STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-17533
	)	
	)	By: Margaret A. Mangan
Charles Smith	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Skyline Corporation	)	
and RSKCO	)	Opinion No. 20A-02WC

ATTORNEY FEES AND COSTS

At the Commissioner's direction, the Claimant by and through his attorney, Theodore A. Parisi, Jr., submitted an amended request for attorney fees of $5,752.95 and costs of $1,425.00. Defendant, by and through its attorney, Christopher J. McVeigh, Esq., asks for limitations on that request.

Claimant's initial request under 21 § 678 (a) was for attorney fees of $20,546.25 and costs of $1,612.34, including $500.00 for Steven Mann, Ph.D and $664.00 for Todd Lefkoe, M.D. Although the invoice total includes 29.5 hours in attorney time and 238.55 hours in paralegal time, it is unclear specifically how the time was divided between lawyer and paralegal and whether both ever billed for the same work.

In his amended request, Claimant asks for $5,132.00 in attorney fees, which represents 28% of the original request, in proportion to his degree of success in the disputed aspect of this case. Such a proportion might be reasonable if it were possible to distinguish between lawyer and paralegal time and to eliminate any billing for both practitioners performing the same work. For example, a Claimant is not entitled to fees for the attendance of two advocates at a hearing, yet such a claim was submitted in this case. Without a precise accounting there is an inadequate basis for an attorney fee award based on an hourly rate. Therefore, a contingency fee under WC Rule 10(a) is the only appropriate award in this case and Claimant is awarded fees based on 20% of the amount awarded. Based on claimant's estimate of a $5,132.00 award, that fee is $1,026.40.

Next, Claimant is entitled to necessary costs incurred to prevail partially in this claim. Under Rule 40.111, reimbursement for expert medical testimony is limited to $300.00 per hour and $75.00 per hour for each additional fifteen minutes. Although Rule 40.080 provided for good cause exception to allow a higher fee in exceptional circumstances, there is no basis in this case to depart from the Rule 40. Because Dr. Mann and Dr. Lefkoe each testified for one and one half hours, they are entitled to a fee award of $450.00 ($300.00 + $75 x 2). This limitation requires a reduction of $264 from the total requested ($664.00 (requested amt) – $450 (allowable amt)= $214 (disallowed amt) for Dr. Lefkoe and $500.00 (request) - $450.00 (allowed) =$50 for Dr. Mann)). Therefore, the costs awarded total $1,161 ($1,425.00 request –$264).

ORDER:

Because the Claimant has prevailed on an aspect of this claim, he is awarded attorney fees based on 20% of the total award and costs of $1,161.00.

Dated at Montpelier, Vermont this 25th day of July 2002.

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R. Tasha Wallis
Commissioner

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Skyline Corporation and	)	
RSKCO	)	Opinion No. 20-02WC

Hearing held in Middlebury, Vermont on December 20, 2001
Record closed on February 8, 2002

APPEARANCES:

Theodore A. Parisi, Jr., Esq. for the claimant
Christopher J. McVeigh, Esq. for the defendant

ISSUES:

1. Has the claimant reached maximum medical improvement?

2. Is the claimant entitled to the medical treatment recommended by Dr. Lefkoe?

3. Is the claimant entitled to a continuation of temporary total disability benefits terminated by the carrier on or about May 21, 2001?

EXHIBITS:

Claimant's Exhibit 1:	Medical Reports
Claimant's Exhibit 2:	Schedule of benefits paid to the claimant
Claimant's Exhibit 3:	Employee record excerpts
Claimant's Exhibit 4:	IWRP (O'Neil)
Claimant's Exhibit 5:	IWRP (received with Attorney Parisi's 12/26/01 letter)
Defendant's Exhibit A:	Medical Records
Defendant's Exhibit B:	Records from Connecticut claim
Defendant's Exhibit C:	Transcript of deposition of Eui K. Chung, M.D.
Defendant's Exhibit D:	Dr. Chung's office records
Defendant's Exhibit E:	Notice to change VR counselors
Defendant's Exhibit F:	IWRP
Defendant's Exhibit G:	Letter from McVeigh to Parisi (11/20/01)
Defendant's Exhibit H:(i.d.only)	Patient questionnaire from Dr. Bucksbaum's office

FINDINGS OF FACT:

1. The Exhibits (except Defendant's H) are admitted into evidence. Judicial notice is taken of Department forms.

2. Prior to his employment with Skyline, claimant had been diagnosed with carpal tunnel syndrome (CTS) from work he was doing in Connecticut. He had surgery for the condition and received permanency benefits.

3. Claimant became an employee of Skyline Corporation in October 1988. He disclosed his history of CTS on an application and passed the pre-employment physical.

4. At Skyline, the claimant worked building modular homes. That work involved the use of pneumatic hand tools, including a stapler and a nailer. In his years at Skyline, claimant was engaged in several different phases of the home building process. He worked five days a week for 12 years. He described his attendance as perfect.

5. Sometime in 1996 claimant reported to his employer that he had the return of symptoms he recognized as carpal tunnel symptoms.

6. In February of 2000 the claimant was injured when a staple from a staple gun was accidentally shot into his left forearm. In the course of the medical treatment claimant received for the staple injury, it was confirmed that the claimant again had carpal tunnel syndrome.

7. In March and April of 2000 Dr. John Wheeler performed surgical carpal tunnel releases on both of the claimant's hands. In an April return to work note, Dr. Wheeler cleared the claimant to return to unrestricted regular work with the caveat "though it may not be wise for the company to assign him to the most difficult work for the first two weeks or so…."

8. By May 17, 2000 Dr. Wheeler determined that the claimant could return to regular work unrestricted. At the hearing, Dr. Wheeler acknowledged that he had spoken with the insurance adjuster at RSKCO, although he had no notes of that conversation.

9. The insurance adjuster told the claimant that he was not authorized to see Dr. Ann Stein, that the insurer would only cover visits to Dr. Wheeler.

10. Claimant returned to work, but had problems with his hands and wrists, including pain, tingling, numbness and swelling, especially in his left hand and wrist. As a result, he stopped working.

11. In early June 2000 the employer contacted the claimant, asking that he report to work. When the claimant advised that he was unable to do so, and that he had an upcoming appointment with Dr. Stein, an orthopedic surgeon, the employer terminated him for failure to return to work.

12. When Dr. Stein saw the claimant on July 3, 2000, she determined that he was unable to use his left hand until he was re-evaluated. Next, on July 13, 2000, she issued a written order stating that he was unable to work due to pain and swelling after the carpal tunnel release. Dr. Stein then referred the claimant to a physiatrist for pain control. The physiatrist claimant then saw was Dr. Lefkoe.

13. Nerve conduction studies performed in late August of 2000 were within normal limits. When Dr. Stein saw the claimant on September 12, 2000, she recommended a referral to a physiatrist for pain control to be followed by a strengthening program and a vocational assessment. She referred him to Dr. Lefkoe for continuing care "until he reaches maximal medical improvement." On a work injury-tracking form Dr. Stein indicated that her instructions and/or limitations for the claimant had not changed.

14. Contrary to his testimony at the hearing that his hand pain had been bilateral, medical records in the summer of 2000 refer only to left hand pain.

15. Because claimant's symptoms persisted despite treatment, Dr. Lefkoe referred the claimant to a Dr. Steven Mann, a psychologist at Occupational Disability Management Center (ODMC). On November 22, 2000 Dr. Lefkoe asked the insurance carrier to approve an evaluation by Dr. Mann, a request that was initially denied, but later approved.

16. On December 27, 2000 claimant submitted to an Initial Behavioral Medicine and Pain Experience Evaluation, and extensive testing and evaluation process conducted by Dr. Mann. Based on that evaluation, Dr. Mann determined that the claimant would be an excellent candidate for the modified ODMC treatment program. Dr. Mann referred his recommendation to Dr. Lefkoe, who concurred in the assessment.

17. Then at three visits in January 2001 claimant saw Dr. Mann in follow-up.

18. Dr. Mann is a licensed clinical psychologist who is board certified in pain management and rehabilitation psychology.

19. Dr. Mann proposes a four-week pain management program for this claimant, for which the carrier has denied payment. The program includes pain management strategies, massage therapy, aquatic therapy, land based treatment and behavioral medicine. Because the claimant is one who has a high fear of re-injury and because he ignores symptoms initially, Dr. Mann believes that the program he is recommending will improve the claimant's functioning.

20. Dr. Mann owns the for-profit program he is recommending for this claimant. Dr. Lefkoe supervises some patients in the program.

21. Dr. Lefkoe is a physician board certified in physical medicine and rehabilitation. In his opinion, claimant has not yet reached medical end result for his chronic pain syndrome. Dr. Lefkoe recommends the interdisciplinary program proposed by Dr. Mann. Although he acknowledges that a functional capacity evaluation assessed the claimant at a medium level work capacity, Dr. Lefkoe does not believe that the claimant could succeed at a medium level job at this point. The FCE provides a view for only a limited period of time. In this case, Dr. Lefkoe opined that any attempt claimant would make to return to medium duty work before he undergoes the pain program would not succeed. The work would not last long and the attempt would set the claimant up for failure. Only after he completes the program will the functional capacity evaluation have validity.

22. At the carrier's request, the claimant saw Dr. Mark Bucksbaum on February 2001. Dr. Bucksbaum is a physician board certified in physical medicine, pain management and independent medical examinations. In his opinion, the claimant is at medical end result for his carpal tunnel syndrome. That conclusion was based on a review of the medical records, a physical examination of the claimant and his opinion that the claimant had a long standing medical condition that had stabilized, was not expected to change within the next year and for which there was no further need for additional testing or treatment.

23. Dr. Bucksbaum also opined that the proposed program for pain relief is not necessary for this claimant. He based that opinion by comparing the goal of the program, which is to meet a specific goal, with the claimant's condition, for which there is nothing to improve. Although he agreed that the claimant has a fear avoidance problem, he did not think that a pain management program was necessary to treat it. In his opinion, the pain management program would be merely palliative, which would not preclude a finding of medical end result. Finally, Dr. Bucksbaum determined that counseling alone would be sufficient intervention for his problem.

24. Dr. Bucksbaum agreed that this claimant has a tendency to deny psychological problems, but that his opinion about medical end result remains unaltered. In his opinion, claimant's need is for the improvement of coping skills. He does not believe that the claimant has a psychological condition that prevents him from working.

25. Claimant left school before finishing high school. He does not have a GED. Claimant denies psychological problems Dr. Mann believes he has, including fear avoidance.

26. Aggravating the claimant's overall pain has been his inability to sleep adequately. When the claimant's temporary total disability benefits were terminated, the carrier also terminated medical benefits, although it was not authorized to do so. At the hearing, claimant estimated that he had gone six months without the prescribed Wellbutrin because of he carrier's failure to pay for it. When this uncontested fact came out during the claimant's testimony, the hearing officer instructed defense counsel to assure that the carrier resume payment so that the claimant would receive the prescribed medications.

27. Claimant has reached medical end result for his carpal tunnel syndrome.

28. The proposed Occupational Disability Management Center program will likely provide the claimant with palliative care for symptom relief.

29. Claimant has submitted evidence that his lawyer and paralegal expended 238.55 hours in the pursuit of this claim. It is unclear from the invoice how the time was divided between lawyer and paralegal or whether both billed for the same time period. For example, a total of 17.5 hours is billed for attendance at the hearing that lasted approximately eight hours. In addition, claimant submitted evidence that his attorney incurred $1,612.34 in costs, including numerous charges for facsimiles.

DISCUSSION:

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. However, once an employee has adequately established the original injury and a subsequent disability, the burden is on the employer to justify the termination of temporary total disability compensation. *Merrill v. University of Vermont*, 133 Vt. 101 (1974).

4. In this case the defendant has the burden of proving the propriety of terminating temporary total disability benefits for an accepted work-related injury. The claimant has the burden of proving his entitlement to the proposed pain clinic.

Temporary Total Disability Benefits

5. A claimant is entitled to temporary total disability compensation until he either reaches a medical end result or successfully returns to work. *Wroten v. Lamphere*, 147 Vt. 606 (1987).

Medical End Result

6. "The proper test to determine medical end result is whether the treatment contemplated at the time it was given was reasonably expected to bring about significant medical improvement." *Coburn v. Frank Dodge & Sons,* 165 Vt. 529, 533 (1996) (citing Vt. Workers' Comp. and Occupational Disease Rules, Rule 2(h), current Rule 2.1200).

7. "The fact that some treatment, such as physical or drug therapy, continues to be necessary does not preclude a finding of medical end result if the underlying condition causing the disability has become stable and if further treatment will not improve that condition." *Coburn* 165 Vt. at 533 (citing 1C A. Larson, Workmen's Compensation Law § 57.12(c), at 10-40 to 10-46; other citations omitted).

8. Dr. Bucksbaum opined that the claimant has reached medical end result for his carpal tunnel syndrome. Drs Lefkoe, who has been treating the claimant, opined that he has yet to reach medical end result for his chronic pain syndrome.

9. As is obvious from the opinions themselves, they are different, but not necessarily conflicting. Claimant can be at medical end result for carpal tunnel syndrome, but still be in need for treatment for this pain as *Coburn* firmly establishes. Id. Therefore, with the objective evidence presented, including nerve studies, and persuasive medical opinions, defendant has met its burden of proving that it was justified in terminating temporary total disability benefits because claimant had reached medical end result. Consequently, it is not necessary to address the secondary justification for terminating temporary benefits, that claimant had failed to conduct a good-faith effort to look for work.

Proposed Pain Clinic

10. An employer subject to the provisions of the Workers' Compensation Act shall furnish reasonable surgical, medical and nursing services and supplies to an injured employee." 21 V.S.A.§ 640(a). A decision or choice is reasonable when it is "fair, proper, moderate, suitable under the circumstances." Black's Law Dictionary, 5th Ed. A reasonable treatment is typically one that is also necessary for a particular claimant. See, e.g. *Raymond v. Grand Union Stores of Vermont* Opinion No. 13-99WC (Mar. 24, 1999)

11. Without doubt, this claimant experiences pain. Because of that pain, he avoids activities out of fear. At the same time, he denies symptoms. The proposed pain clinic over a four-week period with a multidisciplinary approach to pain management is intended to provide supervised exercise, relaxation and coping skills. That not all clinicians would advise such a program for this particular claimant is not to negate its reasonableness. In fact, for an individual committed to full participation in the program, and who has been caught in a pain cycle, fear avoidance and the protracted delays involved in this litigation, the pain program proposed by Doctors Mann and Lefkoe is a reasonable and necessary one.

CONCLUSIONS:

1. Because the claimant has reached medical end result, he is not entitled to further temporary total disability benefits. *Wroten*, 147 Vt. 606. However, he is entitled to participation in the ODMC program for the treatment of his pain.

2. Having partially prevailed in this case, the claimant is entitled to reasonable attorney's fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A.§ 678 (a). Such an award must be proportional to the degree of success, which in this case is less than half of the requested relief.

3. Claimant has 45 days from the date of this order to re-submit a request for fees and costs based on that portion of the case on which he has succeeded, unless the parties can stipulate to an amount. In the case of a stipulation, the parties must file the agreement within 45 days.

ORDER:

THEREFORE, based on the Foregoing Findings of Fact and Conclusions of Law:

1. The employer is ORDERED to cover payment for the pain program at the Occupational Disability Management Center;

2. Claimant is ordered to submit a revised request for fees and costs;

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3. The claim for continued temporary total disability benefits is DENIED.

Dated at Montpelier, Vermont this 13th day of May 2002.

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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.