatively.¹ She was put on significant work restrictions on 22 January 2002. On January 25, 2002 Dr. Backus assessed the patient as having cervical strain with radiculopathy and shoulder rotator cuff signs. In August and September of 2002, the Claimant complained to Dr. Nichols (her orthopedic surgeon who was treating her shoulder) that the increase in physical therapy was bringing on added migraine headaches. (Joint Medical Exhibit, Tab 4, September 16, 2002).

¹ In January of 2002 the Claimant went with her husband on a vacation to the Bahamas. They had won the vacation and it was scheduled. During the vacation the Claimant was uncomfortable and could not swim or snorkle. Her activities were limited.

6. The Claimant's right shoulder pain was the focus of most of her treatment in 2002 culminating in shoulder surgery with Dr. Nichols on January 31, 2003. The surgery was a "right shoulder arthroscopy, subacromial decompression, and open reduction internal fixation os acromiale". About this same time (January of 2003) the Claimant became a full-time student at Johnson State College with 27 previous credits being used toward her Associate's degree.
7. The Claimant was involved in physical therapy following her surgery. Again, the physical therapy was reported by the Claimant to be bringing on her migraine headaches. (See Joint Medical Exhibit, Dr. Cody note of May 22, 2003.) On June 2, 2003, physical therapist Janet Carscadden noted her opinion that there was a "mechanical component" to the migraine headaches since traction seemed to relieve the headaches. (Joint Medical Exhibit, Tab 8.) Neck pain and migraine headaches were a significant problem for the Claimant during this period. The migraine headaches were different from the previous menstrual headaches. The migraines which were brought on by physical exercise, were not relieved by her usual pain medication. She received biofeedback training from Julia Wick, MS, LCMHC, to try to break the association between pain, tension, and headache. It was recommended that she use a gym and trainer to gain strength. (See Joint Medical Exhibit, note of June 20, 2003.)
8. It was also during June of 2003, that Dr. Dulaney became the Claimant's neurologist. On June 23, 2003, he related her changed pattern of migraine headaches to the traumatic injury of November 2001. (See Joint Medical Record Exhibit, Tab 4, Note of June 23, 2003.)
9. She was evaluated by an orthopedic surgeon, Dr. Robert D. Monsey, on September 3, 2003. Dr. Monsey gave the Claimant options for medical treatment of her neck pain. His options included interdisciplinary evaluation, medial branch nerve blocks, radiofrequency ablation, and surgery. The surgery being discussed was a fusion of sections of her cervical spine, performed via access from the front of her neck. The likelihood of success of the surgery was in the range of 50%.
10. Following Dr. Monsey's statement of options, the Claimant then pursued some of the less invasive options. She participated in the multidisciplinary programs of physical therapy, exercise, and biofeedback.
11. On February 11, 2004 and again on June 11, 2004, the Claimant received injections into her neck by Dr. Tarver of steroids and anesthetics as "medial branch blocks". These treatments only gave temporary relief and were essentially ineffective to stop the neck pain and migraine headaches.
12. On February 23, 2004 (in between the medial branch blocks of Dr. Tarver) Dr. John Johansson conducted a medical review and examination of the Claimant for the Defendant. He concluded that the Claimant was at medical end result. On March 25, 2004 he augmented his report by letter to express the added opinion that the migraine headaches were not a condition resulting from trauma and were not causally related to her injury. (Joint Medical Exhibit, Tab 7)

13. On September 19, 2004, the Claimant underwent a radiofrequency ablation. This, too, did not give the Claimant lasting relief of her pain.
14. By December of 2004, the Claimant was having daily migraine headaches. (Joint Medical Exhibit, Tab 4, note of December 9, 2004.) The headaches were debilitating and made the Claimant essentially non-functional while she was having a headache. In late 2004, the Claimant returned to the care of Dr. Backus. He questioned whether the Claimant was at maximum medical improvement and whether there might be other treatments for her.
15. On December 9, 2004, Dr. Delaney concluded that the Claimant's worsening migraine headaches were a chronic condition.
16. In late December, 2004, the Claimant was referred to Physical Therapist Leslie Bell by nurse-case manager Mary Guyette. While in treatment with Leslie Bell, Ms. Bell noticed what she thought was ligament weakness in Ms. Crowe's neck on the right side. It appeared to her that there was ligament damage because there was increased muscle tone on the right side of the neck, which could indicate that the muscles were compensating for the injured ligaments. She also felt that the mechanism of injury and the inability of the Claimant to hold her head up for long periods supported this conclusion. Ms. Bell used a form of tape (kinesio tape) to support Ms. Crowe's head. She noticed improvement in her neck pain and her migraine headaches.
17. Ms. Bell treated the Claimant from December 2004 until May of 2005 at which time the Claimant had reached a plateau of improvement in her physical therapy with Ms. Bell. It was suggested by Ms. Bell that the Claimant investigate "prolotherapy" as a way to increase the ligament strength further.
18. A referral was made to Dr. Jonathan Fenton who first evaluated the Claimant on May 4, 2005. He asked that she do some manipulation therapy before considering prolotherapy. The Claimant completed the manipulations without positive results. The decision was made to do her first prolotherapy treatment on August 22, 2005.
19. Prolotherapy is a method of causing ligaments to 'proliferate' by inflammation. Inflammation of the weak ligaments is induced by the injection of solutions containing glycerin and painkillers into the spaces between the cervical joints with a large needle. Because prolotherapy causes ligaments to regenerate, it is not a palliative treatment, but rather, it is a treatment which can provide a cure for weak and damaged ligaments, according to Dr. Fenton. The procedure is not widely used. The procedure can be quite painful and uncomfortable. For this reason, Dr. Fenton warns his patients about the pain. He conducts the procedure under an anesthesia administered through an intravenous line.
20. During the second treatment of the Claimant by Dr. Fenton on September 12, 2005, he acknowledged that he did not give her enough pain medication to avoid very severe pain following the procedure. The Claimant was in extreme pain following the second injection. It was for this reason that she did not return to Dr. Fenton until February 13, 2006. Dr. Fenton understood this delay and was not surprised by it. Rather, he felt it was a natural reaction to her pain and discomfort.

21. The Claimant returned for prolotherapy treatments with Dr. Fenton on March 20, 2006, April 10, 2006, June 19, 2006, and July 24, 2006. These treatments improved her neck pain and migraine headaches. After the treatments, she could exercise again for much longer periods without triggering a migraine headache. The prolotherapy was successful. Mary Guyette, who had followed the Claimant through many of the diverse therapies, was very impressed by the Claimant's improvement after the prolotherapy.
22. In June of 2006 the Claimant returned to Ms. Bell for continuing physical therapy. This course of physical therapy was intended to increase strength since the Claimant could now tolerate more vigorous exercise without triggering migraine headaches. According to Ms. Bell, the difference in the capabilities of the Claimant between December of 2004 and June of 2006 was "huge". Her ability to lift and to work without triggering a headache were much improved.
23. On September 14, 2006, Dr. Backus opined that the Claimant could work a full day.
24. As of the hearing date (November of 2006), the Claimant was still taping her neck, occasionally, in order to tolerate long trips and other positional challenges. While she still had occasional migraine headaches, she was able to avoid the triggers of her migraine headaches and to work full time. She received her BA degree in History in May of 2006. At the time of the hearing she was working full time as a special education teacher earning \$34,000.00 per year. She began this job in August of 2006.

Medical End Result

25. The Department approved a Form 27 ending temporary disability benefits because of Dr. Johansson's opinion that the Claimant had reached a medical end result as of February 23, 2004. It appears that Dr. Johansson was the only person who had this opinion at this time. His opinion was formed in large part because; (1) he did not include or mention the headaches in his initial evaluation; (2) his first update stated that migraine headaches are not caused by trauma; (3) his second update indicated that there are so many potential triggers for migraine headaches that he could not attribute the triggers to the traumatic injury suffered by the Claimant.
26. His opinion was contradicted by Dr. Backus (chronic cervical pain exacerbated and aggravated the migraines, see note of January 4, 2005), Dr. Dulaney (migraine headaches are related to her trauma, June 23, 2003 note), Physical Therapist Janet Cacadden (there was a mechanical component to Claimant's migraines as shown by the effect of traction, note of June 2, 2003), and Dr. Fenton (migraine headaches were triggered by muscles working overtime to make up for an unstable neck caused by weakened ligaments in the cervical spine; testimony of Dr. Fenton).
27. Since Dr. Johansson did not believe that the migraine headaches were caused by the Claimant's injury, he did not consider that the continuing treatments of her neck and migraine headaches were part of her recovery.

28. Dr. Backus assessed maximum medical improvement as of July 12, 2005 in his chart note, but at that time, the Claimant was in treatment with Dr. Fenton. Dr. Backus, in his later testimony, revised his opinion about medical end result and put the date of medical end result at August 11, 2006. (see testimony of Dr. Backus, Deposition, Page 27).

Prolotherapy as Reasonable and Necessary Treatment

29. In Dr. Johansson's deposition testimony, he opined that the prolotherapy administered in this case was not medically indicated for the Claimant. In his opinion, there was no evidence of "ligamentous laxity in her cervical spine." (See deposition of Dr. Johansson, 21 February 2007, Page 28.) This conclusion is contradicted by Dr. Fenton (who felt that there was cervical instability caused by weak ligaments – Testimony of Dr. Fenton), Dr. Backus who thought there was ligament dysfunction or instability (Deposition of Dr. Backus, page 8), and the examination of Physical Therapist Bell (who noted increased muscle tone and reaction to taping as evidence of lax ligaments – Testimony of Leslie Bell). Dr. Backus expressed the opinion that prolotherapy offered "an excellent chance at improvement and avoid surgery." (See Joint Medical Exhibit, Tab 3, note dated April 8, 2005 in which his assessment included ligament weakness and/or instability). Likewise, Dr. Backus testified that prolotherapy was a reasonable medical treatment for the Claimant in January of 2005 (Dr. Backus deposition testimony, Page 10.)
30. With the benefit of hindsight, it is clear that the prolotherapy was a significant benefit to the Claimant. She had tried numerous other treatments without improvement.² The prolotherapy allowed her to control the triggers of her migraine headaches and to have more physical activity and overall function.
31. The Defendant argues that the Claimant intentionally delayed, prolonged, and confused her treatments in order for her to be in treatment until she was gainfully employed as a teacher. (See Defendant's Proposed Finding, Paragraph 47.) In support of this argument the Defendant pointed to the delays in the prolotherapy treatments from Dr. Fenton, missed appointments by the Claimant with physical therapists, and an early opinion by Mary Guyette that the Claimant might have been trying to draw out the treatments. Mary Guyette has a BSN and Masters of Nursing degree and has worked in the Vermont medical community for many years. She was hired by the Defendant. She monitored the Claimant's case from April of 2002 forward. Mary Guyette was instrumental in making the referral to Leslie Bell and to Dr. Fenton. It was her opinion at the hearing that the Claimant was sincere in her complaints of pain and her efforts to find a solution. In looking at the whole history of the case, she did not believe that the Claimant had intentionally delayed or prolonged treatment. Her opinion on this point is persuasive.

² The Defendant challenged prolotherapy as non-traditional medicine, and outside the usual range of medical treatment. Dr. Johansson himself administers prolotherapy in certain cases. The only significant issue in the case was whether the treatment was appropriate in this case.

32. Likewise, the Defendant argues that the Claimant's subjective reporting to doctors and health care providers was so full of discrepancies, that her credibility in reporting symptoms cannot be relied upon, thus, discrediting the medical conclusions of her providers. While there are some inconsistencies in the eight years of medical records, there were few inconsistencies in the Claimant's reports of persistent pain and disability until the conclusion of her treatments with Dr. Fenton. Likewise, the medical record demonstrates that the Claimant took advantage of all reasonably proposed treatments, despite the risks, in order to return to as much function in her life as she could recover. In this sense, the Claimant's pain condition and her desire to "get better" were confirmed, not only by her treating medical providers, but by her own behavior.

Vocational Rehabilitation

33. On May 19, 2004, the Claimant participated in a Functional Capacity Examination by Erica Galipeau. This assessment concluded that the Claimant had a functional work capacity of full-time, medium work capacity and some capacity in a heavy range. It was the opinion of the evaluator that the Claimant would be most successful in a return to work in a medium work level position.³ (See Joint Medical Exhibit, Tab 9, page 28.)

34. In April of 2004 Wayne Sullivan was assigned to perform a vocational rehabilitation entitlement assessment of the Claimant. Mr. Sullivan is a vocational rehabilitation counselor with over twenty years experience. He met with the Claimant on April 8, 2004. According to Mr. Sullivan, a worker may be entitled to vocational rehabilitation services if the worker cannot return to suitable employment following an injury. "Suitable" employment is deemed to be a job which would create income of at least 80% of what the employee was earning before the injury. The Claimant had worked as a substitute teacher before working for the Defendant. She earned \$55.00 per day for a 6 hour day as a substitute teacher. Her hourly rate as a machine operator for the Defendant was \$11.52 per hour.

35. Mr. Sullivan determined that the Claimant was not entitled to vocational rehabilitation services because she had a medium to heavy, full-time work capacity. He determined that she had transferable skills, which would enable her to work as an office manager, substitute teacher, or machine operator at a job paying a minimum of \$9.01/ hour.⁴ (See Joint Medical Exhibit, VR Report of June 24, 2004.)

36. In making this assessment, Mr. Sullivan relied upon the information provided by the Claimant, information from Dr. Monsey, and the Functional Capacity Examination by Erica Galipeau.

³ The Claimant testified that she started to have a migraine headache during the functional capacity examination, but there was no mention of this in the report.

⁴ The target salary of \$9.01 was calculated as 80% of her average weekly wage with the Defendant in 2001 which was \$450.74 per week.

37. At the hearing, the Claimant argued that the Functional Capacity Examination report was flawed because it did not consider the migraine headaches. The Claimant testified that she had severe migraine headaches after the functional capacity examination and that she tried to communicate this to the evaluator but did not receive a call back. The Claimant presented evidence from Dr. Backus that the Claimant did not have a medium to heavy work capacity in March of 2006.
38. The Claimant also argued that the conclusion of Mr. Sullivan was flawed because the \$9.01 target salary which he used as a minimum target should have been adjusted for inflation upwards to \$12.65 (100%) or \$10.12 per hour (80%). Because the FCE and the Vocational Rehabilitation Eligibility Assessment were flawed, according to the Claimant, her own plan should now be approved by the Department. Her own plan was her completion of a college education, which she pursued during her recovery period.
39. Prior to her employment with the Defendant, the Claimant had worked as a substitute teacher. In January of 2003 she enrolled as a full time student at Johnson State College in Johnson, Vermont. She received her Associate of Arts degree in June of 2004 and her BA degree in May of 2006, graduating *magna cum laude*. She majored in history because she wanted to be a history teacher. As of November 2006, she was pursuing a Master's degree in Special Education while she was working as a special education teacher, full time, earning \$34,000.00 to 35,000.00 per year.
40. The Claimant asks that the Department now order that the Defendant "reimburse Claimant for the reasonable cost of he[r] tuition, fees, books and mileage, plus interest." (See page 23, Claimant's Proposed Findings.) No evidence was offered by the Claimant of the amount of these expenses.
41. The Claimant's college education plan was never accepted by the Defendant or the Department as a vocational rehabilitation plan.
42. There was no evidence offered at the hearing to show that the Claimant had requested an alternate FCE or alternate vocational rehabilitation assessment, or that an alternate vocational rehabilitation counselor was requested.
43. The Claimant incurred \$2,093.11 in costs. (see statement of costs filed with proposed findings and supplemental letter of September 11, 2007.) The Claimant's attorney expended 106.4 hours in representation of the Claimant in this case. His fee agreement with the Claimant calls for a contingent fee in the amount of one-third of the gross recovery, plus any attorney's fee awarded by decision at a formal hearing. (See fee agreement dated August 21, 2006 filed with Claimant's Proposed Findings.)

CONCLUSIONS OF LAW:

1. In Worker's 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 proven must be the more probable hypothesis. *Burton v. Holden and Martin Lumber Co.* 112 Vt. 17 (1941).
3. Where the causal connection between the accident and the injury is obscure and a layperson would have no well-grounded opinion as to causation, expert medical opinion is necessary. *Lapan v. Burno's Inc.*, 137 Vt. 393 (1979).
4. While the claimant has the burden of proof in the first instance, once the claim is accepted and benefits are paid, the burden of proof to terminate the claim is upon the employer. *Merrill v. University of Vermont*, 133 Vt. 101 (1974). A disabled, injured worker is entitled to temporary disability benefits until he or she has successfully returned to work or has reached medical end result. *Coburn v. Frank Dodge and Sons*, 165 Vt. 529, 532 (1966). 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. WC Rule 2.1200.
5. Under Vermont's Workers' Compensation Act, the employer must furnish "reasonable surgical, medical and nursing services to an injured employee." 21 V.S.A. Sec. 640(a). In determining what is reasonable, competent expert evidence of reasonableness is usually determinative. *J.H. v. Therrien Foundations*, Opinion No. 53-05 WC (August 19, 2005). When an employer seeks to terminate coverage for medical benefits, it has the burden of proving that the treatment at issue is not reasonable. *Ploof v. Heritage Ford*, Opinion No. 26-07 WC (September 28, 2007). Thus, upon the issues of terminating temporary disability benefits and the reasonableness of the prolotherapy treatments, expert testimony is necessary and the burden falls upon the Defendant.

6. When choosing between conflicting medical opinions, the Department has looked at several factors: (1) the nature of the treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualification of the experts. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03 WC (Sept. 17, 2003). In the present case, Dr. Johansson's opinion is less credible than that of Dr. Fenton, Dr. Dulaney, and Dr. Backus. Dr. Johansson was not in a treating relationship with the Claimant as were the other doctors. Moreover, he did not accept or consider that the headaches were caused by the injury. Thus, his opinion appeared to have been formed, in the first instance, without consideration of the headaches. Dr. Johansson believed that, "there's no evidence that she had ligamentous laxity in her cervical spine." (Deposition of Dr. Johansson, Page 28.) Since both Leslie Bell and Dr. Fenton found such evidence, Dr. Fenton's opinion has more objective support than Dr. Johansson's.
7. The Commissioner is persuaded by the expert testimony in favor of the Claimant concerning the date of medical end result and the reasonableness of the prolotherapy treatment. The testifying experts (except for Dr. Johansson) were in general accord that the prolotherapy treatments caused substantial improvement in the condition of the Claimant and that they were reasonable.
8. Dr. Backus placed the Claimant at medical end result on August 11, 2006. The Commissioner finds that this opinion is more credible than that of Dr. Johansson and that the date of medical end result in this case is August 11, 2006.
9. A claimant is entitled to vocational rehabilitation services when, as a result of a work-related injury, she is unable to perform work for which she has previous training or experience. 21 VSA Sec. 641 (a); *Peabody v. Home Ins. Co.*, 170 Vt. 635 (2000) (mem.).
10. In an accepted workers' compensation case with a vocational rehabilitation referral, entitlement to vocational rehabilitation services is determined by a rehabilitation counselor and a report is made. WC Rule 32.2000. In this instance, the only evaluation performed by a rehabilitation counselor found the Claimant not entitled to vocational rehabilitation services. The rehabilitation counselor considered her past experience and work capacity and concluded there was work she could perform making close to her pre-injury wage.

11. Even assuming that the Claimant had established her entitlement to vocational rehabilitation services, WC Rule 33.200 provides that the counselor develop a plan and a hierarchy of vocational options is followed. An educational/academic program would be recommended only if four other preferred options are not available or feasible. Those include return to work with the original employer in a modified job, return to work for a different employer in a modified job, on-the-job training, or new skill training or retraining. The vocational rehabilitation plan, once formulated, would then be submitted to the parties for signature. If a party fails or refuses to sign the plan, the matter is set for formal hearing. WC Rule 33.600. In the normal course, the Commissioner or her designee would be considering a specific vocational rehabilitation plan which has been prepared by a certified vocational rehabilitation counselor in accordance with the rules of the Department. If the Claimant disagrees with a determination of a particular vocational rehabilitation counselor, she is free to retain the services of her own vocational rehabilitation counselor to prepare a proposed plan. See *Martell v. Dowlings, Inc.*, Opinion No 15-04 WC (March 30, 2004).
12. In this case, however, the Claimant formulated her own, unwritten, educational plan, which was to become a special education teacher. She offered scant evidence that this academic/educational program was the optimal solution to her employment situation or that this plan complied with WC Rule 33.200 (hierarchy of preferred programs). Likewise, any plan must, by rule, consider the costs associated with the plan. WC Rule 33.3400. No evidence of the costs of the Claimant's program was offered. Finally, it appears that the educational plan of the Claimant (to acquire a Master's Degree in special education, or subordinate, prerequisite degrees such as a Bachelor of Arts degree in History, at the expense of the employer) may have overshot the mark of returning the Claimant to suitable employment. Without any supporting opinion of a vocational rehabilitation expert, the Commissioner can only speculate as to whether the vocational goal of the claimant is within the definition of "suitable employment." WC Rule 2.1250. "Although injured workers are entitled to rehabilitation, they are only entitled if the proffered plan will result in suitable employment. Furthermore, it is not incumbent on the Commissioner to establish such entitlement." *Bishop v. Town of Barre*, 140 Vt. 564 (1982) (where Claimant's self-generated plan was rejected by Commissioner). In the past, the Commissioner has not looked favorably upon those plans formulated by the claimant "sua sponte" without sponsorship or prior approval of a vocational rehabilitation counselor. *Provost v. Contractor Crane Service, Inc.*, Opinion No. 26-96 WC (April 29, 1996).
13. Where the Claimant prevails, the Commissioner shall include interest at the statutory rate computed from the date the compensation should have been paid, or, for medical expenses, from the date when the cost was incurred. 21 VSA Sec. 664, *Martell v. Dowlings, Inc.* (supra.).
14. Under Vermont Workers' Compensation Rule 10.0000 and 21 VSA Sec. 678(a), the Commissioner may, in her discretion, award reasonable attorney's fees to the prevailing party. When a claimant has partially prevailed, she is entitled to a fee award in proportion to her success. *Martell v. Dowlings, Inc.* (supra.)

15. The legal bill of Claimant's counsel only identifies 1.2 hours of work (out of a total of 106.4 hours) specifically related to the vocational rehabilitation. Clearly, more time than this was related to this issue. Considering the evidence, the arguments of counsel, the proposed findings of fact, and the Department file, the Commissioner determines, in her discretion, that 85% of the attorney's fees of the Claimant should be awarded. The amount of compensable attorneys' fees is therefore \$8,139.60 (106.4 X 85% X \$90.00/hr).

ORDER:

Therefore, based upon the foregoing findings of fact and conclusions of law, the Commissioner determines that the Claimant is entitled to the following:

1. Medical benefits regarding the Claimant's cervogenic induced migraine headaches, including the prolotherapy treatments of Dr. Fenton;
2. Temporary disability benefits for the period of March 13, 2004 until August 11, 2006;
3. Interest at the legal rate on the medical benefits from the date each medical payment was due until the date of payment and interest on the temporary disability benefits from the date they became due until the date of payment;
4. The Claimant's request for the reimbursement of college expenses is denied;
5. Attorneys' fees of \$8,139.60 and costs of \$2,093.11.

Dated at Montpelier, Vermont this 8th day of January 2008.

Patricia Moulton Powden
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. Sec. 670, 672.