



3. Interest on temporary total disability compensation found to be due, from June 10, 1991.

#### STIPULATIONS

1. On May 31, 1990:
  - a. The claimant, Patricia Ling, was employed by the defendant, Simpson Paper Company, of Gilman, Vermont, as a stock prep operator.
  - b. The defendant was an employer within the meaning of the Workers' Compensation Act.
  - c. The claimant suffered a personal injury when she was lifting a stainless steel cover and injured her lower back.
  - d. The claimant's injury arose out of and in the course of employment with the defendant.
  - e. The Liberty Mutual Insurance Company was the workers' compensation carrier for the defendant.
2. On June 5, 1990, the defendant filed a first report of injury.
3. On August 18, 1992, the claimant and the defendant entered into an Agreement for Temporary Disability Compensation (Form 21) in which the defendant agreed to pay the claimant \$333.18 a week, including dependency benefits of \$10.00, beginning June 4, 1990.
4. On July 1, 1990, the claimant's compensation was increased under 21 V.S.A. §650(d) to \$332.07, plus \$10.00 for each dependant; on July 1, 1991, to \$351.66 plus \$10.00 for each dependant.
5. The defendant has one dependent.
6. On March 5, 1991, the defendant filed a Notice and Application for Hearing on whether the claimant was working for her husband.
7. On March 8, 1991, the defendant discontinued temporary total disability compensation being paid the claimant on the basis that the claimant was working for her husband. A Form 27, Notice of Intention to Discontinue Payments, was mailed to the claimant.
8. On July 15, 1991, the defendant was ordered to reinstate temporary total disability benefits effective June 11, 1991.

9. On August 2, 1991, the defendant filed notice with the Commissioner and Claimant that defendant had learned that in August 1990, the claimant had been released for work with a restriction on driving to 15 to 20 miles. This was followed by a Notice of Intention to Discontinue Payments dated August 6, 1991. The Commissioner did not approve this discontinuance.
10. On February 3, 1992, the defendant filed a Notice of Intention to Discontinue Payments on February 3, 1992, on the basis that the claimant had reached a medical end result according to Dr. Seddon Savage.
11. On July 6, 1992, the claimant and defendant filed an Agreement for Permanent Partial Disability Compensation (Form 22) in which the defendant agreed to pay the claimant as a result of an injury causing 20% injury to the spine.

#### FINDINGS

1. Stipulations 1 through 11 are true.
2. The following documents were received in evidence without objection:

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| Claimant's Exhibit 1: | Letter dated May 10, 1991, from Jean Perrigo to Liberty Mutual                         |
| Claimant's Exhibit 2: | Letter dated August 19, 1991, from Sheldon Keitel to Keith Kasper, Esq.                |
| Claimant's Exhibit 3: | Ninety-three pages of medical records, prescriptions and physical therapy bills        |
| Claimant's Exhibit 4: | Employer's First Report of Injury dated June 5, 1990                                   |
| Claimant's Exhibit 5: | Letter dated August 7, 1991, from Town of Thornton regarding marriage                  |
| Claimant's Exhibit 6: | Marriage Certificate   |
| Claimant's Exhibit 7: | Letter dated April 20, 1993, from Chief Walter Joyce of the Thornton Police Department |
| Claimant's Exhibit 8: | Statement of Diane Arsenault, M.D., dated April 17, 1991                               |
| Claimant's Exhibit 9: | Statement of Robin D. Ling dated April 11, 1991  |

- Claimant's Exhibit 10: Letter dated August 6, 1991, from Keith Kasper to Sheldon Keitel and unsigned Form 27.
- Claimant's Exhibit 11: Letter dated August 26, 1991, from Keith Kasper to James Ritvo.
- Claimant's Exhibit 12: Article entitled "Step Aside, Sam Spade."
- Defendant's Exhibit 1: Affidavit of Dianna McPherson dated April 9, 1993.
- Defendant's Exhibit 2: Report of February 4, 1991, from Dennis Fisher, Solutions 2000.
- Defendant's Exhibit 3: Letter dated August 2, 1991, from Keith Kasper to Sheldon Keitel together with correspondence dated August 1, 1991, from James Ritvo to Keith Kasper and attached prescriptions from Dr. Savage releasing the Claimant from work.
- Defendant's Exhibit 4: Video tape.
- Defendant's Exhibit 5: Wagner Rehabilitation records.

3. On May 31, 1990, the claimant was living with her husband, Robin D. Ling in Thornton, New Hampshire. The distance between the claimant's residence and the defendant is approximately 50 miles.
4. In August, 1990, Dr. Diane Arsenault, the claimant's family physician, gave the claimant a release to work at a sedentary job, lifting no more than 15 lbs. and no repetitive lifting, bending or stooping. Dr. Arsenault would not release the claimant to work at the defendant's place of business because of the long drive. Dr. Arsenault said that the claimant should not drive longer than 10-15 miles to work.
5. Dr. Arsenault, recommended that the claimant exercise her back and legs by walking, walking about on cross-country skis, and moving about as much as possible, as well as spend time around other people to fight depression.
6. The claimant helped her husband at his Cross Country Ski Area by socializing with guests, doing light odd jobs, and accompanying guests on the ski trails in pursuit of Dr. Arsenault's recommendations.
7. As of September 26, 1990, the defendant had a light duty job available for the claimant consisting of removing old material safety data sheets and replacing them with new data sheets and indexing books.

8. On October 30, 1990, Dr. John Grobman concurred with Dr. Arsenault, saying that the claimant "would be capable of doing the light duty job at Simpson Paper." However, Dr. Grobman also did not believe that the claimant should drive one hour to Simpson Paper Company.
9. In November, 1990, the claimant suffered a "fairly severe recurrence of back pain" and Dr. Grobman recommended that the claimant remain out of work at that point until further evaluation of Dr. Ward and/or referral to a chronic pain management center.
10. The claimant was seen by Dr. Thomas Ward in September, 1990, who recommended that the claimant be seen at a pain clinic in Hanover.
11. Between February, 1991, and June, 1991, the claimant was seen as an out-patient of the Dartmouth-Hitchcock Medical Center for pain management, during which she received physical therapy and Lidocaine injections.
12. In October, 1991, the claimant's physician, Dr. Seddon Savage at Dartmouth-Hitchcock Medical Center, concluded that the claimant's physical condition had been stable for several weeks, and it appeared appropriate to perform a work capacity evaluation at the Dartmouth-Hitchcock Medical Center Industrial Rehabilitation Program.
13. On November 22, 1991, the claimant was evaluated as being capable of part-time (3-4 hour) "sedentary physical demand level work" with restrictions. This capacity was noted to be less than the capacity necessary to be categorized as capable of "sedentary work."
14. On January 13, 1992, the claimant was released to work with a limited capacity consistent with the capacity evaluation in November, 1991, as long as the claimant continued with her treatment plan.
15. On January 31, 1992, Dr. Savage notified the defendant that the claimant had "reached a medical end point in terms of her stable chronic back pain syndrome."
16. It appears from the evidence that the only period during which the claimant could perform the light duty work at Simpson Paper Company was between August and November, 1990. The claimant's work release was withdrawn in November, 1990, and was not reinstated until January, 1992.
17. The defendant employed Wagner Rehabilitation in August, 1990. There is no evidence that the claimant refused to cooperate with Wagner Rehabilitation with respect to efforts to find suitable part-time, sedentary work within 10 to 15 miles from the claimant's home.

18. Pursuant to the Affidavit of James M. Ritvo, Esq., the claimant and her attorney have entered into an agreement for payment of attorney's fees at a contingent fee rate of 20% of any recovery. Twenty percent of the claim in this matter is \$891.84. These fees are reasonable and necessary.

## CONCLUSIONS

1. The claimant has the burden of proof in establishing her injury and disability. King v. Snide, 144 Vt. 395, 399, 479 A.2d 752 (1982). If the injury and the resultant disability are not in dispute, the burden of proof is on the employer to establish the facts justifying termination of compensation. Merrill v. University of Vermont, 133 Vt. 101, 105, 329 A.2d 635 (1974).
2. The claimant is entitled to temporary total disability compensation until she either reaches a medical end result or successfully returns to work. Wroten v. Lamphere, 147 Vt. 606, 523 A.2d 1236 (1987). A claimant is not required to return to work if it would cause serious discomfort. Sivert v. Knight, 118 343, 346, 109 A.2d 495 (1954); Vermont Worker's Compensation Guidelines for Suitable Work, A(4).
3. There is no evidence that suitable light duty work was available to the claimant during the period of August through November, 1990.
4. An employee is a person who enters into employment or works under a contract of service and generally does not include a family member dwelling in an employee's house unless the family member is on the payroll. 21 V.S.A. §601(14). Generally, a family member helping another without any contract of hire or remuneration is not considered employed within the meaning of the Workers' Compensation Act. 1C Larson, Law of Workmen's Compensation §47.41(b). There is no evidence that the claimant received any compensation for helping her husband in the operations of his cross country ski center.
5. Pre-judgment interest is awarded within the discretion of the Commissioner. Blaine v. St. Johnsbury Trucking, Opinion No. 19-91WC (Oct. 10, 1991). Interest is a legal right of the plaintiff when a debt becomes payable, and if the contract does not stipulate a rate of interest, the statutory rate applies. Greenmoss Builders, Inc. v. King, 155 Vt. 1, 8 (1990). Since a proceeding for workers' compensation benefits is an action in contract, Hartman v. Ouellette Plumbing & Heating Corp., 146 Vt. 443, 445, 507 A.2d 952 (1985), the claimant is entitled to interest from the date compensation payments were due her.

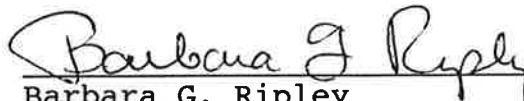
6. The claimant has requested an award of attorney's fees. The purpose of 21 V.S.A. §678(a) is to discourage any unnecessary expense and unreasonable delay in the resolution of the workers' compensation claim. Morrisseau v. Legac, 123 Vt. 70, 79, 181 A.2d 53 (1962). An award of attorney's fees is discretionary under 21 V.S.A. §678(a). The claimant was not responsible for any unnecessary delay, and has prevailed on this claim. Therefore, an award of attorney's fees is appropriate.

**ORDER**

It is therefore, **ORDERED**, that the defendant immediately pay to the claimant:

1. Temporary total disability compensation from March 9, 1991 through June 10, 1991, in the total amount of \$4,459.22;
2. Interest at the rate of 12% per annum from June 10, 1991, until the date of this Order at the rate of \$1.466 per diem;
3. Attorney's fees in the amount of \$891.84;
4. Future benefits as provided by the Workers' Compensation Statute.

**DATED** at Montpelier, Vermont, this 22 day of June, 1993.

  
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Barbara G. Ripley  
Commissioner