

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

Sharon Quinlan	)	Opinion No. 50-03WC
)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
)	
Concentra Managed Care)	
and Windham Group	)	For: Michael S. Bertrand
	)	Commissioner
)	
	)	State File No. P-13089 and S- 04712

APPEARANCES:

Frank E. Talbott, Esq., for the Claimant
Glenn S. Morgan, Esq. and Marion T. Ferguson, Esq. for Concentra
Stephen D. Ellis, Esq., for the Windham Group, for the Defendant

RULING ON DEFENDANTS' MOTIONS FOR STAY

After protracted discovery and an evidentiary hearing, claimant partially prevailed in her claims against the two defendants. She then took a timely appeal to the Vermont Supreme Court on the unsuccessful issues. Defendants cross-appealed. This motion came before the department on the defendants' motions to stay the order that: 1) Windham/Acadia pay medical and surgical benefits for claimant's shoulder injury, approximately five months of temporary total disability benefits, and fees associated with a vocational rehabilitation referral and recommendations; and, that 2) Concentra/Atlantic Mutual cover the cost for treatment of Claimant's psychological conditions.

Defendants argue that a stay would put all parties on equal footing for the appeal and that a failure to grant a stay would encourage future partially prevailing claimant's to appeal because they would have nothing to lose.

Any award or order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner, any appeal notwithstanding. 21 V.S.A. § 675. To prevail on its request in the instant matter, Defendants must demonstrate: “1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; 3) a stay will not substantially harm the other party; and 4) the stay will serve the best interests of the public.” *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc.*, 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co.*, 132 Vt. 554 (1974). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A. § 675(b); *Austin v. Vermont Dowell & Square Co.*, Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v. Webster Corporation*, Opinion No. 62S-96WC (1996).

While it is true that § 675 was passed based on the legislature’s belief that a delay inherent in a stay would “unduly burden injured claimants and force...them to accept settlements for less than an award,” see *id.*, there is nothing in case law to suggest that the standards applicable to the granting a stay are reduced, or changed in any way, when a claimant partially prevails.

Claimant correctly points out that should, on appeal, the defendants prevail on the temporary total disability claim for the period from September 2001 to the date of hearing and beyond, they will be able to offset any amount paid against any permanency award, since no permanency benefits have been paid. See, 21 V.S.A. § 651. Consequently, defendants cannot prove irreparable harm. Without this essential prong of the four-part test under *In re Insurance Services Offices, Inc.*, the motion for a stay must be denied.

Dated at Montpelier, Vermont this 26th day of November 2003.

Michael S. Bertrand
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.

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

Sharon Stephens (Quinlan)	)	Opinion No. 18S-03WC
)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
)	
Concentra Managed Care and)	)	For: Michael S. Bertrand
Windham Group	)	Commissioner
)	
	)	State File No. P-13089 and S-04712

RULING ON MOTION FOR ATTORNEY FEES

This matter came before the Department on the Claimant's motion for fees and costs. Frank E. Talbott, Esq. represents the Claimant. Marion Ferguson, Esq. and Glenn S. Morgan, Esq. represent Concentra Management, insured by Atlantic Mutual. Stephen D. Ellis, Esq. and Gregory A. Bullman, Esq. represent the Windham Group, insured by Acadia.

In the original decision in this matter, the Commissioner held that Claimant was entitled to fees in proportion to her success and gave her leave to amend her request. She had submitted a claim for \$19,782.60 in attorney fees and a copy of a contingent fee agreement. Claimant succeeded in her claim for psychological care, for which Concentra is responsible, and slightly less than five months of temporary total disability benefits as well medical and surgical treatment of her upper extremity, for which Windham is responsible. Because it is not possible to determine the precise value of the medical benefits at this juncture, I agree with the position taken by Windham that fairest way to determine attorney fees in this case is on a contingency fee, supported by the agreement on file. With a cap on such an award of \$9,000 under Rule 10.1220, and realizing that claimant prevailed on no more than half of all that was claimed, the maximum contingency award is appropriate.

Which party, then, is responsible for the fees? Concentra argues that it should have no liability for fees since its responsibility for future care cannot be ascertained. Windham urges the Department to divide the total award equally between the two defendants because of the uncertainty of the cost of future medical benefits. Given the shared liability in this case and the contingency fee limitation I am imposing, I accept the argument that an equal share in the total \$9,000 fee is appropriate.

Next, is the question of the amount and divisibility of costs, which must be awarded to a prevailing claimant, if the costs were necessary. 21 V.S.A. § 678(a). Because Concentra is responsible for the psychological aspect of the claim and Windham is responsible for the upper extremity problems, it logically follows that each should cover the cost associated with the physicians and therapists for the respective specialties, that is Concentra must pay fees for Doctors Mann, Weker and Bruce; Windham must pay the fees for Dr. Long. Another care provider, Dr. Evans, provided opinions regarding a claim that Concentra settled before the hearing and on the claim for which Windham is liable under this Department's order. Therefore, Windham's suggestion that the defendants share equally in the fees for Dr. Evans is accepted. The defendants should also share equally in the modest remainder of the fee request, in the interest of administrative expediency.

SO ORDERED

Dated at Montpelier, Vermont this 3rd day of November 2003.

Michael S. Bertrand
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.

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

	)	State File Nos. P-13089 and S-04712
)	
Sharon Stephens (Quinlan)	)	By: Margaret A. Mangan
	)	Hearing Officer
v.)	
	)	For: Michael S. Bertrand
Concentra Managed Care	)	Commissioner
and)	
Windham Group	)	Opinion No. 18A-03WC

RULING ON CLAIMANT’S MOTION TO AMEND

This matter came before the Department on the Claimant’s motion to amend. Frank E. Talbott, Esq. represents the Claimant. Marion Ferguson, Esq. and Glenn S. Morgan, Esq. represent Concentra Management, insured by Atlantic Mutual. And Stephen D. Ellis, Esq. represents the Windham Group, insured by Acadia.

Following a three-day hearing, findings of fact, conclusions of law and an order, Claimant, pursuant to V.R.C.P. 52(B) and V.R.C.P. 59, asks this Department to amend the decision to include additional facts and award her temporary total disability benefits from September 13, 2001 to the present. As counsel for Windham and Concentra convincingly argue, each fact Claimant now proposes is based on evidence presented to the Department at the time of the hearing. That they were not included in the decision does not mean they were not considered. It is the province of the fact finder to determine the weight to be given the testimony of all witnesses, including experts. See *State v. Muscari*, __ Vt. __, __, 807 A.2d 407, 415 (2002) (citing *Keus v. Brooks Drug, Inc.*, 163 Vt. 1, 5, 652 A.2d 475, 478 (1994)).

With no new evidence presented in this motion, no intervening change or clear legal error, this Department will not amend the original decision. Nor will the Department include the proposed additional findings as a recitation of expert testimony. See *Valsangiacomo v. Paige & Campbell*, 136 Vt, 278, 279 (1978) (recitation of testimony is not a finding).

Next, Claimant requests an award of fees and costs, a decision that was deferred in the original decision and must be deferred once again to provide defense counsel an adequate opportunity to respond. Unusual circumstances in this case have made it unrealistic for

the defense to have responded sooner. They now have two weeks from the date this order is mailed to do so.

Accordingly, the Claimant's motion to amend is DENIED.

Dated at Montpelier, Vermont this 22nd day of September 2003.

Michael S. Bertrand
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.

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

)	State File Nos. P-13089 and S-04712
)	
Sharon Stephens Quinlan)	By: Margaret A. Mangan
)	Hearing Officer
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)	For: Michael S. Bertrand
Concentra Managed Care)	Commissioner
and)	
Windham Group)	Opinion No. 18A-03WC

Hearing Held in Montpelier on September 24, September 25 and October 4, 2002
Record closed on December 2, 2002

APPEARANCES:

Frank E. Talbott, Esq. for the Claimant
Glenn S. Morgan, Esq. for Concentra Management, insured by Atlantic Mutual
Andrew W. Goodger, Esq. for Windham Group, insured by Acadia

ISSUES:

1. Are the Claimant's upper extremity and shoulder problems compensable? If so, to what benefits is she entitled? Which employer is responsible?
2. Does Claimant have an identifiable, compensable psychological condition? If so, to what benefits is she entitled? Which employer is responsible?
3. Did the Claimant willfully make false allegations in order to obtain workers' compensation benefits?
4. Is the Claimant entitled to vocational rehabilitation benefits?

EXHIBITS:

Joint Exhibit 1:	Medical Records
Claimant's Exhibit 2:	Transcript of deposition of Charles Evans, D.C.
Claimant's Exhibit 3:	Curriculum vitae of Jonathan Weker, M.D.
Claimant's Exhibit 4:	Map (i.d. only)
Claimant's Exhibit 5:	Excerpt from DSM IV re: PTSD (i.d. only)
Claimant's Exhibit 6:	Timeline of events
Claimant's Exhibit 7:	Curriculum vitae of Raymond Long, M.D.

Claimant's Exhibit 8: Client Caseload 5/6/01 for Sharon Quinlan
Concentra Exhibit A: Curriculum vitae of Melvin Lurie, M.D.
Concentra Exhibit B: Curriculum vitae of Victor Gennaro, M.D.
Windham Exhibit AA: Transcript of deposition of Craig Chartrand with exhibits
Windham Exhibit BB: Curriculum vitae of John Johansson, M.D.
Windham Exhibit CC: Curriculum vitae of Robert Weiner, M.D.

FINDINGS OF FACT:

1. On December 17, 1999 Claimant was working for Concentra Managed Care (Concentra) as a Vocational Rehabilitation Case Manager. At that time Atlantic Mutual was the workers' compensation insurance carrier for Concentra.
2. In October 2000 Claimant was working for the Windham Group (Windham), insured by Acadia for workers' compensation coverage.
3. Claimant has a master's degree and work experience as a graphic designer and marketing person as well as a vocational rehabilitation case manager.
4. In the course of her employment with Concentra on December 17, 1999 Claimant was involved in a motor vehicle accident (MVA). She was following a tractor-trailer in the snow when she lost sight of its taillights and came to a stop. She then noticed that the tractor-trailer had partially gone off the road, in a jackknifed position with her car no more than six feet behind it. Next, in her rearview mirror she noticed a car approaching too fast to stop. She braced herself for an impact, put both feet on the brake and gripped the steering wheel. She thought her car would be pushed under the tractor-trailer and she would be decapitated. The oncoming car hit hers and she thought she would die. Her car was pushed forward, stopping with the windshield about a foot from the back of the trailer and the hood under it.
5. In the first few months after the accident, Claimant experienced nightmares and flashbacks. She had difficulty sleeping. During the day and when driving a car, she felt stressed and anxious and had difficulty concentrating.
6. Claimant's job required a significant amount of driving. After the accident, she became more vigilant, focused and stressed while driving.
7. After the MVA, Claimant first saw a chiropractor for complaints of neck pain, lower back pain, knee pain and shoulder pain. Within a couple of weeks, she also noted that her foot was swollen, discolored and painful. She remembered that at the time of the accident, her foot slipped off and got caught behind the brake pedal. Her foot then became the main focus of medical treatment, which included a cast shoe and crutches.
8. In February 2000 Claimant awakened with extreme pain in her foot that she noticed had turned purple. She was treated in the emergency department at Central Vermont Hospital

and then was referred to Dr. Franklin Lynch at the Dartmouth Hitchcock Medical Center (DHMC).

9. Dr. Lynch diagnosed Reflex Sympathetic Dystrophy in her foot and documented his suspicion that she also had Post Traumatic Stress Disorder (PTSD). He recommended psychological counseling.
10. Claimant continued her regular job. However, in February 2000, when it was clear that her foot was worsening, Dr. Evans took her out of work.
11. Claimant followed up on the recommendation for psychological counseling and began treating with Dr. Raven Bruce in June 2000. Dr. Bruce is a licensed psychologist with a master's degree in counseling and psychology and a doctorate in clinical psychology.
12. Dr. Bruce diagnosed Claimant with Post Traumatic Stress Disorder (PTSD) from the motor vehicle accident in December 1999. She based this diagnosis on the criteria in the DSM-IV and Claimant's experiences of intense fear, horror and helplessness as well as her re-experiencing the accident and having intrusive distressing recollections of the event. She is hypervigilant, detached and estranged from others. And she has flashbacks and nightmares. Dr. Bruce treats the Claimant with counseling; Dr. Lynch or Dr. Wolfe prescribes needed psychiatric medications.
13. After being out of work in March, April and May of 2000, Claimant asked Dr. Lynch for a release to return to work as a vocational rehabilitation case manager. Dr. Lynch determined that she could return part time. Claimant then went to work for CorVel for what was supposed to have been 20 hours per week but turned out to be more.
14. In July 2000 Dr. Lynch released Claimant to return to work full time.
15. Notes from Dr. Bruce in August 2000 reflect Claimant's psychological strain due to pain and financial hardship.
16. Claimant started working at Windham in October 2000. She told her supervisor, Craig Chartrand, that driving caused her difficulties because of her PTSD and because of continuing neck pain, knee pain and swelling and pain in her foot. Mr. Chartrand suggested that she do more phone work, if possible, and not make the typical once per month trip to visit each client.
17. From October 2000 until the beginning of 2001 Claimant worked at Windham full-time and without problems. She was able to keep up with the driving requirements, which were considerable, and managed her physical and psychological pain.
18. In February 2001 Claimant moved from her home in Middlesex, Vermont to Hillsboro, New Hampshire, a move that coincided with the separation from her husband that ultimately led to a divorce. When she and Craig Chartrand discussed the move beforehand, they agreed that she would continue her work with Windham and that she would receive assignments in the southern part of the state when they became available. Nevertheless, only one of her clients was within 50 miles of her home.

19. In March 2001 the carrier for Concentra sent the Claimant for an independent medical examination (IME) with Melvyn Lurie, M.D., a psychiatrist at Harvard Medical School. Dr. Lurie concluded that the Claimant was suffering from Major Depressive Disorder and PTSD, both of which he opined were causally related to the motor vehicle accident of December 1999. However, he did not believe that the Claimant's psychiatric conditions disabled her from working or that she had yet reached medical end result.
20. Also in March 2001 Windham received a new contract that resulted in an increase in Claimant's workload with a concomitant increase in driving.
21. In April 2001, her chiropractor, Dr. Evans, told her that she should limit her driving to 50 miles per day. Dr. Evans noted that the increased driving increased the pain in her neck, mid back, knee, ankle and foot.
22. Also in April 2001 Claimant saw Dr. Lynch who diagnosed epicondylitis in her left arm, an overuse phenomenon he attributed to her driving. No mention is made in the note of the Claimant's shoulders. Dr. Lynch predicted that the problem would resolve on its own.
23. In May 2001, Dr. Evans noted shoulder pain as well as back and neck pain. He recommended that she not drive more than 50 miles per day with a gradual increase to 400 miles per week.
24. Dr. Wolfe at DHMC, with whom Claimant treated from May to September 2001, managed her medications, including psychotropic medications. Dr. Wolfe noted that Claimant's pain got worse with more driving.
25. When Claimant discussed the driving limitation with Craig Chartrand and they were not able to come up with a mutually acceptable plan, Mr. Chartrand suggested she "go out on workers' compensation." He suggested she do what work she could, then go out on temporary partial disability, an arrangement Claimant had experienced before and found to be unfair because she had to work many more hours than her billable hours would show.
26. In July of 2001 Claimant saw Dr. Stommel at DHMC who performed EMG's, which failed to confirm a diagnosis of carpal tunnel syndrome. Nevertheless, her clinical examination supported a diagnosis of mild carpal tunnel syndrome. Dr. Stommel advised the Claimant to limit her driving to 50 miles per day.
27. Claimant's actual driving exceeded medical recommendations. In fact, it would have been impossible for her to have done her job with a 400 miles per week, or even 50-mile per day.
28. Claimant continued to do her job, but had increasing difficulty tolerating the driving and typing her reports. Her billable hours decreased. Claimant rejected the notion that she stay overnight at some sites to reduce the number of miles she was driving because she

did not have a laptop computer to do her reports. Mr. Chartrand suggested that she move closer to Keene to reduce the number of miles driven, but that was not realistic for her.

29. On September 13, 2001 Dr. Bruce recommended that Claimant stop working because of escalating depressive symptoms. She thought the treatment for Claimant's depression was being frustrated by the pain, stress and frustration she was experiencing at work.
30. Also in September 2001 Mr. Chartrand at Windham suggested that Claimant go out on workers' compensation disability. Claimant then filed a claim.
31. Neither carrier accepted payment of the claim in September 2001.
32. From September 13, 2001 until January 2002 when Atlantic Mutual began advancing permanency benefits, Claimant received no workers' compensation benefits.
33. Claimant applied for welfare and food stamps and went to food shelves for help.
34. In October 2001 Claimant saw Dr. Lynch who noted her complaint of pain radiating to her neck and right shoulder, which he attributed "more to her posttraumatic stress disorder and strain than an overuse phenomenon or anything new related to her work." When Dr. Lynch saw the Claimant again in November 2001, he listed as problems: 1) status post injury to a nerve in her foot; 2) posttraumatic stress disorder; 3) depression and 4) fibromyalgia. At that time, she was unable to drive to work and had anxiety and muscle pain with prolonged sitting in a car.
35. At the November 2001 visit, Dr. Lynch determined that "the stress, the fibromyalgia, the PTSD, upper extremity and shoulder problems are more disabling than her bony and soft tissue injuries ...without an effort at rehabilitation, I don't think she will ever return to work."
36. On November 27, 2001 Dr. Bruce recommended a six-month period of temporary total disability status due to her posttraumatic stress disorder. The following February (2002) she reiterated her opinion that the Claimant was "100% disabled" due to symptoms of PTSD, which at that time included frequent and debilitating anxiety and panic attacks, recurrent and intrusive flashbacks of the car accident and a depressed/anxious mood. Furthermore, she had a disturbed memory, difficulty maintaining concentration, inability to sustain focus on tasks and to organize her thoughts.
37. In January 2002, Claimant was referred to a pain clinic at DHMC and ultimately was referred to a shoulder specialist.
38. On April 8, 2002, Claimant saw Raymond Long, M.D. in St. Albans, Vermont. Dr. Long is an orthopedic surgeon who did fellowship training in shoulder and elbow surgery. He performed an examination and administered therapeutic and diagnostic injections into the shoulders. Although he acknowledged that Claimant has a myofascial component to her pain, Dr. Long opined that it was bilateral rotator cuff syndrome that caused her shoulder problems. Rotator cuff syndrome is an inflammation of the subacromial space and tendon of the rotator cuff. The diagnosis was confirmed by clinical evidence, including

the impingement test and Hawkins test, the Claimant's history and her reaction to the subacromial injections.

39. On a medical status form dated May 20, 2002, Dr. Long wrote that Claimant was to be off duty until her recovery was complete. At the hearing he explained that the note was written in anticipation of surgery and that she was to be off duty until her postoperative recovery was complete. Yet he also opined that the Claimant was capable of sedentary work at that time.
40. Because conservative treatment has failed, Dr. Long recommended arthroscopic surgery to treat her shoulder syndrome.
41. On the eve of the hearing, Claimant and Atlantic Mutual agreed to a permanent partial disability award of 99.825 weeks broken down as follows: 13.5% whole person for the foot, 6% whole person for the spine and 3% whole person for the knee, equaling 54.675 weeks of the foot, 33 weeks for the spine and 12.15 weeks for the knee.

Expert opinions for Claimant

42. Dr. Bruce, who has treated the Claimant since June of 2000, characterized Claimant's marriage as a casualty of the PTSD rather than the other way around.
43. When Dr. Mann saw Claimant on September 18, 2001, he concluded that she had PTSD and moderate to severe depressive symptoms.
44. Dr. Lurie opined that the driving Claimant was doing at Windham Group aggravated her PTSD. He found no link between her depression or PTSD and her separation from her husband.
45. Dr. Jonathan Weker evaluated the Claimant on May 10, 2002 and analyzed her records. He diagnosed PTSD and Major Depressive Disorder due to the motor vehicle accident in December of 1999. In his opinion, Claimant's divorce was a casualty of her physical injuries from the motor vehicle accident and had an impact on her symptoms of depression, but was not the cause of the depressive disorder. He wrote, "the equilibrium that had sustained the marriage for 19 years was thrown off in significant ways as a consequence of her accident and the sequela."
46. Further Dr. Weker opined that Claimant is not yet at medical end result for her psychiatric condition and will probably need treatment for a year or two following the resolution of her "legal circumstances."
47. Finally, Dr. Weker opined that Claimant's depression significantly worsened because of the physical pain and limitations that developed in the spring of 2001. Up to that time her depression had improved, but then worsened as it became increasingly more difficult for her to do her job. However, he could not say whether her psychological condition disabled her.

48. Dr. Long was aware of the amount of driving Claimant did at Windham and that she did substantial keyboarding while typing reports. Based on this history he concluded that the driving combined with the keyboarding led to her rotator cuff syndrome. Furthermore, he opined that PTSD, depression and anxiety could also be contributory. He explained that the pain Claimant has in her shoulders is progressive and will continue to worsen until she has corrective surgery. The fact that she exceeded recommended mileage in April and May 2001, in his opinion, is irrelevant because the process had already begun and would continue regardless of what she was doing. He did not find it surprising that Claimant also had elbow pain, a not uncommon complaint for those with rotator cuff syndrome.
49. On May 20, 2002 Dr. Long issued an out of work slip, with the direction that she is to be out of work until after she has arthroscopic surgery and recovers. Surgery was scheduled for July of 2002 but was postponed because of the denial of insurance coverage. At the time of the hearing, it had not yet been performed.

Expert for Windham

50. Dr. Weiner concluded that the Claimant did not have PTSD because the car accident was not in fact life threatening and therefore not a severe enough stressor to lead to PTSD. He attributed her anxiety and depression to the breakup of her twenty-year marriage.

Experts for Concentra

51. Victor Gennaro, D.O., an orthopedic surgeon, performed an IME on September 26, 2001. On examination he found no specific tenderness in her shoulders and determined that the “impingement maneuver” was negative. However, such a negative finding does not absolutely rule out rotator cuff syndrome.
52. Also on examination, Dr. Gennaro found signs and symptoms of bilateral epicondylitis and bilateral carpal tunnel syndrome. He attributed the upper extremity symptoms to Claimant’s work at Windham, particularly the amount of driving she was doing.
53. On the issue of work capacity, Dr. Gennaro determined that Claimant could not return to work as a Vocational Case Manager with the need to drive, but that she was not disabled from working in another job.
54. John Johansson, D.O. performed an independent medical examination and reviewed Claimant’s medical records in response to Acadia’s request that he render opinions regarding the Claimant’s upper extremity problems. He opined that she has cervical-thoracic regional myofascial pain syndrome. Dr. Johansson based his opinion on the Claimant’s inconsistent history, with pain complaints from different anatomical locations. He concluded that he “cannot state with any degree of probability that her current complaints in her shoulders, scapulae and neck are due to a work injury or an overuse injury while driving.”

55. On examination, Dr. Johansson did not find impingement signs, but did find significant restrictions when testing her shoulder joints. Examination of the neck revealed diffuse myofascial trigger points extending down to the shoulders. Dr. Johansson concluded that the motor vehicle accident in December 1999 caused myofascial pain syndrome, which accounts for the Claimant's current complaints.
56. Dr. Johansson acknowledged that his clinical findings differed from those of Dr. Long who examined her a few months earlier. He did not doubt Dr. Long's diagnosis and agreed that injections Dr. Long administered could have altered the findings Dr. Johansson was able to make at the time he examined the Claimant.
57. Dr. Johansson does not believe that the driving Claimant did at Windham caused the shoulder problems, although he agreed that repetitive activities involving the upper extremities probably aggravated the Claimant's shoulder symptoms, whether they are due to rotator cuff syndrome or myofascial pain syndrome.
58. Dr. Johansson reviewed records for the treatment Claimant had prior to the motor vehicle accident. He was able to distinguish those problems from subsequent ones in two ways. First, the pre-MVA shoulder symptoms were limited to the right side. Second, the severity of her symptoms after the MVA was much greater.

Past medical treatment

59. In May 1999 Claimant sought chiropractic care with Dr. Evans for symptoms in her neck and right shoulder, which began when a loud noise startled her and she turned her head suddenly. That treatment continued for months. In November 1999 Claimant saw Dr. Laffal with the complaint of pain in her neck and between her shoulders from driving 200 miles per day for work. She lost no time from work during the time of those treatments.
60. At her deposition Claimant denied having treated with a chiropractor prior to December of 1999. Afterwards, she acknowledged her error and amended the deposition transcript to say that she had treated with Dr. Evans and had been confused when asked the question. Well before that deposition she had given releases to the defense to obtain all records, including the pre-December 1999 records from Dr. Evans. Those records were available to all parties prior to the Claimant's deposition and had been reviewed by their experts. Although I find her explanation that she was confused and forgot about the earlier chiropractic treatment less than convincing, I cannot find she willfully lied to obtain workers' compensation benefits. See 21 V.S.A. § 708.

Attorney Fees and Costs

61. Claimant has submitted a claim for attorney fees based on 174.74 attorney hours at \$90.00 per hours and 67.60 paralegal hours at \$60.00 per hour for a total of \$15,726.60 and her claim for necessary costs total \$8,243.15. These claims are supported with the contingency fee agreement with her attorney, an itemized statement for hours worked and a specific list of all charges incurred.

DISCUSSION AND 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. The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as a causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
4. Atlantic Mutual for Concentra is the carrier responsible for benefits associated with Claimant's injuries if she suffered a recurrence, that is if the work for Windham merely caused a return of symptoms following temporary remission, *Workers' Compensation Rule* 14.9242, and did not causally contribute to her disability. *Pacher v. Fairdale Farms* 166 Vt. 626, 629 (1997) (mem.). On the other hand, Acadia for Windham is responsible for the entire disability if Claimant's work for Windham aggravated, accelerated, or combined with a preexisting impairment to produce a disability greater than what would have resulted from 1993 injury alone. *Id.*; Rule 2.110.
5. Factors traditionally considered in an aggravation versus recurrence analysis are whether a subsequent incident or work condition destabilized a stable condition, whether the Claimant had stopped treating medically, whether she had reached medical end result and whether subsequent work contributed to the final disability. *See Trask v. Richburg Builders*, Op. No. 51-98WC (1998).
6. Because the injuries in this case are both physical and psychological, they necessarily must be considered separately.

Psychological claim

7. In considering conflicting expert opinions, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (Aug. 4, 1997); *Gardner v. Grand Union Op. No. 24-97WC* (Aug. 22, 1997).

8. The experts agree that the Claimant suffers from depression. With the exception of Dr. Weiner, all experts also opined that she has PTSD as a result of her work related injuries. Dr. Weiner believes that the stringent standards for PTSD have not been met, particularly that an objective life-threatening event must be the precipitant. Further, he attributes her depression to her divorce.
9. Dr. Bruce has the advantage of having treated the Claimant over time. She, Dr. Weker and Dr. Weiner are well qualified in the areas of education and experience to render opinions in this area. Doctors Weker and Wiener have the advantage of objectivity. Doctor Weker's evaluation is thorough, comprehensive and logical.
10. The persuasive opinions in psychology and psychiatry prove that the Claimant's motor vehicle accident caused PTSD. However there is nothing about the work at Windham that would have caused or aggravated such a condition. Therefore, Concentra is responsible for the ongoing treatment for PTSD.
11. In addition the Claimant suffers from depression with an etiology that is multifactorial and intertwined with the PTSD. Undoubtedly the ongoing psychological treatment for PTSD will encompass treatment for the depression as well, which means that Concentra must cover the cost of the treatment.

Upper Extremity Condition

12. Claimant asserts that she has bilateral carpal tunnel syndrome, bilateral epicondylitis and bilateral rotator cuff syndrome. Doctors Lynch, Gennaro and Long have all offered opinions on this issue. Dr. Lynch diagnosed epicondylitis in April 2001, which he attributed to the large number of miles she was driving at Windham. He also diagnosed fibromyalgia. Dr. Gennaro diagnosed epicondylitis and carpal tunnel syndrome, which he opined were caused by her driving at Windham. Dr. Long diagnosed bilateral shoulder arthritis and rotator cuff syndrome, which he ascribed to the driving and keyboard work she did at Windham. Dr. Johansson diagnosed myofascial pain syndrome caused by the motor vehicle accident in December of 1999 and which could have been aggravated by subsequent repetitive work.
13. These opinions, which lack unanimity in diagnosis, underscore the elusive nature of the Claimant's problems, particularly because they worsened after she left the workplace. Yet they all point to the driving she did at Windham as the causative agent. Dr. Long, well qualified because of his specialty and status as treating physician, supported his diagnosis with objective testing, which cannot be ignored.
14. As a whole, this medical evidence supports the conclusion that Claimant's driving at Windham caused upper extremity problems, or at the least aggravated her upper extremity and shoulder problems, and limited her ability to drive. As Dr. Johansson clearly explained, the subsequent condition was qualitatively different from the shoulder problems that predated the motor vehicle accident and work at Windham. Accordingly, Windham is responsible for associated benefits.

15. It is troubling to recognize that Claimant's personal choice to move undoubtedly led to the increased driving and resultant upper extremity problems. Yet that choice on the facts in this case does not bar workers' compensation benefits. The employer acquiesced. Claimant did not willfully injure herself. See 21 V.S.A. § 649.

What benefits are due?

16. To receive indemnity benefits, Claimant must prove that her injury caused total disability for work. 21 V.S.A. § 642. Once entitlement to temporary disability benefits has been established, those benefits continue until the Claimant reaches medical end result or successfully returns to work. *Coburn v. Frank Dodge & Sons*, 165 Vt. 529 (1996).
17. Claimant stopped working on September 13, 2001 pursuant to the recommendation of her psychologist who thought that the issues at her work, including her pain, were frustrating psychiatric treatment. On November 21, Dr. Lynch determined that "the stress, the fibromyalgia, the PTSD, upper extremity and shoulder problems are more disabling than her bony and soft tissue injuries ... without an effort at rehabilitation, I don't think she will ever return to work." On September 26, 2001, Dr. Gennaro agreed that she could not do her job at Windham because of the symptoms her work caused her.
18. Therefore, Claimant argues that she has established her entitlement to ongoing temporary total disability benefits because she has yet to be released to work.
19. The data on which Dr. Bruce based her recommendation that Claimant not work was necessarily based on what the Claimant had told her. But such a report alone cannot support a TTD claim given the strong advocacy role and lack of objectivity associated with that opinion. Both Dr. Weiner and Dr. Lurie opined that Claimant was not disabled from work as a result of her psychological condition and her own expert, Dr. Weker, was unable to comment as to disability due to her psychological condition. The PTSD did not disable the Claimant from working prior to September 2001 and no convincing medical evidence proves that it worsened to the point of becoming disabling at that point.
20. Next is the question whether the Claimant's physical condition disabled her. While it is true that her physicians opined that the Claimant was unable to perform work that involved extensive driving, the evidence does not support her claim that she was unable to do work within restrictions until May 20, 2002 when Dr. Long unequivocally wrote that she was to have been out of work for her shoulder condition. It is clear now that he wrote that note in anticipation of surgery that has been delayed. Nevertheless, there is nothing modifying that opinion until the date of the hearing when Dr. Long testified that she could perform sedentary duty work. Her assertions that she tried unsuccessfully to find a job are unconvincing. Nevertheless, the medical records support Claimant's entitlement to temporary total disability benefits from May 20, 2002 until October 4, 2002, when she had an affirmative duty to look for work.

Vocational rehabilitation

21. Pursuant to Rule 30.1000, a vocational rehabilitation referral must be made since Claimant's entitlement to TTD meets and exceeds the 90 days specified. However, an entitlement to services is far from certain given her education and experience.

Attorney fees and costs

22. A prevailing Claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. 21 V.S.A. § 678(a). Claimant has submitted a claim for attorney fees based on 174.74 attorney hours at \$90.00 per hours and 67.60 paralegal hours at \$60.00 per hour for a total of \$15,726.60 and her claim for necessary costs total \$8,243.15. These claims are supported with the contingency fee agreement with her attorney, an itemized statement for hours worked and a specific list of all charges incurred. However, it is not clear if the claim for costs is in compliance with the Rule 40 Fee Schedule and the defense should be given additional time to respond to the request for fees.
23. Because the Claimant has prevailed partially, she is entitled to fees in proportion to her success. Therefore, unless this issue can be resolved informally, Claimant has thirty from the date this order is sent to amend the request, after which the Defendant has 15 days to respond.

ORDER:

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law,

1. Windham/Acadia is ORDERED to pay:
 - a. Medical and surgical benefits for Claimant's shoulder injury;
 - b. Temporary total disability benefits from May 20, 2002 until October 4, 2002;
 - c. Fees associated with a vocational rehabilitation referral and recommendations.
2. Concentra/Atlantic Mutual is ORDERED to cover the cost for treatment of Claimant's psychological conditions.
3. The issue of attorney fees and costs is deferred.
4. All other claims are DENIED.

Dated at Montpelier, Vermont this 11th day of June 2003.

Michael S. Bertrand
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.