

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

Anthony Vach	)	State File No. L-17584
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
	)	
Twin City Subaru	)	For: Steve Janson
	)	Commissioner
	)	
	)	Opinion No. 02-00WC

Formal Hearing held in Montpelier on September 8, 1999  
Record Closed on September 24, 1999

**APPEARANCES:**

Heidi S. Haught, Esq. and Joseph C. Galanes, Esq. for the claimant  
John W. Valente, Esq. for the employer

**ISSUES:**

1. Whether claimant suffered physical injuries by accident arising out of and in the course of his employment with Twin City Subaru.
2. Whether claimant suffered traumatic brain injury, post traumatic stress disorder, or other psychological injuries by accident arising out of and in the course of his employment.
3. If the answer to the first two issues is in the affirmative, was claimant temporarily totally disabled from work and, if so, for what period of time?

**Claimant Seeks:**

1. Temporary Total Disability Benefits pursuant to 21 V.S.A. § 642 for a total for 71 weeks, that is from January 24, 1998 to July 18, 1998 and from November 10, 1998 to September 28, 1999.
2. Medical and hospital benefits pursuant to 21 V.S.A. § 640 for psychological care and medical care for his back.
3. Attorney fees and costs pursuant to 21 V.S.A. § 678 (a).

**EXHIBITS:**

Joint Exhibits I a and I b : Medical Records

Claimant's Exhibit 1 : Transcript of deposition of Judy Nepveu, M.D.  
Claimant's Exhibit 2 : Transcript of deposition of Todd Lefkoe, M.D.

Defendant's Exhibit A : Transcript of deposition of Kenneth Ciongoli, M.D.

**FINDINGS OF FACT:**

1. In the summer of 1997 the claimant, his wife Mary Kay, and their adult son moved to Vermont. At the time of the move, claimant was taking prescription medications for depression. He testified that he was feeling well. He testified further that he was active and healthy, was doing woodworking in his wood shop, and cutting wood for the winter's heating supply.
2. On September 23, 1997, in his effort to establish a physician in Vermont, claimant saw Dr. Philip G. Kiely who wrote at the outset that claimant was on an "indefinite medical leave for cardiac and psychological problems." At that time he was taking Luvox 100 mg. a day and Ativan morning and evening. Dr. Kiely wrote that claimant "has been a little bit more active since he has been here and is mentally and physically feeling better and has lost 15 pounds." And he documented that claimant had chronic low back pain for which he took one to two Darvocet tablets on average per day. On examination the doctor noted that he had swelling in both legs, more on the right, the side of a saphenous vein graft some years earlier. Dr. Kiely refilled claimant's Luvox, Ativan and Darvocet. He asked claimant to return in six months.
3. In November 1997, claimant slipped and fell in the Price Chopper in Morrisville. He testified that his lower back hit something. He explained that after seeing a chiropractor, he was fine.
4. In November 1997 claimant responded to an advertisement for a car salesperson at Twin City Subaru in Montpelier. After interviewing with the manager John Henning, he was hired.
5. Claimant started working at Twin City Subaru in November 1997.
6. On December 18, 1997 claimant returned to Dr. Kiely with complaints of a headache, cough, joint pain and bilateral lower extremity paresthesias. The note reflects that claimant told the doctor that the headaches had started when he fell and hurt his back in the snow in November.
7. For the twelve weeks preceding the January 24, 1998 accident, Twin City paid claimant an average weekly wage of \$221.26.
8. His coworker, Chip Milne, described claimant as a non-aggressive, quiet man who stayed in his office a great deal of time. Claimant got along well with everyone. At times, however, he was seen sleeping in his office and had to be reminded to create an image

more conducive to a work setting, e.g., reading at his desk during slow periods. Another coworker, Charles Paini, also testified that he had seen claimant fall asleep at work before his fall. Michael Hughes, the used car manager at the time claimant worked at Twin City, at times prodded claimant's foot to startle him awake. Hughes testified that claimant complained of being tired. Claimant denied ever sleeping on the job. He said that because he has droopy eyelids, he appears to be sleeping even when he is not. However, claimant's appearance at the hearing did not suggest that his normal awake state would be confused with sleeping.

9. On January 24, 1998, claimant and his coworkers were clearing snow from cars in the sales lot when claimant's feet slid out from under him and he fell. The claimant testified that coworkers helped him up.
10. Claimant testified that he flew into the air, then crashed to the ground, landing on his back and left shoulder. He further testified that he struck his head on the snow-covered asphalt when he landed, then immediately felt dizzy and dazed and had pain in his back and in the back of his head.
11. Chip Milne, a coworker, was about seven or eight cars away from claimant at the time of the fall. He noticed that someone helped claimant get to his feet. Claimant then walked unassisted to the office where he worked for the rest of the day.
12. Claimant testified that initially he had generalized lower back pain and various aches. By evening, he testified, he was confused and dizzy. Also, he said that he had a headache and numbness in both feet. However, the medical records make no mention of headache for almost a month after the incident. Numbness in his lower extremities dated back to open heart surgery and saphenous vein graft several years earlier, a complaint he still had when he saw Dr. Kiely for the first time in the fall of 1997.
13. Because he had had low back pain in the past that was relieved with chiropractic treatment, claimant sought care from the chiropractor, Dr. Charles Vartanian. He then treated for about three weeks. In his January 26, 1998 office note, Dr. Vartanian recorded claimant's history as, "Fell two days ago at work and landed on his back. Feels continuing L-S [lumbar sacral] discomfort and slight right foot numbness. Has not been noting right calf numbness since last treatment says this feels different. Low back discomfort not as severe as in recent past." No mention is made in that note of any injury to the head or neck. Dr. Vartanian assessed mild re-injury of L-S joint dysfunction and planned to treat three times over the next week and reassess. At the January 30 visit, Dr. Vartanian noted claimant's report of "slightly better decreased low back discomfort." On February 6, the claimant reported no significant change at his visit to Dr. Vartanian where treatment consisted of spinal manipulation, ultrasound and electrotherapy. On February 13 claimant told Dr. Vartanian that he noted increased numbness in the left foot.
14. Not until February 23, 1998 did Dr. Vartanian document that claimant had complained of headache and increased lower back discomfort. From that point on, Dr. Vartanian referred to claimant's "cervical complaints" in his treatment notes.

15. Claimant and his wife testified that between January 24 and February 17, they both noticed a steady decline in claimant's functional ability, specifically that his mood was more depressed, he was confused, had speech problems, migraine headaches, and continued numbness and pain in his legs and feet. However, those with whom he worked did not notice a change in his mood, any indication of confusion, or speech problems.
16. Chip Milne recalls taking a call from claimant one morning in which claimant reported that he could not work that day because he had injured his back the previous day while helping his son move. Claimant denied that he had helped his son move. His son did not testify.
17. Claimant continued to work until February 17, 1998 and has not worked since. Not one of the three coworkers who testified, Chip Milne, Charles Pains and John Henning, noted any difference in claimant's behavior or activity before and after the January 24 fall.
18. Because claimant's sales were far below what was expected of a salesperson, claimant was terminated.
19. On his last day at work, claimant went to Dr. Kiely's office where he saw the doctor's assistant. The note for that visit reflects claimant's "multiple complaints." Those complaints were: 1) left wrist pain with diminished ability to hold cups since the previous Sunday; 2) bilateral leg pain especially in the left calf with walking; and 3) bilateral diminished feeling of feet with increased falls. Following the description of the third complaint, the examiner wrote that there was "no recent change in back pain or injury. Leg/foot sensation progressing over weeks."
20. Dr. Kiely evaluated the claimant on February 20, 1998 and was initially confused by the symptoms claimant presented. He told claimant to remain out of work until March 7, 1998 so that he could investigate the pathology. Over the next weeks, Dr. Kiely noted that claimant's condition deteriorated.
21. Claimant testified that on February 21, 1998 he received a certified letter from Twin City stating that his employment had been terminated.
22. John Henning, General Manager, testified that workers at Twin City Subaru knew the proper procedure for reporting a work-related injury. On March 2, 1998 when he received a request from claimant for a form, Henning first learned that claimant was alleging an injury related to the fall on January 24. Until that day in early March, Mr. Henning had received facsimiles from claimant's physician excusing him from work, but had no indication that he alleged a work-related injury.
23. On April 15, 1998 Dr. Vartanian wrote a letter to the insurer in which he recounted the history of his treatment and the lack of objective findings on examination. For example he wrote that claimant was able to walk with a normal gait and had normal straight leg and sciatic notch tests as well as normal popliteal and pedal pulses bilaterally.
24. On April 27, 1998 Dr. Kiely wrote:

Mr. Vach does have some pre-existing depression and back pain, but it appears that certainly all of his symptoms have worsened since this accident ... I do believe that much of the symptoms that Mr. Vach is suffering from are causally related to his accident in January at Twin City Subaru.

25. In a letter to claimant's counsel dated May 11, 1998, Dr. Kiely opined that claimant remained totally disabled from any work and should remain out of work until at least July 10, 1998.
26. Dr. Kiely referred claimant to a neurologist, Dr. Frederick Fries, for an opinion on the array of neurological symptoms.

### **History**

27. Claimant was an ordained Episcopal minister. He obtained his Bachelor's degree from St. Edward's University in Austin, Texas, in 1989 and graduated from the Episcopal Theological Seminary of Southwest Texas in May 1993. He graduated with a Master of Divinity degree. By June 1994 he was working as a priest for the Episcopal Missionary Church in Portland, Texas.
28. The following fall, however, he was working in a construction job. He explained at the hearing that he relied on his spouse's salary because he was unable to support his family on the pay he was receiving as a priest. When his wife suffered an injury that prevented her from working, he took a better paying job in the construction industry. Less than a week into that job, he suffered a knee injury that ultimately led to a total knee replacement.
29. During the course of claimant's recovery from the knee replacement, he began to experience psychological problems, which psychologist Dr. Joseph Horvath diagnosed as post-traumatic stress disorder relating to his knee injury. He opined that claimant developed a sense of impotence that in turn triggered panic attacks and extreme depression.
30. In 1996 claimant underwent open-heart surgery for a multiple vessel bypass. Afterwards, he had shoulder pain and left arm numbness. He also had a saphenous vein graft and lower extremity swelling.
31. Before he moved to Vermont, claimant underwent intensive inpatient and outpatient psychological therapy. The last psychiatric treatment note in the record is one from Texas on August 30, 1996. At the time, the record indicates that he was handling his trauma well and was no longer suicidal.
32. The psychiatric problems claimant suffered in Texas were determined to have arisen out of his work injury and paid as a workers' compensation claim.

33. During the course of his recovery from the knee injury and subsequent depression, claimant had a falling out with the Episcopal Church. He relinquished his parish but maintains that he remains true to his religious faith.
34. No physician in Texas ever placed claimant at maximum medical improvement for his back or psychological injuries.

### **Opinion of Dr. Fries**

35. Dr. Fries described the purpose of his first evaluation of claimant on May 7, 1998 as follows: "Strictly speaking, patient has been referred just for evaluation for the LE [lower extremity] pain complaint, but he and his wife wanted a re-evaluation of the whole neurological situation."
36. Claimant complained to Dr. Fries of frontal headaches with surges accompanied by nausea, photophobia, dizziness, and blurred vision. He also complained of difficulty concentrating, organizing his thoughts, difficulty dealing with complex situations, and difficulty using his home computer. Claimant reported personality changes and possibly an increase in his underlying depression. He complained of cold sweats, neck pain that spread to his shoulder, upper arm, and medial three fingers. He complained of low back pain that radiated to his left buttock, thigh, calf, foot, and toes. He also reported numbness in his right foot, weakness in his legs, and generalized weakness and tiredness.
37. The claimant reported to Dr. Fries that all the symptoms began following a work accident on January 24.
38. On examination, claimant kept his eyes closed and his head hanging down because of what he described as photophobia. Dr. Fries determined that the musculoskeletal examination was unremarkable. Language function was normal. His head, face, and neck were sweaty. Strength and tone were normal. Gait was "quite ataxic looking." He had a left hand tremor that claimant told Dr. Fries was "only since the trauma." Right straight leg raising test at 80° caused pain to spread to the leg in a "vague pattern." The left straight leg raising test at 20° "caused dramatic surge in LBP [low back pain] spreading into ant[erior] groin and down the back of the calf."
39. Dr. Fries assessed claimant's condition as follows:

Post-concussion syndrome with post-traumatic vascular headaches and typical post-concussion sx[symptoms] such as reduced ability to handle life's daily complexities. It's not clear what the cause is of his LE [lower extremity] sx[symptoms]... I am not sure how to explain the stuttering. It must be part of the post-concussion syndrome in this particular patient. I've never seen it before as a post concussion sx.
40. Dr. Fries noted that since the trauma claimant stuttered and hesitated with his speech. He prescribed Elavil and referred claimant to the head injury clinic at Fletcher Allen Health Care.

41. In correspondence to claimant's counsel dated June 9, 1998, Dr. Fries clearly opined that claimant's medical condition was caused by the accident he suffered while at Twin City Subaru. He diagnosed post-concussion syndrome and advised that claimant was in no condition to return to work at that time.

### **Brain Injury Center Evaluation**

42. Dr. Todd Lefkoe, a physiatrist, evaluated claimant at the Brain Injury Center at Fletcher Allen Health Care on June 30, 1998. On the new patient questionnaire, to the direction to identify from a list the problem areas he had had over the previous three months, claimant checked: anger management, depression, job/workplace, socialization/interaction, sexual function, stress management, marital/partner relationship, organization, communication, concentration, time management, nutrition, memory, thinking/problem solving, speech clarity, pain, driving, migraine headaches, fatigue, homemaking, physical limitations, medications, medical equipment, and dizziness. To that list, he added, "dizziness, balance, light sound and crowd sensitivity, imbalance, overall weakness, left arm tremors, blurred vision."
43. Goals claimant identified were: saying Mass and preaching, operating a home business, earning money, being self-sufficient, being the person I was prior "to falling at Twin City Subaru on 1-24-98 and hitting my head."
44. In his assessment, Dr. Lefkoe recorded a history that included major depression, two suicide attempts, and a "closed head injury as the result of a fall at work on 1/24/98." He described the accident as follows:

The patient was employed as a car dealer at Twin City Subaru. He slipped on ice and snow in the dealer lot and fell back wards, striking his head. He is uncertain whether he lost consciousness for a brief period. He recalls being dazed and disoriented and describes post-traumatic amnesia for as long as 48 hours.
45. Dr. Lefkoe noted that claimant described cognitive, emotional and physical symptoms "since the injury" and that prior to the injury he was scheduled to be tapered from his psychotropic medications. At the time of that Brain Injury Center visit, claimant was being treated for major depression.
46. Dr. Lefkoe concluded that claimant's "history and examination are consistent with a diagnosis of mild, traumatic brain injury." The history included a specific finding that claimant had struck his head when he fell in January.
47. Over the course of the next ten months, Dr. Lefkoe and his staff examined claimant on six occasions, the last of which was on March 16, 1999. At his deposition, Dr. Lefkoe expressed his expert medical opinion that claimant suffered a mild traumatic brain injury as a result of the January 24, 1998 fall and that the fall caused a reactivation of claimant's recurrent depression. He also testified that during the time he monitored claimant's condition, that claimant did not have any capacity to work.

48. Dr. Owen Drudge, a psychiatrist at the Center wrote that "I suspect much of patient's problems stem from a recurrence of a major depressive episode triggered by his head injury and stressors related to it."

### **Psychiatric Diagnosis and Prognosis**

49. Dr. Judy Nepvue, a psychiatrist who has treated claimant since April 21, 1998, agreed with Dr. Lefkoe that claimant's underlying depression was reactivated by the January 24 accident. The basis for her comparison of claimant's condition before and after the fall was what the claimant had told her or other health care providers.
50. Dr. Nepvue initially treated claimant for one hour per week. In the fall of 1998 she reduced the time of his sessions to one half hour, also once a week. Since June 1999 she has seen him once every two weeks.
51. Dr. Nepvue described claimant as having an inflexible and rigid personality. She noted that he has very high expectations of himself. It is hard for him to change directions and change ideas. When things do not go as he has planned, he becomes extremely disappointed.
52. In Dr. Nepvue's opinion, claimant's rigidity and high expectations make it more difficult for him, than those who are more flexible in their thinking, to cope with life's stressors. In her opinion, claimant's depression was in remission in the fall of 1997. She explained that when he suffered an injury at work, the anxiety symptoms and depression came back with enormous symptoms.
53. As a result of her care and treatment of claimant, Dr. Nepvue diagnosed claimant as having recurrent depression with psychotic features and post traumatic stress disorder. She testified that his January 24, 1998 accident severely aggravated his underlying psychological condition.

### **Dr. Albert Drukteinis, Defense Expert**

54. Dr. Albert Drukteinis, a psychiatrist who holds a law degree, evaluated claimant for the employer. In his forensic psychiatric business, he does considerable work for insurance companies.
55. Dr. Drukteinis agreed that it is possible for a work injury to aggravate an underlying psychiatric condition. He also agreed that claimant is suffering from a major depression and an undifferentiated somatoform disorder. He explained that a somatoform disorder is a psychiatric condition in which the patient has physical sensations such as numbness and pain that cannot be explained by any known physical or organic process. One of the diagnostic criteria for a somatoform disorder is that the patient not be faking or feigning physical symptoms.
56. At the hearing Dr. Drukteinis testified that claimant's underlying psychological conditions were not aggravated by the January 24, 1998 incident but rather that claimant's underlying psychological conditions were actively seeking an outlet for their



expression. The slip and fall and resulting physical pain and stress provided incidental triggering force.

57. Dr. Drukteinis did not dispute any of the medical evidence regarding claimant's ability to work.

#### **A. Kenneth Ciongoli, M.D.**

58. Dr. Ciongoli reviewed claimant's medical records, conducted an extensive interview, and examined claimant at the employer's request. During the interview, claimant never mentioned that he had helped his son move. On examination, Dr. Ciongoli concluded that claimant's sensory and motor physical findings were normal. Among his observations were that claimant's symptoms over time became more diffuse, although patients rarely broaden their complaints over time after a single injury. Dr. Ciongoli concluded that claimant's complaints were related to chronic depression, not to any physical abnormality.

#### **Medical End Result**

59. In his office notes, Dr. Kiely indicated that claimant's condition had stabilized by September 8, 1998, but he later explained that he was referring only to the low back pain.

#### **Attorney's Fees and Costs**

60. Claimant's attorneys have submitted evidence of necessary costs of \$2,154.08 and a contingency fee agreement.

#### **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, Morse Co.*, 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 employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
2. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary to establish the claim. *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979). 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. 117 (1941).
3. In this case it is undisputed that claimant fell on January 24, 1998. Within days he sought the care of his chiropractor.

4. Likewise there is no evidentiary dispute that claimant remains temporarily totally disabled today. The only issue for decision is whether claimant's current disability is causally related to his work-related fall in January 1998 or whether it is a result of his pre-existing conditions.
5. In support of his claim for compensability, the claimant relies on the opinions of no fewer than five physicians who opine that claimant's physical injuries to his head, upper and lower back, and shoulder are the result of the slip and fall. From that premise he argues that he suffered an aggravation of his underlying psychiatric condition as a result of a physical injury.
6. Claimant's theory, therefore, is that this is a physical-mental claim. Such a claim is compensable if he proves a causal connection between a compensable physical injury and the psychological impairment. *Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99WC (July 30, 1999).
7. Where there has been a physical injury as a result of work accident and the claimant's impaired condition is increased or prolonged by a psychological condition, it is uniformly recognized that the psychological impairment, in addition to the physical impairment, is compensable. 3 *Larson's Workers' Compensation Law*, § 56.03 and cases cited therein. This is true even where a claimant may have been predisposed to a psychological condition as long as it is shown that the work injury aggravated or accelerated that condition. See, *Marsigli Estate v. Granite City Auto Sales*, 124 Vt. 95, 103 (1964). *Laird v. State Highway Department*, 112 Vt. 67, 86 (1941).
8. In support of his position, claimant cites *Gimbert v. United Parcel Service*, Opinion No. 22-88WC (Feb. 27, 1991) where the claimant was found entitled to permanent total disability on the basis of a physical-mental claim. Past trauma predisposed the *Gimbert* claimant to psychological injury that was precipitated by a physical injury incurred when a step gave way under her.
9. Claimant also relies on *Weaver v. Agway*, Opinion No. 67-81WC (Jan. 6, 1981) in which the Department awarded compensation to a claimant for a mental injury that arose from a work-related physical injury. In *Weaver* the claimant was injured when an elevator he was in fell one and half stories. His physical injuries were immediate. The Department specifically found that the elevator accident was the precipitating factor in Weaver's neurosis and subsequent increasingly severe anxiety. Citing *Campbell v. Savelberg*, 139 Vt. 31 (1980), the Commissioner concluded, "if a causal link between the accident and the neurosis is established, the fact that the claimant may have been predisposed to develop the neurosis is irrelevant." *Weaver* ¶ 6, Conclusions.
10. Crucial to all compensable physical-mental cases is the fundamental requirement that a causal nexus between the physical injury and psychiatric disability be proven. Proof of causation requires medical evidence.
11. Like the claimant in *Gimbert*, testimony suggests that Anthony Vach is a fragile, rigid person. The medical evidence, including that of the defense experts, is that claimant's

fall at Twin City awakened, triggered, or aggravated his pre-existing mental health problems. It is black letter law that such an acceleration or aggravation is compensable.

12. Claimant has sustained his burden of proving that he suffered a minor physical injury and an aggravation of his major depression as a result of his fall on January 24, 1998.

**ORDER:**

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the insurer/employer pay to claimant:

1. Costs for all reasonable medical care incurred for the care of claimant's physical injuries including treatment for his back and for reasonable psychological care pursuant to 21 V.S.A. § 640 (a);
2. Temporary total disability benefits from January 24, 1998 to the present, excluding the time during which the defendant advanced payment without prejudice, and continuing until a valid Form 27 is filed;
3. Attorney's fees totaling 20% of the amount awarded, not to exceed \$6,000.00 and costs of \$2,154.08.

Dated at Montpelier, Vermont, this 24<sup>th</sup> day of March 2000.

---

Steve Janson  
Commissioner